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THE EXERCISE OF STATE AUTHORITY IN THE AIRSPACE

OVER THE HIGH SEAS

O G U N B A N W O

THE EXERCISE OF STATE AUTHORITY IN THE AIRSPACE OVER THE HIGH SEAS

by

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TABLE OF CONTENTS

TABLE OF CONTENTS

(Continued)

INTRODUCTION

The airspace over the high seas is not a lawless domain. Although the theory of the freedom of the air has been challenged since the beginning of controlled flight, yet "as regards the air above the high seas, the principle of freedom was never successfully challenged."[1] The essential idea underlying the freedom of flight over the high seas is the concept of the prohibition of interference in peacetime by aircraft flying one national flag with aircraft flying the flags of other nationalities.

Both the Chicago Convention of 1944 (Article 12) and the 1958 Geneva Convention on the High Seas (Article 2) have dealt with the status of the airspace over the high seas. Despite the principles enunciated by these Conventions, there still exists the problem of a constant increase of state activities in and claims to the airspace over the high seas. Examples are the establishments on the high seas of "prohibited", "restricted" and "danger" areas. For fifteen years, states have been making claims far beyond their territorial boundaries. Because of the increasing speed of aircraft, and the possibility of using photography for reconnaissance,

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1 Goedhuis, "Sovereignty and Freedom in the airspace," 41 Transacs Grotius Society, 138-139 (1956).

there is now the tendency on the part of states, to extend their authority far to the high seas. There is no doubt that the effect of technological progress in the space age on existing legal concepts will be tremendous. It is important that the law does not lag behind these developments.

The literature on the exercise of state authority in the airspace over the high seas is sparse. In view of the new technological developments in the instruments of violence and detection, it is perhaps time to have another look at the problems involved.

In Chapter I, Relevant Rules of International Law, we offer an analysis of the legal regime of the airspace over the high seas. The principal topics to be considered will be the Chicago Convention, 1944; the International Law of the sea; and Customary Law.

In Chapter II, Contemporary Air Defence Identification Zones, we make a comparative study of various security Regulations of some selected countries. The question of off-shore identification zones are discussed only in so far as they extend over the high seas and are therefore relevant to the treatment of this thesis. When Murchison wrote his book in 1955,[2] there were no Inter-

2 Murchison, The Contiguous Airspace Zone in International Law (Ottawa. 1956)

continental Ballistic Missiles. It is necessary to consider the future of Air Defence Zones in the light of the recent development of the technology of violence. The Bomber threats of 1950 have now been superseded by those of the long-range missiles. Today, "the significance of aircraft and airspace for national security has relatively diminished with the development of space technology."[3] Surprise attack is now measured in minutes and not days. "A Modern Intercontinental Ballistic Missile will reach its target 5000 miles away only some 30 minutes after firing."[4]

Chapter III deals with the legality of ADIZ Regulations. This will be mainly a legal analysis of the status of Air Defence identification zones in international law. The thesis is not concerned with an abstract statement that these zones are legal or illegal.[5] Legal problems

3 McDougal, Lasswell, Vlasic, Law & Public Order in Space. Yale University Press, 249 (1963).

4 Id. pg. 366.

5 This is not to suggest that the International lawyer should wash his hands of all responsibility in the matter."In order to make his own contribution to the tasks ahead, he must remove his own thought barriers. He must be prepared to defy outmoded conventions of a more secure age and be prepared to consider legal planning as one of the essential social functions he has to fulfil" - Schwarzenberger, The Legality of Nuclear Weapons. London (Stevens), pp. 58-59 (1958)

to be considered include the attempt to test the legality of ADIZ on the basis of maritime analogy, the concept of anticipatory self-defence, ADIZ and customary rule of international law. Some writers on ADIZ have used the analogy of maritime law and suggested to that end that if a "littoral state has certain interests extending into the ocean as far as one hour's sailing distance, then it seems reasonable to argue that the littoral state also has certain interests extending over the ocean, not to the same distance, but to the distance that an aircraft can fly in one hour."[6] If we relate this representation to the recent announcement that the United States YF-12A aircraft, formerly called the A-11, exceeded 2000 m.p.h. on a straight course and hit a speed of 1,688 m.p.h. on a closed course,[7] then the results are worth examining. The recent speed record goes on to show the danger of rigidly assimilating the treatment accorded to shipping to aircraft; "for there is little analogy between the slow restricted movement of the merchant vessel and the fast unrestricted movement of the aircraft."[8]

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6 Head, "ADIZ, International Law and Contiguous Airspace," 3 Alberta Law Review, 188 (1964).

7 The Montreal Star, Tuesday May 4th, 1965 at pg.15.

8 R.Y. Jennings,"International Civil Aviation and the Law," B.Y.I.L., 196 (1945).

The oldest ADIZ regulations were established fifteen years ago. Hitherto, the enforcement of these regulations has not brought any protest. In the Anglo-Norwegian Fisheries Case, it was held that the United Kingdom could not have been ignorant of the reiterated manifestations of Norwegian practice which was so well known. Does it mean now that a new customary rule of international law is in the making?

There will also be an examination of the concept of anticipatory self-defence. The discussion of such a concept will necessarily devolve on what is an armed attack under Article 51 of the U.N. Charter. The definition of an armed attack has an elusive character. Dr. Brownlie recognised the problem when he said, "the problem is rendered incredibly delicate by the existence of long-range missiles ready for use; the difference between attack and imminent attack may now be negligible."[9]

In Chapter IV, Instances of the Extra-territorial Exercise of state authority in the air-space over the high seas, we consider the following topics - Aerial identification of ships over the high seas; Nuclear Tests; Testing of Long-range missiles; Space Experiments; Pirate broadcasting in international waters; and Jurisdiction over crimes in the airspace

9 Brownlie, International Law and the Use of Force by States. Oxford University Press, 368 (1963)

over the high seas. The thesis will distinguish between the right of approach of merchant vessels by warships and the right of approach of ships by an aircraft over the high seas. In the past, nuclear tests had been conducted with impunity over the high seas. What is the effect of the Nuclear Test Ban Treaty of 1963 on the exercise of state authority over the high seas. The significance of the non-ratification of the Test Ban Treaty by France and the People's Republic of China will be discussed. We will also examine the reaction of states to the testing of long-range missiles and the criterion for conducting such tests. The section on space experiments is concerned with the recovery of space capsules through the airspace over the high seas, and the use of the Pacific ocean for soft-landing techniques for manned spacecraft.

Very little attempt will be made to expound on the legal regime of the airspace over the high seas during the time of war and national emergency. Article 89 of the Chicago Convention has settled the matter in the following terms: "The provisions of this Convention shall not affect the freedom of action of any of the contracting states affected."

CHAPTER I

RELEVANT RULES OF INTERNATIONAL LAW

1. Chicago Convention, 1944.

The rights of a state over the superjacent airspace are settled in Article 1 of the Chicago Convention as follows: "The Contracting States recognise that every state has complete and exclusive sovereignty over the airspace above its territory. This right according to Article 2 extends over the airspace of the land areas and territorial waters."

Accordingly, each state has the right to make rules and regulations relating to flight and manoeuvre within its own territory. The first part of Article 12 requires every aircraft carrying the nationality mark of a state, wherever it may be, to comply with the rules there in force. But "over the high seas, the rules in force shall be those established under the Convention. Each contracting state undertakes to insure the prosecution of all persons violating the Regulations applicable."[10] This means in essence that no state has the power to effectively enact regulations over the high seas. The wording of Article 12 indicates clearly that the I.C.A.O. is to exercise its legislative powers over the high seas to the exclusion of individual

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10 Article 12 of the Chicago Convention, 1944.

contracting states. No state is competent to require compliance with certain rules by a foreign aircraft when flying over the high seas.[11]

However, there appears to be a conflict between the procedure established under Article 12 and the attitude adopted by the I.C.A.O. council in a Forward to Annex 11 to the Chicago Convention. In the latter, the council stated that "the Standards and Recommended Practices in Annex 11 apply in those parts of the airspace under the jurisdiction of a contracting state within which Air Traffic Services are provided and also wherever a contracting state accepts the responsibility of providing Air Traffic Services over the high seas or in airspace of undetermined sovereignty. A contracting state

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11 Ref. McDougal, Lasswell, Vlasic, op.cit. pg. 590: "Article 12 makes the establishment and modification of the Rules of navigation in the airspace over the high seas the exclusive domain of community regulation." See further Carroz, "International Legislation on Air Navigation over the high seas," 26 J.Air L. & Com., pg. 161 footnote 15 (1959): "Failure on the part of the Organization to take appropriate action would not allow contracting states to impose any such rules repugnant to International law."

accepting such responsibility may apply the Standards and Recommended Practices in a manner consistent with that adopted for airspace under its jurisdiction." The implication of this provision is that a contracting state will be the one to determine the rules covered by Annex 11 to be applied over the high seas. Where these rules relate to the flight and manoeuvre of aircraft, they appear to be in conflict with the procedure enunciated by Article 12 of the Chicago Convention.

The I.C.A.O. has the authority to adopt and amend from time to time, as may be necessary International Standards and Recommended Practices and procedures dealing with the rules of the air and air traffic control agencies.[12] Article 49(K) of the Chicago Convention exempts explicitly from the jurisdiction of the I.C.A.O. Assembly matters specifically assigned to the council. Therefore in practice, the Council of the I.C.A.O. has recognised that it is the department entrusted with the establishment of the rules referred to in Article 12. Article 38 lays down the procedure for departures from International Standards and Procedures established under the Chicago Convention. It is submitted that the procedure under Article 38 does not apply to that part of Article

12 Article 37(c) of the Chicago Convention.

12 which stipulates that over the high seas, the rules in force shall be those established under the Convention. This provision is another example of international legislation over the high seas.

The Council has given its interpretation of Annex 2 in a Forward to the Annex under the title 'Flight over the high seas' - "The Council resolved that the Annex constitutes 'Rules relating to the flight and manoeuvre of aircraft' within the meaning of Article 12 of the Convention; and that over the high seas these rules apply without exception."[13]

Each contracting state has undertaken to insure the prosecution of all persons violating the regulations applicable. The principle of universality becomes the basis of exercising authority in cases of violations of the Rules of the Air over the high seas. This implies that the state of registry of the complainant aircraft is not excluded from taking disciplinary action if this is possible. This action, if taken, must be subject to the rule ne bis in idem. There is however no uniformity in the practice of states concerning sanctions under Article 12.

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13 Forward to Annex 2, pg. 5, column 3; Annex 2 also extends to aircraft the International Regulations for Preventing Collision at sea adopted in 1948.

The rules relating to state aircraft over the high seas are those established by the 14th Assembly of the I.C.A.O.[14] The rules are "... that all contracting states consider the need, when issuing regulations for their state aircraft concerning flight over the high seas, to require such aircraft to comply with the rules of the air in Annex 2, unless measures are taken to ensure that other aircraft are not endangered, such measures preferably being determined in co-ordination with the authority responsible for the provision of air traffic services over the area of the high seas in question."[15]

2. International Law of the Sea.

The sovereignty of a state extends beyond its land territory and its internal waters, to a belt of sea adjacent to its coast described as the territorial sea.[16] The principle laid down is quite clear but its application has run into practical

14 See I.C.A.O. Assembly Resolution A14-25, Clause 1(b).

15 Ibid.

16 Article 1(1), Convention on the Territorial Sea and the Contiguous Zone.

difficulties. Thus there is no unanimity among states as to the proper width of the territorial sea[17] as can be seen from the following Table:

	Number of States	Number of Miles adhered to
(i)	Four States.[18]	200 miles
(ii)	Eleven States	12 miles
(iii)	One State	10 miles
(iv)	One State	9 miles
(v)	Twelve States	6 miles
(vi)	Three States	4 miles
(vii)	Twenty-one States	3 miles[19]

The failure to reach agreement on the width of the territorial waters could create serious problems. One of the repercussions of an extension of the territorial sea would be that certain Straits

17 Every question now posed as to the upper boundary of the airspace over territorial waters applies mutatis mutandi to the free airspace over the high seas. On the origin and significance of the three mile limit see Walker, "Territorial Waters: The canon shot Rule." 22 B.Y.I.L. 210 (1945); Kent, "Historical origin of the three mile limit," 48 AM. J.I.L. 537 (1954).

18 Chile, Peru, Honduras and El Salvador.

19 U.N.DOC. A/CONF.13/C.1/L.11/Rev.1 (as amended by Corr.1 and 2), 3 April 1958; Ref. also U.N. Legislative Series,Laws and Regulations on the Regime of the High Seas, vol. 1

above which aircraft can now fly would thereafter be closed to air traffic. A number of areas usually known as the high seas would be reduced and foreign states would be kept out of the airspace over such areas but for the unilateral extension. For example, the extension of the territorial waters from three to twelve miles "would result in the Straits of Gibraltar, the Large Strait at the mouth of the Red Sea, the Torres Strait, Tsugaru Strait and the Bering Sea Strait becoming territorial waters."[20] Another result might be that it would impose additional restrictions on the use of the sea as a medium of International Commerce and Navigation and would constitute a retrograde solution to the problem of territorial waters. It would add to the difficulties of seamen in ascertaining with accuracy whether or not a vessel were within territorial waters.

The delimitation of sea areas has always an international aspect which cannot depend merely on the will of the coastal state as expressed in its municipal law. The act of delimitation is necessarily a unilateral act, because only the coastal state is competent to undertake it; however, the validity of such a delimitation with regard to

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20 Arthur Dean, "The Geneva Conference on the Law of the Sea, What was accomplished," 52 AM. J.I.L., pg. 612 at the footnote (1958).

other states depends on international law.[21]

Since the Geneva Conferences on the law of the sea failed to resolve the issue of the width of the territorial waters, the international law position on the matter is far from being settled.

The 'high seas' is not a 'res nullius', as this term suggests that it is capable of ownership. It is a 'res communis', i.e. common and open to all nations on the basis of equality. 'High seas' means all parts of the sea that are not included in the territorial sea or in the internal waters of a state.

The rights over the high seas are common rights and can only be denied by agreement of other interested states.[22] The liquor treaties signed by the United States between 1924 and 1932 for the enforcement of its prohibition laws contain an affirmation of this principle. Bilateral agreements of the United Kingdom with Norway, Denmark, Iceland between 1959 and 1961 recognised that there could

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21 The assertion of El Salvador of 1950 that its land territory includes adjacent seas up to 200 miles led to quick protest from Britain and the United States - Dept. of State Bulletin, 24 (1950)

22 See Colombos, International Law of the Sea. 101 (1962). Longmans, 5th Edition.

not be an exercise of jurisdiction beyond three miles off the coasts of states except by the express consent of other interested states.

It must also be emphasised that freedom of flight is only one factor in the situation. The other equally essential test is "that of legitimate interests of states viewed in the light of reasonableness and fairness and of the requirements of the international community at large."[23] This means that any freedom that is to be exercised in the interests of all entitled to enjoy it must be regulated. "Hence the law of the seas contains certain rules, most of them already recognised in positive international law, which are designed, not to limit or restrict the freedom of the high seas, but to safeguard its exercise."[24] Article 2 of the Convention on the High Seas grants the freedom to fly over the high seas to every state, and no state may purport to subject any part of them to its sovereignty. Freedom to fly over the high seas is subject to the following provisions: "These freedoms and others which are recognised by the general principles of international law shall be exercised by all states

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23 Lauterpacht, "Sovereignty over Submarine areas," 27 B.Y.I.L. 376 (1950).

24 U.N. Conference on the Law of the Sea, Doc. A/CONF. 13/4, at pg. 68.

with reasonable regard to the interests of other states in their exercise of the freedom of the high seas."[25] The most important qualification imposed by the latter part of Article 2 is the expression 'reasonable regard'. It is necessary to make a legal analysis of this qualification in order to understand the extent of the freedom of flight over the high seas.

The desire to accord a place to 'reason' in international law is not a new one. Chief Justice Marshall in his classic test of reasonableness in the case of CHURCH v. HUBBART[26] declared: "If these laws are such as unnecessarily to vex and harass foreign lawful commerce, foreign nations will resist their exercise. If they are such as are reasonable and necessary to secure their laws from violations, they will be submitted to."[27] In 1919, the International Commission for Aerial Navigation (C.I.N.A.) pleaded for reasonableness in the establishment of prohibited zones. The Commission's plea was to the effect that states should only exercise the powers recognised in Article 3 of the 1919 Paris Convention to the minimum extent compatible

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25 The latter part of Article 2 of the Convention on the High Seas. Ref. also Hayton, "Jurisdiction of the Littoral State in the 'Air Frontier'", 3 Philippine Int'l L.J. 381 (1964)

26 (1804), 2 CRANCH 187, at pg. 234.

27 Ibid.

with their interests.[28]

Also at Chicago in 1944, Article 9 required "that such prohibited zones shall be of reasonable extent and location so as not to interfere unnecessarily with air navigation." In the Anglo-Norwegian Fisheries case, it was held that the base-lines adopted by the 1935 Norwegian Decree are not only justified but also drawn in a reasonable manner. Lord Asquith, in the case of PETROLEUM DEVELOPMENT (TRUCIAL COAST) LTD. and the SHEIKH of ABU DHABI,[29] recognised that "there might well exist a good case for introducing such a doctrine (moderate claims) into the body of international law.[30]

The tests of reasonableness are "(i) the interest sought to be protected, (ii) the significance of that interest, (iii) the scope of authority asserted, (iv) the relationship between claimed authority and the interest at stake and (v) the nature and significance of the inclusive uses affected."[31] At which point reasonableness becomes

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28 C.I.N.A. Official Bulletin, No.23, 1935, pg. 93, Resolution 828.

29 I.C.L.Q., 247 (1952).

30 Lord Asquith, cited in Green, "The Geneva Convention and the freedom of the Seas," 12 C.L.P., 231 (1959)

31 McDougal and Burke, The Public Order of the Oceans. pp. 579-80 (1962)

unreasonableness depends on the merits of each case. It was clearly unreasonable when Italy after the 1919 Paris Convention and just before the Second World War "prohibited flights over the entire North West, North and North East frontiers."[32] All claims to the high seas by states as long as they are reasonable are commonly regarded as being in accord with international law.[33]

There are various exceptions to the freedom of the high seas. Article 19 of the Convention on the High Seas authorises every state to apply its exclusive competence against a pirate aircraft over the high seas, and in any other place outside the jurisdiction of any state. Thus international law allows the destruction of pirate ships and the capture of pirates regardless of their citzenship and the bringing of them to legal responsibility. Article 23 (4)[34] grants the right of hot pursuit of a foreign ship by aircraft of a state. This could be interpreted to include the hot pursuit of offending aircraft. The right of hot pursuit commences from the internal waters or the territorial

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32 Sand, Pratt & Lyon, Historical Survey of the Law of Flight. Publication No. 7, Institute of Air & Space Law, Montreal. at pg. 14.

33 McDougal, Lasswell, Vlasic, op. cit., pg. 310.

34 Convention on the High Seas.

sea or the contiguous zone of the pursuing state when the competent authorities have good reason to believe that the ship has violated the laws and regulations of that state. This pursuit may be continued outside the territorial sea or contiguous zone if the pursuit has not been interrupted. But if the foreign ship is within a contiguous zone, as defined in Article 24 of the Convention on the Territorial Sea and the Contiguous Zone, the pursuit may only be undertaken if there has been a violation of the rights for the protection of which the zone was established.[35] Finally, Article 24 of the Convention on the High Seas may be interpreted as conferring on each state the authority to enforce its sanitary and anti-pollution regulations in a 'zone of the high seas contiguous to its territorial sea' and also against offending aircraft.

CONTINENTAL SHELF

Various other off-shore claims which affect the regime of the high seas include the Continental Shelf, Archipelago and the Arctic. The Convention

35 The interests protected within the Contiguous Zone are Customs, fiscal, immigration and sanitary regulations.

on the Continental Shelf came into force on May 11, 1964.[36] The Continental Shelf means (a) the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres; (b) the seabed and subsoil of similar submarine areas adjacent to the coasts of islands.

The control and jurisdiction accorded states over the continental shelf for certain limited purposes (i.e. exploration and exploitation of its natural resources) may not be extended to the superjacent airspace.[37] Similarly, the coastal sovereignty does not affect the legal status of the superjacent waters as high seas.[38]

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36 U.N. Monthly Chronicle, June 1964, at pg. 114. Ref. also the U.K. Continental Shelf Act, 1964 which vests in the crown the rights exercisable by the U.K. outside territorial waters with respect to the sea-bed and subsoil and their natural resources.

37 Convention on the Continental Shelf, Article 2.

38 Id, Article 3.

ARCHIPELAGO

The regime of airspace over an Archipelago is also a problem pertinent to this study. Archipelago has been described as a body of water studded with islands.[39] The temptation to convert the waters of a coastal archipelago into inland waters becomes great if there are fisheries or other resources involved. West Germany North Sea Coast is characterised by numerous fringing islands and banks. It has been suggested that the "Islands are so closely related to the Coast that there does not seem ever to have been any serious question about the status of the waters between as inland waters or about the measurement of the territorial sea from the seaward side of the islands and their dependent banks."[40] On the other hand if the Philippine and Indonesian claims that waters "around, between and connecting the islands of an Archipelago should be treated as territorial waters were accepted, the whole of the South Eastern Pacific would be removed from the high seas."[41] From this point of view, the recent

39 U.N. DOC. A/CONF 13/39, vol. 3, pg. 44.

40 Young, R., "Offshore claims and problems in the North Sea," 59 AM. J.I.L., 514 (July 1965)

41 U.N. Conference on the Law of the Sea, Doc.A/CONF 13/15.

United States judicial decision involving the Hawaii Islands will be very instructive. The litigation involved the CAB and Island Airlines Inc.,[42] and it fairly explains the juridical nature of Inter-island waters beyond the three-mile limit.

In this case, the CAB claimed that Island Airlines Inc. was an air carrier engaged in inter-state air transportation within the meaning of 49 U.S.C. 1301 (3), (10) and (21)(a) which defines Interstate air transportation to include flights between places in the same state of the United States through the airspace over any other place outside thereof. Island Airlines claimed that its flights between the major islands were intra state flights. "The major islands making up the state of Hawaii are separated from each other by the waters of the North Pacific Ocean, and the distances between the islands of Kanai and Oahu, Oahu and Molokai, Molokai and Maui, Maui and Hawaii ..."[43]

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42 235 F. Supp. 990.

43 Ref. Stevenson, J.R., "Judicial decisions involving questions of international law, 59 AM. J.I.L., pg. 639 (July 1965). Stevenson was commenting on the case of CAB v. Island Airlines Inc.

The claims of Island Airlines were untenable because such a delimitation would mean expropriation to Hawaii large portions of the sea normally falling within the international concept of high seas.[44] The Court dismissed any claim that the waters are historic waters acquired by prescription. The Court declared that after the annexation of Hawaii, the islands are ceded to the United States. After annexation, "the United States never made any claim either locally, nationally, internationally that the channel waters were being claimed by the United States as "historic waters" i.e. internal waters of Hawaii."[45]

THE ARCTIC

Claims to the Arctic had been made on the basis of the sector theory. Prominent among the claimant states were Canada and the USSR. The United States had always opposed any claim to authority based on the sector theory. The frankest statement of the limits of the "Sector" theory was made by the Hon. John Lesage when he said: "We have never subscribed to the 'Sector' theory in application

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44 'High Seas' means all parts of the sea that are not included in the territorial sea or in the waters of a state.

45 Stevenson, J.R., op.cit. at pg. 641.

to ice .... we have never held a general sector theory. To our mind, the sea, be it frozen or in its natural liquid state is the sea .... If you adhere to the general sector theory you claim that you have sovereignty over waters beyond your territorial waters. We have never done that. Other countries would never recognise our sovereignty over these high seas be they in liquid or frozen form, and which in their frozen form are moving all the time. That is the law ....."[46]

3. Customary Law.

Custom is an important source of the international law of the sea. Its development has been considerably influenced by the usages of the great maritime states and recognition by states generally. As a commentator said, "the usage of nations becomes law and that which is an established rule of practice is a rule of law."[47] The idea of custom as a rule of

46 John Lesage, cited in Cohen, "International law and Canadian Practice," at pg. 336 in McWhinney, E., Canadian Jurisprudence, the Civil law, and Common law in Canada (1958).

