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By

JOHN TAYLOR MURCHISON

# THE CONTIGUOUS AIR SPACE ZONE

# IN

# INTERNATIONAL LAW

## PREFACE

Two States, namely the United States and Canada, have seen fit, in recent years, to formulate rules, for security purposes, in respect of identification and control of aircraft approaching their coasts, or within certain fixed zones contiguous to the coast, whereby, in effect, they assert a jurisdiction for that limited purpose only, which departs drastically from the popular conception in Maritime Law of the three-mile limit, six-mile limit, or twelve-mile limit, which has heretofore been generally accepted, among laymen particularly, and by governments, and indeed, by some international lawyers, as the limit to which a State may exercise jurisdiction over the high seas contiguous to its coasts, for various purposes. Foreign aircraft approaching the coasts, in particular in respect to the United States rules, are required to identify themselves and submit to control by controllers on the surface for as far as three hundred nautical miles from the coast. While the rules formulated by Canada are not as extensive in respect of distance, they are just as onerous insofar as the control aspect is concerned.

Heretofore, it has generally been accepted, and perhaps loosely accepted, that the status of the air space, or flight space over the high seas, is the same as that enjoyed by the high seas themselves, and is derived therefrom. As early as 1911, for example, Hazeltine[1] held the view in effect that the

[1] Law of the Air (1911) p.9

flight space over the high seas enjoyed the same status as the high seas themselves. Later on, the drafters of the Paris Convention agreed with this view.[1]

The most modern view of text writers is the same as the earlier and is to be found in McNair[2], and Oppenheim[3], and these two views agree substantially with the earlier views set forth by Hazeltine and the drafters of the Paris Convention.

If these views are correct, it would appear, therefore, that the rules formulated by Canada and the United States may be in conflict with international law in that infringements are being made on this freedom, or alternatively, that a new problem has arisen, which the authors of the views expressed above did not, or could not, foresee.

The problem, therefore, appears to be: have States the right to legislate unilaterally and thereby acquire jurisdiction, valid in international law in the flight space over the high seas contiguous to their coasts, for security or defence purposes?

This thesis will endeavour to prove that the rules formulated by Canada and the United States are not in conflict with International Law, and that they have the right, under International Law, to make such rules, and indeed, that any

1 Conference de la Paix (1919 & 1920 Minutes), pp 428 & 429.

2 Law of the Air, 2nd Ed. p 113.

3 International Law, Lauterpacht, 7th Ed. p 469.

State whose borders are adjoining the high seas, have similar rights. It is hoped to prove this thesis by four main arguments, and they are as follows:

(1) These rules asserting jurisdiction over the high seas for the limited purpose of defence are not contrary to the Chicago Convention of 1944, of which there are sixty-five signatories and adherents, as of the 1st of July, 1955;

(2) by analogy, States today are engaged in asserting various claims over the Continental Shelf, and consequently, for defensive purposes, a State has the right to claim, at least, jurisdiction in flight space within those limits but is not necessarily bound by such limits;

(3) by analogy, again, jurisdiction, it will be shown, has been claimed in the past, over vast areas of the open or high seas, and indeed is being claimed, to some extent, today; consequently the flight space over the seas enjoys <u>at least</u> the status of the seas themselves but again is not dependent on that status;

(4) the doctrine of necessity combined with that of self-preservation, not only gives a State the right to formulate such rules as set up

by the United States and Canada, but, indeed, places a duty on such State to make such rules.

The views expressed in the following pages are those of the writer only, and, while he holds an official position in the Government of Canada, in no way do they reflect any official views of that Government. They represent his personal views only.

TABLE OF CONTENTS

# THE CONTIGUOUS AIR SPACE ZONE IN INTERNATIONAL LAW

## CHAPTER I - INTRODUCTION AND PURPOSE

On examining the title of this thesis the first question that may naturally come to the mind of the reader is: "What is the Contiguous Air Space Zone"? For the purposes of this work it is a zone of varying dimensions in the air space or flight space over the high seas contiguous to the territory of a state and extending outwards over the high seas. In short, it is that space outside and adjacent to the air space or flight space over the territory of a state, as contemplated by Article I of the Chicago Convention, which states as follows:

> "The contracting States recognize that every State has complete and exclusive sovereignty over the air space above its territory".

If we go on to Article II of the Convention we find that territory includes the land areas and territorial water adjacent thereto under the suzerainty, protection or mandate of such State. The Contiguous Air Space Zone may be said to be analogous to the contiguous sea zone which is well known in Maritime Law, and which will be discussed at length later on in the work. The primary purpose of this discussion is to determine the legal status of the Contiguous Air Space Zone and the rights of States therein.

The United States and Canada have established certain zones extending out to sea for the identification and control of aircraft outside their national territories and extending

in some cases to quite considerable distances over the high seas. An aircraft within these Contiguous zones, subject to certain conditions, is required, generally, when approaching, or within certain specified areas over the high seas, to identify itself, and subject itself to the appropriate air traffic controller on land. These zones are known officially as the Canadian Air Defence Identification Zone (CADIZ) and the American zone is known as the Air Defence Identification Zone (ADIZ).

As early as 1948 the problem of air defence in the United States was considered to be a real one and with the outbreak of the Korean War, in 1950, the problem took on such a degree of urgency that studies by military planners became intensified and culminated in the establishment of ADIZ in December of 1950.[1] Approximately five months later Canada established CADIZ[2]. The rules, if such they can be called, setting up CADIZ, were issued by the Department of Transport and followed generally the lines of the American rules. Unfortunately, however, their legal basis, insofar as domestic, or municipal law is concerned, would appear at best to be doubtful, for no legislation was passed by the Parliament of Canada and neither apparently, do the rules have any force under the Aeronautics Act[3]. Indeed, it is doubtful whether these rules

1 Regulations of the Administrator, Part 620.

2 NOTAM (Notification to Airmen) 13/54 dated 31 March 1954 supersedes all previous NOTAMS and information circulars.

3 R.S.C. 1952, Chapter 2.

could be given the force of law under that Act, as it now stands, as both Sections 3 and 4 restrict the regulatory power of the Minister to the "limits of the territorial waters of Canada". It would appear, therefore, legally speaking, that a violation of these rules outside the territorial waters of Canada would lead to nothing but an exercise in frustration, for the conclusion must be reached that the punitive provisions of the Act would not apply for the reason that a violation of the NOTAM, which lacks the authority or sanction of the Act, would not be, therefore, a violation of the Act. It is true that Article 2.10.1 of the NOTAM provides for interception for violation of the rules by military aircraft, but that is the only penalty prescribed, if such it can be called, and it is not at all clear just what is to happen, in the legal sense, after the interception takes place. It would not be difficult to guess the result from a military viewpoint if an unidentified aircraft entered the zone, was intercepted, and still refused to identify itself, or to obey the direction of intercepting fighters, but that is not justifying such acts legally, from the municipal point of view. The question, however, is more academic than real in the sense that the Parliament of Canada could enact the necessary legislation. The establishment of ADIZ, on the other hand, is solidly founded on American municipal law, for Part 620 is based on an executive order by the president[1], and as such, has the force of law in the United

[1] EXECUTIVE ORDER 10197 - DIRECTING THE SECRETARY OF COMMERCE TO EXERCISE SECURITY CONTROL OVER AIRCRAFT IN FLIGHT - By virtue of and pursuant to the authority vested in me by section 1201 of the Civil

Aeronautics Act of 1938 (52 Stat. 973), as amended by the act of September 9, 1950 (Public Law 778, 81st Congress), and having determined that this action is required in the interest of national security, the Secretary of Commerce is hereby directed, for such time as this order remains in effect, to exercise by rule, regulation, or order, in such manner as he may deem necessary to meet the requirements of national security, all the powers, duties, and responsibilities granted to him in section 1203 of the said act, as amended. Harry S. Truman THE WHITE HOUSE, December 20, 1950. See also U.S. Code (1952) Title 49 Sec 704 which provides for penalties for violation of the provisions of ADIZ.

States. Furthermore, this document provides specifically for prosecutions for violations of its provisions.[1] Suppose an incoming aircraft is identified, after interception, but for some reason best known to the crew, refuses the direction and control of either the intercepting aircraft or the radio controller on the surface, and suppose also that for some reason no hostile act such as firing at this aircraft is committed by the intercepting fighters; the crew of that aircraft or the captain could subsequently be proceeded against and convicted in American courts for violating the laws of the United States, but no such action could take place in Canada for a violation of the NOTAM. For the purposes of this study we will assume that there is no problem insofar as domestic law is concerned and that both CADIZ and ADIZ rest on solid domestic legal foundations. From a practical viewpoint any defects that might exist could be eliminated by legislation passed by the Parliament of Canada and the United States Congress, respectively.

[1] 620.18.

In addition to the foregoing differences, there are differences as to detail. For example, the American regulations are applicable only if the aircraft has the intention of entering United States territory[1], while the Canadian NOTAM is intended to apply to any aircraft about to enter the country, or actually in the zone, regardless of the destination of such aircraft[2]. There is, in addition, a provision that the rules of CADIZ do not generally apply to aircraft which are flying below 4,000 feet[3].

