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## Examining the Chinese ‘Spy’ Balloon Incident: Does it Constitute a Breach of International Law?

Nittyam Modi<sup>a</sup>

<sup>a</sup>OP Jindal Global University, Sonipat, India

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*This article discusses the recent incident of a Chinese surveillance balloon being detected in the northwestern region of the United States. The purpose of this object, found over 11,000 kilometers away from its Chinese origin, is unknown, but there is a possibility that it was intended for surveillance. This situation has tested the boundaries and capabilities of international law, potentially heightening tensions between the two global powers. The article also explores the history of military usage of hot air balloons and their unique advantages for espionage purposes. The question arises as to whether the airspace could become the next site of conflict between the US and China. International law provides clear guidelines regarding the usage of balloons in the airspace of other nations, and the 1944 Chicago Convention on International Civil Aviation could potentially be invoked if irrefutable evidence is presented that the recent Chinese balloon incident involved spying<sup>1</sup>. This could result in China being held responsible for any resulting damages, as such actions would constitute a breach of the Convention and a violation of Article 1, which affirms the exclusive and complete sovereignty of contracting States over the airspace above their territories. The article concludes by asking whether airspace may become the next site of conflict between the two superpowers.*

**Keywords:** *airspace conflict, sovereignty, breach of convention, violation, tensions, global powers.*

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<sup>1</sup> ‘Did China's balloon violate international law?’ (*The Print*, 06 February 2023) <<https://theprint.in/world/did-chinas-balloon-violate-international-law/1356435/>> accessed 13 March 2023

## CHINESE 'SPY' BALLOON INCIDENT: VIOLATION OF INTERNATIONAL LAW?

International Geopolitics represents a realm of conflict and strategic maneuvering, characterized by elements such as betrayal, surveillance, espionage, and alliance-building. The current state of tension between Russia and Ukraine has resulted in significant imbalances within the global arena, with the intensity of these tensions rivaling that of the Cuban missile crisis. Given the persistent threat of nuclear war, exacerbating tensions between the two preeminent world powers is undoubtedly cause for concern. The escalation of tensions between the world's two preeminent nations was prompted by the discovery of a Chinese balloon floating in the unobstructed skies of Montana. Despite hovering at a height of roughly 200 feet, which is comparable to a 20-story building, and spanning a distance of 7 miles<sup>2</sup>, this object was deemed to be anything but a typical balloon by United States officials.

The Pentagon has revealed that a Chinese surveillance balloon was detected hovering over the north-western region of the United States. This discovery was made just before Secretary of State Antony J. Blinken's planned visit to Beijing<sup>3</sup>. The primary concern is the purpose of this object, which was found over 11,000 kilometers away from its Chinese origin. China claims that it was being used for research, but there is a possibility that its intended function was for surveillance. While the answers to these questions are not yet known, this situation has certainly tested the boundaries and capabilities of international law.

The recent events have added another layer of intricacy and vulnerability to the already strained relations between the United States and China, potentially heightening tensions between the two global powers. The scheduled visit of US Secretary of State Antony Blinken to Beijing has been postponed in light of these developments. In response to the shooting down of the "civilian" balloon, the Chinese government has reacted with diplomatic indignation, warning of the possibility of further actions. The US presence of naval vessels in the South China Sea and

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<sup>2</sup> Caitlin Yilek, 'China's spy balloon: Unidentified objects shot down, what we know so far' (*CBS News*, 20 February 2023) <<https://www.cbsnews.com/live-updates/chinas-spy-balloon-unidentified-objects-shot-down-what-we-know-so-far/>> accessed 13 March 2023

<sup>3</sup> Helen Cooper, 'China Deploys Spy Balloon Over American Midwest, Pentagon Says' (*The New York Times*, 02 February 2023) <<https://www.nytimes.com/2023/02/02/us/politics/china-spy-balloon-pentagon.html>> accessed 13 March 2023

Taiwan Strait, which China considers as its territorial waters but the US regards as international waters, has long been a point of contention between the two nations. The question now arises as to whether the airspace could become the next site of conflict between these two superpowers.