47 Chief Justice Marshall, cited in Colombos, op.cit. at pg. 7.

conduct coupled with usage is also reinforced by the statute to the International Court of Justice. The statute recognises[48] International custom, as evidence of a general practice accepted as law. For the rule of practice where there is no International rule, custom is a valuable source to look to. Also where there is doubt as to the interpretation of treaties, reference will always be made to the International custom on the matter.[49]

All that is required for evidence that a custom exists in the international sphere is that there is a general practice accepted as law. It is however impracticable to expect that every state should recognise a certain practice before it can become custom. "The test of general recognition whether national or international, is not susceptible of exact or final formulation."[50] Today, new customs can develop and win acceptance as law when the need is sufficiently clear and urgent.[51]

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48 Article 38 of the Statute to the I.C.J.

49 Oppeinheim, cited in McDougal, Lasswell and Vlasic, op.cit. at pg. 116 footnote 232.

50 See Brierly, Law of Nations. Oxford (6th Ed.), pg. 61 (1963).

51 Brierly, op.cit. pg. 62.

When a Minister of a state acts or speaks on a matter of international law, such act gives evidence that a rule of international law does or does not exist. The value of the evidence depends on the occasion and the circumstances. In the Eastern Greenland case,[52] it was decided that an oral declaration in the nature of a promise made by the Minister of Foreign Affairs of one country on behalf of his country to the Minister of Foreign Affairs of another and in a manner within his competence and authority may be as binding as formal written treaty.[53]

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52 See the decision of the P.C.I.J. in the Eastern Greenland case, Pub. P.C.I.J. (1933), Series A/B, No. 53.

53 See further the Official British Position, cited in Starke, An Introduction to International Law. London. pg. 324 (1963. 5th Ed.):"If an agreement is intended by the parties to be binding, to affect their future relations, then the question of the form it takes is irrelevant to the question of its existence. What matters is the intention of the Parties, and that intention may be embodied in a treaty or convention or protocol or even a declaration contained in the minutes of a conference."

Judge Hudson has described custom as follows:

(a) Concordant practice by a number of states with reference to a type of situation falling within the domain of international relations;

(b) Continuation of the practice over a considerable time;

(c) Conception that the practice is required by or consistent with international law;

(d) General acquiescence in the practice by the states.[54]

In the space age we cannot afford to adhere rigidly to the immemorial time necessary to establish custom. Indeed, where the development of space law is concerned, the time scale is irrelevant if states agree on what to do. It has even been suggested that United Nations Resolutions on outer-space can create "instant" customary law especially when the resolutions are passed by the unanimous vote of member states.[55]

The most important customary rule concerning the airspace over the high seas is that it is free to

54 U.N. DOC. A/CN. 4/6, March 3, 1950 at pg. 5.

55 Bin Cheng, "United Nations Resolutions on outer-space: "Instant" International Customary Law?" Indian Journal of International Law, vol. 5, Jan. 1965, pg. 35.

the aircraft of all states.[56] For jurisdictional purposes an aircraft on the high seas is to be considered as a part of the territory of the country to which it belongs. There is nothing in the law to show that, in case of injury to life or property on board an aircraft on the high seas, the operation of this principle differs in any way.

The decision in the Lotus case[57] seems to be contrary to the principle which confers jurisdiction over the aircraft on the state to which the aircraft belongs. When the Lotus arrived at Constantinople both the French navigating officer and the Master of the Turkish Collier were tried and convicted for manslaughter. The International Tribunal to which the case was referred decided by majority vote that there was nothing contrary to international law in the Turkish Criminal Code. Article 3 of the Tokyo Convention on Offences and certain other acts committed on board aircraft has restated the customary rule. It establishes the competence of the national law of the flag state when the aircraft is flying over the high seas. Article 3 of the Tokyo Convention reads: "The state of Registration of the aircraft is competent to exercise jurisdiction over offences and acts

56 Ref. also Article 2(4) of the Convention on the High Seas.

57 The Lotus, P.C.I.J., A/10, 69 (1927).

committed on board."[58]

Although the rule is freedom to fly, yet there are many important qualifications under International Customary law. The right of the reasonable user of the high seas, the airspace above them and the bed of the sea may be exercised for any purpose not expressly prohibited by international law, and this rule is an integral part of the principle of the freedom of the seas.[59]

There is also the customary right of approach which forbids any interference in time of peace with the ship of another nationality upon the high seas. This right of approach is the right accorded to warships to verify the nationality of any merchant ship which they may meet on the high seas. This problem is now regulated by the 1958 Geneva Convention on the law of the sea and will be dealt with in greater detail below.[60]

Another aspect of the law of the sea in which custom has played an important role is the problem of piracy over the high seas. By the custom of the

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58 For further comments on the Tokyo Convention, See below (pp. 97-101).

59 Schwarzenberger, International Law. vol. 1, 3rd Ed., pg. 349 (1957).

60 See below at (pp.80-85).

sea, a pirate is regarded as an outlaw. Every state may seize a pirate ship or aircraft. The fact that the high seas is a no man's land and free for use by all nations on the basis of equality does not mean that it must be allowed to be an area of anarchy or crime. The repression of piracy is the responsibility of all mankind.

Apart from piracy, another exception to the freedom of the seas is the customary right of hot pursuit. The right of hot pursuit can be exercised against a foreign vessel for an infringement of the laws and regulations of the coastal state. The pursuit must begin when the foreign vessel is within the inland waters or the territorial sea of the state, and may be continued outside the territorial sea so long as the pursuit is not interrupted. This right ceases as soon as the ship enters a foreign territory. The customary right is now recognised under Article 23 of the Convention on the High Seas. Article 23 extends the right of hot pursuit to military aircraft or aircraft on government service specially authorised to that effect. The aircraft giving the order to stop must itself actively pursue the ship.

During the war the established custom is that, upon refusal to establish identity, a neutral aircraft can be shot down. No aircraft has a right of innocent passage under Customary International law over or through the foreign territorial seas in time of peace or war. However, "an aircraft while on board a belligerent warship including an aircraft carrier, shall be regarded as part of such warships as long as it does not attempt to take to the air."[61]

Finally, Customary as well as Conventional International law allows the exercise of measures of self-defence upon the high seas and in the superjacent airspace. The interpretation of self-defence under Customary law permits anticipatory action in face of imminent danger. This interpretation is free from the problems which face the definition of self-defence within the meaning of Article 51 of the Charter of the United Nations.

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61 Harvard Law School, Research on International law Draft Convention on Rights and Duties of Neutral States in naval and aerial war, Article 3, 11 AM. J.I.L., Supp, pg. 231 (1939).

CHAPTER II

CONTEMPORARY AIR DEFENCE

IDENTIFICATION ZONES

1. Description of Various Security Regulations.

a. U.S.A.

Considerations of security led the United States to establish in 1950 Air Defence Identification Zones.[62] American ADIZ is defined as areas of airspace over land or water in which ready identification, location and control of civil aircraft is required in the interest of national security.[63] The use of the expression 'civil aircraft' will lead to the conclusion that military aircraft or state aircraft is excluded from the Regulations.

ADIZ extends to a maximum distance of 300 nautical miles from land around Alaska. On the Atlantic Coast, it extends into the high seas more than 200 miles; while in the Pacific Coast it has a minimum distance of 75 miles to 100 miles. The pilot-in-command of a foreign aircraft shall not operate an aircraft into the

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62 The Current Regulations are contained in Part 99, Security Control of Air Traffic, 13th of August, 1965. /Hereinafter referred to as Part 99./

63 Ibid, Part 99.3(a).

United States without (i) making position reports as prescribed for U.S. aircraft in Part 99.21 or (ii) reporting to an appropriate aeronautical facility when the aircraft is not less than one hour and not more than two hours average direct cruising distance from the United States.[64] The fact that the United States assumes one hour cruising distance will further suggest that she is claiming more than the limits of ADIZ.[65]

Before a pilot-in-command takes off from the place where the flight originates, he must file a flight plan if he intends to operate into, within or out of the United States through an American ADIZ. Also no person may operate an aircraft in an ADIZ unless the aircraft has a functioning two-way radio.[66] The pilot-in-command of an aircraft for which a flight plan has been filed shall file an arrival or completion notice with an appropriate aeronautical facility, unless the flight plan states that no notice will be filed.

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64 Part 99.23

65 Ref. Martial, "State Control of the Airspace over the Territorial Sea and the Contiguous Zone", Can Bar Rev. pg. 258 (March 1952).

66 Parts 99.9 and 99.11.

The reports required to be made to an appropriate aeronautical facility before penetration are: the time, position, and altitude at which the aircraft passed the last reporting point before penetration and the estimated time of arrival over the next appropriate reporting point along the flight route. If there is no appropriate reporting point along the flight route, the pilot should report at least 15 minutes before penetration: the estimated time, position, and altitude at which he will penetrate.[67] No pilot is expected to deviate from his filed flight plan without notifying an appropriate aeronautical facility. Any radio failure should be reported as soon as possible.

b. CANADA

In 1951, Canada promulgated Security Regulations which were found necessary in the interest of national security, to identify, locate, and control aircraft operations within areas designated as Canadian Air Defence Identification Zones.[68] CADIZ has a maximum distance of about

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67 Part 99.19.

68 The Current Canadian Regulations are contained in The Canadian Gazette, Part II, vol. 98, April 8, 1964, SOR/64, 127. [Hereinafter referred to as CADIZ Regulations]

100 miles. Along eastern CADIZ, it does not extend over the high seas more than thirty miles from the coast.

CADIZ Regulations apply to all aircraft whether Canadian or foreign. No person may operate an aircraft into any identification zone unless the aircraft is equipped with a two-way radio. The pilot of an aircraft is not expected to deviate from his filed flight plan without notifying the appropriate air traffic control unit.[69] When an emergency occurs, the pilot-in-command of an aircraft must submit a detailed report of the emergency in writing to the Assistant Deputy Minister, Air, Department of Transport, within forty-eight hours of the emergency.[70]

Before a pilot-in-command takes off from the place where the flight originates, he must file a flight plan with an appropriate air traffic control unit if he intends to operate into or within the domestic or Coastal CADIZ.[71] The flight plan will include inter alia, the estimated place and time of penetration of a Coastal CADIZ from

69 CADIZ Regulations, Part II, SS. 4 & 3.

70 Ibid, S.5.

71 Ibid, Part III, S.8; Part IV, S. 12.

seaward. Position reports required to be made to an appropriate air traffic control unit before penetration are: position, altitude, time and estimated time of arrival over the next reporting point. If it is not possible to make the above reports and estimates, the pilot-in-command must report his altitude and estimated time and place of penetration at least 15 minutes prior to penetration.[72] The pilot of an aircraft that will penetrate a coastal CADIZ from seaward shall, at least fifteen minutes prior to penetration, revise his estimate with an appropriate air traffic control unit when the aircraft will not be within (a) a time tolerance of plus or minus five minutes of the flight planned time of penetration or last revised time of penetration; or (b) a distance tolerance of twenty nautical miles from the flight planned point of penetration or last revised point of penetration.[73]

c. FRANCE

France, during the hostilities in Algeria, declared a 'Zone of Responsibility' which extended over the airspace off the coast of Algeria. This

72 CADIZ Regulations, Part III, Sec. 9.

73 Ibid, Part IV, S. 14.

zone covered 80 miles or more from the coast of Algeria over the high seas.[74] The French Regulations required the filing of flight plans, identification of passengers, flying within the assigned aerial corridor, and contact with ground identification zones. These regulations are no longer in force as Algeria is now an independent state.[75]

d. ICELAND

The Commander of the Iceland Defence Force has established an ADIZ over the coastal waters of Iceland.[76] Iceland ADIZ Regulations did not specify the extent of the zone, but it extends beyond the three mile limit. Once a flight plan has been filed, it cannot be changed in flight unless in an emergency. But if a change is necessary, the pilot-in-command must report to an Iceland aeronautical facility as soon as possible.[77]

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74 McDougal, Lasswell, Vlasic, op.cit., pg. 310.

75 The reference to the French 'Zone of Responsibility' is for the purpose of comparative studies. The aim of the Zone was to prevent foreign aircraft involvement in the Algerian conflict.

76 USAF/USN Flight Information Publication, Section on Europe and North Africa, pp. 154-156, corrected up to July 1965.

77 Ibid, Iceland ADIZ Regulations, Article 2.

Before a pilot-in-command takes off from the place where the flight originates, he must file a flight plan if the flight penetrates or operates in the ADIZ. The Regulations do not permit flight plans to be submitted enroute to provide for entry or operating permission within the ADIZ.[78] When the aircraft is outside the ADIZ, standard position reports are expected to be made to an Iceland aeronautical facility.[79] If this is not possible, altitudes, position and estimated entry time should be reported 15-30 minutes before entry.[80] While the aircraft is within the ADIZ, position reports will be made as required or at least every hour, using reporting points whenever possible.[81] The Regulations did not provide for penalties in case of violations.

e. JAPAN

Japan has also established an ADIZ which extends in some instances 100 nautical miles from land.[82] The applicability of the Japanese ADIZ

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78 Iceland ADIZ Regulations, Article 3 (a).

79 Ibid, Article 3(b) (1).

80 Ibid.

81 Ibid, Article 3(b) (2).

82 USAF/USN, Flight Planning Information Publication - Section on Pacific & South East Asia, pp. 59-64, corrected up to Aug. 1965.

Regulations depends on whether the pilot-in-command of the aircraft is flying either in or outside controlled airspace. All aircraft, when flying outside controlled airspace, must give information as to the estimated time of arrival, point of penetration and altitude at least 15 but not more than 30 minutes prior to penetration.[83] The pilot must further report when crossing the ADIZ 100 nautical miles from land and every 30 minutes while within the ADIZ.[84]

If the pilot is flying in controlled airspace, a report over the ADIZ is not required unless designated as a regular reporting point on the Enroute Charts.[85] When the aircraft is within ADIZ, the pilot should make normal position reports as shown on Enroute Charts and as requested.[86] The Regulations did not provide for penalties in case of violations.

f. KOREA

Korea has established an ADIZ which extends over 100 miles from land. All aircraft when flying outside controlled airspace, must give

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83 Japan ADIZ Regulations, USAF/USN, Flight Planning Publication, Corrected up to Aug. 1965, at pg. 59. Section on Pacific and South East Asia.

84 Ibid.

85 Ibid.

86 Ibid.

information as to the estimated time of arrival, point of penetration and altitude at least 15 but not more than 30 minutes prior to penetration. The pilot must report when crossing the ADIZ about 100 miles from Korea.[87]

Flying in controlled airspace does not demand a report over the ADIZ unless designated as a regular reporting point on the Enroute Charts. Inside ADIZ, the pilot is required to make normal position reports as shown on Enroute Chart and as requested.[88]

g. ITALY

Italian ADIZ Regulations appear to be a departure from the trends in the style of drafting ADIZ regulations. The applicability of the Italian ADIZ Regulations depends on whether the pilot-in-command is flying off airways or on airways and whether the aircraft is military or civil.[89] There is no distinction made between foreign and Italian

87 Korea ADIZ Regulations, USAF/USN, Flight Planning Information Publication, Section on Pacific and South East Asia, corrected up to Aug. 1965, at pg. 59.

88 Ibid.

89 Italy ADIZ Regulations (Article 1),USAF/USN, Flight Information Publication - Section on Europe and North Africa, corrected up to July 1965, pg. 155.

aircraft. Italian ADIZ extends into the Adriatic Sea. All military aircraft (whether foreign or Italian) are required to make contact with the appropriate Air Traffic Control unit 10 minutes before entering the ADIZ when flying off airways. If flying on airways and after taking off from aerodromes within the ADIZ, the directions as to how to make contacts will be made by the A.T.C. The same rules apply to civil flights on airways and after take off from aerodromes within the ADIZ.

Italy regards its ADIZ Regulations as part of the domestic law. Pilots not complying with the regulations will be intercepted and reported for violations of Italian Air Regulations.[90]

h. THE PHILIPPINES

The applicability of the Philippine ADIZ Regulations depends on whether the pilot-in-command of the aircraft is flying in or outside controlled airways.[91] All aircraft when flying outside controlled airways must give the estimated

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90 Ref. Supra, pg. 40 footnote 89

91 Philippine ADIZ Regulations, USAF/USN, Flight Planning Information Publication, Section on Pacific and South East Asia, corrected up to Aug. 1965, at pg. 60. Ref. also Hayton, op.cit., pp. 387-88, 384.

time of arrival, point of penetration, and altitude between 15 and 30 minutes prior to crossing PADIZ.[92] The pilot is required to make position reports inside PADIZ every 30 minutes or as required. When flying in controlled airways, the regulations require the pilot to give the estimated time of arrival when reporting over last compulsory point prior to crossing PADIZ.[93] Reporting over PADIZ is required only at designated compulsory reporting points indicated on enroute charts.[94] There are no provisions for interception in the basic documents of PADIZ Regulations.

i. U.S.S.R.

As far as is known, Russia has not declared any Air Defence Identification Zone; however, certain incidents which have taken place in the air-space off the coast of the USSR tend to indicate that the practice of the Soviet Union may be similar to that of the countries which have publicly announced the establishment of such zones. From this point of view we would examine the aerial incidents of 1954 and 1960.

92 Ref. Supra, pg. 41 footnote 91

93 Ibid.

94 Ibid.

The aerial incident of 1954 occurred when Soviet fighter planes attacked and shot down a U.S. Navy P_2V Neptune type aircraft some distance off the Soviet pacific coast. The United States plane was alleged to have violated the frontier of the USSR in the region of Cape Ostrovnoi. The United States however, maintained that its plane was 30 to 40 nautical miles away from the Soviet territory and was lawfully flying in international airspace over the sea of Japan. The United States submitted the case for adjudication before the international Court of Justice, but, the USSR declined to accept the Court's jurisdiction.[95]

The other aerial incident involved the U.S. Air Force plane RB-47, shot down by the Soviet aircraft on July 1, 1960 over the Barents Sea. The United States claimed that the RB-47 was on an electro magnetic observation flight over the international waters of the Barents, and "when shot down was actually 50 miles off the Coast."[96] The Soviet Union counter-claimed that the plane was attacked and shot down after it had intruded into Soviet airspace.

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95 Ref. I.C.J. Pleadings, Aerial Incident of Sept. 4, 1954.

96 U.S. Representative Cabot Lodge in the Security Council of the United Nations, 43 Dept. of State Bulletin, 235-36 (1960).

Although the Soviet Union theoretically has not established the counterparts of the American and Canadian ADIZ, her actions justified the conclusion that for security reasons she was involved in the incidents of the RB-47 and P_2V Neptune type aircraft, in areas beyond the three mile limit and even the twelve mile limit of the Soviet Union.[97]

2. The Consequences of Violations.

a. U.S.A.

The original American Security Regulations made provisions for interception of offending aircraft.[98] In the current Regulations there are no

97 Early in January 1966, Russia advised the United States to keep off the Black Sea. The Black Sea is an international body of waters. Russia claimed that the Black Sea is her sphere of influence for defence purposes. Two American V-Bombers were reported lost recently in the Black Sea while on a routine mission there.

98 F.A.A., Regulations of the Administrator, Security Control of Air Traffic, Part 620.11, 620.14, No. 16 (1961).

penalties provided for violations of the regulations.[99] The question that needs to be answered is what does happen in case of violation? Whatever opinion that may be expressed on this question is no more than an academic exercise since the state concerned is silent on the issue. The United States regards its ADIZ Regulations as part of the domestic law. Therefore the pilot-in-command of the aircraft that violates the regulations will be intercepted and reported for violations of U.S. Air Regulations. The method of interception will depend on the circumstances of each case. Presumably the offending aircraft will be warned about the violations; thereafter, the method of treatment of the offending aircraft depends on the behaviour of her pilot-in-command.

b. CANADA

In the Canadian ADIZ Regulations of 1955 there were provisions for interception by military interceptor aircraft.[100] The new Regulations are silent as to the penalty for violations.[101]

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99 Supra, pg. 32 footnote 62

100 Canada, Dept. of Transport, Air Services branch, 22/55 Rules for the Security Control of Air Traffic, (NOTAM 22, 1955) Sec. 2.10.1.

101 Supra, pg. 34 footnote 68 .

From this point of view both the American and the Canadian rules are similar in not providing for penalties for violations in their New Regulations. What has been said with respect to the United States as to what does happen in case of violation applies mutatis mutandi to Canada.

c. FRANCE

Here again we refer to the Regulations which established the French 'Zone of Responsibility' off the coast of Algeria in so far as certain incidents occurred during the period when the regulations were operative.[102] On the 9th of Feb. 1961, Soviet civil aircraft carrying the Soviet president was intercepted on the high seas contiguous to the Algerian border by French military aircraft.[103] The exchange of notes between the French and Soviet governments showed that the Soviet aircraft was actually on the high seas, but it had penetrated into the French 'Zone of Responsibility'. This zone was called 'Zone 230'

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102 The French 'Zone of Responsibility' no longer exists.

103 See Debbasch, "La Zone Contigue en Droit Aerien," 24 RGA 249 (1961). Translations from the French language into the English language are by Julie Aneckstein of the Department of Economics and Political Science, McGill University.

and had its origin in a Decree of Nov. 1, 1956 passed by the Army Ministry.[104]

After the incident which involved the President of the Supreme Soviet, Mr. Gromyko issued the following statements:[105]

> "Who has given to the French authorities the right to identify aircraft of other states which are flying in the airspace over the high seas? The French Government should be fully aware of the fact that the generally recognised rules of international law provide for the freedom of flight in the airspace over the high seas and that no states, unless it wished to violate international law is authorised to restrict this freedom or to dictate arbitrarily the itineraries over territorial waters /High Seas?/[106]

What is clear from Gromyko's statement is that but for the attack on the soviet civil aircraft, Russia would not challenge the validity of the French Regulations. The Russians quietly agreed to the direction to follow a particular air

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104 See Debbasch, op.cit., at page 250 footnote 2, and at pg. 256; Ref. also Hayton, op.cit., at pg. 388.

105 English translation by Professor Vlasic, Institute of Air & Space Law, McGill University. Ref. also Debbasch, op.cit., pg. 250.

106 In all probability, the use of the expression 'territorial waters' must be a typographical error.

corridor along the high seas contiguous to the Algerian border. Gromyko's statement seems to have been made in anger because of the attack.

d. KOREA

Korea ADIZ Regulations did not provide for penalties in case of violations. However, early in 1965, an incident arose off the coast of North Korea which involved the RB-47 of the U.S. Air Force. According to the United States the RB-47 was more than 50 miles from North Korea when it was fired at by the Korean fighter plane. However, North Korea claimed that the U.S. plane penetrated into its territorial airspace.

e. MALAYSIA (Sabah & Sarawak Area).

Malaysia has introduced a new concept to the whole procedure for interception of aircraft in cases of violations of its ADIZ Regulations. The rules to be followed immediately an aircraft is intercepted are as follows:-

(i) The aircraft must fly straight and level;

(ii) The aircraft radio must be tuned to 118.1 or 243.0 MC, and comply with instructions given.[107]

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107 Malaysia ADIZ Regulations, USAF/USN, Flight Planning Information Publication, Section on Pacific & South East Asia, corrected up to Aug. 1965, at pg. 59.

CHAPTER III

THE LEGALITY OF ADIZ REGULATIONS

1. An examination of the attempt to test the legality of ADIZ on the basis of maritime analogy.

It has been argued that ADIZ is justified on the basis of maritime analogy.[108] There is a difference between what is sought by states over the high seas and what is sought in the airspace above those seas. Furthermore, "we must not forget that the air is not, after all, a sea, and the air-vehicle is not, after all, a ship. The conditions of the sea and the conditions of the air are not the same."[109] Things happen much faster in the air than in the sea. The rate of technological advancement in the air has little comparison to the advancement in sea voyage.

A commentator has expressed an opinion thus: "We have also shown that by analogy to the Continental Shelf claims they[110] are valid in international law and lastly again by analogy with

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108 Murchison, Contiguous Airspace Zone in International Law. Ottawa 1956.

109 Hazeltine, The Law of the Air. pp. 10-11, (London 1911). See also Schick, Who Rules the Skies. 10-11 (1961); Hayton, op.cit., pg. 382.

110 i.e. Air defence identification zones.

maritime law and jurisdiction practised outside territorial waters that they are valid."[111] The argument was that tacit acquiescence was the test of the legality of national claims by coastal states of limited sovereignty over the Continental Shelf and therefore that the same considerations apply to air defence zones. There is little or no similarity between an air defence zone and the Continental Shelf. Although they are both off-shore claims, yet they are claims for different purposes. The Continental Shelf claims are for the exploitation and exploration of the natural resources of the sub-soil and sea-bed of the Continental Shelf. On the other hand, ADIZ Regulations are rules for the Security Control of Air Traffic.