While the Canadian identification zone is dimensionally much smaller than its American counterpart, being not much more than one hundred nautical miles from land at its widest, it is more stringent in its control aspects in that so long as an aircraft is operating in the zone, irrespective of its destination, the fact of its operating in the zone makes it subject to CADIZ, and consequently its destination is immaterial. It will be recalled that ADIZ applies only to aircraft operating in the American zone, and whose destination is the United States. Dimensionally, the American zone extends in some areas, particularly around Alaska, for a distance of over 300 nautical miles from land. Moreover, paragraph 620.12 (b)(ii) reads as follows: The pilot in command of a foreign aircraft shall not operate an aircraft into the United States without: (i) making position

1 id 620.12(b)(2).
See also Martial - "State Control of the Air Space Over the Territorial Sea and the Contiguous Zone", Canadian Bar Review, March 1952, p 258.

2 Article 2.1 NOTAM.

3 Ibid.

reports as prescribed for United States aircraft in sub paragraph (1) of this paragraph, or (ii) reporting to an appropriate aeronautical facility when the aircraft is not less than one hour and not more than two hours average cruising distance via the most direct route from the United States. Thereafter, reports shall be made as instructed by the facility receiving the original report". As Martial says,

> "The fact that one hour cruising distance was adopted may be significant, since, depending on the speed of the aircraft, the United States may be assuming jurisdiction even beyond the limits of the ADIZ. It is also interesting that the one hour standard adopted corresponds to the theory of jurisdiction in the contiguous zone in Maritime Law, for the twelve-mile limit, equivalent to one hour's sailing distance from the shore, is recognized for customs and immigration purposes"[1].

Although Canada and the United States are the only two nations who to date have officially established such zones, it may well be, and indeed the probabilities are that other nations will follow suit. From a military point of view, such zones are essential if we are to cope adequately with air defence of the North American Continent. Indeed, as will be illustrated later on in this work, the dimensions of CADIZ and ADIZ are perhaps even now obsolescent if not obsolete.

In any future conflict it is not anticipated that we will have the luxury of a warning from the enemy, at least in the form of a formal declaration of war, and with the speeds of modern jet bombers it will readily be seen that <u>immediate</u> (underlining mine) identification of unknown aircraft is vital, especially during a period of world tension where groups of

[1] op cit. p 258.

nations are indulging in unprecedented mutual distrust of each other, as is the case today. There can be no quarrel with the proposition that immediate identification is necessary and vital, but the question may naturally be raised as to why control is also necessary. The answer is a military one and is simply this, that if control is maintained, then, in the event of an emergency, all friendly aircraft can be directed to land, or to divert away from the anticipated target or targets. Then, too, the defending forces would not have the additional burden of being called upon to determine friend from foe. This would apply equally to defending interceptor aircraft as well as anti-aircraft and guided missile units. Friendly aircraft would consequently be protected from accidental hostile action either by interceptor aircraft or ground forces in control of anti-aircraft guns and guided missiles, where they are not only known to these forces but are guided by them.

With the advent of nuclear fission many claims have been made as to the effect on our generally accepted concepts of war, some of them perhaps rather extreme; but one truth emerges from a military point of view at least, that it can no longer be seriously argued that these zones are unnecessary. Indeed, from the militarist's point of view, it can be argued successfully that they are vital, and as the speed of aircraft increases, so the width of the zones seaward must be increased too. This work will endeavour to analyze the position in international law.

For the purposes of this work we will assume that no internal constitutional difficulties exist and that both the

Canadian and American rules are solidly founded in respect of municipal law. We will concern ourselves only with the legal right of these two countries and others to formulate such rules and to demand that they be obeyed by foreign aircraft.

The presentation of the argument will be under four main headings:

1 The Chicago Convention.

2 The Continental Shelf Claims analogy.

3 Maritime Law Analogy.

4 Necessity and Self-Preservation.

It is hoped that the validity of CADIZ and ADIZ, and similar zones established by other States can be justified in International Law on each of the foregoing grounds.

## CHAPTER II

## CADIZ AND ADIZ DO NOT VIOLATE THE CHICAGO CONVENTION OF 1944

Canada and the United States are original signatories to the Chicago Convention of 1944[1] and as such, are subject to the Convention and to the rules and regulations made thereunder. They also, however, derive the benefits conferred by the Convention. To date (1st July 1955) there are sixty-five signatories and adherents who generally represent the major powers engaged in international air transport. It is true that the Soviet Union is not an adherent or signatory to the pact, but some of the so-called "satellite" States are, such as Poland and Czecho-Slovakia. The government of the Chinese Republic, which was an original signatory and deposited its instrument of ratification to the Convention, on the 20th of February, 1946, has since denounced it. This denunciation took effect on the 21st of May, 1951, in accordance with Article 95(b)[2]. We think it safe to say, however, that the parties to the Convention represent virtually one hundred per cent of those States who are engaged in trans-oceanic travel to any appreciable degree.

It is perhaps quite true to say that only those States who are parties to the Convention are bound by it, but it may also be true to say that by virtue of the fact that the vast majority of States engaged in international air transport are

[1] ICAO Doc. 7300.

[2] Ibid p 49.

signatories or adherents any rules or regulations have become or may become International Law by custom and by general acquiescence on the part of those States outside the Convention affected thereby, but who have by their very silence, tacitly acknowledged the Convention as a whole and have not disputed the principles contained therein. In short, it may be that a customary rule of International Law is in the making if it does not already exist insofar as those States outside the conventions are concerned[1].

[1] Art. 38 of Statute of International Court of Justice states in part as to sources of International Law:

"(b) international custom, as evidence of a general practice accepted as law;

(c) the general principles of law recognized by civilian nations."

Manley O. Hudson on Customary International Law (UN Doc A/CN 4/16 (3 March 1950), 5, require the following:

"(a) concordant practice by a number of States with reference to a type of situation falling within the domain of international relations;

(b) continuation or repitition of the practice over a considerable period of time;

(c) conception that the practice is required by, or consistent with, prevailing international law; and

(d) general acquiescence in the practice by other States.

Of course the presence of each of these elements is to be established (doit etre constate) as a fact by a competent international authority."

OPPENHEIM 7 Ed p 17.

"New rules can only become law if they find common consent on the part of those who constitute the

> community at the time. It is for that reason that custom is at the background of all law, whether written or unwritten."
>
> And at: 25
>
> "International jurists speak of a custom when a clear and continuous habit of doing certain actions has grown up under the aegis of the conviction that these actions are, according to International Law, obligatory or right."

As we have said in Chapter I, the Convention lays down, first of all, the doctrine that the superjacent air space over the territory of a State is, for legal purpose, part of that territory. In other words the superjacent State enjoys complete and absolute sovereignty over the flight space above its lands and waters. It is not surprising therefore that the Convention provides, as a corollary to this principle, that entry into the flight space above a territory shall be in accordance with the provisions of the Convention, which, we will attempt to show, jealously guard the sovereign rights in such flight space of each individual party to the Convention. As regards the flight space over the high seas the Convention is silent as to this status of such flight space. It will be recalled that in the preface mention was made of the generally accepted view that the status of the flight space over the high seas was the same as that of the high seas themselves. It is agreed that such flight space enjoys <u>at least</u> that status but we hope later to show that the above principle may not go far enough. The Convention, it is true, arrogates the right, under article 12, to make rules for air

navigation over the high seas in the following words:

> "..... over the high seas, the rules in force shall be those established under this convention"

but it is submitted that, in view of the very intent of the Convention, namely to promote international air travel and commerce, that any security considerations lie outside the Convention and that what is contemplated in article 12 is confined to "rules of the road" only. Consequently, such rules of the road would not affect the status of the flight space itself.

To return to flight space over national territories, article 6, for example, states as follows with respect to scheduled aircraft:

> "No scheduled international air service may be operated over or into the territory of a contracting State except with the special permission or other authorization of that State, and in accordance with the terms of such permission or authorization."

It is quite clear from this article, it is submitted, that even as among parties to the Convention, a scheduled air service may not be operated <u>over or into</u> the flight space of a contracting State except with the knowledge and consent, and in accordance with such terms as may be laid down by that State into which the scheduled air-line is operating. In short, no right exists but a State may grant a privilege of flying over its territory. This same article 6, we think, would interfere in no way with any bilaterals that two States

may wish to enter into with respect to international air transport.

Article 6 by itself, it is submitted, would be sufficient to take away any imagined rights outside of bilaterals or other arrangements under the Convention in respect of scheduled aircraft, the home States of which are parties to the Convention, and would justify, it is submitted, the proper establishment of CADIZ and ADIZ through correct constitutional domestic law as regulations for the entry of aircraft into territorial flight space.

In the case of non-scheduled aircraft, Article 5[1] of the Convention provides that such aircraft shall have the right, subject to the terms of the Convention, to make flights into, or in transit, non-stop, across its territory and to make stops for non-traffic purposes without the necessity of obtaining

[1] Article 5: "Each contracting state agrees that all aircraft of the other contracting states, being aircraft not engaged in scheduled international air services, shall have the right, subject to the observance of the terms of this Convention, to make flights into or in transit, non-stop across its territory and to make stops for non-traffic purposes without the necessity of obtaining prior permission and subject to the right of the state flown over to require landing. Each contracting state, nevertheless, reserves the right, for reasons of safety of flight, to require aircraft designed to proceed over regions which are inaccessible, or without adequate air navigation facilities, to follow prescribed routes, or to obtain special permission for such flights.