## **HISTORY OF MILITARY USAGE OF HOT AIR BALLOONS**

German observation balloon launching at Équancourt in the Somme (22 September 1916). Although hot air balloons are commonly associated with leisure activities, they have a military legacy that dates back to the Napoleonic era in Europe, where they were utilized for surveillance and bombing operations. The initial rules of warfare incorporated certain provisions aimed at regulating the military application of balloons during armed conflicts.

During World War I, <sup>4</sup>observation balloons played a crucial role in military operations. The British, who had experience using balloons in Africa during the late 1800s, initially used spherical balloons but soon replaced them with more advanced versions known as kite balloons, which could withstand extreme weather conditions and were flyable. The German Parseval-Siegsfeld-type balloon was the first to be adopted, followed by the French Caquot-type dirigible. With artillery now able to engage targets beyond the visual range of ground-based observers, positioning artillery observers on balloons several miles behind the front lines and at altitude allowed them to see targets at greater ranges. This enabled the artillery to take advantage of its increased range and accuracy.

Although balloons may seem less relevant to modern military operations due to the effectiveness of drones in conflicts like the current Ukraine war, they still have a unique advantage in terms of surveillance capabilities. With the ability to fly at higher altitudes than aircraft, hover over specific locations, camouflage themselves as civilian weather balloons, and evade radar detection, balloons remain useful for espionage purposes.

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<sup>4</sup> 'Balloons and Dirigibles in WWI' (*The National WWI Museum and Memorial*)

<<https://www.theworldwar.org/explore/exhibitions/past-exhibitions/balloons-and-dirigibles-world-war-i>>

accessed 13 March 2023

## **WHICH INTERNATIONAL LAW CAN BE INVOKED TO DEAL WITH THE PRESENT SCENARIO?**

International law provides clear guidelines regarding the usage of balloons in the airspace of other nations and effectively eliminates the question – who owns the sky? The incident in question implicates the mentioned international law but is not exhaustible -:

### **The 1944 Chicago Convention on International Civil Aviation**

The 1944 Chicago Convention on International Civil Aviation<sup>5</sup> is a landmark treaty that regulates the principles and regulations of international air navigation and the use of airspace. It is one of the most important agreements in the history of aviation and has played a significant role in shaping the modern aviation industry. The Convention was adopted in Chicago in 1944 and has been ratified by over 190 countries. It sets out the basic principles and rules of international air transport and establishes the rights and obligations of member states regarding civil aviation. The Convention aims to promote the safe, efficient, and economical use of airspace, and to foster cooperation and understanding among nations. If irrefutable evidence is presented that the recent Chinese balloon incident involved the use of the balloon for spying purposes, the 1944 Chicago Convention on International Civil Aviation could potentially be invoked. This could result in China being held responsible for any resulting damages, as such actions would constitute a breach of the Convention and a violation of Article 1, which affirms the exclusive and complete sovereignty of contracting States over the airspace above their territories. The principle of exclusive sovereignty over airspace is a foundational aspect of the Convention and any actions that undermine this principle would be regarded as a violation of the treaty.

By established regulations and procedures, foreign aircraft may be authorized to transit through U.S. airspace. It is required, however, that such aircraft comply with specific guidelines and regulations. Under Article 8 of the Convention<sup>6</sup>, aircraft operated without human pilots are

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<sup>5</sup> Convention on International Civil Aviation 2006

<sup>6</sup> *Ibid*

obligated to seek permission from the country below and must be subject to appropriate control measures to minimize the risk of danger. Consequently, the implicated State, the United States, could potentially leverage the Convention to hold the Chinese Government responsible and pursue reparations for any injuries or losses sustained. The International Civil Aviation Organization (ICAO) is responsible for the development and implementation of rules and regulations governing the access and use of airspace around the world. These rules are designed to ensure the safety and efficiency of air travel, while also preserving the sovereignty and security of individual states. The rules apply to all aircraft, including hot air balloons, which must comply with a range of requirements when operating in international airspace.

One of the most critical rules established by the ICAO for the use of airspace is the requirement for compliance with air traffic control procedures. All aircraft, including hot air balloons, must adhere to established air traffic control procedures when operating in or transiting through controlled airspace. This includes obtaining clearance from air traffic control authorities before entering controlled airspace, following established flight paths, and maintaining communication with air traffic control authorities throughout the flight.