Even while states assert jurisdiction over the Continental Shelf they often qualify it by stating that their claims do not affect the right of free and unimpeded navigation or the character of the high seas and airspace above the shelf. The Defence Zone Regulations are different in that they are operative over the free airspace above the high seas.

The motives for the creation of the defence zones are different from those required by the Convention on the Territorial Sea and the Con-

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111 Murchison, op.cit., pg. 116.

tiguous zone. The coastal states may exercise jurisdiction over the contiguous zone for purposes of preventing infringement of customs, immigration, fiscal or sanitary regulations. Security is not one of the purposes required by this Convention. In fact, the International Law Commission has described 'security' as a vague term which would open the way for abuses and the granting of such right is not necessary.[112] It must also be remembered that the character of the airspace above the high seas is not affected by the fact that the coastal states may exercise jurisdiction over the contiguous zone for the limited purposes specified above.

It has also been said that "it might well be mentioned that even in respect to maritime law, the twelve-mile contiguous zone, which appears to be generally the widest zone set up at the moment, which enjoys general acceptance among maritime states, may not be adequate, in view of the technical advances made in self-propelled guided missiles."[113] The twelve-mile limit of the contiguous zone traditionally represents the distance that a ship can steam in one hour. What Murchison is in fact

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112 United Nations Law of the Sea Conference, Doc. A/Conf. 13/4, at pg. 71.

113 Murchison, op.cit., at pg. 75.

saying is that if the guided missile could travel one thousand miles per hour then that will presumably represent the limit of the contiguous airspace. The United States has recently announced that the YF-12A aircraft, formerly called the A-11, exceeded 2000 mph on a straight course and hit a speed of 1,688 mph on a closed course.[114] Does this mean that the limit of the contiguous airspace will be 2000 miles?

The other distinction between maritime law and air law is that the former recognised the right of innocent passage in the territorial waters, while such right does not exist in the territorial airspace.

Since the right to fly over the high seas is a right enjoyed by all nations, the basis of balancing the common rights is reasonableness. The burden of proof is on the state exercising jurisdiction to show that its regulations are in accordance with the principle of reasonabless and peaceful uses.

2. The concept of anticipatory self-defence.

When the Yugoslav government proposed to the International Law Commission that a contiguous

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114 The Montreal Star, op.cit., Supra pg. 4.

zone be provided for security reasons, the answer of the Commission was "(a) that such a provision in the Article would pave the way for abuses and (b) that it would in any event be unnecessary since, if the state security was, in fact threatened, it could take security measures in accordance with its right of self-defence, not only within a twelve-mile zone, but if necessary, even beyond that limit."[115] This amounts to a situation in which the Commission does not recognise security interests under the contiguous zone but recognises the same under self-defence; states are thereby referred to the general principles of international law and the charter of the U.N. under which they could exercise the right of self-defence.

Self-defence is a legal right and it was in the Caroline Case that it was changed from a political excuse to a legal doctrine.[116] The question whether or not ADIZ is justified on the grounds of self-defence is in essence a legal question.

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115 U.N. DOC. A/CN.4/60 at pg. 122.

116 Ref. Jennings, R.Y., "The Caroline and Macleod Cases," 32 AM.J.I.L. pg. 82 (1938).

The right of self-defence is expressly recognised by the charter of the United Nations. Article 51 of the charter reads:

> "Nothing in the present charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by members in the exercise of this right of self-defence shall be immediately reported to the Security Council ....."117

If ADIZ has been established under the terms of Article 51, then it can only be justified if there has been an armed attack. But who decides whether there has been an armed attack? It is the state concerned alone that could decide in the first instance whether she is threatened with armed attack; but the legality of such an action cannot be determined unilaterally by such state.[118]

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117 Article 51 of the U.N. Charter.

118 Ref. also the opinion of the Nuremberg Tribunal: "It was ..... Germany alone that could decide .... whether preventive action was a necessity, and that in making her decision her judgement was conclusive. But whether action taken under the claim of self-defence was ... agressive or defensive must ultimately be subject to investigation and adjudication if international law is ever to be enforced." ____quoted in Briggs, The Law of Nations, (2nd Ed. 1952) at pg. 985.

Traditional international law allows a state to take anticipatory action in face of imminent danger. Daniel Webster has formulated the right of self-defence in the following terms - there must be a necessity of self-defence, instant, overwhelming, leaving no choice of means and no moment for deliberation. The action must involve nothing unreasonable or excessive since the act justified by the necessity of self-defence must be limited by that necessity and kept clearly within it. What is implicit in Webster's statement is the fact that it confers a right of anticipatory action. This right is qualified by the principle of proportionality. The advocates of ADIZ have stated that the raison dêtre for the establishment of these zones is security. The measures taken under ADIZ are protective and defensive; and are in anticipation of threats of attacks. Such anticipatory actions are permitted by the customary rule enunciated by Webster. However, the action taken must not be a disproportionate deterrent reaction to the threat anticipated.

The obligation imposed on the pilot-in-command of an aircraft by Air Defence Zone Regulations is not burden-some and not inconsistent with the ordinary in-flight procedure on any international flight. "By virtue of long-accepted aeronautical regulations, all aircraft which fly Westward across the Atlantic or towards North America

by means of the polar route must comply with a specified routine."[119] We must not forget that there has been no protest since the establishments of ADIZ and CADIZ in 1950 and 1951 respectively. Scheduled flights have increased along the Atlantic route. This means that the test of reasonableness as required by Webster's statement must have been met by the application of ADIZ Regulations to other states.

Dr. Brownlie says that, "the terms of Article 51 of the Charter would seem to preclude preventive action."[120] But when he attempted to define an armed attack within the meaning of Article 51, he had to admit that "the whole problem is rendered incredibly delicate by the existence of long-range missiles ready for use: the difference between attack and imminent attack may now be negligible."[121] In the Caroline Case "the Law Officers advised the British Government that Canada's action

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119 Head, "ADIZ, International Law, and Contiguous Airspace," 3 Alberta Law Review, pg. 183 (1964).

120 Brownlie, International Law and the use of force by states. Oxford University Press, 367 (1963).

121 Brownlie, op.cit., at pg. 368.

could only be justifiable as a precaution against future injury ...[122] There is no doubt that the establishment of ADIZ is no more than a precaution against future injury. It is enough if there is a strong probability of armed attack. It has been suggested that "preparations for atomic warfare would in view of the appaling power of the weapon have to be treated as an armed attack within Article 51 of the Charter."[123]

A restrictive interpretation of Article 51 of the Charter means that "the target state is being compelled to defer its reaction until it would no longer be possible to repel an attack and avoid damage to itself. In case of delivery by ballistic missiles whose trajectory is traversed in a matter of minutes and against which effective repulsion measures have yet to be devised, it should even be clearer that to require postponement of response until the last irrevocable act is in effect to reduce self-defence to the possible infliction, if

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122 Jennings, R.Y., "The Caroline and Macleod Cases," 32 AM. J.I.L., 87 (1938).

123 Passage cited in Waldock, "The Regulation of the use of force by individual states in international law, Recueil des Cours de l'Academie de Droit international de la Haye, pg. 498 (1952).

enough defenders survive, of retaliatory damage upon the enemy."[124]

It is sheer illusion to expect states to wait for armed attack before they react to what is happening around their coasts. A state may exercise acts of preventive police on the high seas although not claiming such area within its exclusive jurisdiction and domain. From this point of view it is still permissible for a state to assume "a protective jurisdiction within the limits circumscribing every exercise of the rights of self-defence upon the high seas in order to protect its ships, its aircraft, and its rights of territorial integrity and political independence from an imminent danger or actual attack."[125] What is sought under ADIZ is in substance a claim to prepare for self-defence; a claim to take certain preparatory measures under conditions comparable to those traditionally held to justify measures of self-defence.[126]

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124 McDougal and Feliciano, Law and Minimum World Public Order. Yale. 240 (1961).

125 Bowett, Self-Defence in International Law. pg. 71 (1958).

126 McDougal and Schlei, "The Hydrogen Bomb tests in perspective: Lawful-Measures for Security. 64 Yale Law Journal, pg. 686 footnote 38 (1955).

Article 51 further declares that measures taken by members in the exercise of this right of self-defence shall be immediately reported to the Security Council. A commentator has said that Article 51 does not involve the obligation to report preparatory measures.[127] The right to take preparatory measures which emanates from customary rule probably does not involve the obligation to report to the Security Council. But where such right of self-defence is purported to have been exercised by virtue of Article 51 of the Charter such measures will have to be reported. Perhaps the reason why states feel reluctant in reporting self-defence measures to the Security Council is because of the "potential sterility of Security Council action because of the possible abuse of the veto. This has caused the concept of collective self-defence in conformity with the terms of Article 51 of the Charter to burgeon into collective security pacts such as the Rio Treaty, the Western European Treaty and the North Atlantic Treaty as possible substitutes for the Security Council."[128]

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127 Goodrich & Hambro, Charter of the United Nations. pg. 307. (2nd Revised Ed. 1949).

128 Briggs, The Law of Nations. (2nd Ed. 1952) at pg. 986.

Article 51 of the U.N. Charter grants "inherent" right of self-defence. "Inherent" suggests that the right is an existing one. The only existing right is the customary right of self-defence which allows a state to take anticipatory action in face of imminent danger. Therefore, ADIZ seems to be justifiable on the grounds that Article 51 of the Charter does not preclude anticipatory self-defence. However, Dr. Brownlie has warned that the customary rule permitting anticipatory action must be exercised with caution.. "Statements of the rule all too often appear in a context, whether it be the Caroline Case or works of authority, in which no clear distinction was made between self-preservation,[129] necessity and self-defence."[130]

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129 For the purposes of this Thesis, self-perservation is a "pseudo-legal notion which is excellently suited for the ideological purpose of contracting out of otherwise undeniable international duties."—— Schwarzenberger, The Legality of Nuclear Weapons. London, pg. 42 (1958).

130 Brownlie, op.cit., at pg. 258.

3. ADIZ and Customary rule of international law

Both the American ADIZ and Canadian ADIZ Regulations were promulgated in 1950 and 1951 respectively. Since that time, the regulations have affected scheduled flights across the Atlantic. However, their enforcements have not brought any protests to the governments of Canada and America. States are known to be swift in reacting to a practice which appears to violate international law.[131] The absence of protests against these zones proves either that the consent of other states was unnecessary or that such consent has been granted at least for the periods 1950-66; or that the regulations have been advanced in modest forms and acquiesced in by states.

In the Anglo-Norwegian Fisheries Case,[132] the method of delimitation adopted by Norway has been established in the Norwegian system and consolidated by a constant and long practice. The application of the system encountered no opposition from other

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131 See further Quincy Wright in 26 AM. J.I.L. pg. 342 (1932) for the Stimson Doctrine of non-recognition.

132 The Anglo-Norwegian Fisheries Case, I.C.J. Reports, 1951.

states. Even the United Kingdom did not contest it for many years. It was held that the United Kingdom could not have been ignorant of the reiterated manifestations of Norwegian practice, which was so well known.

The question now is whether a customary rule of international law is in the making? Custom means usage coupled with a feeling by those who follow it to be an obligatory one.[133] "A customary rule is observed, not because it has been consented to, but because it is believed to be binding".[134] To establish customary international law, we have to examine what states do in relation to one another; we must examine whether the custom shows "a general practice accepted as law."[135]

The fact that there were no protests against ADIZ for the past 15 years cannot by itself establish a customary rule of international law. However, it does give evidence of what states do in relation to one another. The fact that more and more states establish air defence zones suggests strongly that a new customary law is in the making.

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133 Brierly, op.cit., pg. 59.

134 Ibid. pg. 52.

135 Article 38 of the Statute to the I.C.J. See also Supra, Ch.1(3), for further discussion on Customary Law.

CHAPTER IV

INSTANCES OF THE EXTRA-TERRITORIAL EXERCISE OF STATE AUTHORITY IN THE AIRSPACE OVER THE HIGH SEAS

1. Space Experiments.

It has become the practice of both the United States and the Soviet Union to be making use of the airspace over the high seas for space experiments. The United States uses international waters to recover its space capsules. For this purpose, notices have been issued to airmen not to fly over certain portions of the high seas during the recovery period of space capsules.[136] The purpose of these 'Notices to airmen' is to secure safety both of the experiments and other users of the oceans.

Space experiments of this nature appear to be a judicious exercise of the right of 'Occasional exclusive competence' over the high seas[137] which is customarily exercised by states. It is important to note that there has been a lack of protests against the United States practice. The areas used for recovering the American space

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136 See page 67 below for a specimen of the special Notices to airmen issued by the U.S. during the recovery of manned spacecraft.

137 To use the language of McDougal, Lasswell and Vlasic in Law and Public Order in Space.

capsules on the high seas have been carefully chosen so as not to affect traffic. The extent of the area involves the least interference with the activities of other states.

Russia, on the other hand, announced recently that she would try out landing equipment for space ships in a series of tests in the Pacific from December 16th, 1965 until June 1st, 1966.[138] All foreign aircraft and shipping were warned to keep out of the test area between midnight and noon during the six months test period. The test area is in the North Pacific halfway between the United States and Russia. The systems to be tested were thought likely to be soft-landing techniques for manned spacecraft.[139] The reaction of other states to the Soviet announcement of December 1965 has been tacit acquiescence. It may be that the extent of the area chosen by the Soviet Union does not seriously affect the activities of other states.

The most relevant international action on the question of space experiments is the United Nations Declarations of Legal Principles Governing the Activities of States in the exploration and use of outer-space, Nov. 22nd, 1963. Before

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138 The Montreal Star, column 1, pg. 43, 15th of December 1965.

139 Ibid.

discussing the relevant provisions of these U.N. Declarations, it is necessary to make some comments on the effect of U.N. General Assembly Resolutions or Declarations. The fact that they are Resolutions and not treaties has not deprived them of legal effect. They aim at establishing a foundation for a process of authoritative decision. To evolve space law, we have to start from what is possible now, i.e. U.N. General Assembly Resolutions on outer-space; and then we can do the impossible later, i.e. space law in treaty form. It has been suggested that United Nations Resolutions on outer space can create "instant" customary law especially when the resolutions are passed by the unanimous vote of member states.[140]

The U.N. General Assembly Resolution 1721, 20 December 1961, was regarded by some states, including the United States as a declaration of existing law.[141] The U.N. Declaration of Legal Principles (Nov. 22nd, 1963) was adopted unanimously. All member states promised to respect the Legal Principles and that the conduct required by

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140 Bin Cheng, "United Nations Resolutions on Outer-space: "Instant" International Customary Law?" Indian Journal of International Law, vol. 5, Jan 1965, pg. 35.

141 Cohen ed., Law and Politics in Space, McGill University Press, pg. 60 (1964).

the principles will become the practice of every state. The public expressions by Governments of opinions on matters of law in such an important forum and in such a forceful manner provides cogent evidence as to the state of the law.

Principles 1 and 9 of the Declaration appear to be relevant to the discussion of the recovery of space capsules over the high seas. Principle 1 requires that the exploration and use of outer-space shall be carried on for the benefit and in the interests of all mankind. Principle 9 reads: "States shall regard astronauts as envoys of mankind in outer space and shall render to them all possible assistance in the event of accident, distress or emergency landing on the territory of a foreign state or on the high seas. Astronauts who make such a landing shall be safely and promptly returned to the state of Registry of their space vehicles." Among other things, this provision covers the likelihood of miscalculations which often lead to the space capsules being recovered several miles off-target. The reference to the state of registry under Principle 9 suggests that the space capsule should be registered for the purposes of nationality. Provided that 'Notices to airmen' are issued, and provided that the spacecraft is registered, every state shall permit and as far as possible assist,

the recovery of spacecraft which lands on the high seas, and the return of any person travelling in it to the state from which it is launched.

SPECIMEN OF NOTICES TO AIRMEN ISSUED BY THE UNITED STATES DURING THE RECOVERY OF MANNED SPACECRAFT.

DURING PERIOD 181303Z TO 181803Z THIS AREA WILL BE OPEN FOR TRANSIT ONLY BY ACFT ON 1. FILED FLT PLAN WITH APPROPRIATE ATC FACILITY AND 2. IN CONTINUOUS COMMUNICATIONS WITH EITHER MIAMI NEWYORK SANJUAN OR BERMUDA CENTERS. THE AREA WILL BE CLOSED WHEN NOTIFICATION IS RCVD OF PENDING RECOVERY OF GEMINI SPACECRAFT. ACFT PROPOSING FLT THRU THIS AREA DURING PERIOD SPECIFIED ARE HEREBY NOTIFIED OF PSBL REROUTING AND ADVISED TO PLAN FUEL RESERVES ACCORDINGLY. IFR SEPARATION FM HONEYBEE GT7/2 AREA WILL BE PROVIDED IFR TFC BY THE MIAMI NEWYORK BERMUDA AND SANJUAN ATC FACILITIES. FLTS SHOULD PLAN TO OVERFLY OR REMAIN 60NM LATERALLY IN NEWYORK AND BERMUDA AREAS AND 50NM LATERALLY IN MIAMI AND SANJUAN AREAS FM BOUNDARY THIS AREA DURING THE TIME SPECIFIED.
12/21XX PBI
12/21XX PBI
MIA FDC 5/1557 CANCEL NOTAMS FDC 5/1554 AND 5/1555 GEMINI TEST 7100 GT6 COMPLETED.
MIA FDC 5/1559 NOTAM 1247 ATLANTIC OCEAN GEMINI TEST 6145. CONSISTENT WITH U.S. SFAR16 CIVIL OR PUBLIC ACFT OF U.S. REGISTRY AND PILOTS OPERATING UNDER AN FAA ISSUED AIRMANS CERTIFICATE ARE PROHIBITED FM OPERATING WITHIN AN AREA 40NM EACH SIDE OF A LINE BTN 2610N 7147W TO 2514N 6815W SFC TO 60000 FT FM 181303Z TO 181803Z UNLESS SUCH ACFT AND PILOTS ARE OPERATING IN ACCORDANCE WITH THE TERMS OF AN ATC CLEARANCE OR APPROVAL BY NASA WHICH PERMITS PENETRATION OF THIS AREA.
MIA FDC 5/1558 NOTAM 1246 ATLANTIC OCEAN GEMINI TEST 6145. HONEYBEE GT7/2 AREA. AFETR CONDUCTING ACTIVITIES HAZARDOUS ACFT SFC TO 60000 FT WITHIN RECOVERY AREA 40 NM EACH SIDE OF A LINE BTN 2610N 7147W TO 2514N 6815W. DURING PERIOD 181303Z TO 181803Z THIS AREA WILL BE OPEN FOR TRANSIT ONLY BY ACFT ON 1. FILED FLT PLAN WITH APPROPRIATE ATC FACILITY AND 2. IN CONTINUOUS COMMUNICATIONS WITH EITHER MIAMI NEWYORK SANJUAN OR BERMUDA CENTERS. THE AREA WILL BE CLOSED WHEN NOTIFICATION IS RCVD OF PENDING RECOVERY OF GEMINI SPACECRAFT. ACFT PROPOSING FLT THRU THIS AREA DURING PERIOD SPECIFIED ARE HEREBY NOTIFIED OF PSBL REROUTING AND ADVISED TO PLAN FUEL RESERVES ACCORDINGLY. IFR SEPARATION FM HONEYBEE GT7/2 AREA WILL BE PROVIDED IFR TFC BY THE MIAMI NEWYORK BERMUDA AND SANJUAN ATC FACILITIES. FLTS SHOULD PLAN TO OVERFLY OR REMAIN 60NM LATERALLY IN NEWYORK AND BERMUDA AREAS AND 50NM LATERALLY IN MIAMI AND SANJUAN AREAS FM BOUNDARY THIS AREA DURING THE TIME SPECIFIED.

2. Testing of Long-Range Missiles.

For a number of years following the end of World War II, certain states have been using international airspace over the high seas for missile tests. The question of safety of missile tests was widely discussed in 1957 after the firing of the SNARK from Patrick Air Force Base in Florida.[142] Article 8 of the Chicago Convention[143] on "Pilotless aircraft" requires each contracting state whose aircraft is flying without a pilot over "regions open to civil aircraft" to control such aircraft so as to obviate danger to civil aircraft. In so far as the airspace over the high seas is an area open to civil aircraft, states sending pilotless aircraft must take measures which will promote safety of flight in the region.

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142 New York Times, "Little Peril seen in Missile Tests," 25 March 1957 at pg. 9. The U.S. Air Force stated that safety precautions were taken in firings from the Florida Base and that the chances were one in a million that one of the Missiles fired over the Atlantic could hit an airplane.

143 ".... Each contracting state undertakes to insure that the flight of such aircraft (i.e. "pilotless aircraft") without a pilot in regions open to civil aircraft shall be so controlled as to obviate danger to civil aircraft."

Article 9 of the Chicago Convention, 1944, grants to each contracting state the right to establish restricted areas over certain areas of its territory for reasons of military necessity or public safety.[144] This right does not include a right to establish danger areas over the high seas. However, (under Chapter I of Annex 2) to the Chicago Convention, "danger area" is defined as "specified area within or over which there may exist activities constituting a potential danger to aircraft flying over it." Technically then a state may establish such area over the high seas but another state is not compelled to respect it. The most important principle is that states should refrain from any acts which might adversely affect the use of the high seas by nationals of other states.[145]

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144 Article 9 reads: Each contracting state may, for reasons of military necessity or public safety, restrict or prohibit uniformly the aircraft of other states from flying over certain area of its territory, provided that no distinction in this respect is made between the aircraft of the state whose territory is involved, engaged in international scheduled airline services, and the aircraft of the other contracting states likewise engaged ....."

145 The principle of international law enunciated by the Trail Smelter Arbitration imposes a duty on all states not to engage in activities that will be damaging to their neighbours.

Missile tests have been justified on the ground that they represent a limited exercise of jurisdiction over the high seas. It has been the custom of states to close certain areas of the seas while they perform military or naval manoeuvres or training or defence exercise.

The testing of long-range missiles requires the use of extensive areas of the sea. The Atlantic Missile testing range used jointly by the U.S. and the U.K. covered approximately 30,000 square miles.[146] The Soviet Union also has been conducting such tests in the Central Pacific Ocean South West of Hawaii, and had requested other states to inform their shipping and aircraft to stay out of the target area.[147]

Acquiescence seems to be the reaction of other states to the establishment of missile testing range. Examples were the danger areas in the Caribbean and South Atlantic region which were used as proving grounds for rockets and guided missiles launched into space from sites in Florida.[148] The extensive limitation imposed by the 30,000

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146 Taubenfeld, "Nuclear Testing and International Law, 16 Southwestern L.J. pg. 389 (1962).

147 New York Times, Jan 8, 1960, pg. 1, col. 4.

148 U.N. Conference on the Law of the Sea, Doc. A/CONF. 13/4, at pg. 70.

square mile Atlantic Missile testing range (used jointly by the U.S. and the U.K.) has not elicited protests from other nations.[149] With one exception, no state protested against the Soviet practice of conducting missile tests in the central pacific ocean. Indeed, the President of the United States was quoted as saying that it "would be very unusual for us to make a protest when we have done the same thing ourselves and intend to do it again."[150] Japan however opposed these test firings on the ground that they would interfere with fishing operation. She claimed the right to compensation should there be losses or damages to fishing operations.[151]

Although the testing of long-range missiles requires the use of extensive areas of the sea, yet it is true to say that missile tests cause fewer hazards to users of the seas and the airspace than tests of atomic weapons. In cases where missile tests are opposed, the reasons were based on the freedom of the seas. The allegation was that any interference with free access and use no matter how slight is not permissible. This cannot be the case especially when there is no perfect freedom of the seas. As long as there are

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149 Taubenfeld, op.cit., at pg. 389.

150 New York Times, Jan 14, 1960, pg. 14.

151 New York Times, Jan 14, 1960, pg. 14, col. 8.

circumstances of regarding missile tests as peaceful uses of the open sea, then the criterion should be whether they unreasonably interfere with inclusive use by others. To safeguard the inclusive uses, elaborate safety precautions will have to be taken that tests do not interfere with safe navigation over the seas and the airspace above.