Such aircraft, if engaged in the carriage of passengers, cargo, or mail, for remuneration or hire on other than scheduled international air services, shall also, subject to the provisions of Article 7, have the privilege of taking on or discharging passengers, cargo, mail, subject to the right of any state where such embarkation or discharge takes place, to impose such regulations, conditions or limitations as it may consider desirable."

prior permission, and subject to the right of the State flown over to require landing. But even here, while this appears at first glance to confer a right on non-scheduled aircraft, which does not exist in respect of scheduled aircraft, reading further on in the article it is provided that each contracting State reserves the right to require aircraft desiring to proceed over regions which are inaccessible, or without adequate air navigation facilities, to follow prescribed routes, or to obtain special permission for such flights, for reasons of safety. As we have pointed out, however, Article 5 provides specifically that any apparent benefits conferred by that Article are subject to the other terms of the Convention, and a study of Article 11[1] leads us to the conclusion that a party to the Convention may enact laws and regulations in respect to the admission or departure from its territory of foreign aircraft, and there is apparently no limitation on how onerous those laws or regulations might be, and neither does there appear to be any limitation as to the reasons for enacting such laws and regulations, such as safety of flight, as designated in Article 5.

It would appear, therefore, that on the basis of Article 11 alone, which places a duty on foreign aircraft entering or departing from the territory of a contracting State to comply with those laws, Article 11 of itself would be sufficient for the establishment of regulations such as are in ADIZ.

[1] Article 11: "Subject to the provisions of this Convention, the laws and regulations of a contracting state relating to the admission to or departure from its territory of aircraft engaged in international air navigation, or to the operation and navigation of such aircraft while within its territory, shall be applied to the aircraft of all contracting states without distinction as to nationality, and shall be complied with by such aircraft upon entering or departing from,

We have previously stated that the Convention limits the operation of non-scheduled aircraft in various ways, including the prohibition of flights over certain areas or sometimes altogether, and subject to Article 11, a state could make conditions so onerous as to virtually prohibit flight over its territory altogether, so long as no discrimination is exercised. This principle was recognized by the Chicago Drafting Committee[1].

It would seem, therefore, that so long as ADIZ is a part of the law of the United States, and does not conflict with the provisions of the Convention, which it is submitted, is the case, all aircraft of contracting States engaging in international air navigation, entering or departing the United States, must comply with the rules laid down by ADIZ.

In the first chapter we have pointed out the difficulty encountered so far as the Canadian rules are concerned, and it may be that these rules are not perhaps <u>within</u> the spirit and intent of Article 11, but as they now stand, they are really no rules at all, and have no basis in law; consequently they cannot be considered to have violated the Convention. The point to bear in mind, however, is that Canada has the right to legislate along the lines adopted by the United States in the case of ADIZ, and such imperfections as at present exist could be cured by a little domestic housecleaning insofar as Canadian law is concerned.

American rules, on the other hand, have the force of law in the United States and consequently, if an aircraft bound

[1] Cooper J.C., <u>The Right to Fly</u>, p 173

for or departing from the United States violates any of the rules laid down by ADIZ, and that aircraft's home State is a party to the Convention, then that aircraft, in addition to breaking the law of the United States, is also breaching the Convention itself by virtue of Article 11. Indeed, the Convention goes farther than either CADIZ or ADIZ, for it provides that such aircraft, that is, aircraft who are entering the territory, or who are leaving the territory, shall comply with the national laws and regulations in that territory[1]. The distinction is that ADIZ, in particular, requires aircraft approaching the United States to comply with the rules and is silent on aircraft departing from the United States, whereas the Convention requires such aircraft to obey any rules and regulations that may be laid down even though they are, in fact, departing.

As to the applicability of the Convention, Article 3 is somewhat anomalous, in that it provides, in sub clause (a) that the Convention shall be applicable only to civil aircraft, but when we read down to sub clause (c) there is a provision directly affecting State aircraft. This says, in effect, that no such aircraft of a contracting State shall fly over the territory of another contracting State, or land thereon, without authorization by special agreement or otherwise, and in accordance with the terms thereof. The effect of this latter provision would seem to be contradictory to sub clause (a). However, it is suggested that no real problem exists insofar as our identification zones are concerned, for any State air-

[1] Article 11.

craft desiring to enter the territory of another State for peaceful purposes would, as a matter of international comity, apart from Article 3(c), inform that State in advance of the intended trip, and no doubt of the route to be followed. Indeed, any such aircraft failing to do so, or any such State failing to ensure that its aircraft did so, would be quite properly viewed with the gravest suspicion.

In conclusion, therefore, while Article 6 appears to be more restrictive, in that a scheduled air service may not operate into the territory or over the territory without special permission of what we shall term the host State, and at first glance Article 5 seems to permit such operations in respect of non-scheduled aircraft, yet it must be remembered that the latter specifically makes the supposed rights granted thereunder subject to the observance of the terms of the Convention. It follows, it is submitted, when we read Article 5 in conjunction with Article 11, that if the contracting State wishes to impose the same restrictions on non-scheds as on scheds, all it has to do is legislate accordingly and the rights granted under Article 5 are taken away so far as Article 11 is concerned.

We submit that in respect to parties to the Convention, ADIZ, in particular, is within the terms of the Convention, and while CADIZ suffers from some legal deficiencies, Canada could, and has the right to, adopt, legislation similar to ADIZ.

The foregoing remarks are applicable to States parties to the Convention. What, then, is the position of States who are

not parties thereto. We have previously remarked that their very silence is evidence that they have tacitly acquiesced in the provisions or principles laid down in the Convention, and consequently at least a customary rule of International Law is evolving, if indeed it does not already exist; bearing in mind that the vast majority of States engaged in international air transport are parties to the Convention and that International Air Law is a new field in which establishment of customary rules "can have no temporal equivalent to the immemorial customs in certain fields"[1].

[1] Briggs Law of Nations (2nd Ed) p 47.

## CHAPTER III

## ANALOGY OF NATIONAL CONTINENTAL SHELF CLAIMS

In recent years States have given a great deal of thought to the so-called Continental Shelf and some have asserted various claims thereto. It would be presumptuous in this work to attempt to define the "continental shelf". Therefore we shall briefly describe it, for our purposes, as that submerged land contiguous to the coast and extending outwards under the high seas covered by no more than 100 fathoms of water. Geologically speaking, at the end of this 600 foot line the land drops off sharply to the ocean depths.

As previously stated, various States have, in the past few years, made more or less sweeping claims to the "continental shelf", probably the best-known being that made by the United States by presidential proclamation on the 28th of September, 1945. In this proclamation the United States claimed the natural resources of the sub-soil and sea-bed of the continental shelf contiguous to the coast of the United States as "appertaining to the United States", and subject to its jurisdiction and control. The United States did, however, specifically preserve in the proclamation the character of the high seas in that free and unimpeded navigation on those seas were in no way affected by the proclamation. We quote in part from a press release accompanying the proclamation:

> "The study of sub-surface structures associated with oil deposits which have been discovered along the Gulf Coast of Texas, for instance, indicates that corresponding deposits may underly the off-shore or submerged land. A trend of oil-productive salt domes extends directly into the Gulf of Mexico off the Texas coast. Oil is also being taken at present from wells

> within the three-mile limit off the coast of California. It is quite possible, geologists say, that the oil deposits extend beyond the traditional limit of national jurisdiction. Valuable deposits of minerals other than oil may also be expected to be found in these submerged areas ..... While asserting jurisdiction and control of the United States over the mineral resources of the continental shelf, the proclamation in nowise abridges the right of free and unimpeded navigation of waters of the character of high-seas above the shelf, nor does it extend the present limits of the territorial waters of the United States"[1].

While the United States is perhaps not the first State to make a widespread continental shelf claim, as we have said before it is probably the best known. Other States however were quick to jump on the bandwagon, so to speak, and within the next few years the following States laid claims to the continental shelf, of which more detail will be given later. These were Argentina, Chile, Costa Rica, Guatemala, Honduras, Iceland, Mexico, Nicaragua, Panama, Peru, the Philippines, Saudi-Arabia, and the United Kingdom. We have said that more or less sweeping claims were made by various States who jumped on the bandwagon, the three most sweeping being Argentina, Chile and Peru. The Argentine Decree No. 14708, 11th October 1946[2], states as follows in Article I:

> "It is hereby declared that the Argentine epicontinental sea and continental shelf are subject to the sovereign power of the nation" (underlining mine).

[1] The United Nations Legislative Series, Law and Regulations on the Regime of High Seas, ST/LEG/SER.B/1. p 39. Original Source Department of State Bulletin, Vol. 12 (1945) p 484.

[2] Ibid, p 4.

Chile and Peru published similar decrees but not quite so sweeping, for they limited their "sovereignty" to those rights necessary to reserve, protect, preserve and exploit the natural resources of the continental shelf.

Although in both instances they claimed property rights to anything found in the waters above the continental shelf and the right to control the use of those waters for exploitation purposes, that is, either for drilling for submerged oil or minerals, or for fishing purposes, they did not claim complete sovereignty. The United States, however, on the 2nd of July 1948[1], sent a note to the Government of Argentina, and on the same date similar notes to the Governments of Chile and Peru, which reads in part as follows:

> "The United States Government, aware of the inadequacy of past arrangements for the effective conservation and utilization of such resources, views with sympathy the considerations which led the Argentine Government to formulate its declaration. At the same time, the United States Government notes that the principles underlying the Argentine Declaration differ in large measure from those of the United States Proclamations and appear to be at variance with the generally accepted principles of international law. In these respects, the United States Government notes in particular that (1) the Argentine Declaration decrees national sovereignty over the continental shelf and over the seas adjacent to the coasts of Argentina outside the generally accepted limits of territorial waters and (2) the declaration fails, with respect to fishing, to accord recognition to the rights and interests of the United States in the high seas off the coast of Argentina. In view of these considerations, the United States Government wishes to inform the Argentine Government that it reserves the rights and interests of the United States so far as concerns any effects of the declaration of 11th of October, 1946, or of any measure designed to carry that declaration into execution".