Another critical requirement for hot air balloon operators is the compliance with local regulations in the countries in which they operate. This includes obtaining necessary permits and adhering to specific operating procedures. For example, hot air balloon operators in the United States must obtain a commercial pilot license from the Federal Aviation Administration (FAA)<sup>7</sup> and comply with specific safety regulations related to equipment, operations, and maintenance. Similarly, hot air balloon operators in other countries must adhere to local regulations and obtain necessary permits before operating in that country's airspace.

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<sup>7</sup> 'Balloon Safety' (*Federal Aviation Administration*) <<https://www.faa.gov/balloon-safety/>> accessed 13 March 2023

## **WHY WAS THE PRESIDENT OF THE UNITED STATES HESITANT TO SHOOT DOWN THE BALLOON?**

Addressing homeland-security threats involves a distinct set of considerations compared to national security threats. The practical and legal implications of either destroying an adversary's aerial surveillance equipment in Montana or attempting to seize it differed from those encountered in a military conflict. Following the disclosure, several armchair analysts and GOP politicians promptly criticized President Joe Biden's perceived lack of resolve<sup>8</sup> in the face of Chinese aggression. Some of these commentators contended that former President Donald Trump would have prevented such a violation of American borders. Many individuals advocated for the United States to take some form of action, regardless of its nature.

In addition to the potential logistical and legal hurdles of kinetic action, Montana residents would likely have objected to debris falling from the sky. Such debris could have harmed or even killed people on the ground caused property damage and incurred personal losses. In a situation like this, the costs of kinetic action would have been borne not by another country or its citizens but by our own. Furthermore, the Chinese balloon's precise surveillance capabilities remained unknown at that time, and the Chinese government denied that it was gathering intelligence. However, this assertion appeared highly dubious. Even if Beijing were collecting information that it could not obtain via satellites, balloons could have lingered over specific sites, including nuclear-missile launch facilities in Montana. The United States' goal was to compel China to desist from such activities while preventing harm to American interests. The balloon did not impede commercial airlines or US military operations.

## **THE SHOOTING OF THE BALLOON**

On February 4th, the Chinese surveillance balloon was reported to have drifted over the Carolinas. In response, the Federal Aviation Administration enacted one of the largest temporary flight restrictions in U.S. history, closing the airspace over the area. Ground stops

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<sup>8</sup> W.J. HENNIGAN, 'Chinese Weather Balloon Mistaken for Spy Device and Shot Down by India' (*Time*, 02 February 2023) <<https://time.com/6252551/chinese-weather-balloon-shoot-down/>> accessed 13 March 2023

were also ordered at several airports along the coast. Military aircraft were reportedly mobilized in preparation for the potential downing of the balloon within American territorial waters over the Atlantic Ocean. The balloon was ultimately downed by an AIM-9X Sidewinder missile fired from a U.S. Air Force F-22 Raptor that had departed from Langley Air Force Base<sup>9</sup>. The missile struck the balloon at an altitude of 60,000-65,000 feet, causing it to splash down 6 nautical miles off the coastline within U.S. territorial waters. This was the first recorded downing by an F-22 aircraft and is speculated to be the highest altitude air-to-air kill in recorded history.

## CONCLUSION

In light of established international regulations, the United States' response to the Chinese balloon incursion was legally justified. Permission must be obtained from the US for foreign aircraft to enter its airspace, and in this case, such permission was not sought. Initially, China attempted to claim force majeure by suggesting that the balloon had malfunctioned and drifted into US airspace. However, according to a report in *Scientific American*, the balloon displayed a high degree of maneuverability, especially when it lingered over sensitive US defense facilities in Montana. Despite the provocation, the Biden administration exercised restraint in responding to the incursion. It took some days before military jets were authorized to shoot down the balloon safely without endangering lives on the ground.

This incident has put the Biden administration and the US response to China's growing military assertiveness to the test. Similar events occur regularly in the South China Sea, where the US Navy conducts freedom of navigation operations through waters claimed by China, leading to vigorous challenges from the Chinese Navy. China has also responded aggressively to the presence of US reconnaissance planes over the South China Sea, which raises the risk of an accident that could spark a wider conflict. What makes the balloon incident remarkable is that China has asserted its physical presence well within America's sovereign borders. The response of both sides in the aftermath will determine whether China-US tensions will escalate and

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<sup>9</sup> *Ibid*

whether potential future provocations between the two sides in the air and at sea can be expected.