Where a state makes exaggerated claims in its Notices to airmen, it will of course be opposed by other states. This was the case when in 1957 "the Soviet Union declared Peter the Great Bay to be part of its 'internal waters' within a line 115 miles long running from Cape Povorotny in Siberia to the estuary of the River Tyumen-ula, at the boundary between Siberia and North Korea."[152] The Soviet declaration required other states to seek permission from the USSR before they could enter Peter the Great Bay. Japan, Britain and the United States are known to have protested to the USSR.[153]

Another important point about the long-range missile is that it is capable of being used for both military and civilian application of space technology. Missile testing will appear to be contrary to the principle of the freedom to fly

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152 Reiff, The United States and the Treaty Law of the Sea. pg. 371 (1959).

153 Reiff, op.cit., at pg. 371 footnote 317.

over the high seas if the stated purpose is military. It is not a peaceful use if missiles which are being tested carry bomb warheads capable of hitting any target in the world.

3. Nuclear Tests.

In 1946, the United States began to use the high seas for nuclear tests. The tests were conducted in the trust territory of the Pacific Islands. The area was composed of 98 island groups (2000 islands) with a total dry area of 3000,000 square miles of the North Pacific ocean.[154] The Eniwetok Atoll near Bikini was chosen as the tests site. Mariners were advised to avoid the waters in an area of approximately 180,000 square miles surrounding the Atoll during May to August of 1946.[155] In 1947, a zone of about 30,000 square miles was declared dangerous to ships, aircraft and personnel and the area was patrolled to prevent ships or aircraft from entering inadvertently.[156] In May 1953

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154 McDougal & Schlei, "The Hydrogen Bomb Tests in Perspective: Lawful Measures for Security," 64 Yale L.J. 650 (1955).

155 McDougal & Schlei, op.cit., pg. 651.

156 Ibid.

and 1954, the warning areas over the high seas included about 50,000 square miles and 400,000 square miles respectively.[157]

The tests of March 1st, 1954 injured many Japanese and they also affected the Japanese fishing industry.[158] When in 1962 vast areas of the sea were closed for nuclear tests, the action involved substantially more interference with surface movement than the airspace normally used for air routes.[159] There was the singular incident where one commercial air route, that between Wake Island and Guam, was deflected northward by the largest zone, making it necessary for two to three flight weekly to follow a route fifty miles longer than usual during the fifty-seven days that the zone was in effect.[160]

The Soviet Union protested against the tests and expressed concern at the destructive power of nuclear weapons. Some neutral statesmen questioned the legality of these tests and claimed that they violated the customary international law of the sea.[161] The United States while regarding

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157 McDougal & Schlei, op.cit., pg. 651.

158 Id. at pg. 649.

159 New York Times, April 10, 1962, pg. 4, col.1., Ref. Taubenfeld, op.cit., at pg. 390.

160 McDougal & Schlei, op.cit., at pg. 683.

161 Id. at pg. 649.

the tests as action in self-defence, expressed regrets at the accidents which resulted in injuries to Japanese nationals and fishing industry. The United States made an ex gratia payment of $2000,000 to Japan without reference to the question of legal liability.[162]

Under general international law, states are expected to observe the following general principles whether or not they are parties to treaties on nuclear tests. Because of the harmful effects of nuclear explosions, nuclear tests constitute an international wrong against humanity. Where such tests are conducted within the territory of a state, they would be regarded as abuse of rights. The principle of absolute liability for harbouring dangerous activities is recognised in international law. A state which carries on test explosions of nuclear weapons is therefore absolutely liable for the damage caused by such test explosions.[163]

Concerning the question of what is being done by states in the field of nuclear testing, the 1958 Conference on the Law of the Sea made a rather unfruitful attempt to resolve the question of the

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162 McDougal & Schlei, op.cit., at pg. 649.

163 These were the conclusions reached by the Asian-African Legal Consultative Committee. Sixth Session, Cairo. Feb - March 1964. Ref also 59 AM. J.I.L. pg. 722 (July 1965).

legality of nuclear tests. The Conference adopted a Resolution on the 27th April, 1958, on the report of the Second Committee, in connection with Article 2 of the Convention on the high seas. This Resolution pointed out that many felt nuclear tests constituted an infringement of the freedom of the seas, and decided to refer the matter to the General Assembly of the United Nations for appropriate action. A proposal sponsored by Poland, Czechoslovakia, Yugoslavia and the Soviet Union to include a paragraph to the effect that states are bound to refrain from testing nuclear weapons on the high seas was not accepted by the Conference. The feeling was that it was inappropriate to deal with the matter outside of a more general disarmament context.[164] It can safely be concluded that the work of the 1958 Conference on the law of the sea did not alter the position of nuclear tests over the high seas. International community had to wait for the 1959 Antarctic Treaty and the Nuclear Test Ban Treaty, 1963.

The Antarctic Treaty of 1959 expressly prohibits the testing of any type of weapons. The geographical scope of the treaty is dealt with in Article VI where it is stipulated that the treaty shall apply to the area south of 60° South Latitude, including all ice shelves. Article 1

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164 U.N. Doc. No.A/CONF. 13/C 2/L.30, 1959.

of the Treaty requires the Antarctic to be used for peaceful purposes. Article V(1) reinforces the purpose of Article 1 by stating that any nuclear weapons in the Antarctica and the disposal there of radio-active waste material shall be prohibited. Article V(2) raises an interesting point whereby the parties agreed to bind themselves by the terms of international agreements dealing with nuclear energy including nuclear explosions which may be concluded in the future.[165] In other words, when such an international agreement comes into being, the terms will be incorporated by reference into the Antarctica Treaty. As many as twelve states including the U.S., U.K., and USSR signed this treaty.

The Antarctic Treaty also raises an interesting question concerning states which are not contracting parties. Each of the contracting Parties undertakes to exert appropriate efforts, consistent with the charter of the U.N., to the end that no one engages in any activity in Antarctica contrary to the principles or purposes of the present treaty.[166]

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165 Article V(2) reads: "In the event of the conclusion of international agreements concerning the use of nuclear energy, including nuclear explosions and the disposal of radio-active waste material, to which all of the contracting parties whose representatives are entitled to participate in the meetings provided for under Article IX are parties, the rules established under such agreements shall apply in the Antarctica."

166 Article X, the Antarctica Treaty, 1959.

The practice of conducting nuclear tests over the high seas ended in 1963. That was the year in which the Partial Nuclear Test Ban Treaty came into force.[167] The signing of the Test Ban Treaty has lessened, though by no means eliminated the importance of the question of the legality of atmospheric testing under general international law. There is no doubt that when a Contracting State to the Test Ban Treaty conducts atmospheric tests in violation of the treaty, such state will be liable for damages caused by fall-out. What of non-contracting states to the Test Ban Treaty? Does it mean that they could conduct tests which cause injuries with impunity?

At the moment two nuclear powers, France and Communist China have not signed the Treaty. The Test Ban Treaty itself cannot stop these two powers from testing their nuclear weapons anywhere they like. China had already conducted nuclear tests at a site near a lake called Lop Nor, in the Takla Makan desert of the remote central Asian province of Sinkiang.[168] France has been making

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167 At that time, it had been signed by 105 governments in addition to the original parties (USSR, U.K., and U.S.A.) By Feb 10, 1964, 28 states had ratified the treaty excluding the original parties. Ref. also Schwelb, "Nuclear Test Ban Treaty and International Law," 58 AM. J.I.L. 647 (1964).

168 U.S. Dept. of State Bulletin, pg. 611 (Nov.2, 1964).

preparations to conduct nuclear tests in the South-Pacific. However, it may be recalled that the principle which underlies the Trail Smelter case is that each state is internationally responsible for its acts or omissions which cause injuries or damage to other states or their nationals. The United States ex gratia payment to Japan for injuries caused by its 1954 tests was an example of the liability of states generally for damages caused by fall-out.

Finally, the withdrawal clause in the Nuclear Test Ban Treaty[169] gives to each contracting party the right to give three months notice of withdrawal to all other contracting parties. The right to withdraw is exercisable by each contracting party if it decides that its national interests have been jeopardised by the subject-matter of the Test Ban Treaty. Each state will be the sole judge of what its own national interests are.[170]

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169 Article IV reads: "... Each party shall in exercising its national sovereignty have the right to withdraw from the treaty if it decides that extraordinary events related to the subject-matter of this treaty have jeopardised the supreme interests of its country. It shall give notice of such withdrawal to all other Parties to the Treaty three months in advance."

170 Ref. Brownlie, "Some legal aspects of the use of nuclear weapons," 14 I.C.L.Q. pg. 437 (April 1965).

4. Aerial Identification of Ships Over the High Seas.

The practice of aerial identification of ships over the high seas has become in recent times a hotly disputed issue between the U.S. and the USSR. Probably the best way to start a discussion on this subject is to enumerate some of the incidents which took place. An attempt will then be made later to analyse the legality of aerial identifications generally, distinguishing between the right of approach of merchant vessels by warships and the right of approach of ships by aircraft over the high seas.

The Soviet Union had made several complaints alleging that her ships were being buzzed on the high seas by the military planes of other states. She declared that "the use of airspace for the identification of surface vessels hinders navigation and is, therefore not permissible."[171] In a memorandum to the U.S. Embassy in Moscow, Russia claimed that "there had been 250 cases of low-level passes over Soviet ships."[172] The Soviet government further warned "that if the low-level passes did not cease, the government would be obliged to take measures to

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171 New York Times, July 15, 1960, pg. 4.

172 Ibid.

insure the safety of navigation of Soviet vessels in open seas."[173] The Soviet Union further charged that "the buzzing took place in locations thousands of kilometers from the United States shores."[174] What is implicit in the Soviet protests is that they did not question the right of identification when properly exercised. The charges were against the buzzing and the low-level passes over Soviet ships.

The other complaints were made to Britain. Russia complained that British aircraft had on various occasions buzzed Soviet vessels. Britain denied the allegation and said that "no British aircraft had flown over Soviet vessels in such a way as to endanger them or their crews or to hinder navigation."[175] Britain argued that none of its aircraft had flown over Soviet vessels at heights below 500 ft; that "the overflights were in fact a legitimate execution of the right to fly over shipping on the high seas, as reaffirmed by the Convention on the high seas which was signed by

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173 New York Times, July 15, 1960, pg. 4.

174 Ibid.

175 The Times, July 30, 1960, pg. 5.

the Soviet Union in October 1958."[176]

The United States in its reply to Soviet allegations, claimed that these overflights were merely routine identification of ships in international waters and in the ocean approaches of the United States.[177] United States pilots were under instructions not to approach closer than was necessary for the purpose of identification. "The Soviet Union has freedom of the seas but must respect this freedom in respect of other nations."[178]

After noting the various incidents in connection with aerial identification, it will be necessary to examine the legal status of the buzzing of ships over the high seas. It was, Grotius in his 'Mare Liberum' who first placed the freedom of the seas on a legal basis. This doctrine has triumphed and is generally recognised. In the 'Marianna Flora',"Upon the ocean, in time of peace, all possess an entire equality. It is

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176 The Times, July 30, 1960. pg.5. The Soviet Union also made complaints about the buzzing of its non-military ships by other foreign aircraft e.g. France, Turkey, Greece, Denmark, Norway and Canada - See New York Times, July 17, 1960, pg. 4. All these states had rejected Soviet protests.

177 New York Times, July 22, 1960. pg. 6.

178 Ibid.

the common highway of all, appropriated to the use of all and no one can vindicate to himself a superior or exclusive prerogative there."[179]

The essence of the freedom of the seas is to make it available to all nations as a necessary instrument of international navigation and trade. As one commentator said, "in places where no local authority exists, where the subjects of all states meet on a footing of entire equality and independence, no one state, or any of its subjects, has a right to assume or exercise authority over the subjects of another. No nation can exercise the right of visitation and search upon the common and unappropriated parts of the sea, save only on the belligerent claim."[180]

Where a state is interfering with the peaceful passage of a ship in the open seas, the onus is on such state to prove its claims to jurisdiction. The claim must be a recognised exception to the rule of law. One of such exceptions is the right of approach conferred on warships to approach merchant vessels on the high seas, in cases of suspicion to verify nationality. In the 'Marianna Flora,'

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179 (1826) 1 Wheaton 1, 43.

180 Lord Stowell, cited in Colombos, International law of the sea, 5th Ed, pg. 286 (1962).

the action of the American Warship (the Alligator) in approaching the vessel in order to determine her true character was described as a judicious exercise of a warship authority. The party exercising such jurisdiction does so at his peril and if he fails to justify his action he must make compensation.

Another relevant principle is that enunciated by the proviso to Article 2 of the Convention on the High Seas (1958). This proviso declares that aircraft has the right to fly freely over the high seas with the qualification that "these freedoms and others, which are recognised by the general principles of international law, shall be exercised by all states with reasonable regard to the interests of other states in their exercise of the freedom of the high seas."

Up till now, we have discussed the right of warships to approach merchant vessels over the high seas. The problem now is the right of approach exercised by an aircraft over ships on the high seas. The question is whether the right of approach is limited to approach by warships to the exclusion of the exercise of such right by aircraft? It would seem that the right to visit, approach, or stop merchant vessels cannot be effected by airplanes, as by their very nature they are unable to conform to the established

rules prescribed for ships. For example the aircraft has greater powers of destruction or of endangering the lives of persons on board the merchant vessel than are possessed by ships or other surface vessels. On the basis of this thinking it can be said that an aircraft does not possess the right of approach similar to that accorded to warships. However, there are other important considerations.

It will be recalled that when the Soviet Government alleged that the British aircraft had on several occasions buzzed Soviet vessels, the British Government replied that its aircraft had flown over Soviet vessels at heights of not less than 500 ft. In accordance with the rule of international law, civil aircraft must fly at a height of at least 500 ft (or 1000 ft over congested areas) except when taking off or landing. Such rules will apply to flights over the high seas.[181] If we accept the British Government's statement concerning the height of 500 ft., then British aircraft overflights of Soviet vessels at the height of 500 ft. are compatible with the rule of international law relating to the heights to be maintained by civil aircraft while in flight.

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181 See Article 3.1.2. of Annex 2 to the Chicago Convention. Rules relating to flight and manoeuvre of aircraft within the terms of Article 12 of the Chicago Convention 1944.

Finally, Article 3 (a) of the Chicago Convention provides that the Convention does not apply to state aircraft. State aircraft means aircraft used in military, police or customs services. Therefore the identification of ships by military aircraft does not appear to be contrary to that Convention, i.e. the Chicago Convention.

The following rules are recommended for observation concerning aerial identifications of ships:-

(i) They must not unreasonably interfere with navigation on the high seas;

(ii) The flight must not endanger ships or their crews;

(iii) It must not be low-level. It should be at the internationally recognised height of 500 feet or above;

(iv) The right should be exercised for the purpose of identification only;

(v) If the reasons for which the right of approach was exercised prove to be unfounded, and provided that the ship has not committed any act justifying them, it shall be compensated for any loss or damage that may have been sustained.

5. Pirate Broadcasting in International Waters.

The jurisdiction which a state is entitled to exercise over its superjacent airspace includes the right to prevent injurious transmissions by means of radio waves from foreign sources e.g. international waters. Technically, when a state has no legal link of nationality with a person or property, it has no right of action against such a person or property, unless it has the consent of the national state or the case falls within the general rules relating to piracy. Acts of piracy committed on board registered ship or airborne object on the high seas are punishable by any state. Therefore where piracy is concerned, the exclusive jurisdiction granted to the state of registration cannot be invoked.

Unauthorised transmissions of Radio and Television programmes from ships situated in international waters have currently been worrying European states. Countries known to be affected by such broadcasts are the Nordic countries, Belgium, Holland and Britain.[182]

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182 For a more detailed and current paper on the problem of pirate broadcasting in European Waters, see Hunnings, "Pirate Broadcasting in European Waters," 14 I.C.L.Q. pp. 410-433 (1965).

All the four Nordic countries had enacted common legislations to suppress pirate broadcasting in waters outside their state boundaries. The legislations prohibit the establishment of Radio transmitting stations in the airspace over the open seas. The acts performed in such airspace are subject to the criminal jurisdiction of the Nordic countries if the radio transmitting station is so operated as to be directed for reception in their territories.

The most important international action on the problem of pirate broadcasting is the European Agreement for the Prevention of broadcasts transmitted from stations outside national territories.[183] The salient features of the Agreement are as follows. The Agreement applies to airborne objects over the high seas, on which radio broadcasting stations are installed and where the broadcasts are intended for reception on the territory of a contracting state or if it is capable of being received in any contracting state. The mere installation of broadcasting station without broadcast may make the act punishable as an offence. The proof is that although the station is not used, yet when it is used it is capable of being transmitted to the territory of a state which is a

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183 See below Appendix 'F' for full text of the Agreement.

party to the Agreement.

Any contracting state has the competence to punish the offence whether or not it is the intended recipient of the pirate broadcast.[184] Collaborators or accomplices are punishable under the Agreement. Article 6 excludes from the category of collaborators, those who perform acts for the purpose of giving assistance to a ship or aircraft or any other airborne or floating objects in distress or of protecting human life. The provisions of the Agreement apply to the nationals of each contracting state who have committed the offence referred to in Article 2, and to foreigners who are on board airborne or floating objects under the jurisdiction of a contracting state while the act was committed.

The first thing that strikes one after reading the European Agreement for the prevention of pirate broadcasts is that it is an unnecessary Agreement. It contains nothing new which states

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184 Article 2 of the Agreement reads: "Each Contracting Party undertakes to take appropriate steps to make punishable as offences, in accordance with its domestic law, the establishment or operation of broadcasting stations reffered to in Article 1 as well as acts of collaboration knowingly performed."

had not already possessed either through the customary law of piracy or through the provision of Article 2 of the Geneva Convention on the High Seas, 1958. Under Customary International Law, the suppression of piracy over the high seas is based on the principle of universality. This means that each state has the power to deal with any act of piracy which takes place outside its territorial waters. States have interest in activities around their coasts. They are allowed to take appropriate protective action against acts which threaten their territorial independence.

The prejudicial nature of the activity (i.e. pirate broadcasting)may be a ground for invoking Article 2 of the Geneva Convention on the High Seas, 1958. Article 2 grants the freedom to fly over the high seas. For the freedom to fly to be lawful it must be exercised for lawful purposes. The right to fly does not allow its use for illegal purposes against another state even outside the high seas. Therefore, pirate broadcasting, because of its prejudicial nature, cannot be said to be in accordance with the terms and spirit of Article 2 of the Convention on the High Seas.

6. Jurisdiction Over Crimes in the Airspace Over the High Seas.

Another instance where states make extra-territorial claims concerns the competence with respect to crime committed aboard their national aircraft. Although the high seas is a res communis omnium, it does not follow that a criminal act committed on board aircraft flying over the high seas should go unpunished or that no state has jurisdiction over the act.[185] However, there were occasions in the past[186] when a common law crime went unpunished because it was committed on a U.S. airliner flying over the high seas.[187]

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185 Under the customary law of the sea, every state has the competence over crimes committed aboard the ships bearing its own nationality.

186 e.g. U.S. v. Cordova and Santano. 89 F. Supp. 298 (E.D.N.Y. 1950).

187 See Dr. Fitzgerald, "The Development of International Rules concerning offences and certain other acts committed on board aircraft," Can. Yearbook Int L., pg. 230 (1963); the decision in U.S. v. Cordova has been criticised in Hibert, "Jurisdiction in High Seas Criminal Cases," 18 J. Air L & Com, 427 (1951) (Part I).

The British experience also showed that there was a serious gap in the general body of English criminal law. Even after the British Parliament had drawn up legislation to fill up the gap, there are still problems as to the correct interpretation of the relevant provision of the Civil Aviation Act, 1949.

The problems of jurisdiction over crimes aboard aircraft on the high seas will be examined under the following headings:

(1) Judicial decisions and National Legislations;

(2) International Rules: The Tokyo Convention on offences and certain other acts committed on board aircraft, 1963.

Judicial decisions and national legislations in both the United Kingdom and the United States will be considered as they provide respectively good examples of the problem and action of states with respect to extra-territorial application of criminal law over the high seas. The Tokyo Convention of 1963 provides the latest of the rules to fill up the lacunae that had existed in a number of states.

1. Judicial Decisions and National Legislations.

a. The United Kingdom.

In the U.K., the problem was judicially first dealt with in the case

of R. v. MARTIN.[188] The defendant was charged with being in possession of raw opium on a British aircraft flying between Bahrein and Singapore, contrary to Regulation 3 of the Dangerous Drugs Regulations 1953. The plea was that English court had no jurisdiction.

The prosecution conceded that Regulation 3 only created an offence if the act constituting the offence is committed in England, but alleged that by virtue of Section 62 of the Civil Aviation Act 1949, any act, which if done in England would be an offence, was an offence if committed on a British aircraft.

The court held that Section 62 did not create offences, but provided the place where an act which was already an offence if committed on a British aircraft outside England might be tried (i.e. venue) and as it was conceded that Regulation 3 only created an offence if the act constituting the offence is committed in England, the defendants committed no offence under English

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188 (1956) 2 Q.B. 272.
The relevant provision of the Civil Aviation Act, 1949 is Section 62 which reads thus: "Any offence whatever committed on a British aircraft shall, for the purpose of conferring jurisdiction, be deemed to have been committed in any place where the offender may for the time being be."

law by being in possession of opium outside England.

The second British case was R. v. NAYLOR.[189] The defendant was charged with a violation of Section 2 of the Larceny Act, 1916 for stealing three rings on a British aircraft in flight over the high seas. The plea was that English courts had no jurisdiction.

It was held that by virtue of Section 62 (1) of the Civil Aviation Act, 1949, any act, or omission which would constitute an offence if committed in England was made an offence if done on a British aircraft, except where the act or omission was contrary only to legislation which was purely of domestic application and therefore the court had jurisdiction to try the defendant.

The third British case was COX v. ARMY COUNCIL.[190] The decision in the case of R. v. Naylor has been criticised by Viscount Simonds in Cox v. Army Council. The learned judge said, "As to the latter (i.e. R. v. Naylor), I would make only one comment. With great respect to the learned Lord Chief Justice, Lord Parker, I doubt

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189 (1961) 2 A.E.R. 932.

190 (1962) 1 A.E.R. 880.

whether the distinction which he makes between purely domestic and other legislation is a valid one, or perhaps I should rather say that it is capable of being misunderstood. For as I have already pointed out, with rare exceptions the whole body of our criminal law is domestic, in the sense that it is made for the order and good government of this country and is applicable only to acts done on English soil."[191]

The differences in approach to the legal problem by both the learned judges i.e. Lord Parker and Viscount Simonds, mean that the position is far from being settled. Perhaps at this point one might recall the advice already given by Dr. Bin Cheng: "What seems to be required is the early extension of general English criminal law and jurisdiction to United Kingdom registered aircraft when they are in territorium nullius or over the high seas....."[192]

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191 Per Viscount Simonds in COX v. ARMY COUNCIL.

192 Bin Cheng, "Crimes on board aircraft," 12 C.L.P. pg. 204 (1959).

b. United States

In the United States, the problem of extra-territorial jurisdiction over crimes aboard aircraft was judicially dealt with in U.S. v. Cordova and Santano (89 F. Supp. 298 (E.D.N.Y. 1950). In this case, Cordova and Santano started to argue with one another while the plane in which they were travelling was over the high seas. Cordova attacked the pilot and before he could be subdued, he bit the pilot on the shoulder drawing blood.

It was held that the court had jurisdiction to hear the case, and the defendant was found guilty of the acts charged, but granted a motion for arrest of judgment of conviction, on the ground that there was no federal jurisdiction to punish those acts.

As a result of Cordova's case, the United States Congress has passed 'Crimes of Violence over the High Seas in American Aircraft Act 18 U.S.C. 7 (1958). The provision of Section 7 (5) seems to extend to the United States jurisdiction over offences committed on an aircraft which has the nationality of another state if the aircraft is partly or wholly owned by United States nationals. The other American legislation dealing

with the problem is the Federal Aviation Act of 1958. Section 902 (k)(1) reads: "Whoever, while on board an aircraft in flight in air commerce, commits an act which, if committed within the special maritime and territorial jurisdiction of the United States as defined in Section 7 of Title 18, United States Code, shall be punished as provided therein."