[1] U.N. Doc A/CN.4/19, p 115.

Even though these more modest claims, such as that of the United States, which assert only the right to exploit and purport to preserve the juridical character of the high seas, at first glance would seem perhaps not to interfere with the high seas as we know them, we must be realistic and face the fact that any such exploration and exploitation, conservation, etc., as contemplated by these various continental shelf claims, is bound to interfere to a more or less degree with the principle of freedom of the seas. There is a negative recognition of this by the International Law Commission of the United Nations where Article IV of their draft relating to the regime of the high seas[1] states as follows:

> "The exploration of the continental shelf and the exploitation of its natural resources must not result in any unjustifiable interference with navigation, fishing or fish production".

Article II, however, goes on to provide that a littoral State may construct and maintain on the continental shelf such installations as are necessary for the exploration and exploitation of the natural resources thereof, and further, it permits such State to establish safety zones at a reasonable distance around such installations and to take, in those zones, measures necessary for their protection. In a later report the Commission recommends the establishment of safety zones around such installations as are necessary for the exploitation of the resources of the continental shelf[2]. In the comment to the draft Article 6, which provides for the construction and main-

[1] U.N. Doc A/CN.4/79 d 22 March 1954.

[2] See General Assembly Official Records, 8th Session Supp. No. 9, A/2456, in particular Article 6 of the draft, p 13.

tenance on the continental shelf of installations necessary for the exploration and exploitation of the natural resources, and the establishment of safety zones, the Commission, while not specifying the size of the safety zones, believed that generally speaking a radius of 500 metres would be sufficient for the purpose[1]. Again there is a recognition of the interference for national purposes of the littoral State with the traditional freedom of the seas, for the Commission advocates that where installations are likely to interfere with navigation, warning devices must be maintained.

In addition to the unilateral action of the States we have mentioned above in declaring their right to dominium over the continental shelf, the International Law Commission as early as 1950 recognized the right of a littoral State to exercise control and jurisdiction over the sea-bed and subsoil of the submarine area situated outside its territorial waters, with a view to exploring and exploiting the natural resources there[2]. While the recommendations of the International Law Commission have not the force of law, nevertheless they do represent the fruits of great thought and study by perhaps the foremost international legal minds of our time, and consequently, such views or recommendations are not to be lightly brushed aside. It recommends and takes the view, for example, that States whose nationals carry on fishing in a particular area, have the right and responsibility to make

[1] Ibid p 15.

[2] General Assembly Official Records, 5th Session Supp. No. 12 (A/1316).

regulations for the purpose of safeguarding the marine fauna against extermination in the particular area in which they are operating. The Commission itself regarded these views and recommendations as being in the category of the progressive development of International Law[1]. The existing position in International Law at the moment appears to be that any such regulations issued unilaterally by a State for the conservation of fisheries in the high seas are binding upon the nationals of that State only. But even here, it is submitted there is an exercise of a limited jurisdiction for a limited purpose over the high seas which is recognized in International Law.

In the latest draft article submitted by the Commission on the continental shelf[2] the Commission was careful to include two articles, namely 3 and 4, which preserve the legal status of the superjacent waters over the shelf as high seas and the legal status of the air space above those waters. Indeed, in the comment to the draft, the Commission has this to say[3]:

> "These articles which are couched in categorical terms, are self-explanatory. For the articles on the continental shelf are intended as laying down the regime of the continental shelf only as subject to and within the orbit of the paramount principle of the freedom of the seas and of the air space above them. No modification of or exceptions from that principle are admissible unless expressly provided for in the various articles". (Underlining mine).

Article 6 of the draft[4] is as follows:

1 General Assembly Official Records, 8th Session Supp No. 9 (A/2456 p 17).

2 Ibid pp 12 & 13.

3 Ibid p 15.

4 Ibid p 13

> "The exploration of the continental shelf and the exploitation of its natural resources must not result in any unjustifiable (underlining mine) interference with navigation, fishing or fish production".

It will be noted that the interference contemplated in the article is unjustifiable interference. The Commission recognized that exploration and exploitation of the shelf was bound to result in some interference and hence used the word unjustifiable, and held the view that interference, even if substantial, that is, interference with navigation and fishing, might in some cases be justified. On the other hand, interference even on an insignificant scale would be unjustified if unrelated to reasonably conceived requirements of exploration and exploitation.

We have seen from the foregoing that the Commission is realistic. In the same report[1] the Commission has recognized, also on a realistic basis, that with respect to the air space above the high seas new rules will be necessary and we quote:

> "Air traffic may necessitate the establishment of an air zone over which the coastal state may exercise control. However, this question is outside the subject of the regime of the high seas".

It is probably quite true to say that continental shelf claims and claims for contiguous zones in respect of the high seas can in no way affect the juridical status of the air space over the high seas superjacent to the continental shelf. Conversely, it is submitted that the establishment of an area of identification and control in the air space over the high seas can in no way affect the high seas below the air space and the sea-bed beneath those seas. Air navigation might be affected

[1] Ibid, para 113.

by the former to the extent that obstructions or installations were constructed and projected above the surface of the sea, but this would only interfere to the extent that aircraft should and must be warned of the presence of these installations in the same manner as ships on the surface. From recent press reports we have learned that the United States is planning installations on the Atlantic continental shelf at least, whose sole purpose will be to identify unknown aircraft over the high seas. These installations are popularly called "Texas Towers" because of their similarity to the oil-drilling platforms off the Gulf Coast of Texas. They will thus extend the radar eyes of the continent for purposes of defence a great deal farther than is presently possible. So far as is known, they have nothing to do with the exploration or exploitation of the submarine areas of the continental shelf. But if the littoral State is to exercise over the continental shelf sovereign rights for the purpose of exploring and exploiting its natural resources, as recommended by Article 2 of the draft by the International Law Commission, it is difficult to see how the right of the United States to erect installations such as these "Texas Towers" for the more important and even vital purpose of national survival could be seriously challenged by any other State. It is true that this is a military measure, but so long as the rights of other States on the high seas, or in the air space over the high seas, are not interfered with, it is submitted that the position in International Law is a perfectly correct one. Even the much publicized doctrine of freedom of the seas has certain limitations imposed

upon it, such as the rules of the road, the rules of piracy and the right of "visit and search" during time of war. In short, absolute freedom of the seas does not, in fact, exist. This position which we are submitting as the correct one, is even strengthened, or will be strengthened, if there is a complete absence of protests from other nations over the construction of these installations. To date we are not aware of any such protests. A customary rule of International Law may therefore be said to exist if this absence of protest continues for an adequate period of time, (as yet we are not in a position to lay down a fixed number of years)[1] for it can be said that where there is a general acquiescence, tacit perhaps, but nonetheless real, among nations which allows littoral states to act in a manner which would ordinarily be considered a violation of International Law, without protest, then a customary rule is evolving if not already in existence. As no known protest has been voiced vis a vis any reasonable claim in respect to the Continental Shelf then it follows, it is submitted, that the same considerations apply to ADIZ and CADIZ.

[1] Briggs - Law of Nations (2nd ed) p 47 remarks as follows: "Observations of the practice of States in given international situations permit conclusions as to whether conduct is concordant, general and consistent over a period of time. The period of time required may vary: the establishment of customary rules of international air law can have no temporal equivalent to the immemorial customs in certain fields". (underlining mine).

## CHAPTER IV

## THE MARITIME LAW ANALOGY

### Part 1 - The Three Mile Limit

We think it useful for purposes of this study to examine the so-called "Contiguous Zone" in Maritime Law, but in (sl) doing it must always be borne in mind that while there may be, and indeed, is, close analogy between the law of the sea and the law of the air, it does not follow that air law, or jurisdiction in air space or flight space, must rigidly adhere to the older rules of maritime law. Air space or flight space, as John C. Cooper calls it[1], is a comparative infant as a medium of transport, completely different from the sea, and those rules that are practicable and that have been set up in respect of navigation on the high seas, may be wholly inadequate for navigation in the flight space over the high seas. What was good for the seas may not necessarily be good for the flight space above those seas. What is sauce for the goose is not necessarily sauce for the gander[2]. In any event, flight space is three dimensional and rules that would apply to media of transport that can move in one plane only, would never be adequate for media that can travel in three planes.

The Contiguous Zone in Maritime Law is that zone outside of territorial waters over which a littoral State exercises limited jurisdiction for certain purposes. Territorial waters have generally been recognized as three miles out to sea from

[1] John C. Cooper, Institute Study No. 1, dated 15 September 1951

[2] See McNair, Law of the Air, 2nd Ed., p 233.

the land, measured from the low-water mark, and although the so-called three-mile limit of territorial waters is universally known, insofar as universal recognition is concerned perhaps the best that can be said of it is that it is recognized as a minumum distance only, and the littoral State exercises for that distance all the rights capable of being exercised on its land territory, subject to the traditional generally undisputed right of innocent passage.

We will endeavour to show that while this distance is established as a minimum only, there are exceptions to it and further that, for certain limited purposes jurisdiction extends over a greater distance seaward, although there is no general agreement as to what jurisdiction should be claimed and the distance out to sea it may be exercised. Insofar as the three-mile limit is concerned, the state exercises exclusive jurisdiction. We find the reasons for this general acceptance as being (1) the security of the State demands that it should have exclusive possession of its shores and that it should be able to protect its approaches, (2) for the purpose of furthering its commercial, fiscal and political interests, a State must be able to supervise all ships entering, leaving or anchoring in its territorial waters, and (3) the exclusive enjoyment of the products of the sea within the State's territorial waters is necessary for the existence or the welfare of the people on its coast [1].

J.P.A. Francois, the Rapporteur to the International Law Commission set up by the United Nations, quotes Gidel, on

1 International Law of the Sea, Higgins & Columbo, 2nd Ed, p 61.

page 26, as follows[1]:

> "There is no rule of international law concerning the extent of the jurisdiction of the coastal State over its adjacent waters other than a minimum rule whereby every coastal State exercises all the rights inherent in sovereignty over the waters adjacent to its territory to a distance of three miles, and partial jurisdiction beyond that distance in the case of certain specific interests".

Scelle has this to say[2]:

> "In reality there is no rule established by custom, any rules laid down by States, either unilaterally or more rarely by treaty, compliance with which they enforce within the limits of their power --- in short, there is anarchy".,

and Francois himself says[3]:

> "At the present time the three-mile limit, either alone or in combination merely with a contiguous zone for customs, fiscal, or sanitary control (the only contiguous zone which the International Law Commission declared its readiness to accept) is applied by the following states: Australia, Belgium, China, Denmark, Germany, Indonesia, Israel, Italy, Japan, Netherlands, Union of South Africa, United Kingdom, and the United States. Even in certain countries which have adopted the three-mile rule, doubts are expressed as to the possibility of maintaining that position", "the irresistible tide of economic, political and social interests", says Joseph Watley Bingham "is running against the Anglo-American three-mile doctrine, it is doomed" ".

Francois recommends[4] a belt of exclusive fishing rights for three miles and limited rights up to twelve miles. Article 3 of the Draft Regulation prepared by the International Law Commission is as follows[5]:

1 U.N. Doc A/CN.4/61 d 19 Feb 1953, at p 26.

2 Ibid

3 " p 27

4 " p 29

5 " p 10

> "The territory of the coastal state includes all of the air space over the territorial sea, as well as the bed of the sea, and the sub-soil",

and the comment, in part is as follows:

> "The rapporteur wishes to point out that the Commission decided to distinguish clearly between the rights of states over the continental shelf on the one hand, and their rights over the bed and sub-soil of the territorial sea on the other".

For the purposes of this study it does not appear to matter whether the belt is to be considered territory or whether the littoral State merely possesses a bundle of rights in connection therewith. The majority view seems to favour the territorial aspect. Certainly the Air Navigation Convention of 1919, in Article I, and the Chicago Convention of 1944 in Article II, support the territorial view, where territory is defined as including the territorial waters. Oppenheim[1] informs us that during the Hague Codification Conference in 1930 practically all States including Great Britain, Germany, Italy, and Japan, expressed themselves in favour of the territorial principle. Similarly, the American Institute of International Law declared that each American Republic enjoys the right of sovereignty over territorial waters[2].

In Attorney General for British Columbia versus Attorney General for Canada[3] the Judicial Committee of the Privy Council refused to pronounce on the nature of territorial waters on the ground that this was an unsettled matter as yet, and would go no farther than to assert that it was unwise to pronounce on their status until a conference of the powers could be called.

1 International Law, 7th Ed, p 443, Note 1.

2 Higgins & Columbo, op cit p 63.

3 (1914) A.C. 153 at p 174.

Historically, the three-mile rule was a child of expedience in that it was supposed to represent the utmost range of a cannon shot, but prior to this so-called rule being laid down we had what could be described as a tug-of-war commencing with the Roman law principle, or concept of complete freedom of the seas, which was gradually encroached upon until in the sixteenth century Spain and Portugal virtually divided the oceans between themselves with the aid of the Pope and the Treaty of Tordesillas[1]. It was at this time that Grotius wrote his famed Mare Liberum and Selden wrote his equally famous Mare Clausum, the net result of these two great works being the beginning of the end for claims to vast regions of the sea. In 1876 Great Britain took her final step which spelled out her present position by enacting the Customs Consolidation Act, which repealed the old Hovering Acts, of which more will be said later.

The United States, on the other hand, had, as far back as 1793, stated her position in two diplomatic notes handed to the British and French ministers, in which was stated in part "that the smallest distance to seaward claimed was the utmost range of a cannon ball, usually stated at one league"[2].

Finally, in the years 1924 to 1926 we find the United States concluding treaties with Great Britain, the Netherlands, Germany, Cuba, and Panama, wherein the contracting parties declared it was their firm intention to uphold the principle that "Three marine miles extending from the coastline outwards and measured from low-water mark, constituted the proper limits of territorial waters".

[1] Fulton, The Sovereignty of the Sea, p 5.
[2] See Jessup, the Law of Territorial Waters and Maritime

Higgins and Columbo have this to say[1]:

> "A review of the discussions held at the Hague Conference brings out with clearness the fact that the majority of the principal maritime States are emphatically in favour of the three-mile limit of territorial waters. This limit represents the minimum (underlining mine) distance which states are prepared to accept at present, and therefore more in accordance, than any other breadth, with the principle of the freedom of the seas. Any extension of the limit must necessarily 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".

In the United States versus California[2] the Supreme Court held that the United States had national dominion over the three-mile belt, and in the same judgment:

> "The three-mile rule is but the recognition of the necessity that the government next to the sea must be able to protect itself from dangers incident to its location. It must have powers of dominion and regulation in the interests of its revenue, its health and the security of its people from wars raged on or too near its coasts"

Part 2 - The Contiguous Zone

While we have shown we submit that the three-mile belt is universally recognized as a minimum rule, at least, in addition to these waters (commonly known as territorial waters) there is a belt that extends beyond them which we hope to show has been firmly established and recognized in international law. Jessup says[3]:

> "There is a vital distinction between the maritime belt, which is claimed as a part of the territory of the state, and the limited rights of control or jurisdiction claimed upon the high seas".

1 Higgins & Columbo, International Law of the Sea, 2nd Ed p 76.

2 1946, 332, 19 at p 34

3 The Law of Territorial Waters and Maritime Jurisdiction, p 33.

Today some writers hold the view that the three-mile limit is dead in view of modern technical developments and while this view may or may not be agreed with, the International Law Commission has this to say, in part, in respect to the exploitation of the sea-bed and sub-soil[1]:

> "The problem does not appear insoluble, provided the extension of the jurisdiction of littoral States to the high seas in the vicinity of their coasts, does not develop into a territorial jurisdiction, similar to the rights of sovereignty formerly claimed over the high seas, but is confined to a special jurisdiction over one or more of the natural elements distinguishable in the high seas; the stratosphere or atmospheric area, the surface of the sea, the sea depths, the bed and the marine sub-soil".

While this remark may not have the force of law, yet it is submitted that it is a recognition by the foremost international experts of our day that there must be some modification of the rigid three-mile territorial belt and the somewhat less certain belt of twelve miles for limited purposes. After all, even with the latter it is not easy to see what magic the figure 12 has, and has had in the past. It cannot be denied that great thought and effort have gone into the work of the Commission.

In Manchester versus Massachussetts[2] the United States Supreme Court said, in 1891:

> "We think it must be regarded as established that as between nations the <u>minimum</u> (underlining mine) limits of the territorial jurisdiction of a nation over tide waters is a marine league from its coast; that bays wholly within its territory, not exceeding two marine leagues in width at the mouth, are within this limit;

1 U.N. Document A/C.4/32 d 14 July 1950, at p 15

2 139 U.S. 240, at 257 and 258.

> and that included in this territorial jurisdiction is the right of control over fisheries, whether the fish be migratory, free-swimming fish, or free-moving fish, or fish attached to or embedded in the soil. The open sea within this limit is, of course, subject to the right of navigation and all governments for the purpose of self-protection in time of war or for the prevention of frauds on its revenue, exercise an authority beyond this limit" (underlining mine).

We find in Higgins and Columbo[1], that at the Hague Codification Conference of 1930, the committee submitted to its members a request for their views as to the limit of territorial waters:

> "The twenty states comprising Great Britain and the British Dominions, the United States, Belgium, China, Egypt, Estonia, Germany, Greece, Holland and Poland answered "three miles"and some accepted on condition the contiguous zone. A group of twelve states, amongst which were Brazil, Chile, Italy, Portugal, Spain, Roumania, Turkey, Uruguay and Jugoslavia, answered "six miles" and several of them required a contiguous zone. Four of the Scandinavian states asked for six miles for themselves, without proposing it for all countries".

H.A. Smith tells us[2], after referring to the Canadian Statute I Edward the Eighth, Chapter 30, which, in effect, proclaimed a contiguous zone, in respect of customs waters, for twelve miles, including the tradiomal three-mile belt, that:

> "the text of the Statute thus clearly asserts the claim to exercise jurisdiction over foreign vessels found hovering in the extended zone. The proclamation actually issued, which seems to have been drafted out for discussion with the United Kingdom, limits the operation of the section to ships registered in Great Britain and the British Empire, exclusive of the Dominions. In this way care has been taken to avoid

[1] Op cit, p 75.

[2] British Yearbook of International Law, 1939, at p 122.