2. International Rules: The Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft, 1963.

The Tokyo Convention is not the first international action on the question of jurisdiction over crimes on board aircraft. The International Law Association has considered the matter in its 45th Conference in Lucerne in 1952.[193] The International Criminal Police Organisation also considered

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193 Report of the 45th Conference of the International Law Association at pp. 99-137 (1952).

a detailed proposal in Rome, Italy in 1954.[194]

There were various reasons which made it necessary to have an International Convention on Crimes Committed on Board Aircraft. The recent incidents of aerial hijacking and the handling of Dr. Sobben's case in England demonstrated the need for improvement in the application of the law in this type of situation. It was desirable that the law applicable over crimes aboard aircraft while over the high seas or over state territories other than the state of registry be made more definite and certain. Other reasons include the absence of uniform international rules concerning offences on board aircraft, the disparity in the provisions of various national laws relating to offences aboard aircraft, the lack of international rule concerning extra-territorial jurisdiction of a state in regard to offences on aircraft of its nationality engaged in international air navigation.

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194 See ICAO DOC. LC.SC Legal Status, WD No. 13, at 35; see also Boyle, "Jurisdiction over crimes committed in flight: An International Convention," 3 AM Crim. L.Q., pg. 69 (Winter 1965).

The Tokyo Convention has two objectives - to prevent crime from going unpunished; to promote the safety of air navigation.[195] Article 3(1) of the Tokyo Convention grants the right of extra-territorial jurisdiction to the State of Registration of aircraft over offences on board its aircraft. This provision establishes the competence of the national law of the flag when the aircraft is flying over the high seas or stateless territories. Article 3(1) reads: "The State of Registration of the aircraft

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195 Recent writers on the Tokyo Convention include G.F. Fitzgerald, "The Development of International Rules Concerning Offences and Certain Other Acts Committed on board aircraft," Can. Yearbook Int. L., pp. 230-251 (1963); G.F. Fitzgerald "Offences and Certain Other Acts Committed on Board Aircraft: The Tokyo Convention of 1963," Can. Yearbook Int. L. pp. 191-204 (1964); J.J.L. Gutierrez, "Should the Tokyo Convention of 1963 be ratified?" 31 J. Air L. & Com., 1 (Winter 1965); R.P. Boyle, "Jurisdiction over Crimes Committed in flight: an International Convention," 3 AM. Crim. L.Q., pp. 68-83 (Winter 1965); R.P. Boyle, & R. Pulsifer, "Tokyo Convention on offences and certain other acts committed on board aircraft," 30 J. Air L. & Com., 305 (Autumn 1964); see also McDougal, Lasswell, Vlasic, op.cit. at pp. 701-02, 703n, 696, 702n.

is competent to exercise jurisdiction over offences and acts committed on board."

The circumstances under which a contracting state which is not the state of registration can exercise criminal jurisdiction are as follows:

(a) the offence has effect on the territory of such state;

(b) the offence has been committed by or against a national or permanent resident of such state;

(c) the offence is against the security of such state;

(d) the offence consists of a breach of any rules or regulations relating to the flight and manoeuvre of aircraft in force in such a state;

(e) the exercise of jurisdiction is necessary to ensure the observance of any obligation of such state under a multilateral International Agreement.[196] The provision of Article 4 of the Tokyo Convention was included to preserve the safety of air navigation.[197]

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196 Article 4 of the Tokyo Convention, 1963.

197 Ref. also McDougal, Lasswell, Vlasic, op.cit. pp. 701-02, where the authors mentioned the circumstances in which other states other than the State of Registration may be accorded competence to control the legal consequences of a crime committed on board aircraft over the high seas.

By Article 3(2), contracting states are asked to take steps to establish themselves as the state of registration. According to Article 17 of the Chicago Convention, 1944, aircraft has the nationality of the state in which it is registered. Furthermore, a state is free to decide what acts occurring on board its aircraft it wishes to make the subject of legislation.

Article 3(3), recognises concurrent jurisdiction and this is left to be resolved through existing extradition treaties.[198] The Brazilian Code of the Air of June 8, 1932 (as amended to 1947) provides for concurrent jurisdiction. The relevant provision of the Code reads: "If such criminal acts should originate on an aircraft which is considered Brazilian territory, but if their consequences touch upon foreign territory, they shall be subject concurrently to the Brazilian laws and to the laws of the foreign state."[199]

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198 Articles 16 and 13 of the Tokyo Convention.

199 Brazilian Code of the Air, cited in McDougal, Lasswell, Vlasic, op.cit. at pg. 702.

CONCLUSION

In the past, only the United States, Canada and France were known to have created Air Defence Identification Zones. Today, there is virtually a jungle of Air Defence Zones extending over the high seas. These zones were created for the protection of the security interests of the coastal state. Since the high seas is free to all nations on the basis of equality, then these zones become a confrontation between the security interest of a state on the one hand and the interests of other nations on the other. It is submitted that the best way to reconcile these interests is to apply the test of reasonableness.

The obligation imposed on the pilot-in-command of an aircraft by Air Defence regulations is not burdensome and not inconsistent with the ordinary in-flight procedure on any international flight.[200] "By virtue of long-accepted aeronautical regulations, all aircraft which fly westward across the Atlantic or towards North America by means of the polar route must comply with a specified routine."[201] We must not forget however that the

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200 Head, "ADIZ, International Law, and Contiguous Airspace," 3 Alberta Law Review, pg. 183 (1964).

201 Ibid.

information required by ADIZ Regulations is for security purposes and not primarily for the purpose of safety of flight.

Practically all those who had written on ADIZ and CADIZ did not mention the fact that there were new Regulations. These new regulations show that ADIZ requirements are not meant to be onerous. It is significant to note that the current regulations do not make provisions for interception of offending aircraft. In essence therefore, ADIZ regulations are mere requests to other states and where they are reasonable they will be compiled with.

The right to establish these defence zones cannot be monopolised. The principle of reciprocity will have to be applied in respect of other states that may later wish to establish such zones over the high seas. The right should not be regarded as an extension of sovereignty for the coastal state. It is merely a limited right exercised for a limited purpose.

It is important to note that there has been no protest since the establishments of ADIZ and CADIZ in 1950 and 1951 respectively. Scheduled flights have increased along the Atlantic route. This means that the right of free and unimpeded

international air commerce over the high seas has not been affected by ADIZ.[202] The fact that there were no protests for the past 15 years cannot by itself establish a customary rule of international law. However, it does give evidence of what states do in relation to one another. Custom is conduct coupled with practice over a given length of time. When more and more states establish these zones, the indications are that states need additional protection; and that the international law on the matter needs to be reevaluated.[203]

The 1958 Geneva Conventions on the law of the sea may have granted the freedom to fly over the seas, but it equally imposes a limitation. Article 2(4)

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202 See also Hayton, op.cit. at pg. 393.

203 It will be recalled that security interest was left out of the interests protected under Article 24 of the Convention on the Territorial Sea and the Contiguous Zone. The fact that states have taken unilateral measures to establish defence zones over the high seas shows that security considerations can override other considerations. Professor Green has said that: "Article 24 of the Convention on the Territorial Sea and the Contiguous Zone is an article that may well remain more honoured in its breach than its observance"--- Ref. Green, "The Geneva Conventions and the freedom of the seas," 12 C.L. P., 244 (1959).

of the Convention on the High Seas requires all states to give reasonable regard to the interests of other states in their exercise of the freedom of the high seas.

The justification for the creation of ADIZ on the grounds of self-defence depends on the interpretations of "armed attack" and "self-defence" within the meaning of Article 51 of the U.N. Charter. The interpretation of "self-defence" has been so much refined that it has been extended to anticipatory self-defence. Those who define self-defence under Article 51 of the charter in terms of Webster's classic statement believe that the customary right of self-defence survives the charter. This belief is reinforced by the use of the expression "inherent" in Article 51. "Inherent" suggests that the right of self-defence is an existing one. Concerning the definition of "armed attack", the meaning attached to it in 1945 (when the charter came into force) will have to be re-evaluated in the light of the recent developments of the technology of violence. It is submitted that with the long-range missiles ready for use, the difference between imminent and armed attack becomes negligible.

POSSIBLE ROLE OF THE I.C.A.O.

Article 37 of the Chicago Convention reads: "... to this end (i.e. to the end of achieving the highest practicable degree of uniformity), the I.C.A.O. shall adopt and amend from time to time ... International Standards and recommended practices and procedures...." There are two areas in which the I.C.A.O. could be helpful in achieving uniformity in conformity with Article 37. Article 12 of the Chicago Convention requires each contracting state to insure the prosecution of all persons violating the regulation applicable. As has been noted earlier there is no uniformity in the practice of states as to the penalties for violations. The I.C.A.O. could direct the adoption of uniform rules to be observed by each contracting state in cases of violations.

The Council of the I.C.A.O. also has a role to play by rectifying the apparent conflict between the Forward to Annex 11 and the procedure adopted under Article 12. We have suggested earlier that the contents of the Forward to Annex 11 mean that the contracting state will be the one to determine the rules covered by Annex 11 to be applied over the high seas. If these rules relate to the flight and manouevre of aircraft, the procedure is definitely in conflict with that adopted under Article 12.

One of the mandatory functions of the I.C.A.O. Council is to consider any matter relating to the

Convention which any contracting state refers to it.[204] Presumably, no state has asked the Council to consider the question of Air Defence Zones and international civil aviation. The Council however can initiate an inquiry among its members to find out their attitude. This action will be in line with the objective of the organisation in promoting safety of flight in international air navigation.

In a previous chapter (i.e. Chapter IV) we discussed the various instances of the extra-territorial exercise of state authority in the air-space over the high seas. The discussion shows that states make limited claims over the high seas for various purposes. e.g. Space experiments, Nuclear tests, Testing of long-range missiles, Aerial identification of ships over the high seas, and Air defence identification zones.[205] Under the Chicago

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204 Article 54(n) of the Chicago Convention.

205 As a commentator said, "claims to contiguous zones for specific security purposes - wholly apart from the preeminence of "security" as a general justification for many different kinds of claims - are today asserted by at least eighteen states. As expectations of the most comprehensive violence have increased in recent years, the number and extent of such claims has increased ...." McDougal & Schlei .... op.cit., pg. 676. Ref. also Hayton, op. cit., pg.375. footnote 21.

Convention, the I.C.A.O. prescribes the rules of the air through International Standards and Recommended Practices. A well-drafted comprehensive Convention which will accord multilateral recognition of certain claims in the air frontier will be a desirable contribution to international civil aviation. The Rule-making power under the Agreement should be vested on the I.C.A.O.[206]

THE FUTURE OF ADIZ IN THE LIGHT OF RECENT TECHNOLOGICAL DEVELOPMENTS.

Part of the work of the air defence system is to keep track of everyone of the hundreds of ordinary civil airplanes approaching the North American Continent everyday. A watchful eye has to be kept also on some numerous satellites which are circling the earth.

With the development of space technology, the significance of aircraft and airspace for national security may now relatively diminish.[207] Surprise attack is measured in minutes and not days. In emphasis of this point, it may be recalled that a

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206 Hayton, ... op.cit., pg. 397.

207 McDougal, Lasswell and Vlasic, op.cit., at pg. 249.

modern Intercontinental Ballistic Missile will reach its target 5000 miles away only some 30 minutes after firing.

Threats to security today are posed by the possibility of using outer-space for surveillance purposes; the possibility of an orbiting satellite carrying a nuclear warhead; the problem of the definition of 'peaceful uses' within the activities of states in outer-space, the increasing speed of aircraft and the destructive power of new atomic and other weapons.[208]

There has been a great reduction in the various defence warning systems. These reductions became necessary because of (i) inertia (ii) military establishments probably did not want them and (iii) it became necessary to abandon what was surplus. When these zones were established e.g. ADIZ and CADIZ, they were intended to offset the bomber threat. Today this threat has been superseded by that of long-range missiles. Both Canada and the United States have been reducing anti-bomber defences on the premise that Intercontinental Missiles pose the chief threat to North America.

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208 See also Taubenfeld, "A treaty for Antarctica," International Conciliation, pg. 308 (Jan 1961).

Accordingly the United States Government has started to deactivate part of its radar defences against manned bombers.[209] Priority is now being given to the Ballistic Missile Early Warning System (BMEWS); the Space Detection and Tracking System (SPADATS) for watching satellites; and the U.S. Navy's Space Surveillance System (SPASUR).[210] Canada too has embarked on the closing down of resources committed to anti-bomber defences. This was done by scrapping the Mid-Canada Warning Line.[211]

The development of the technology of violence has necessarily changed our ideas of military tactics and strategy and our ideas of time and distance. What is needed now is an adequate interceptor of Intercontinental Ballistic Missile. For example, the Missile Defence Alarm System could provide a half hour warning of the long-range hostile missiles. Other valuable instruments of detection and surveillance include (a) Satellite devices; (b) it is possible for Manned Spacecrafts to take pictures of any part of the world without being detected; (c) an Over-the-horizon Radar can provide a better view of the horizon.

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209 The OBSERVER, London (England). Feb. 21, 1965.

210 Ibid.

211 The Montreal Star, April 2, 1965, at pg. 1.

APPENDIX A.

[¶ 6075]

Part 99—Security Control of Air Traffic [New]

Subpart A—General

[¶ 6076]

§ 99.1 Applicability.

(a) This subpart prescribes rules for operating civil aircraft in a defense area, or into, within, or out of the United States through an Air Defense Identification Zone (ADIZ), designated in Subpart B.

(b) Except for § 99.7, this subpart does not apply to the operation of an aircraft—

(1) In a Coastal or Domestic ADIZ north of 28 degrees north latitude or west of 85 degrees west longitude at a true airspeed of less than 180 knots;

(2) In the Alaskan DEWIZ at a true airspeed of less than 180 knots while the pilot maintains a continuous listening watch on the appropriate frequency;

(3) From any point in the 48 contiguous States on an outbound track through the Southern Border ADIZ that does not penetrate a Coastal ADIZ;

(4) Within the 48 contiguous States and the District of Columbia, or within the State of Alaska, which remains within 10 nautical miles of the point of departure; or

(5) Over any island, or within three nautical miles of the coastline of any island, in the Hawaiian ADIZ.

(c) Except as provided in § 99.7, the radio and position reporting requirements of this subpart do not apply to the operation of an aircraft within the 48 contiguous States and the District of Columbia, or within the State of Alaska, if that aircraft does not have two-way radio and is operated in accordance with a filed DVFR flight plan containing the time and point of Domestic or Coastal ADIZ penetration and that aircraft departs within five minutes of the estimated departure time contained in the flight plan.

(d) An FAA ATC center may exempt the following operations from this subpart (except § 99.7), on a local basis only, with the concurrence of the military commanders concerned:

(1) Aircraft operations that are conducted wholly within the boundaries of an ADIZ and are not currently significant to the air defense system.

(2) Aircraft operations conducted in accordance with special procedures prescribed by the military authorities concerned.

[¶ 6077]

§ 99.3 General.

(a) Air defense identification zones (ADIZ's) are areas of airspace over land or water in which the ready identification, location, and control of civil aircraft is required in the interest of national security. They are classified as—

(1) Coastal air defense identification zones (Coastal ADIZ's);

(2) Domestic air defense identification zones (Domestic ADIZ's); and

(3) Distant early warning identification zones (DEWIZ's).

(b) Unless designated as an ADIZ, a Defense Area is any airspace of the United States in which the control of aircraft is required for reasons of national security.

(c) For the purposes of this Part, a Defense Visual Flight Rules (DVFR) flight is a flight within an ADIZ conducted under the visual flight rules in Part 91.

[§ 99.3 *as amended by Amendment No.* 99-5, *effective August* 27, 1965, 30 *F. R.* 9358.]

[¶ 6078]

§ 99.5 Emergency situations.

In an emergency that requires immediate decision and action for the safety of the flight, the pilot in command of an aircraft may deviate from the rules in this Part to the extent required by that emergency. He shall report the reasons for the deviation to the

communications facility where flight plans or position reports are normally filed (referred to in this Part as "an appropriate aeronautical facility") as soon as possible.

[¶ 6079]

§ 99.7 Special security instructions.

Each person operating an aircraft in an ADIZ or Defense Area shall, in addition to the applicable operating rules of this part, comply with special security instructions issued by the Administrator in the interest of national security and that are consistent with appropriate agreements between the FAA and the Department of Defense.

[§ 99.7 *as amended by Amendment No.* 99-5, *effective August* 27, 1965, 30 *F. R.* 9358.]

[¶ 6080]

§ 99.9 Radio requirements.

No person may operate an aircraft in an ADIZ unless the aircraft has a functioning two-way radio.

[¶ 6081]

§ 99.11 Flight plan requirements; Coastal or Domestic ADIZ.

(a) No person may operate an aircraft in or penetrating a Coastal or Domestic ADIZ unless he has filed a flight plan with an appropriate aeronautical facility.

(b) Unless ATC authorizes an abbreviated flight plan—

(1) A flight plan for IFR flight must contain the information specified in § 91.83; and

(2) A flight plan for VFR flight must contain the information specified in § 91.83 (a)(1) through (7).

(c) The pilot shall designate a flight plan for VFR flight as a DVFR flight plan.

[¶ 6082]

§ 99.13 Flight plan requirements; DEWIZ.

(a) No person may operate an aircraft in or penetrating a DEWIZ unless he has filed a flight plan before takeoff with an appropriate aeronautical facility. If there is no facility for filing a DVFR flight plan, the pilot must comply with § 99.25(a)(2) and proceed according to the instructions issued by the appropriate aeronautical facility. These instructions normally require the flight to proceed to a specific area for visual identification or to land at a stated location.

(b) Unless ATC authorizes an abbreviated flight plan—

(1) A flight plan for IFR flight must contain the information specified in § 91.83 and the estimated time and point of DEWIZ penetration (ETDP); and

(2) A flight plan for VFR flight must contain the information in § 91.83(a)(1) through (7) and the estimated time and point of DEWIZ penetration (ETDP).

(c) The pilot shall designate a flight plan for VFR flight as a DVFR flight plan.

[¶ 6083]

§ 99.15 Arrival or completion notice.

The pilot in command of an aircraft for which a flight plan has been filed shall file an arrival or completion notice with an appropriate aeronautical facility, unless the flight plan states that no notice will be filed.

[¶ 6084]

§ 99.17 Position reports; aircraft operating in or penetrating a Domestic ADIZ; IFR.

The pilot of an aircraft operating in or penetrating a Domestic ADIZ under IFR—

(a) In controlled airspace, shall make the position reports required in § 91.125; and

(b) In uncontrolled airspace, shall make the position reports required in § 99.19.

[¶ 6085]

§ 99.19 Position reports; aircraft operating in or penetrating a Domestic ADIZ; DVFR.

No pilot may penetrate a Domestic ADIZ under DVFR unless—

(a) He reports to an appropriate aeronautical facility before penetration: The time, position, and altitude at which the aircraft passed the last reporting point before penetration and the estimated time of arrival over the next appropriate reporting point along the flight route;

(b) If there is no appropriate reporting point along the flight route, he reports at least 15 minutes before penetration: The estimated

time, position, and altitude at which he will penetrate; or

(c) If the airport of departure is so close to the Domestic ADIZ boundary that it prevents his complying with paragraphs (a) or (b) of this section, he has reported immediately after taking off: The time of departure, altitude, and estimated time of arrival over the first reporting point along the flight route.

[¶ 6086]

§ 99.21 Position reports; aircraft entering the United States through a Coastal ADIZ; United States aircraft.

The pilot of an aircraft entering the United States through a Coastal ADIZ shall make the reports required in § 99.17 or 99.19 to an appropriate aeronautical facility.

[¶ 6087]

§ 99.23 Position reports; aircraft entering the United States through a Coastal ADIZ; foreign aircraft.

In addition to such other reports as ATC may require, no pilot in command of a foreign civil aircraft may enter the United States through a Coastal ADIZ unless he makes the reports required in § 99.17 or 99.19 or reports the position of the aircraft when it is not less than one hour and not more than two hours average direct cruising distance from the United States.

[¶ 6088]

§ 99.25 Position reports; aircraft entering the United States through a DEWIZ.

(a) The pilot of an aircraft entering the United States through a DEWIZ—

(1) If under IFR, shall report his position as required by § 91.125; or

(2) If under DVFR, shall report when within radio range of an appropriate aeronautical facility but before penetration: The time, altitude, and position at which he passed the last reporting point and the estimated time, altitude, and point of penetration.

(b) If requested, the pilot of an aircraft entering the United States through a DEWIZ shall advise an appropriate aeronautical facility of the difference between the actual time and point of penetration and the same data recorded in the original ground filed flight plan.

[¶ 6089]

§ 99.27 Deviation from flight plans and ATC clearances and instructions.

(a) No pilot may deviate from the provisions of an ATC clearance or ATC instruction except in accordance with § 91.75 of this chapter.

(b) No pilot may deviate from his filed IFR flight plan when operating an aircraft in uncontrolled airspace unless he notifies an appropriate aeronautical facility before deviating.

(c) No pilot may deviate from his filed DVFR flight plan unless he notifies an appropriate aeronautical facility before deviating.

[¶ 6090]

§ 99.29 Radio failure; DVFR.

If the pilot operating an aircraft under DVFR in an ADIZ cannot maintain two-way radio communications, he may proceed in accordance with his original DVFR flight plan or land as soon as practicable. The pilot shall report the radio failure to an appropriate aeronautical facility as soon as possible.

[¶ 6091]

§ 99.31 Radio failure; IFR.

If a pilot operating an aircraft under IFR in an ADIZ cannot maintain two-way radio communications, he shall proceed in accordance with § 91.127 of this chapter.

[¶ 6092]

[§ 99.33 Flight plans: Panama Canal Zone Domestic ADIZ.

Civil aircraft may operate within the Panama Canal Zone Domestic ADIZ only under a flight plan that has been approved by appropriate military authority acting through an FAA air traffic control facility.]

Subpart B—Designated Air Defense Identification Zones

[¶ 6096]

§ 99.41 General.

The airspace above the areas described in this subpart is established as a Domestic ADIZ, Coastal ADIZ, DEWIZ, or Defense Area. The lines between points described in this subpart are great circles except that the lines joining adjacent points on the same parallel of latitude are rhumb lines.

[¶ 6097]

§ 99.43 Domestic ADIZ's.

(a) *Alaskan Domestic ADIZ.* The area bounded by a line 69°50′N, 141°00′W; 71°18′N, 156°44′W; 68°53′N, 166°16′W; 63°17′N,

APPENDIX B.

APRIL 8, 1964 No. 7 THE CANADA GAZETTE PART II VOLUME 98 SOR/64 127

PART II

General

3. No person shall operate an aircraft into or within any identification zone unless

(a) that aircraft is equipped with a two-way radio capable of permitting the communications required by this Order; and

(b) that person maintains a listening watch on a frequency that will permit the receipt of the instructions issued pursuant to this Order.

4. No deviation shall be made from a flight plan or flight notification filed for a flight into or within an identification zone unless

(a) prior notification is given to the appropriate air traffic control unit or MIDIZ or DEWIZ beacon; or

(b) where prior notification is not possible, the deviation is reported to an appropriate air traffic control unit or MIDIZ or DEWIZ beacon as soon as practicable.

5. When, due to an emergency the pilot-in-command of an aircraft is unable to comply with any provisions of this Order, he shall submit a detailed report of the emergency in writing to the Assistant Deputy Minister, Air, Department of Transport, within forty-eight hours of the emergency.

6. In the event of a radio failure the pilot-in-command shall

(a) in the case of an IFR flight, comply with the requirements of the *Communication Failure in IFR Flight Order*, Series V, No. 5 except that if he is operating in VFR weather conditions and has previously been notified that the ESCAT Rules are in effect he shall land at the nearest suitable aerodrome to the route of flight, or

(b) in the case of a VFR flight, proceed in accordance with his flight plan or flight notification or land at the nearest suitable aerodrome to the route of flight except that if he has previously been notified that the ESCAT Rules are in effect, he shall land at the nearest suitable aerodrome to the route of flight.

PART III

Domestic CADIZ Rules

7. This Part applies only to aircraft being operated at a true airspeed of one hundred and eighty knots or more.

8. No person shall operate an aircraft into or within the domestic CADIZ unless he has filed an IFR flight plan, a DVFR flight plan or a Defence flight notification with an appropriate air traffic control unit.

9. The pilot-in-command of a flight that will penetrate the domestic CADIZ through the northern boundary shall provide position reports or

estimates of that penetration to an appropriate air traffic control unit as follows:

(*a*) in the case of a flight for which an IFR flight plan has been filed and that will be conducted within controlled airspace, the pilot-in-command shall comply with normal IFR position reporting requirements; or

(*b*) in the case of a flight for which an IFR flight plan has been filed and that will be conducted outside controlled airspace and in the case of a flight for which a DVFR flight plan or a Defence flight notification has been filed, the pilot-in-command shall report

(i) over the last reporting point on the route of flight prior to penetrating the domestic CADIZ, his position, altitude, time and estimated time of arrival over the next reporting point, or

(ii) if it is not possible to make the report and estimate referred to in subparagraph (i), the pilot-in-command shall report his altitude and estimated time and place of penetration at least fifteen minutes prior to penetration.

10. The pilot-in-command of an aircraft shall revise his estimate with an appropriate air traffic control unit when the aircraft will not be within

(*a*) a time tolerance of plus or minus five minutes of the estimated time over

(i) a reporting point,

(ii) the point of penetration of the domestic CADIZ, or

(iii) the point of destination within the domestic CADIZ, or

(*b*) a distance tolerance of ten nautical miles from

(i) the estimated point of penetration of the domestic CADIZ, or

(ii) the centre line of the route of flight indicated on the flight plan or flight notification.

PART IV

Coastal CADIZ Rules

11. This Part applies only to aircraft being operated at a true airspeed of one hundred and eighty knots or more.

12. No person shall operate an aircraft into or within a coastal CADIZ unless he has filed an IFR flight plan, a DVFR flight plan or a Defence flight notification with an appropriate air traffic control unit.

13. The pilot-in-command of an aircraft that will penetrate a coastal CADIZ from seaward shall

(*a*) file an IFR flight plan, a DVFR flight plan or a Defence flight notification before take off from the last location prior to penetration and shall include in the flight plan or flight notification the estimated place and time of penetration; and

(*b*) provide an appropriate air traffic control unit with position reports required by the instrument flight rules.

APRIL 8, 1964 THE CANADA GAZETTE PART II SOR/64
No. 7 VOLUME 98 127

14. The pilot-in-command of an aircraft that will penetrate a coastal CADIZ from seaward shall, at least fifteen minutes prior to penetration, revise his estimate with an appropriate air traffic control unit when the aircraft will not be within

(*a*) a time tolerance of plus or minus five minutes of the flight planned time of penetration or last revised time of penetration; or

(*b*) a distance tolerance of twenty nautical miles from the flight planned point of penetration or last revised point of penetration.

15. The pilot-in-command of an aircraft shall, upon request by an air traffic control unit, advise that control unit as to the difference in time and distance between the revised estimated time and place of coastal CADIZ penetration and the time and place of coastal CADIZ penetration indicated on the flight plan or flight notification.

PART V

Mid Canada Identification Zone Rules

16. This Part applies to all aircraft.

17. The pilot-in-command of an aircraft departing from a location north of or within the MIDIZ, which location has facilities for the immediate transmission of flight plan information, and that will penetrate or operate within the MIDIZ shall

(*a*) file an IFR flight plan, a DVFR flight plan or a Defence flight notification with an appropriate air traffic control unit or MIDIZ beacon before take-off;

(*b*) include in such flight plan or flight notification the estimated time and place of MIDIZ penetration if applicable; and

(*c*) establish radio contact with a MIDIZ beacon at least five minutes before penetrating the MIDIZ or immediately after take-off from within the MIDIZ and make a position report.

18. The pilot-in-command of an aircraft departing from a location north of or within the MIDIZ, which location does not have facilities for the immediate transmission of flight plan information, and that will penetrate or operate within the MIDIZ shall

(*a*) establish radio-telephone communication with a MIDIZ beacon at least five minutes before pentrating the MIDIZ or immediately after take-off from within the MIDIZ; and

(*b*) file an IFR flight plan, a DVFR flight plan or a Defence flight notification during flight and include in such flight plan or flight notification the estimated time and place of MIDIZ penetration where applicable.

19. The pilot-in-command of an aircraft shall revise his estimate with an appropriate air traffic control unit or MIDIZ beacon when the aircraft will not be within

(*a*) a time tolerance of plus or minus five minutes of the estimated time over the point of penetration of the MIDIZ or the point of destination within the MIDIZ; or

(*b*) a distance tolerance of ten nautical miles from the estimated point of penetration of the MIDIZ.

20. No person shall operate an aircraft on a flight across the MIDIZ at an angle of less than 45° to the length of the MIDIZ.

21. Local flights or flights between points within the MIDIZ shall be conducted as much as possible outside the MIDIZ.

PART VI

Distant Early Warning Identification Zone Rules

22. This Part applies only to aircraft being operated at a true airspeed of one hundred and eighty knots or more.

23. The pilot-in-command of an aircraft that will penetrate the DEWIZ toward the continental land mass of Canada shall

(*a*) file an IFR flight plan, a DVFR flight plan or a Defence flight notification with an appropriate air traffic control unit or DEWIZ beacon before take-off from the last location prior to penetrating the DEWIZ;

(*b*) include in such flight plan or flight notification, the estimated time and place of DEWIZ penetration;

(*c*) establish radio-telephone communication with an appropriate DEWIZ beacon or aeronautical communication facility as soon as possible and make a position report including the estimated time and place of DEWIZ penetration; and

(*d*) upon request by a DEWIZ beacon or an aeronautical communication facility, advise that beacon or facility as to the difference in time and distance between the revised estimated time and place of DEWIZ penetration and the time and place of DEWIZ penetration indicated on the flight plan or flight notification.

24. The pilot-in-command of an aircraft departing from a location within the DEWIZ shall

(*a*) before take-off, file an IFR flight plan, a DVFR flight plan or a Defence flight notification with an appropriate air traffic control unit or DEWIZ beacon; and

(*b*) as soon as possible after take-off, establish radio-telephone communication with an appropriate DEWIZ beacon and make a position report.

25. Notwithstanding sections 22 and 23, the pilot-in-command of an aircraft departing from a location in Canada north of or within the DEWIZ, which location does not have facilities for the immediate transmission of flight plan information, and that will penetrate or operate within the DEWIZ shall

(*a*) as soon as possible after take-off, establish radio-telephone communication with an appropriate air traffic control unit or DEWIZ beacon and file an IFR flight plan, a DVFR flight plan or a Defence flight notification;

(*b*) include in such flight plan or flight notification the estimated time and place of DEWIZ penetration where applicable; and

(*c*) when requested to do so by an appropriate air traffic control unit or DEWIZ beacon, fly at a speed of less than one hundred and fifty knots for a period of not less than five minutes for positive identification.

26. The pilot-in-command of an aircraft shall revise his estimate with an appropirate air traffic control unit or DEWIZ beacon when the aircraft will not be within

(*a*) a time tolerance of plus or minus five minutes of the estimated time over

(i) a reporting point,

(ii) the point of penetration of the DEWIZ, or

(iii) the point of destination within the DEWIZ, or

(*b*) a distance tolerance of twenty nautical miles from

(i) the estimated point of penetration of the DEWIZ, or

(ii) the centre line of the route of flight indicated on the flight plan or flight notification.

27. The pilot-in-command of an aircraft that is operating laterally within the DEWIZ shall conduct as much of the flight as possible south of the centre line between the DEWIZ beacons.

PART VII

Emergency Security Control of Air Traffic Rules

28. This Part applies to all aircraft when the ESCAT Rules are in effect.

29. For the purposes of this Part, the domestic CADIZ is deemed to extend southward to the Canada-United States border.

30. When notified by radio or other means that the ESCAT Rules are in effect, the pilot-in-command of an aircraft operating into or over Canada or its territorial waters shall comply with all instructions from an appropriate air traffic control unit to change course or altitude or to land.

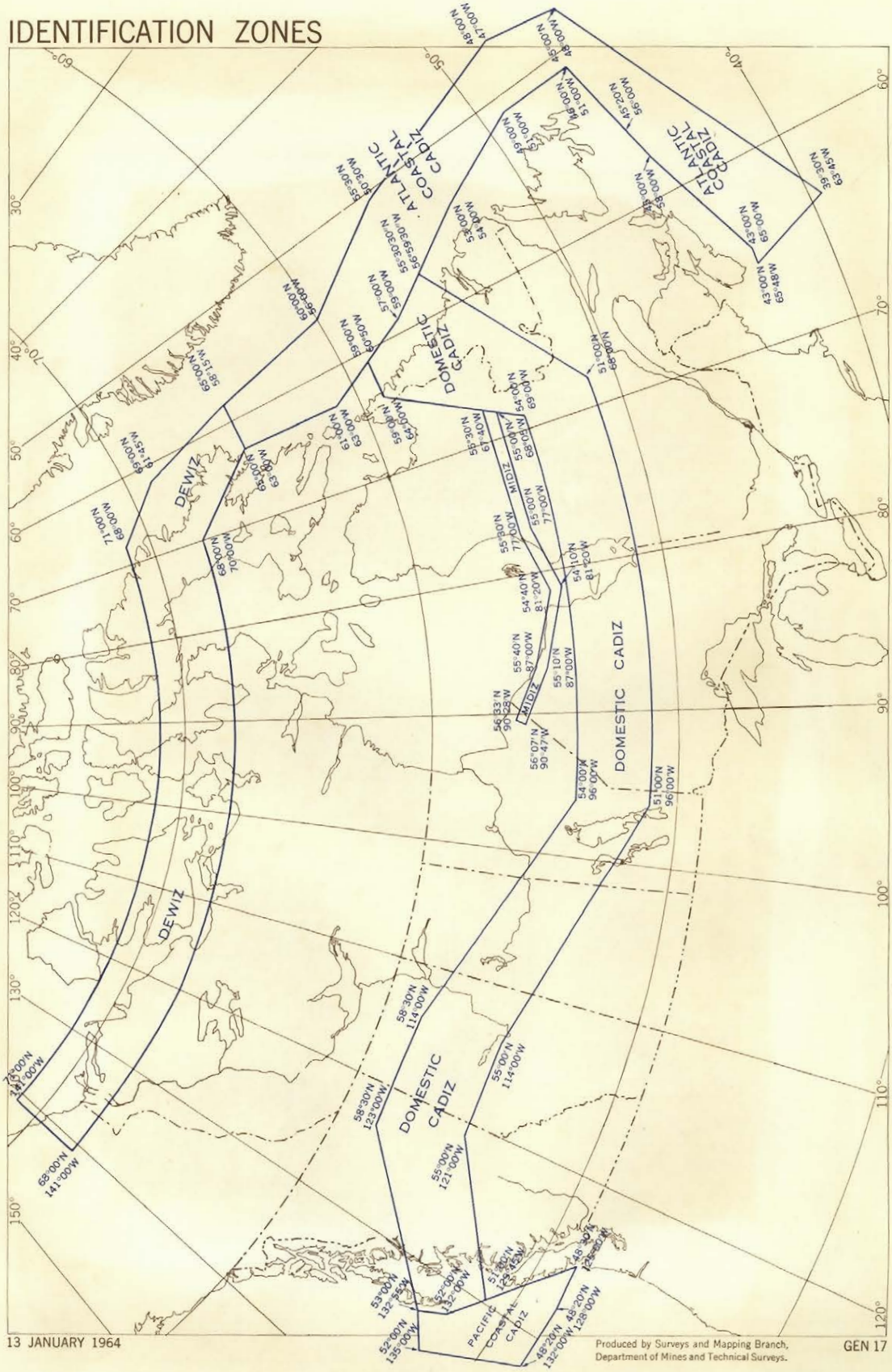
31. When notified by radio or other means that the ESCAT Rules are in effect, the pilot-in-command of an aircraft that will be operated into or within the MIDIZ, DEWIZ, domestic CADIZ or coastal CADIZ shall

(*a*) before take-off, obtain approval for the flight from an appropriate air traffic control unit; and

(*b*) provide an appropriate air traffic control unit with position reports as required by the instrument flight rules

(i) when within controlled airspace, and

(ii) at least every thirty minutes when outside controlled airspace.


IDENTIFICATION ZONES
ATLANTIC COAST
ATLANTIC COAST
DOMESTIC CADIZ
DEWIZ
DEWIZ
MIDIZ
MIDIZ
DOMESTIC CADIZ
DOMESTIC CADIZ
PACIFIC COAST CADIZ
13 JANUARY 1964
Produced by Surveys and Mapping Branch, Department of Mines and Technical Surveys.
GEN 17

APPENDIX C.

PILOT PROCEDURES FOR ADIZ FLIGHT

GENERAL INFORMATION
FLIGHT PLANS

Filing of Flight Plan

File flight plan 30 minutes prior to take-off, either in writing or by telephone with appropriate aeronautical facility for any flight, all or part of which will be conducted in an ADIZ. Designate VFR flight as DVFR, and include route and altitude while within ADIZ, and Estimated Time of penetration. DVFR flight will not be conducted off airways unless aircraft has both applicable authentication codes and IFF.

No deviations shall be made from a DVFR flight plan, unless prior notification is given to an appropriate aeronautical facility.

Revision of Flight Plan

Transmit corrected information to appropriate aeronautical facility immediately after it becomes evident that flight plan cannot be adhered to. (See Allowable Tolerances for Adherence to Flight Plan or Air Traffic Clearances.)

ALLOWABLE TOLERANCES FOR ADHERENCE TO FLIGHT PLAN or AIR TRAFFIC CLEARANCE

Time

Five (5) minutes from estimate over reporting point or point of penetration; or in case of flight originating within ADIZ, five minutes from proposed time of departure, or as amended, unless IFR in control area.

Distance

Ten (10) nautical miles from the centerline of the proposed route, if entering or operating in that portion of the ADIZ located over or within ten (10) nautical miles of land mass area.

Twenty (20) nautical miles from the centerline of the proposed route, if entering or operating within that portion of the ADIZ located beyond ten (10) nautical miles of land mass area.

IFF/SIF Changeover Procedure

NORAD/CINCPAC Changeover Line for airborne IFF/SIF procedures is as follows:
2900N-11450W, 2800N-12315W, 2800N-13100W, 4300N-14000W, 5000N-14000W, 5000N-15700W, thence coincident with the boundary of the Alaskan DEWIZ. All aircraft subject to U.S. Control will comply with either the NORAD or PACOM Procedures for the Use of IFF Mark X (SIF) as appropriate. See page 55. (Effective date, 1 Jan 1964)

GUAM ADIZ

Report over the ADIZ is not required. All aircraft must report to ACC when 100 NM from Guam.

HAWAII ADIZ

a. FLIGHT PLANS

1. Flights conducted over any island or within three nautical miles of the Coastline of any island located within the Hawaiian ADIZ are exempted from the requirement of filing a DVFR or IFR flight plan. Exemption will be suspended during defence emergency conditions.

2. Aircraft operating into or within the Coastal and Domestic ADIZ's North of 28 degrees North latitude or West of 85 degrees West longitude, at a true airspeed of less than 180 knots, are exempted from the requirements of filing a DVFR or IFR flight plan. Exemption will be suspended during defense emergency conditions.

3. Flights conducted wholly within the boundaries of an ADIZ, which are not currently of significance to the air defense system, or flights conducted in accordance with special procedures by appropriate military authorities, may be exempted from the requirements of filing DVFR or IFR by the FAA air route traffic control center. These exemptions may be granted on a local basis only, with the concurrence of the appropriate military commanders. This exemption will be suspended during defense emergency conditions.

b. Flights originating and remaining within the Defense Area are exempt from the provisions of regulations governing all operations within an ADIZ. Exemption will be suspended during defense emergency conditions.
NOTE: Defense Area is defined as area encompassed by Coastal ADIZ inner boundary.

c. Normal IFR or DVFR reporting procedures will apply when entering or operating within the Hawaiian Coastal ADIZ. NOTE: Hawaiian Coastal ADIZ is defined as the area between the inner and outer boundary.

d. Inbound Flights Only: Time of penetration of Coastal ADIZ outer boundary and subsequent operation therein is computed by the Air Defense Control Center using reported ground speed, time over last position outside ADIZ and estimate for intersection or point within the ADIZ. Allowable tolerance for adherence to flight plan is corrected by comparison of actual and pre-plotted track. Revisions to flight plan must be forwarded prior to entering ADIZ to avoid violation of ADIZ procedures. See page II-27.

e. All military aircraft comply with PACOM Procedures For Use of IFF Mark X (SIF) in the Pacific Command. Inbound flights will discontinue use of a PACOM Mode III codes and comply with published Air Traffic Control Radar Beacon Mode III codes upon penetration of inner bound (Defense Area or Hawaiian Airways Area whichever occurs first) unless directed otherwise by Air Traffic Control Agency.

JAPAN ADIZ

If flying in controlled airspace a report over the ADIZ is not required unless designated as a regular reporting point on the Enroute Charts. Give ETA for the ADIZ when giving position report at last reporting position prior to crossing the ADIZ. Inside ADIZ make normal position reports as shown on Enroute Chart and as requested. If flying outside controlled airspace, (off airways give ETA, point of penetration and altitude at least 15 but not more than 30 minutes prior to penetration. Report when crossing the ADIZ, 100 NM from land and every 30 minutes while within the ADIZ.

KOREA ADIZ

Same procedures listed above for Japan apply when entering or operating within the Korean ADIZ.

OKINAWA ADIZ

Position report required when crossing the Okinawa ADIZ whether flying in controlled airspace or not.
If flying in controlled airspace make position reports as indicated on Enroute Charts.

If crossing ADIZ at a point not on airways, give ETA, point of penetration and altitude at least 15 but not more than 30 minutes prior to crossing. Make position reports every 30 minutes while operating within the ADIZ or as requested.

SIF equipment aircraft will comply with PACOM Instructions for the use of IFF Mark X (SIF) in the Pacific Command, when operating outside of the Limited Identification Zone but inside the ADIZ toward an adjacent ADIZ and at all times when penetrating toward the Okinawa ADIZ. Inbound aircraft will change Mode III code as directed by Air Defense or ARTC agencies.

MALAYSIA ADIZ

(Sabah & Sarawak Area)

1. Submit ETA for ADIZ over Labuan Sub FIR boundary.

2. In addition to Diplomatic clearance. 48 hours prior permission is required from Department of Civil Aviation (DCA) for all flights over ADIZ.

3. Non scheduled flights into ADIZ will not be permitted between official Sunset and Sunrise.

4. If intercepted, aircraft are to fly straight and level and to tune Radio to frequency 118.1 or 243.0 mc. and comply with instructions given.

MALAYA & SINGAPORE

1. Enter only at 5,000 feet or above at points indicated below:

ENTRY POINT	NAV AID	CONTROL AUTH	FREQ
Kota Bahru(KB)	RBn	Singapore Airways	123.7
		Lumpur Control	120.1
Kuantan(GF)	RBn	Singapore Airways	123.7
		Lumpur Control	120.1
Mersing(MR)	RBn	Singapore Airways	120.3
		Lumpur Control	118.9
Horsburgh Light(PB)	RBn	Singapore Airways	120.3
Sinjon(SJ)	VOR/RBn	Singapore Airways	120.3
Port Swettenham(PS)	RBn	Singapore Airways	123.7/120.3
		Lumpur Control	119.1
Butterworth(BT)	RBn	Butterworth Approach	118.9
Alor Star(AT)	RBn	*Singapore Airways	123.7
		Lumpur Control	120.1
		Butterworth Approach	119.7

*Aircraft on FL100 and below Alor Star Twr on 118.7 or 120.1, outside of Alor Star hrs of operation etc Lumpur Control on 120.1.

2. Aircraft not equipped with VHF may communicate with the control station on the UHF Frequency indicated below:

Singapore Airways	256.4
Singapore Control	255.5
Lumpur Control	255.4
Butterworth Approach	281.0

3. Call appropriate ATC Unit ten (10) minutes before crossing ADIZ boundary giving identification, flight level, destination, entry point, track, and from ADIZ boundary to entry point.

4. Flights not permitted off airways at night.

5. Follow USAF Foreign Clearance Guide for prior Clearance requirements.

6. Interception procedures are the same as those for United States, Hawaii, Alaska, etc.

PHILIPPINE ADIZ

A. Flying in Controlled Airways—When flying on established airways, ETA, for PADIZ must be given when reporting over last compulsory point prior to crossing PADIZ. Reporting over PADIZ is required only at designated compulsory reporting points indicated on enroute charts.

B. Flying Outside Controlled Airways—If crossing PADIZ at points not on established airway, point of penetration, ETA and altitude shall be given between 15 and 30 minutes prior to crossing. Make position reports inside PADIZ every 30 minutes or as required. Time tolerance of ETO PADIZ is 5 minutes.

VIETNAM (VADIZ)

1. Establish radio contact with Saigon ACC on appropriate air/ ground frequencies prior to entering VADIZ.

2. Enter VADIZ at designated points of entry (PE). (Entry and exist at other points require special approval.)

3. Fly airways and make position reports as indicated on Enroute Charts.

4. If cleared outside controlled airspace, maintain 3000 ft MSL, or 1000 ft above ground level whichever is higher.

5. If intercepted by military interceptor:

(a) Fly straight and level

(b) Tune radio to 121.5 or 243.0 mc

(c) If unable to establish radio contact, visual signals as listed on page 129 of the Enroute Supplement will be complied with.

6. Special procedures for Air Raids.

a If advised that a first call alert has occured, aircraft may proceed along cleared routes but should prepare to apply procedures as listed below.

b. If advised that an air raid is eminent the following action is required.

(1) If departing Saigon FIR continue as cleared.

(2) If approaching Saigon FIR divert to some other area.

(3) If Saigon FIR has been penetrated divert to an alternate outside of the Saigon FIR. If fuel will not permit diverting, land at the nearest aerodrome.

(4) New Flight plan is required from appropriate ATC prior to departing, if landing is made during alert.

(5) During an air raid period all radio navigational aids will be closed drown. For required air/ground communications use 121.5 and 243.0 or 8837 and 6619.5 kc.

TAIWAN ADIZ
FLIGHT PLANS

All non-tactical flights entering, departing and/or crossing ADIZ must file instrument flight plan and conduct their flight along airways.

POSITION REPORTS
Entering, departing and/or Crossing ADIZ

Aircraft with UHF and VHF only contact the nearest appropriate communications station prior to entering ADIZ or as soon as possible thereafter and maintain contact for the duration of the flight. Position Report over 123°E (ADIZ) not compulsory. Acft flying along airways G6, R3, G8, JG6, JR3 and JG8 Westward should report position when crossing 124°E (FIR) including ETA over ADIZ. Acft flying Eastward, in giving last position report before crossing, 123°E should specify ETA 123°E and report when crossing 124°E.

ACTION TO BE TAKEN WHEN INTERCEPTED BY INTERCEPTOR AIRCRAFT

1. If intercepted by interceptor aircraft do not perform any maneuvers that may be construed as hostile. Fly straight and level.

2. Immediately tune radio receiver to international emergency frequency: UHF—243.0 mc, or VHF—121.5 mc, or HF—500 kc or 8364 kc, and stand-by for instructions.