> the occurence of incidents which might give rise to controversies with foreign powers. It remains true, nevertheless, that the statute formally asserts the right to interfere with ships under foreign flags in "customs waters", and it may therefore prove to be of controversial value in international disputes which involve the question of contiguous zones. It may well be asked whether the further controversy upon this question is really necessary. The Canadian statute, which follows the lines of similar legislation in many other countries, is dictated by a proved, practical need, for it is now a matter of common experience that the three-mile limit is often inadequate for the proper protection of legitimate national interests in time of peace. The Law of Nations, if it is to retain its authority, must show itself capable of responding to practical needs, and in one form or another, the principles of the contiguous zone must therefore obtain recognition".

From the foregoing, we submit the conclusion must be reached that international law today recognizes the existence of a maritime belt or area outside the territorial waters over which the coastal state may exercise a certain limited jurisdiction, generally called "The Contiguous Zone".

Part 3 - A Historical Survey of the Contiguous Zone

As we have indicated before, the notion of contiguous zones is by no means new. The British Hovering Acts[1], which began their existence at the beginning of the eighteenth century, were examples of legislation which could be termed, perhaps, drastic, but they were designed to win what then appeared to be an eternal battle against the smuggling trade. Generally

[1] In the following pages the laws and decisions of only two countries will be dealt with insofar as the historical aspect of the contiguous zone is concerned, namely, Great Britain and the U.S. These are, or were atthe time, the two major maritime powers and a review of their legislation and practice in dealing with this

> question should give us a pretty clear picture of what the law has been. As Hall says: (The Rights and Duties of Neutrals (1874) Introduction page 13) "It would be absurd to declare a maritime usage to be legally fixed in a sense opposed to the continued assertion of both Great Britain and the U.S. The acts of minor powers may often indicate the direction which it would be well that progress should take, but they can never declare actual law with so much authority as those done by the states to whom the moulding of the law has been committed by the force of irresistable circumstance".

speaking, in the eighteenth century, legislation was vague as to the exact limits of jurisdiction to be exercised by the littoral State, but in the next century legislation fixed more definite limits of jurisdiction over the smuggling craft of all nationalities, namely, two, three, and four leagues from the shore, as well as large areas of the sea known as the "Kings' Chambers". Other laws declared that certain conduct within the limits of the port or "anywhere at sea" constituted criminal offences[1].

We quote from Masterton's Introduction at page XVIII:

> "In tracing the development of smuggling legislation in its application to the marginal seas, it is evident that the distance seaward to which jurisdiction has been exercised, should not remain fixed, but that it has been altered from decade to decade as necessity required. Among those factors that have entered into the determination of that distance, and into the frequent changes of it found in the laws of some countries, there may be mentioned four in this connection:
>
> (1) The distance from which the smuggler hovered, operated, or became a menace to the revenue and legitimate trade;

[1] Masterton, Wm. E., Jurisdiction in Marginal Seas, p 5.

(2) The type and speed of his craft;

(3) The extent to which smuggling was carried on; and

(4) The commodity smuggled.

In other words, the point to be borne in mind is that the extent of jurisdiction for revenue purposes has been determined with a view to eradicating an evil without reference to the much discussed theories of "territorial waters", the "three-mile limit", or "cannon range".

We have quoted Masterton at this length in an endeavour to show that the claims to jurisdiction in maritime law were based on a present evil, real or imagined, that the nation concerned with felt duty-bound to itself to be rid of. There was a danger to the peace, order and good government of that nation - hence something had to be done.

In the case of Great Britain the necessity for the Hovering Laws was clearly explained by the Earl of Illay, in the House of Lords on February 22, 1739, when he said[1]:

"The liberty of searching the ships of foreigners on the high seas, on suspicion of piracy, is a liberty that is established and regulated by the law of nations alone; but the liberty which every nation enjoys, of searching, on suspicion of unlawful trade, the ships of foreigners that approach near to their coast without any necessity, is a liberty that is not only established by the law of nations, but is generally regulated by the particular laws or customs of each respective society. In this country it is established and regulated, not only by immemorial custom, but by several acts of Parliament; and it is impossible for us, by any precautions we can take at land, to prevent the exportation of our wool, the importation of prohibited goods, or the clandestine running of goods in upon us without paying the duties, unless we take the liberty of searching such ships, upon our own coasts, if we have just cause to suspect their being concerned in, or designed for, some such unlawful trade. This, my Lords, has been found by

[1] Parliamentary History of England from the earliest period to the year 1803 (Hansard), Vol 10, Column 1232.

experience to be true; and therefore by an act of the tenth and the eleventh of the late King William, it was provided that our admiralty should appoint two fifth-rate and two sixth-rate ships, and eight armed sloops, to cruise in the coasts of England and Ireland, to seize all ships and vessels exploiting wool to foreign parts. Now my Lords, if any of the men-of-war, or armed sloops thus employed, should see a French ship hovering or lying at anchor within a few leagues of our shore, and boats passing and re-passing between her and the land, are we to suppose that they are only to visit such ship, according to the rules prescribed by treaty, and to give entire credit to her passports, or sea-letters? If they did, they would always find her bound from some port of France, to some port in Norway or the Baltic; or from some port in Norway or the Baltic to some port of France; yet, nevertheless, she might be half loaded with our wool, and waiting at that place for the rest of her cargo; therefore, in such cases it is absolutely necessary to make some sort of search, and we have always done so, without any nations having complained of our making, by such a practice, any encroachment upon the freedom of their navigation and commerce.

The case, my Lords, is the same with regard to smuggling; it was found by experience that all the precautions we could take at land, would not prevent that pernicious trade, and therefore, we have, by several acts of parliament, enforced and regulated the right we have by the law of nations, of searching, as well as visiting, such foreign ships as approach our coasts, and give just cause for suspecting their being concerned in, or designed for carrying on any contraband trade. For this reason, we ought to be cautious of denying this liberty or privilege to any nation; for if we do, every nation in Europe will say to us 'with what measure ye mete, it shall be measured to you again'; 'as you will not allow us to search your ships upon our coasts, we will not allow you to search our ships upon your coasts'; and if by this means we should be debarred searching any foreign ship upon our own coast, it would be impossible for us to prevent smuggling, or the exportation of our wool. Not only the Dutch and French, but all Nations that had any use for it, would soon fall upon ways and means to steal from us as much of our wool as they could have occasion for, to the great prejudice, if not the utter ruin, of our woollen manufacture"

By the Act of 1736[1], we have it provided for the first time that jurisdiction is extended to four leagues and in addition, that a ship which had any foreign goods which were taken in at sea, could be forfeited, whether within or without the limits of any port[2].

In a report of a committee of the House of Commons[3] we find the following:

> "It is the opinion of the revenue boards, and of well-informed persons, that an extension of this distance (i.e. two leagues), would distress the illicit traders, by rendering a communication and exchange of signals with their associates on shore less easy, and that it would also give greater scope to the revenue cruisers in the execution of their duty :- They propose, therefore, that this distance should be extended to four leagues, conformable to Act 9, George the 2nd, Chapter 35, which forfeits goods taken out of any ship within the distance of four leagues. With regard to the Irish Channel, this distance might perhaps be unlimited".
>
> In order to prevent the mischiefs resulting from the practice of arming vessels for the channel trade in time of peace, it is proposed to your committee, that all vessels be made liable to seizure which are generally called cutters, sloops, luggers, shallops, or schooners, or vessels of any other description, whose bottoms are clincher-work built, and not employed in His Majesty's service, or under the admiralty of any foreign state, found hovering within four leagues of the coast, even through they shall exceed two hundred tons, or which shall have on board any carriage of swivel guns, or other arms or ammunition whatever ....."

From the foregoing report it was clear that there existed a need for new and more effective legislation, and from now on[4] the laws were designed to reach smuggling

1 9 George II, Chapter 35.

2 Masterton, op cit, p 28.

3 Parliamentary Papers from 1731 to 1800, Vol 36, No. 60.

4 Masterton, op cit, p 58.

on the high seas wherever it was carried on. As smuggling craft moved further away from shore, so new legislation followed them:

> "Parliament realized that the law could not remain cast in some mould or frozen within the bounds of a fixed zone, there to remain impotent, before the hosts of smugglers who chose to hover just outside this zone. The laws were adjusted and readjusted to meet a nation's need. There was no principle of international law to which they were made to conform".[1]

An act of 1784[2] provided in effect that any ship or vessel found at anchor or hovering within the limits of any port, or within four leagues of the coast, or discovered to have been within such limited distance (underlining mine) would be liable to forfeiture, provided it had on board goods in the quantities named in the Act. This would seem to be getting pretty close to what we know today as the doctrine of "hot pursuit".

Even the last-mentioned act was not considered adequate, for in ten years' time, namely, 1794, an act was passed[3] which brought large areas of the high seas within the jurisdiction of the Customs, and these areas, in some instances, included waters as far as fifty miles from land.

In the first quarter of the nineteenth century, which Masterton refers to as the "Golden Age of Smuggling"[4], the illicit trade went on with ever increasing vigour, but as the activities of the smugglers expanded, the long arm of the law was metaphorically stretched in order to contain these

1 Ibid.
2 24 George the III (2nd Session), Chapter 47.
3 34 " " " , Chap. 50.
4 Op cit p 72.

activities. Jurisdiction was extended over the English and Irish Seas, from four to eight, and finally on April the 5th, 1805, an act was passed extending jurisdiction for one hundred leagues from the coast.[1]

It should be observed that up to this point jurisdiction was claimed only when the suspected vessel was either owned wholly by British subjects or in part by such subjects, but in 1819 an act was passed conferring jurisdiction over foreign craft with one or more British subjects on board[2].