3. Prepare to authenticate using current authentication procedures, if applicable.

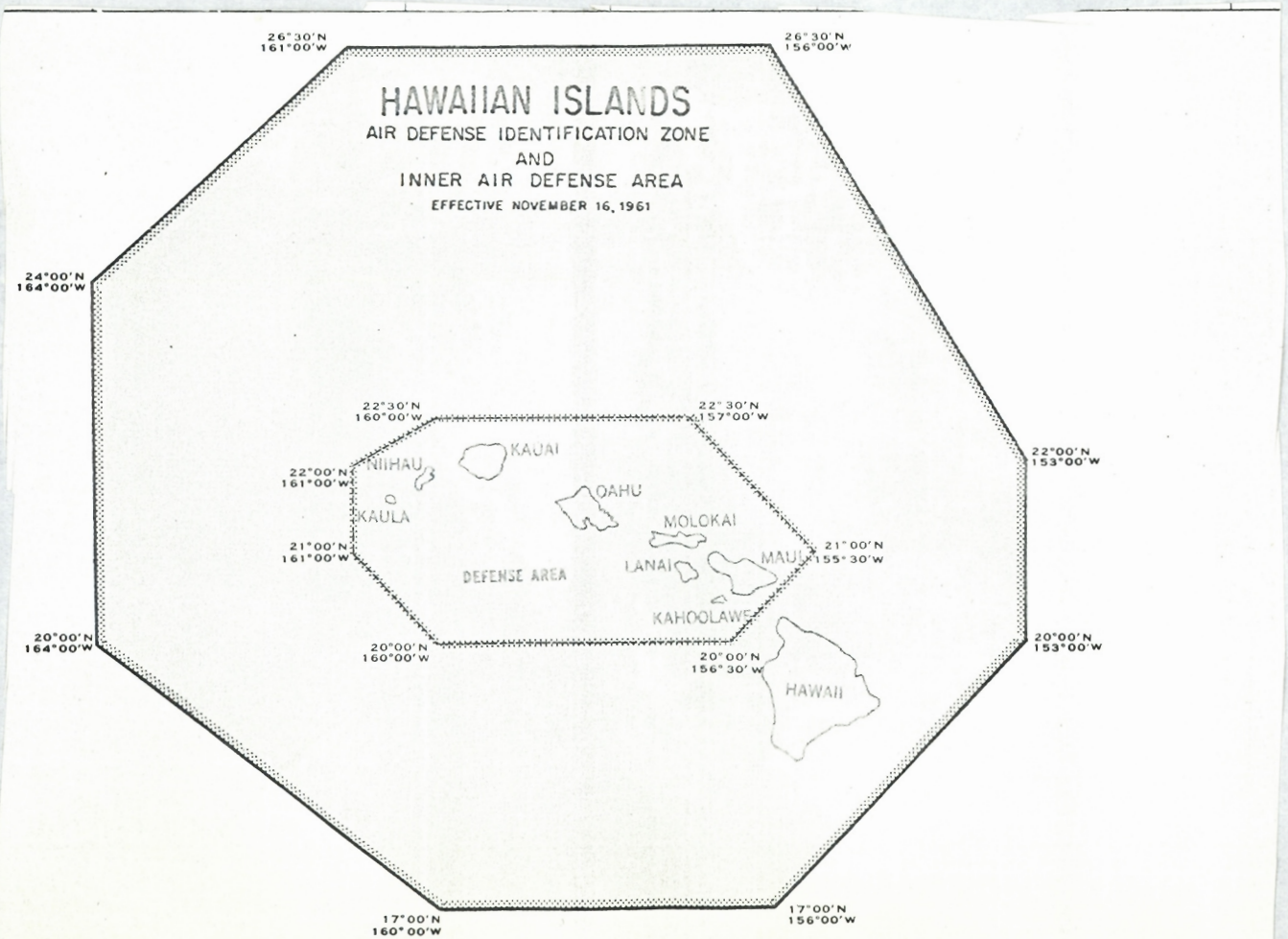
4. If unable to communicate with interceptor comply with his visual instructions. Only internationally recognized signals will be used by USAF, USN and CNAF aircraft.

THAILAND ADIZ

(a) Acft approaching from South: Acft report 10°N with estimate for 11°N to Bangkok Control on assigned freq.

(b) Acft approaching from North: Acft report 10 min before entering or departing ADIZ to Bangok Control on assigned freq.

Note: For eastbound flights Ubon report shall be included in report over FIR(BH).


HAWAIIAN ISLANDS
AIR DEFENSE IDENTIFICATION ZONE
AND
INNER AIR DEFENSE AREA
EFFECTIVE NOVEMBER 16, 1961
26°30'N 161°00'W
26°30'N 156°00'W
24°00'N 164°00'W
22°30'N 160°00'W
22°30'N 157°00'W
22°00'N 161°00'W
22°00'N 153°00'W
21°00'N 161°00'W
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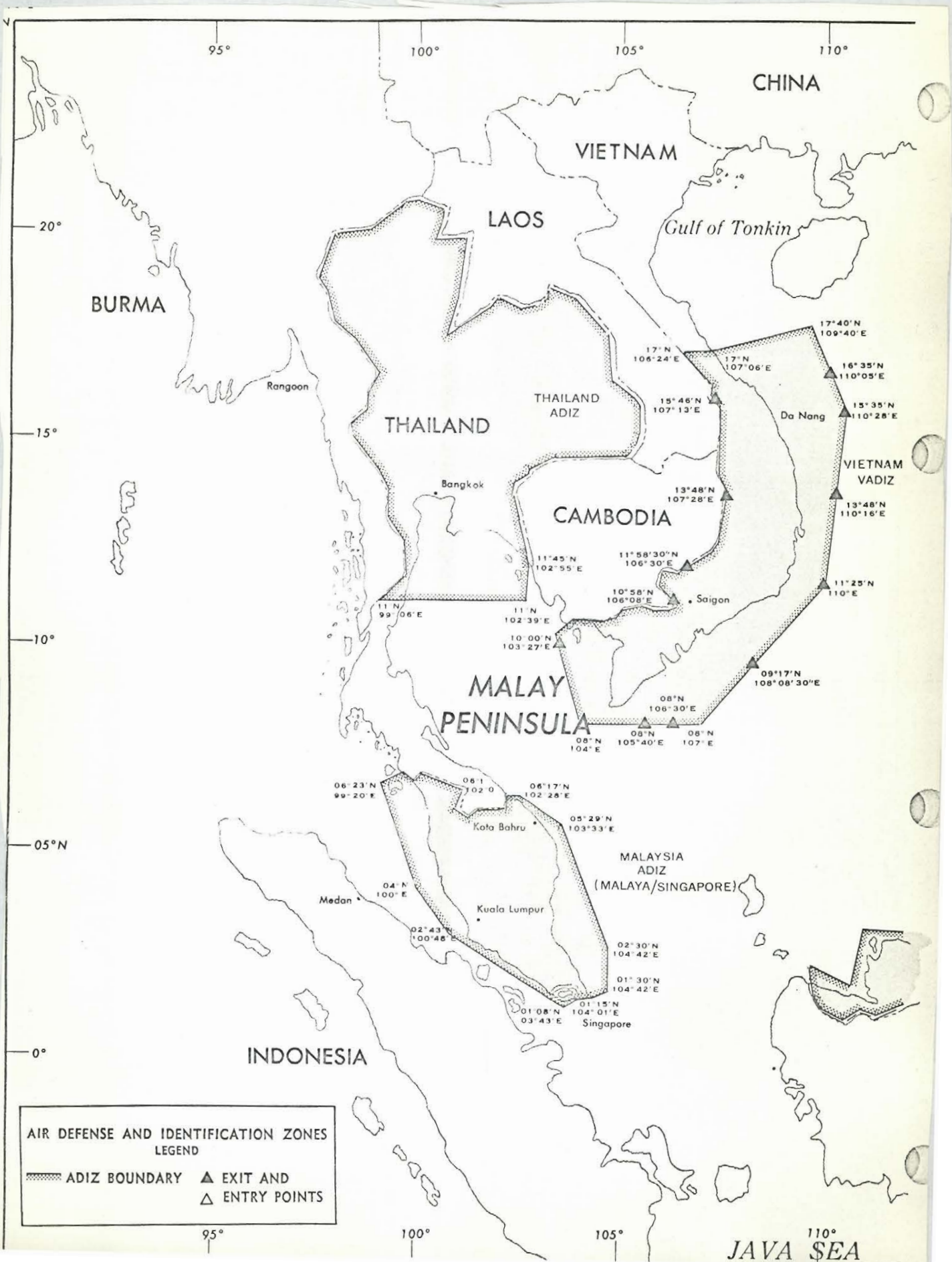
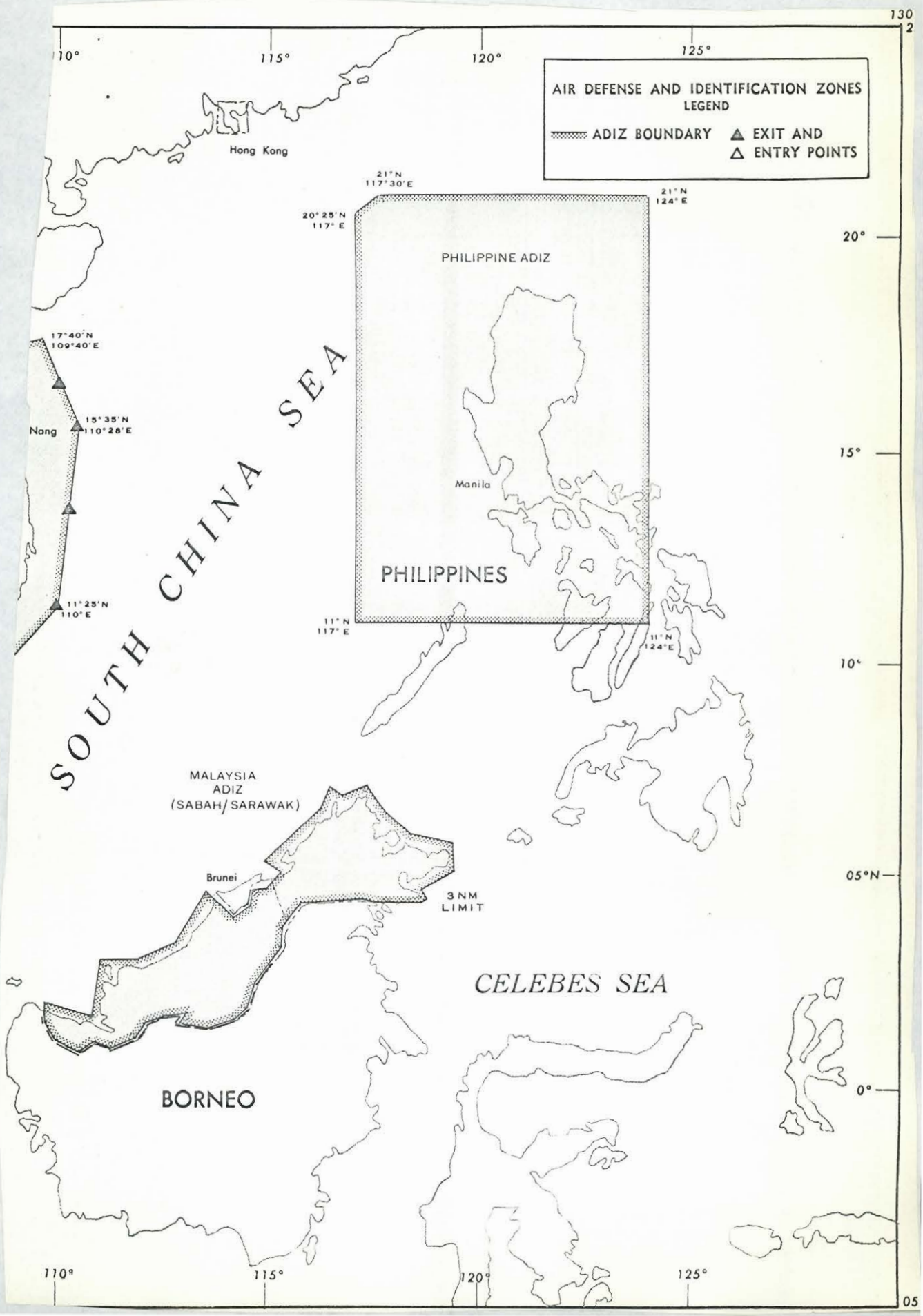
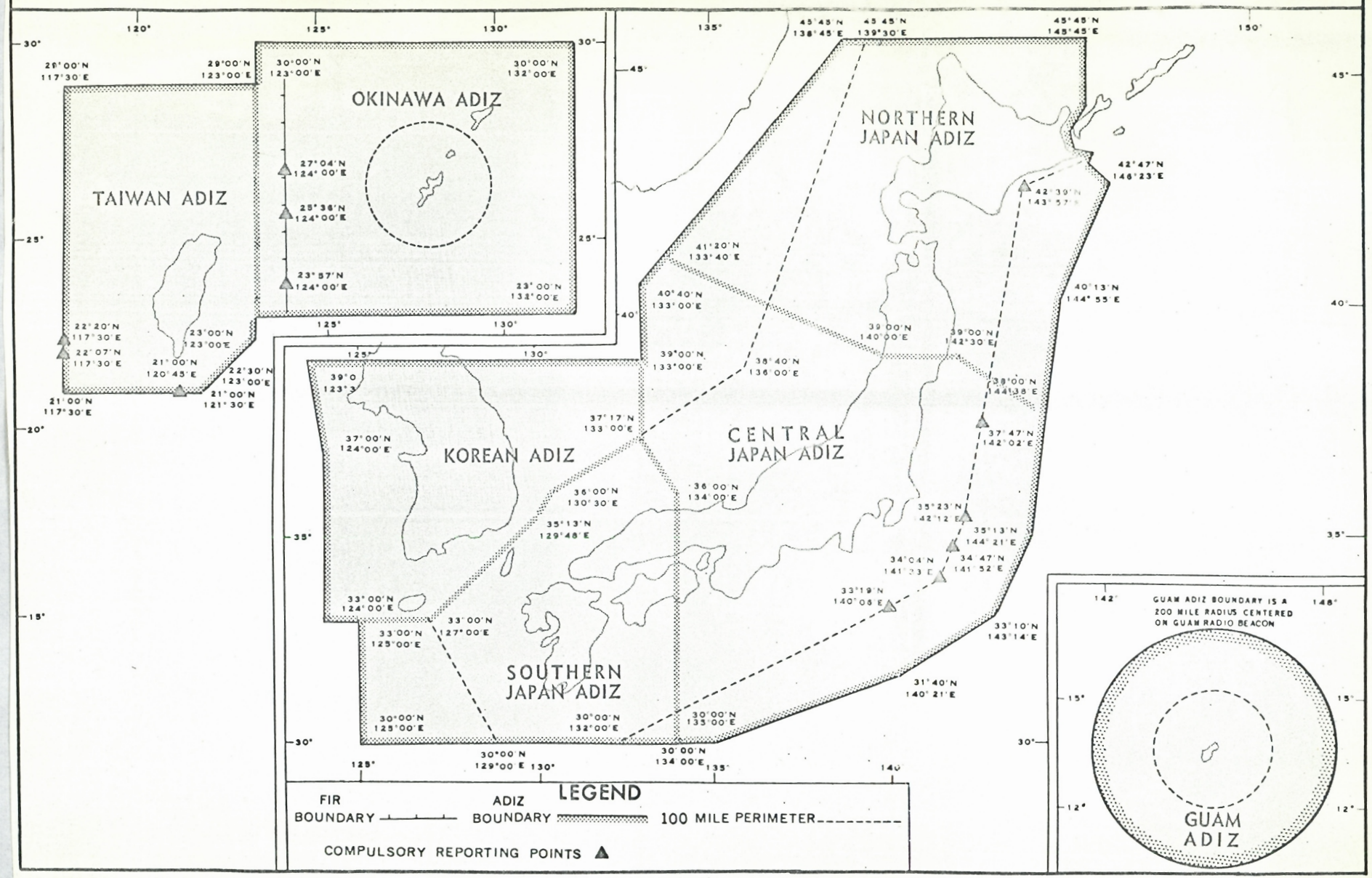
KAUAI
NIIHAU
KAULA
OAHU
MOLOKAI
LANAI
MAUI
KAHOOLAWE
HAWAII
DEFENSE AREA


95°
100°
105°
110°
CHINA
VIETNAM
LAOS
Gulf of Tonkin
20°
BURMA
Rangoon
THAILAND
THAILAND ADIZ
15°
Bangkok
CAMBODIA
VIETNAM VADIZ
Da Nang
Saigon
10°
MALAY PENINSULA
05°N
MALAYSIA ADIZ (MALAYA/SINGAPORE)
Kota Bahru
Medan
Kuala Lumpur
Singapore
0°
INDONESIA
JAVA SEA
17°40'N 109°40'E
17°N 106°24'E
17°N 107°06'E
16°35'N 110°05'E
15°46'N 107°13'E
15°35'N 110°28'E
13°48'N 107°28'E
13°48'N 110°16'E
11°45'N 102°55'E
11°58'30"N 106°30'E
11°25'N 110°E
11°N 99°06'E
11°N 102°39'E
10°58'N 106°08'E
10°00'N 103°27'E
09°17'N 108°08'30"E
08°N 106°30'E
08°N 104°E
08°N 105°40'E
08°N 107°E
06°23'N 99°20'E
06°17'N 102°28'E
05°29'N 103°33'E
04°N 100°E
02°43'N 100°46'E
02°30'N 104°42'E
01°30'N 104°42'E
01°15'N 104°01'E
01°08'N 103°43'E
AIR DEFENSE AND IDENTIFICATION ZONES
LEGEND
ADIZ BOUNDARY
EXIT AND ENTRY POINTS


AIR DEFENSE AND IDENTIFICATION ZONES
LEGEND
ADIZ BOUNDARY
EXIT AND
ENTRY POINTS
110°
115°
120°
125°
130
2
Hong Kong
21°N
117°30'E
21°N
124°E
20°25'N
117°E
20°
PHILIPPINE ADIZ
17°40'N
109°40'E
15°35'N
110°28'E
Nang
15°
Manila
PHILIPPINES
11°25'N
110°E
11°N
117°E
11°N
124°E
10°
SOUTH CHINA SEA
MALAYSIA
ADIZ
(SABAH/SARAWAK)
Brunei
3 NM
LIMIT
05°N
CELEBES SEA
BORNEO
0°
110°
115°
120°
125°
05

AIR DEFENSE IDENTIFICATION ZONES



C. ICELAND ADIZ

1. ICELAND ADIZ

a. The Commander, Iceland Defense Force has established an ADIZ over the coastal waters of Iceland. The free portion of the ADIZ is restricted to military aircraft only during an Air Defense Emergency.

2. EMERGENCY PROCEDURES

a. Flight plans will not be changed in flight to provide initial entry unless in emergency. If such a change is necessary report to the USAF Flight Service and/or an Iceland aeronautical facility as soon as possible.

3. OPERATING INSTRUCTIONS

a. Filing of Flight Plans:

File a DVFR or IFR flight plan before take-off if the flight penetrates or operates in the ADIZ. Military aircraft leaving joint use aerodromes on a DVFR flight plan will insure the initial contact is passed to the civil facility by using the phrase "DVFR" to (destination). If a flight plan cannot be maintained, contact the ACC and transmit the corrected information.

NOTE: Flight plans will not be submitted enroute to provide for entry or operating permission within the ADIZ. Ground-filed IFR or DVFR flight plans may be changed enroute if the flight plan has not changed before the point of change is reached.

b. Position Reports:

(1) Standard position reports will be made outside the ADIZ. If this is not possible altitudes, position and estimated entry time will be reported 15-30 minutes before entry.

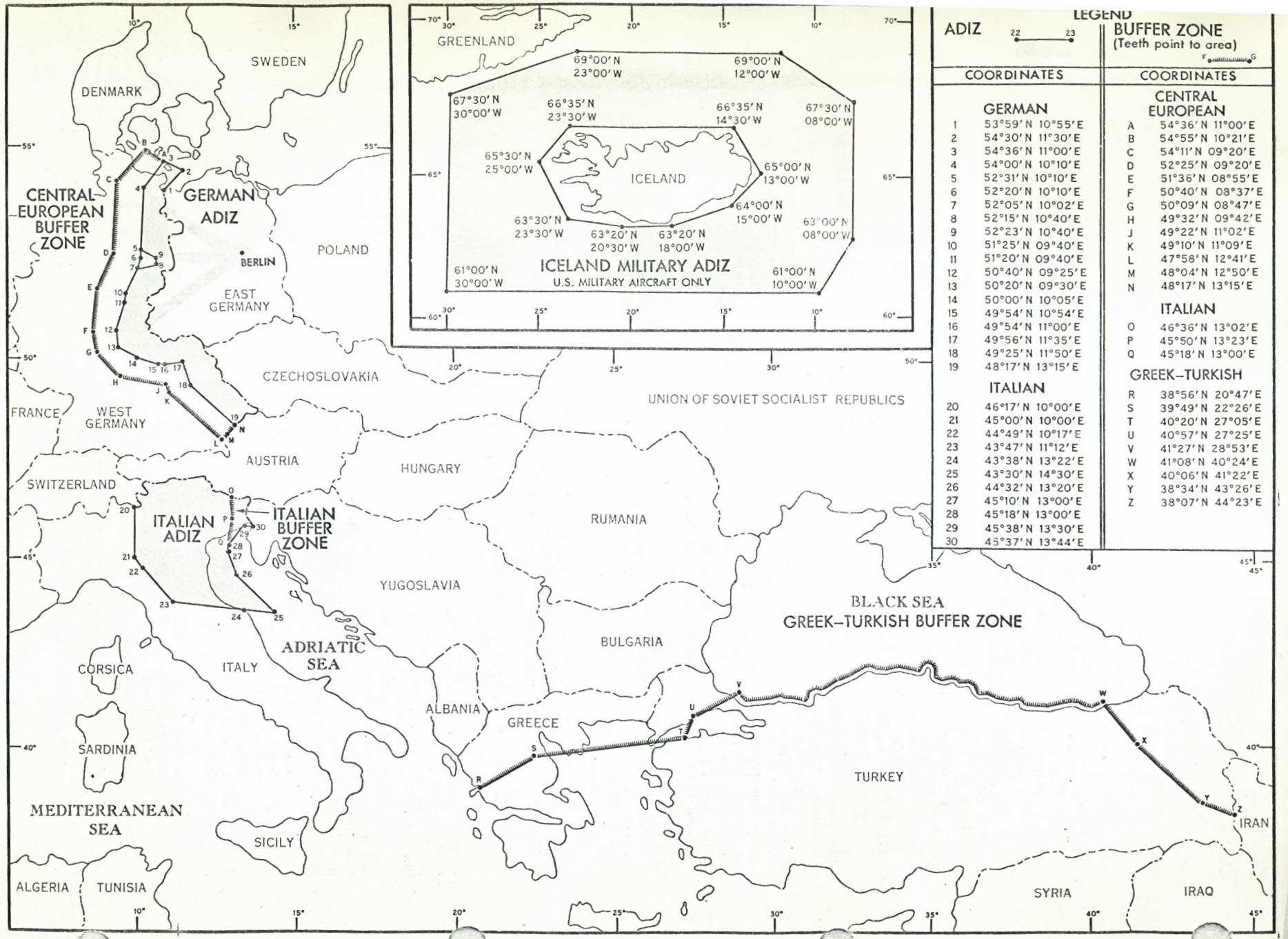
(2) Position reports will be made as required or at least every hour within the ADIZ, using reporting points whenever possible.

c. Allowable deviations from ADIZ flight plan on Air Traffic Clearance: Aircraft must pass reporting or penetration points within 5 minutes of ETA, must not exceed 20 NM from center line of proposed route, and make no altitude deviations unless an amended air traffic clearance is obtained. If no clearance is needed for the flight, prior notice must be given to the ACC before changing altitudes. Normal descent may begin within a reasonable distance of the point of intended landing, if the flight requires no clearance.

D. ITALY ADIZ

1. PROCEDURES

a. All military aircraft must contact JERRY CONTROL 10 minutes before entering the ADIZ when flying off airways. For flights on airways and after take off from aerodromes within the ADIZ either Milan Control or Jerry Control will be contacted as directed by ATC. Pilots not complying will be intercepted and reported for violations of Italian Air Regulations.


LEGEND
ADIZ
BUFFER ZONE
(Teeth point to area)
COORDINATES
COORDINATES
GERMAN
1 53°59′N 10°55′E
2 54°30′N 11°30′E
3 54°36′N 11°00′E
4 54°00′N 10°10′E
5 52°31′N 10°10′E
6 52°20′N 10°10′E
7 52°05′N 10°02′E
8 52°15′N 10°40′E
9 52°23′N 10°40′E
10 51°25′N 09°40′E
11 51°20′N 09°40′E
12 50°40′N 09°25′E
13 50°20′N 09°30′E
14 50°00′N 10°05′E
15 49°54′N 10°54′E
16 49°54′N 11°00′E
17 49°56′N 11°35′E
18 49°25′N 11°50′E
19 48°17′N 13°15′E
ITALIAN
20 46°17′N 10°00′E
21 45°00′N 10°00′E
22 44°49′N 10°17′E
23 43°47′N 11°12′E
24 43°38′N 13°22′E
25 43°30′N 14°30′E
26 44°32′N 13°20′E
27 45°10′N 13°00′E
28 45°18′N 13°00′E
29 45°38′N 13°30′E
30 45°37′N 13°44′E
CENTRAL EUROPEAN
A 54°36′N 11°00′E
B 54°55′N 10°21′E
C 54°11′N 09°20′E
D 52°25′N 09°20′E
E 51°36′N 08°55′E
F 50°40′N 08°37′E
G 50°09′N 08°47′E
H 49°32′N 09°42′E
J 49°22′N 11°02′E
K 49°10′N 11°09′E
L 47°58′N 12°41′E
M 48°04′N 12°50′E
N 48°17′N 13°15′E
ITALIAN
O 46°36′N 13°02′E
P 45°50′N 13°23′E
Q 45°18′N 13°00′E
GREEK–TURKISH
R 38°56′N 20°47′E
S 39°49′N 22°26′E
T 40°20′N 27°05′E
U 40°57′N 27°25′E
V 41°27′N 28°53′E
W 41°08′N 40°24′E
X 40°06′N 41°22′E
Y 38°34′N 43°26′E
Z 38°07′N 44°23′E
GREENLAND
69°00′N 23°00′W
69°00′N 12°00′W
67°30′N 30°00′W
66°35′N 23°30′W
66°35′N 14°30′W
67°30′N 08°00′W
65°30′N 25°00′W
ICELAND
65°00′N 13°00′W
64°00′N 15°00′W
63°30′N 23°30′W
63°20′N 20°30′W
63°20′N 18°00′W
63°00′N 08°00′W
61°00′N 30°00′W
ICELAND MILITARY ADIZ
U.S. MILITARY AIRCRAFT ONLY
61°00′N 10°00′W
CENTRAL EUROPEAN BUFFER ZONE
GERMAN ADIZ
ITALIAN ADIZ
ITALIAN BUFFER ZONE
BLACK SEA
GREEK–TURKISH BUFFER ZONE
SWEDEN
DENMARK
POLAND
BERLIN
EAST GERMANY
CZECHOSLOVAKIA
UNION OF SOVIET SOCIALIST REPUBLICS
FRANCE
WEST GERMANY
AUSTRIA
HUNGARY
SWITZERLAND
RUMANIA
YUGOSLAVIA
BULGARIA
ADRIATIC SEA
CORSICA
ITALY
ALBANIA
GREECE
TURKEY
SARDINIA
MEDITERRANEAN SEA
SICILY
ALGERIA
TUNISIA
SYRIA
IRAQ
IRAN

APPENDIX D.