Previous legislation[3] had provided in addition that jurisdiction would be claimed where one-half the crew were British subjects, but not amounting to half those on board; consequently, the previous legislation had been aimed at foreign vessels as well as British vessels, provided that the foreign vessels came within the terms of the Act in respect of the number of passengers on board, or as to ownership. This new act cured this apparent defect. It would seem that Parliament was now openly claiming jurisdiction over foreign ships because the pretence of part ownership, or the majority on board being British subjects was no longer relied upon.

As has already been noted, the Act of 1805 extended jurisdiction in some cases to one hundred leagues. In 1807 an act had been passed[4] broadening the jurisdiction within

1 45 George the III, Chap 121.

2 59 " " " , " " .

3 eg 47 " " " (2nd Sess) Chap 66, Secs 3, 5 and 8.

4 47 " " " " " " "; see Masterton p 81.

the hundred-league limit, so that ships, if found hovering within that limit, that belonged in whole or in part to British subjects, or having one-half of the persons on board of British nationality, were forfeitable if they violated the Act, regardless of ownership.

The will of Parliament, up to the year 1876, was quite clear. We have touched only briefly on the legislation passed during this period, but suffice it to say, Parliament experimented until laws were found whose teeth were so sharp that eventually the heart was eaten out of the smuggling trade. The significant thing, though, it is submitted, is that during all this time, when Great Britain was asserting these extensive jurisdictions, there is no record of a foreign government lifting its voice in protest[1].

In 1876 the Customs Consolidation Act[2] was passed, which repealed all the acts in force up to this time, and today is the law of England with certain minor exceptions.

Even today, however, jurisdiction is asserted in certain instances of one, three and four leagues, and indeed, in respect of aircraft, the customs laws are not forgotten, for by the Air Navigation Order of 1949[3], Schedule 3 thereof, paragraph 12, makes applicable the Customs Consolidation Act to aircraft, so that with certain exceptions as contained in the Act, together with the order aforesaid, the entire act is now applicable to

1 See Masterton, p 140 and 148.

2 39 & 40, Victoria, Chapter 36.

3 Shawcross & Beaumont, Air Law, 2nd Ed, App 3.

aircraft[1]. For example, Section 179 of the Act makes applicable the laws with respect to forfeiture of ships having prohibited goods on board, or attached thereto, mutatis mutandis to aircraft. Similarly, Section 229 provides that where any offence shall be committed in any place, we repeat, any place in the air, such offence shall, for the purposes of the Customs Act, be deemed and taken to be, an offence committed in the air outside the United Kingdom in the same manner as offences committed on high seas, and while this latter is aimed evidently at the person, nevertheless, the principle of asserting jurisdiction beyond the territorial limits is evident. Here, too, no record can be found of any foreign government protesting in respect of this assertion of jurisdiction over aircraft or persons therein.

We return now to a brief survey of the American legislation. Prior to the Declaration of Independence, smuggling had been carried on along the coasts of the colonies. When the United States came into existence the problem of smuggling was immediately recognized, although[2] the smugglers did not have the ease of operation that they enjoyed on the English coast, for the reason that the Atlantic crossing was long and hazardous,

1 See Halsbury's Statutes of England, 2nd Ed, Vol 21, p 254.

2 Masterton, op cit 178.

and therefore required large vessels, which could easily be spotted and could not outsail the swift revenue cutters which had been set up by the American authorities.

Perhaps the first act of the United States, as such, was passed in 1790[1], which asserted jurisdiction for customs purposes by Section 11 thereof, to four leagues off the coast, and Section 12 provided for the forfeiture of a sum not exceeding $500 by the master of any ship or vessel who should not, upon his arrival within four leagues of the coast, produce a manifest as required by the Act. Further, the application of this section was not limited to vessels belonging in whole or in part to citizens or inhabitants of the United States, as was the case in the earlier English statutes.

The first case before the Supreme Court of the United States was Church v. Hubbart[2]. This was an action on an insurance policy written on the vessel "Aurora", which had been seized by the Portuguese four or five leagues off the Brazilian coast, for alleged illicit trade with Portuguese possessions. There was a clause in the policy which relieved the insurers in the event that the loss arose from illicit trade with the Portuguese. The judgment held that the underwriter was relieved from all liability under the policy and it is necessary to quote at some length from the judgment of Chief Justice Marshall:

> "The authority of a nation within its own territory is absolute and exclusive. The seizure of a vessel within the range of its cannon by a foreign force is an invasion of that territory, and is a hostile Act which it is its

[1] Statutes at Large, (2nd Session), Chap 35, p 145.

[2] 1804, 2 Cranch, 187.

duty to repel. But its power to secure itself from injury may certainly be exercised beyond the limits of its territory. Upon this principle the right of a belligerent to search a neutral vessel on the high seas for contraband of war is universally admitted, because the belligerent has a right to prevent the injury done to himself by the assistance intended for his enemy; so, too, a nation has a right to prohibit any commerce with its colonies. Any attempt to violate the laws made to protect this right is an injury to itself which it may prevent, and it has a right to use the means necessary for its prevention. These means do not appear to be limited within any certain marked boundaries, which remain the same at all times and in all situations. If they are such as unnecessarily to vex or harass foreign lawful commerce, foreign nations will resist their exercise. If they are such as are reasonable and necessary to secure their laws from violation, they will be submitted to.

In different seas, and on different coasts, a wider or more contracted range, in which to exercise the vigilance of the Government, will be assented to. Thus, in the Channel, where a very great part of the commerce to and from all the north of Europe, passes through a very narrow sea, the seizure of vessels on suspicion of attempting an illicit trade, must necessarily be restricted to very narrow limits; but on the coast of South America, seldom frequented by vessels but for the purpose of illicit trade, the vigilance of the Government may be extended somewhat further; and foreign nations submit to such regulations as are reasonable in themselves, and are really necessary to secure that monopoly of Colonial commerce, which is claimed by all nations holding distant possessions.

If this right be extended too far, the exercise of this will be resisted. It has occasioned long and frequent contests, which have sometimes ended in open war. The English, it will be recollected, complained of the right claimed by Spain to search their vessels on the high seas, which was carried so far that the "Guarda Costas" of that nation seized vessels not in the neighbourhood of their coasts. This practice was the subject of long and fruitless negotiations, and at length of open war. The right of the Spaniards was supposed to be exercised unreasonably and vexatiously, but it never was contended that it only could be exercised within the range of the cannon from their batteries. Indeed, the right given to our own revenue cutters, to visit vessels four leagues from our coast, is a declaration that in the opinion of the American Government, no such principle as that contended for has a real existence".

Jessup's comment to this judgment[1] is as follows:

> "It is evident that in this case Marshall, speaking for a unanimous court, considered that a nation might lawfully exercise authority upon the high seas subject only to the test of reasonableness".

This view of the Chief Justice was altered, however, in the case of Rose v. Himley[2], where he stated the proposition that no municipal law can be operative outside the municipal territory. Later still, however, in Hudson v. Guestier[3], Marshall held that Rose v. Himley was now overruled.

In a comparatively recent American case[4], it was said:

> "The high seas are the territory of no nation; no nation can extend its laws over them; they are free to the vessels of all countries. But this has been thought not to mean that a nation is powerless against vessels offending against its laws which remain just outside the three-mile limit ..... these expressions have been questioned by writers in international law, and are perhaps not entirely consistent with views which have been expressed by our State Department. But Church v. Hubbart has never been overruled, and I am bound by it until the law is clearly settled otherwise. Moreover, the principle there stated seems to me such a sensible and practical rule for dealing with cases like the present, that it ought to be followed until it is authoritatively repudiated. This is not to assert a right generally of search and seizure on the high seas, but only a limited power, exercised in the waters adjacent to our coasts, over vessels which have broken our laws. The mere fact, therefore, that the Grace and Ruby was beyond the three-mile limit, does not of itself make the seizure unlawful and establish a lack of jurisdiction. As to the seizure: the line between territorial waters and the high seas is not like the boundary between us and a foreign power. There must be, it seems to me, a certain width of debatable waters adjacent to our coasts. How far our authority shall be extended into them for the seizure of foreign vessels which have broken our laws is a matter for the political departments of the government, rather than for the courts to determine.

1 Op cit, p 82.

2 1807, 4 Cranch, 241.

3 1808, 4 Cranch, 293.

4 1922, 283 Federal, p 473 (The "Grace & Ruby").

> It is a question between governments; reciprocal rights and other matters may be involved (in re Cooper, 143 U.S. 472, 503; the Kodiak (DC) 53F126, 130). In the case of the Cagliari Dr. Twiss advised the Sardinian government that in ordinary cases, where a merchant ship has been seized on the high seas, the sovereign whose flag has been violated waives his privilege, considering the offending ship to have acted with mala fides towards the other state with which he is in amity, and to have consequently forfeited any just claim to his protection. He considered the revenue regulations of many states authorizing visit and seizure beyond their waters to be enforceable at the peril of such states, and to rest on the express or tacit permission of the states whose vessels may be seized. (1 Moore's Digest, 729-730). It seems to me that this was such a case. The Grace and Ruby had committed an offence against our law, if my view as to the unlading is right, and was lying just outside the three-mile limit for purposes relating to her unlawful act. In directing that she be seized there, and brought into the country to answer for her offence, I am not prepared to say that the Treasury Department exceeded its power".