THE ANTARCTIC TREATY

Signed 1 December 1959

The Governments of Argentina, Australia, Belgium, Chile, the French Republic, Japan, New Zealand, Norway, the Union of South Africa, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, and the United States of America,

Recognizing that it is in the interest of all mankind that Antarctica shall continue forever to be used exclusively for peaceful purposes and shall not become the scene or object of international discord;

Acknowledging the substantial contributions to scientific knowledge resulting from international cooperation in scientific investigation in Antarctica;

Convinced that the establishment of a firm foundation for the continuation and development of such cooperation on the basis of freedom of scientific investigation in Antarctica as applied during the International Geophysical Year accords with the interests of science and the progress of all mankind;

Convinced also that a treaty ensuring the use of Antarctica for peaceful purposes only and the continuance of international harmony in Antarctica will further the purposes and principles embodied in the Charter of the United Nations;

Have agreed as follows:

ARTICLE I

1. Antarctica shall be used for peaceful purposes only. There shall be prohibited, *inter alia*, any measures of a military nature, such as the establishment of military bases and fortifications, the carrying out of military maneuvers, as well as the testing of any type of weapons.

2. The present Treaty shall not prevent the use of military personnel or equipment for scientific research or for any other peaceful purpose.

ARTICLE II

Freedom of scientific investigation in Antarctica and cooperation toward that end, as applied during the International Geophysical Year, shall continue, subject to the provisions of the present Treaty.

ARTICLE III

1. In order to promote international cooperation in scientific investigation in Antarctica, as provided for in Article II of the present Treaty, the Contracting Parties agree that, to the greatest extent feasible and practicable:

(a) information regarding plans for scientific programs in Antarctica shall be exchanged to permit maximum economy and efficiency of operations;

(b) scientific personnel shall be exchanged in Antarctica between expeditions and stations;

(c) scientific observations and results from Antarctica shall be exchanged and made freely available.

2. In implementing this Article, every encouragement shall be given to the establishment of cooperative working relations with those Specialized Agencies of the United Nations and other international organizations having a scientific or technical interest in Antarctica.

ARTICLE IV

1. Nothing contained in the present Treaty shall be interpreted as:

(a) a renunciation by any Contracting Party of previously asserted rights of or claims to territorial sovereignty in Antarctica;

(b) a renunciation or diminution by any Contracting Party of any basis of claim to territorial sovereignty in Antarctica which it may have whether as a result of its activities or those of its nationals in Antarctica, or otherwise;

(c) prejudicing the position of any Contracting Party as regards its recognition or non-recognition of any other State's right of or claim or basis of claim to territorial sovereignty in Antarctica.

2. No acts or activities taking place while the present Treaty is in force shall constitute a basis for asserting, supporting or denying a claim to territorial sovereignty in Antarctica or create any rights of sovereignty in Antarctica. No new claim, or enlargement of an existing claim, to territorial sovereignty in Antarctica shall be asserted while the present Treaty is in force.

ARTICLE V

1. Any nuclear explosions in Antarctica and the disposal there of radioactive waste material shall be prohibited.

2. In the event of the conclusion of international agreements concerning the use of nuclear energy, including nuclear explosions and the disposal of radioactive waste material, to which all of the Contracting Parties whose representatives are entitled to participate in the meetings provided for under Article IX are parties, the rules established under such agreements shall apply in Antarctica.

ARTICLE VI

The provisions of the present Treaty shall apply to the area south of 60° South Latitude, including all ice shelves, but nothing in the present Treaty shall prejudice or in any way affect the rights, or the exercise of the rights, of any State under international law with regard to the high seas within that area.

ARTICLE VII

1. In order to promote the objectives and ensure the observance of the provisions of the present Treaty, each Contracting Party whose representatives are entitled to participate in the meetings referred to in Article IX of the Treaty shall have the right to designate observers to carry out any inspection provided for by the present Article. Observers shall be nationals of the Contracting Parties which designate them. The names of observers shall be communicated to every other Contracting Party having the right to designate observers, and like notice shall be given of the termination of their appointment.

2. Each observer designated in accordance with the provisions of paragraph 1 of this Article shall have complete freedom of access at any time to any or all areas of Antarctica.

3. All areas of Antarctica, including all stations, installations and equipment within those areas, and all ships and aircraft at points of discharging or embarking cargoes or personnel in Antarctica, shall be open at all times to inspection by any observers designated in accordance with paragraph 1 of this Article.

4. Aerial observation may be carried out at any time over any or all areas of Antarctica by any of the Contracting Parties having the right to designate observers.

5. Each Contracting Party shall, at the time when the present Treaty enters into force for it, inform the other Contracting Parties, and thereafter shall give them notice in advance, of

(a) all expeditions to and within Antarctica, on the part of its ships or nationals, and all expeditions to Antarctica organized in or proceeding from its territory;

(b) all stations in Antarctica occupied by its nationals; and

(c) any military personnel or equipment intended to be introduced by it into Antarctica subject to the conditions prescribed in paragraph 2 of Article I of the present Treaty.

ARTICLE VIII

1. In order to facilitate the exercise of their functions under the present Treaty, and without prejudice to the respective positions of the Contracting Parties relating to jurisdiction over all other persons in Antarctica, observers designated under paragraph 1 of Article VII and scientific personnel exchanged under subparagraph 1 (b) of Article III of the Treaty, and members of the staffs accompanying any such persons, shall be subject only to the jurisdiction of the Contracting Party of which they are nationals in respect of all acts or omissions occurring while they are in Antarctica for the purpose of exercising their functions.

2. Without prejudice to the provisions of paragraph 1 of this Article, and pending the adoption of measures in pursuance of subparagraph 1 (e) of Article IX, the Contracting Parties concerned in any case of dispute with regard to the exercise of jurisdiction in Antarctica shall immediately consult together with a view to reaching a mutually acceptable solution.

ARTICLE IX

1. Representatives of the Contracting Parties named in the preamble to the present Treaty shall meet at the City of Canberra within two months after the date of entry into force of the Treaty, and thereafter at suitable intervals and places, for the purpose of exchanging information, consulting together on matters of common interest pertaining to Antarctica, and formulating and considering, and recommending to their Governments, measures in furtherance of the principles and objectives of the Treaty, including measures regarding:

(a) use of Antarctica for peaceful purposes only;
(b) facilitation of scientific research in Antarctica;
(c) facilitation of international scientific cooperation in Antarctica;
(d) facilitation of the exercise of the rights of inspection provided for in Article VII of the Treaty;
(e) questions relating to the exercise of jurisdiction in Antarctica;
(f) preservation and conservation of living resources in Antarctica.

2. Each Contracting Party which has become a party to the present Treaty by accession under Article XIII shall be entitled to appoint representatives to participate in the meetings referred to in paragraph 1 of the present

Article, during such time as that Contracting Party demonstrates its interest in Antarctica by conducting substantial scientific research activity there, such as the establishment of a scientific station or the despatch of a scientific expedition.

3. Reports from the observers referred to in Article VII of the present Treaty shall be transmitted to the representatives of the Contracting Parties participating in the meetings referred to in paragraph 1 of the present Article.

4. The measures referred to in paragraph 1 of this Article shall become effective when approved by all the Contracting Parties whose representatives were entitled to participate in the meetings held to consider those measures.

5. Any or all of the rights established in the present Treaty may be exercised as from the date of entry into force of the Treaty whether or not any measures facilitating the exercise of such rights have been proposed, considered or approved as provided in the Article.

ARTICLE X

Each of the Contracting Parties undertakes to exert appropriate efforts, consistent with the Charter of the United Nations, to the end that no one engages in any activity in Antarctica contrary to the principles or purposes of the present Treaty.

ARTICLE XI

1. If any dispute arises between two or more of the Contracting Parties concerning the interpretation or application of the present Treaty, those Contracting Parties shall consult among themselves with a view to having the dispute resolved by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement or other peaceful means of their own choice.

2. Any dispute of this character not so resolved shall, with the consent, in each case, of all parties to the dispute, be referred to the International Court of Justice for settlement; but failure to reach agreement on reference to the International Court shall not absolve parties to the dispute from the responsibility of continuing to seek to resolve it by any of the various peaceful means referred to in paragraph 1 of this Article.

ARTICLE XII

1. (a) The present Treaty may be modified or amended at any time by unanimous agreement of the Contracting Parties whose representatives are entitled to participate in the meetings provided for under Article IX. Any such modification or amendment shall enter into force when the depositary Government has received notice from all such Contracting Parties that they have ratified it.

(b) Such modification or amendment shall thereafter enter into force as to any other Contracting Party when notice of ratification by it has been received by the depositary Government. Any such Contracting Party from which no notice of ratification is received within a period of two years from the date of entry into force of the modification or amendment in accordance with the provisions of subparagraph 1 (a) of this Article shall be deemed to have withdrawn from the present Treaty on the date of the expiration of such period.

2. (a) If after the expiration of thirty years from the date of entry into force of the present Treaty, any of the Contracting Parties whose representatives are entitled to participate in the meetings provided for under Article IX so requests by a communication addressed to the depositary Government,

a Conference of all the Contracting Parties shall be held as soon as practicable to review the operation of the Treaty.

(b) Any modification or amendment to the present Treaty which is approved at such a Conference by a majority of the Contracting Parties there represented, including a majority of those whose representatives are entitled to participate in the meetings provided for under Article IX, shall be communicated by the depositary Government to all the Contracting Parties immediately after the termination of the Conference and shall enter into force in accordance with the provisions of paragraph 1 of the present Article.

(c) If any such modification or amendment has not entered into force in accordance with the provisions of subparagraph 1 (a) of this Article within a period of two years after the date of its communication to all the Contracting Parties, any Contracting Party may at any time after the expiration of that period give notice to the depositary Government of its withdrawal from the present Treaty; and such withdrawal shall take effect two years after the receipt of the notice by the depositary Government.

ARTICLE XIII

1. The present Treaty shall be subject to ratification by the signatory States. It shall be open for accession by any State which is a Member of the United Nations, or by any other State which may be invited to accede to the Treaty with the consent of all the Contracting Parties whose representatives are entitled to participate in the meetings provided for under Article IX of the Treaty.

2. Ratification of or accession to the present Treaty shall be effected by each State in accordance with its constitutional processes.

3. Instruments of ratification and instruments of accession shall be deposited with the Government of the United States of America, hereby designated as the depositary Government.

4. The depositary Government shall inform all signatory and acceding States of the date of each deposit of an instrument of ratification or accession, and the date of entry into force of the Treaty and of any modification or amendment thereto.

5. Upon the deposit of instruments of ratification by all the signatory States, the present Treaty shall enter into force for those States and for States which have deposited instruments of accession. Thereafter the Treaty shall enter into force for any acceding State upon the deposit of its instrument of accession.

6. The present Treaty shall be registered by the depositary Government pursuant to Article 102 of the Charter of the United Nations.

ARTICLE XIV

The present Treaty, done in the English, French, Russian and Spanish languages, each version being equally authentic, shall be deposited in the archives of the Government of the United States of America, which shall transmit duly certified copies thereof to the Governments of the signatory and acceding States. . . .

IN WITNESS WHEREOF, the undersigned Plenipontentiaries, duly authorized, have signed the present Treaty.

DONE at Washington this first first day of December, one thousand nine hundred and fifty nine. . . .

APPENDIX E.

TREATY BANNING NUCLEAR WEAPON TESTS IN THE ATMOSPHERE, IN OUTER SPACE AND UNDER WATER [1]

Signed at Moscow August 5, 1963; in force October 10, 1963

The Governments of the United States of America, the United Kingdom of Great Britain and Northern Ireland, and the Union of Soviet Socialist Republics, hereinafter referred to as the "Original Parties",

Proclaiming as their principal aim the speediest possible achievement of an agreement on general and complete disarmament under strict international control in accordance with the objectives of the United Nations which would put an end to the armaments race and eliminate the incentive to the production and testing of all kinds of weapons, including nuclear weapons,

Seeking to achieve the discontinuance of all test explosions of nuclear weapons for all time, determined to continue negotiations to this end, and desiring to put an end to the contamination of man's environment by radioactive substances,

Have agreed as follows:

ARTICLE I

1. Each of the Parties to this Treaty undertakes to prohibit, to prevent, and not to carry out any nuclear weapon test explosion, or any other nuclear explosion, at any place under its jurisdiction or control:

(a) in the atmosphere; beyond its limits, including outer space; or underwater, including territorial waters or high seas; or

(b) in any other environment if such explosion causes radioactive debris to be present outside the territorial limits of the state under whose jurisdiction or control such explosion is conducted. It is understood in this connection that the provisions of this subparagraph are without prejudice to the conclusion of a treaty resulting in the permanent banning of all nuclear test explosions, including all such explosions underground, the conclusion of which, as the Parties have stated in the Preamble to this Treaty, they seek to achieve.

2. Each of the Parties to this Treaty undertakes furthermore to refrain from causing, encouraging, or in any way participating in, the carrying out of any nuclear weapon test explosion, or any other nuclear explosion, anywhere which would take place in any of the environments described, or have the effect referred to, in paragraph 1 of this article.

ARTICLE II

1. Any Party may propose amendments to this Treaty. The text of any proposed amendment shall be submitted to the Depositary Governments

[1] White House Press Release, July 25, 1963; 49 Department of State Bulletin 239 (1963); Sen. Exec. M, 88th Cong., 1st Sess.

which shall circulate it to all Parties to this Treaty. Thereafter, if requested to do so by one-third or more of the Parties, the Depositary Governments shall convene a conference, to which they shall invite all the Parties, to consider such amendment.

2. Any amendment to this Treaty must be approved by a majority of the votes of all the Parties to this Treaty, including the votes of all of the Original Parties. The amendment shall enter into force for all Parties upon the deposit of instruments of ratification by a majority of all the Parties, including the instruments of ratification of all of the Original Parties.

ARTICLE III

1. This Treaty shall be open to all states for signature. Any state which does not sign this Treaty before its entry into force in accordance with paragraph 3 of this article may accede to it at any time.

2. This Treaty shall be subject to ratification by signatory states. Instruments of ratification and instruments of accession shall be deposited with the Governments of the Original Parties—the United States of America, the United Kingdom of Great Britain and Northern Ireland, and the Union of Soviet Socialist Republics—which are hereby designated the Depositary Governments.

3. This Treaty shall enter into force after its ratification by all the Original Parties and the deposit of their instruments of ratification.

4. For states whose instruments of ratification or accession are deposited subsequent to the entry into force of this Treaty, it shall enter into force on the date of the deposit of their instruments of ratification or accession.

5. The Depositary Governments shall promptly inform all signatory and acceding states of the date of each signature, the date of deposit of each instrument of ratification of and accession to this Treaty, the date of its entry into force, and the date of receipt of any requests for conferences or other notices.

6. This Treaty shall be registered by the Depositary Governments pursuant to Article 102 of the Charter of the United Nations.

ARTICLE IV

This Treaty shall be of unlimited duration.

Each Party shall in exercising its national sovereignty have the right to withdraw from the Treaty if it decides that extraordinary events, related to the subject matter of this Treaty, have jeopardized the supreme interests of its country. It shall give notice of such withdrawal to all other Parties to the Treaty three months in advance.

ARTICLE V

This Treaty, of which the English and Russian texts are equally authentic, shall be deposited in the archives of the Depositary Governments.

Duly certified copies of this Treaty shall be transmitted by the Depositary Governments to the governments of the signatory and acceding states.

IN WITNESS WHEREOF the undersigned, duly authorized, have signed this Treaty.

DONE in triplicate at the city of Moscow the fifth day of August, one thousand nine hundred and sixty-three.

For the Government of the United States of America:

DEAN RUSK

WAH

For the Government of the United Kingdom of Great Britain and Northern Ireland:

HOME

H

For the Government of the Union of Soviet Socialist Republics:

A. GROMYKO

A.G.

APPENDIX F.

APPENDIX

EUROPEAN AGREEMENT FOR THE PREVENTION OF BROADCASTS TRANSMITTED FROM STATIONS OUTSIDE NATIONAL TERRITORIES

The member States of the Council of Europe signatory hereto,

Considering that the aim of the Council of Europe is to achieve a greater unity between its members;

Considering that the Radio Regulations annexed to the International Telecommunication Convention prohibit the establishment and use of broadcasting stations on board ships, aircraft or any other floating or airborne objects outside national territories;

Considering also the desirability of providing for the possibility of preventing the establishment and use of broadcasting stations on objects affixed to or supported by the bed of the sea outside national territories;

Considering the desirability of European collaboration in this matter;

Have agreed as follows:

Article 1

This Agreement is concerned with broadcasting stations which are installed or maintained on board ships, aircraft, or any other floating or airborne objects and which, outside national territories, transmit broadcasts intended for reception or capable of being received, wholly or in part, within the territory of any Contracting Party, or which cause harmful interference to any radio-communication service operating under the authority of a Contracting Party in accordance with the Radio Regulations.

Article 2

1. Each Contracting Party undertakes to take appropriate steps to make punishable as offences, in accordance with its domestic law, the establishment or operation of broadcasting stations referred to in Article 1, as well as acts of collaboration knowingly performed.

2. The following shall, in relation to broadcasting stations referred to in Article 1, be acts of collaboration:

(a) the provision, maintenance or repairing of equipment;
(b) the provision of supplies;
(c) the provision of transport for, or the transporting of, persons, equipment or supplies;
(d) the ordering or production of material of any kind, including advertisements, to be broadcast;
(e) the provision of services concerning advertising for the benefit of the stations.

Article 3

Each Contracting Party shall, in accordance with its domestic law, apply the provisions of this Agreement in regard to:

(a) its nationals who have committed any act referred to in Article 2 on its territory, ships, or aircraft, or outside national territories on any ships, aircraft or any other floating or airborne objects;
(b) non-nationals who, on its territory, ships or aircraft, or on board any floating or airborne object under its jurisdiction have committed any act referred to in Article 2.

Article 4

Nothing in this Agreement shall be deemed to prevent a Contracting Party:

(a) from also treating as punishable offences acts other than those referred to in Article 2 and also applying the provisions concerned to persons other than those referred to in Article 3;

(b) from also applying the provisions of this Agreement to broadcasting stations installed or maintained on objects affixed to or supported by the bed of the sea.

Article 5

The Contracting Parties may elect not to apply the provisions of this Agreement in respect of the services of performers which have been provided elsewhere than on the stations referred to in Article 1.

Article 6

The provisions of Article 2 shall not apply to any acts performed for the purpose of giving assistance to a ship or aircraft or any other floating or airborne object in distress or of protecting human life.

Article 7

No reservation may be made to the provisions of this Agreement.

Article 8

1. This Agreement shall be open to signature by the member States of the Council of Europe, who may become Parties to it either by:

(a) signature without reservation in respect of ratification or acceptance, or

(b) signature with reservation in respect of ratification or acceptance followed by ratification or acceptance.

2. Instruments of ratification or acceptance shall be deposited with the Secretary-General of the Council of Europe.

Article 9

1. This Agreement shall enter into force one month after the date on which three member States of the Council shall, in accordance with the provisions of Article 8, have signed the Agreement without reservation in respect of ratification or acceptance or shall have deposited their instrument of ratification or acceptance.

2. As regards any member States who shall subsequently sign the Agreement without reservation in respect of ratification or acceptance who shall ratify or accept it, the Agreement shall enter into force one month after the date of such signature or the date of deposit of the instrument of ratification or acceptance.

Article 10

1. After this Agreement has entered into force, any Member or Associate Member of the International Telecommunication Union which is not a Member of the Council of Europe may accede to it subject to the prior agreement of the Committee of Ministers.

2. Such accession shall be affected by depositing with the Secretary-General of the Council of Europe an instrument of accession which shall take effect one month after the date of its deposit.

Article 11

1. Any Contracting Party may at the time of signature or when depositing its instrument of ratification, acceptance or accession, specify the territory or territories to which this Agreement shall apply.

2. Any Contracting Party may, when depositing its instrument of ratification, acceptance or accession or at any later date, by declaration addressed to the Secretary-General of the Council of Europe, extend this Agreement to any other territory or territories specified in the declaration and for whose international relations it is responsible or on whose behalf it is authorised to give undertakings.

3. Any declaration made in pursuance of the preceding paragraph may, in respect of any territory mentioned in such declaration, be withdrawn according to the procedure laid down in Article 12 of this Agreement.

Article 12

1. This Agreement shall remain in force indefinitely.

2. Any Contracting Party may, insofar as it is concerned, denounce this Agreement by means of a notification addressed to the Secretary-General of the Council of Europe.

3. Such denunciation shall take effect six months after the date of receipt by the Secretary-General of such notification.

Article 13

1. The Secretary-General of the Council of Europe shall notify the member States of the Council and the government of any State which has acceded to this Agreement, of:

(a) any signature without reservation in respect of ratification or acceptance;

(b) any signature with reservation in respect of ratification or acceptance;

(c) any deposit of an instrument of ratification, acceptance or accession;

(d) any date of entry into force of this Agreement in accordance with Articles 9 and 10 thereof;

(e) any declaration received in pursuance of paragraphs 2 and 3 of Article 11;

(f) any notification received in pursuance of the provisions of Article 12 and the date on which denunciation takes effect.

TEXT OF THE RESOLUTION ADOPTED BY THE CONSULTATIVE ASSEMBLY ON JANUARY 29, 1965 (RECOMMENDATION 422)

The Assembly,

1. Whereas the Committee of Ministers have, on 20th January 1965, opened for signature the European Agreement for the prevention of broadcasts transmitted from stations outside national territories;

2. Expressing its regret that the Committee of Ministers have not seen fit to refer the Agreement to it for an opinion;

3. Considering that the sole justification for an international regulation of telecommunications is the limited availability of frequencies and spectrum space;

4. Whereas the aim of this Agreement is to put a stop to the proliferation of so-called "pirate" broadcasting stations;

5. Whereas the Agreement concerns only the prevention of broadcasts transmitted from stations installed on board ships, aircraft or other floating or airborne objects outside national territories;

6. Noting that the Agreement provides only for the optional application of its provisions to broadcasting stations installed on objects affixed to or supported by the sea-bed outside territorial waters,

7. Recommends that the Committee of Ministers should instruct the Committee of Experts on Broadcasting and Television to examine the possibility of supplementing the Agreement by way of a protocol in order

(a) to express the intention of the signatory powers to use the Agreement exclusively to cope with the limited availability of frequencies and spectrum space, and not to safeguard the vested interests of any State or other monopolies in mass telecommunications and

(b) to extend the provisions of the Agreement to the establishment or operation of broadcasting stations installed on objects affixed to or supported by the sea-bed outside territorial waters or, in the alternative, to prepare a separate convention for the prevention of broadcasts from such stations.

B I B L I O G R A P H Y

1. Bishop, International Law: Cases and Materials. (2nd Ed. 1962).

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