The facts in the "Grace and Ruby" case are briefly as follows; She was a British vessel, owned and registered in Yarmouth, Nova Scotia, and commanded by a British subject. She sailed from the Bahamas with a Saint John, New Brunswick, clearance in February, 1922, having a cargo of liquor, part of which was owned by one Sullivan, of Salem, Massachussetts, who was on board. From the Bahamas she proceeded directly to a point about six miles off Gloucester, Mass., where Sullivan was set on shore, and the schooner stood off and on, keeping always more than three miles from land. Two days later Sullivan came out to her in a motor boat manned by two men, to bring provisions to the schooner and to take on shore part of her cargo. At this time she was about ten miles from land. About 8,000 bottles of whiskey were there transferred from the ship to the motor boat and taken to shore at night. The attempt to land the liquor

was discovered by revenue officers and two days later a revenue cutter picked up the Grace and Ruby and brought her into Boston, where she was proceeded against for forfeiture, for smuggling liquor in violation of American law[1].

In 1922, legislation was passed known as the Tariff Act of 1922[2], which broadened the jurisdiction to four leagues[3], and in one case, namely, the "Muriel E. Winters"[4] it was held that the act of unlading within twelve miles, even though the vessel was never bound to a port, subjected that vessel and the cargo to forfeiture under the Act.

Another American case, similar to the "Muriel E. Winters", was that of the French vessel "Cherie"[5].

In the case of the "Island Home"[6], which was another one of seizure within twelve miles from shore, the judge said this:

> "Conceding that the criminal laws of the United States such as the National Prohibition Act, are not effective more than three miles from the shore, nevertheless, from the earliest times, the United States has claimed and exercised jurisdiction over the marginal sea to at least four leagues for the purpose of enforcing her revenue and customs laws. Jurisdiction was so assumed by the act of March 2nd, 1799 ..... and continued to the present day by the various Tariff and Customs Administrative Acts. Great Britain also claimed the same extent of territory by the Hovering Acts and doubtless every Maritime Nation claims the same right".

1 See also the case of the Henry L. Marshall, 1922, 286 Fed. 260.

2 42 Statutes at Large, Part 1, p 858.

3 At the time of the decision in the Grace and Ruby this legislation had not come into force.

4 1925, 6 Fed (2nd) 466.

5 1926, 13 Fed (2nd) 992.

6 1926 - 13 Fed (2nd) 382.

In the case of the "Panama"[1], the vessel was seized outside the twelve-mile limit, which was laid down by statute, and by the treaty between the United States and Great Britain[2] for seizure of rum-runners outside the three-mile limit. It was alleged that she had five days previously delivered to the Port of New Orleans, liquor, through small shore boats sent out from the shore by pre-arrangement. It was pleaded that the court had no jurisdiction by virtue of the fact that she was outside the twelve-mile zone, but the court said that the right of the executive to seize and search for violations of our laws is not limited to any particular distance from shore. This decision is evidently not looked upon with too much favour in the United States and Jessup[3] is quite severe in his criticism and remarks that the court in not thinking that the treaty changed this right, i.e., the right of the executive to seize and search for violations of the law, says this:

> "The gist of this decision seems to be that so far as our courts are concerned, the effect of the treaties was wholly nugatory. Since this view was a complement of other views that were believed to be fallaceous, it also was thought to be without merit".

This decision is all the more surprising in view of the generally accepted American constitutional principle that a treaty is the supreme law of the land and is, generally speaking, self-executing.

1 1925 - 6 Fed (2nd) 326.

2 U.S. Treaty Series No. 685.

3 op cit, p 348.

Part 4 - Modern Trends, Diplomatic Correspondence and Cases

We think it of interest to refer to some of the diplomatic correspondence arising out of the case of the "Grace and Ruby" previously referred to. It will be recalled that the court in this case believed that it was for the political departments of the government, rather than for the courts, to determine how far the authority of the State should be extended beyond its territorial waters for purposes such as seizing for violations of customs. In a reply to a note from the British Government protesting the manner in which the case of the "Grace and Ruby" was handled[1] Secretary Hughes, replying to this protest on January 18th, 1923, said:

> "I have the honour to state that consideration has been given to the statements contained in your note and the conclusion has been reached that the government of the United States should adhere to the position it has previously taken that foreign vessels outside the three-mile limit may be seized, when it is established that they are using their small boats in illegal operations within the three-mile limit of the United States. This conclusion is supported by the position taken by the British Government in the case of the British Columbian schooner Araunah, which was seized off Copper Island, by the Russian authorities, in 1888, because it appeared that members of the crew of the schooner were illegally taking seals in Bhering Sea by means of canoes operated between the schooner and the land, and it was affirmed that two of the canoes were within half a mile of the shore. Lord Salisbury stated that Her Majesty's Government were of opinion that, even if the Araunah at the time of the seizure, was, herself, outside the three-mile territorial limit, the fact that she was, by means of her boats, carrying on fishing within Russian waters without the prescribed licence, warranted her seizure and confiscation according to the provisions of the municipal law regulation the use of those waters. I may add that it is not understood on what grounds the decision of His Majesty's Government in this matter was reached, in view of the position taken by Lord Salisbury in the Araunah case and the statement in

1 Taken from Jessup op cit, p 246; original source, MS Records, Department of State Press Release, February 20, 1927.

> your note No. 781, of October 13, 1922, that His Majesty's Government 'are desirous of assisting the United States Government to the best of their ability in the suppression of the traffic and in the prevention of the abuse of the British flag by those engaged in it' ".

In an address before the Council of Foreign Relations in New York, on January 23rd, 1924[1], Secretary Hughes, while reiterating the United States traditional support of the three-mile limit, asserted that the power of a littoral state to exercise jurisdiction in such cases (that is, the liquor cases) as those under discussion was not limited by the exact boundaries of its territory, i.e., the three-mile limit.

> "It does not follow, however, that this government is entirely without power to protect itself from the abuses committed by hovering vessels. There may be such a direct connection between the operation of the vessel and the violation of the laws prescribed by the territorial sovereign as to justify seizure, even outside the three-mile limit. This case may be illustrated by the case of "hot pursuit", where the vessel has committed an offence against those laws within territorial waters and is caught while trying to excape. The practice which permits the following and seizure of a foreign vessel which put to sea in order to avoid detention for a violation of the laws of the state whose waters it has entered, is based on the principle of necessity for the effective administration of justice"..... "And this extension of the right of the territorial state was voted unanimously by the Institute of International Law in 1894. Another case was one where the hovering vessel, although lying outside the three-mile limit, communicates with the shore by its own boats in violation of the territorial law. Thus, Lord Salisbury said, with respect to the British schooner Araunah, "Her Majesty's Government were of the opinion that even if the Araunah at the time of the seizure were herself outside the three-mile limit, the fact that she was, by means of her boats, carrying on fishing within Russian waters without the prescribed licence, warranted her seizure and confiscation according to the principles of municipal law regulating the use of those waters. A case similar to this was that of the Grace and Ruby".

[1] 18 American Journal of International Law, p 229.

In the case of Croft versus Dunphy[1] the Judicial Committee of the Privy Council said in part as follows, per Lord McMillan:

> "To what distance seaward the territory of the state is to be taken as extending is a question of international law upon which their lordships do not deem it necessary or proper to pronounce. But whatever be the limits of territorial waters in the international sense, it has long been recognized that for certain purposes, notably those of police, revenue, public health and fisheries, a state may enact laws affecting the sea surrounding its coast to a distance seaward which exceeds the ordinary limits of its territory. There is the weighty authority to this effect of Lord Stowell in the "le Louis": 'Maritime states have claimed a right of visitation and inquiry within those parts of the ocean adjoining to their shores, which the common courtesy of nations has for their common convenience allowed to be considered as parts of their dominions for various domestic purposes. Such are our Hovering Laws, which, within certain limited distances, more or less moderately assigned, subject foreign vessels to such examination'. "This special latitude of legislation in such matters is a familiar topic in the textbooks on international law".

In the report itself, however, Lord Stowell seems to have gone further[2]. Where a French vessel had been captured on the high seas by a British ship Lord Stowell said this:

> "Upon a principle much more just in itself and more temperately applied, maritime states have claimed the rights of visitation and inquiry within those parts of the ocean adjoining their shores, which the common courtesy of nations has for their common convenience, allowed to be considered as parts of their dominions for various domestic purposes, and particularly for fiscal and defensive regulations more immediately affecting their safety and welfare. Such are our Hovering Laws, which within certain limited distances more or less moderately assigned, subject foreign vessels to such examination. This has nothing in common with the right of visitation and search upon the unappropriated parts of the ocean.

[1] (1933) A.C., 156.

[2] 2 Dodson Admiralty Reports, 210, at p 245.

> A recent Swedish claim of examination of the high seas, while confined to foreign ships bound for Swedish ports, and accompanied in a manner not very consistent or intelligible, with disclaimer of all right of visitation, was registered by our government as unlawful and was finally withdrawn".

In re Piracy Jurie Gentium[1] Lord Sankey said in part:

> "International law was not crystallized (i.e. in 1696, referring to the case of Rex versus Dawson), but is a living and expanding code....a body of international law is growing up with regard to aerial warfare and aerial transport, of which Charles Hedges (Chief Judge in Dawson's case) in 1696 could have had no possible idea".

In the case of Molvan v. the Attorney General of Palestine[2] Lord Simonds, speaking for the Judicial Committee of the Privy Council, said in part as follows:

> "There is room for much discussion within what limits a state may, for the purpose of enforcing its revenue or police or sanitary law, claim to exercise jurisdiction in the sea outside its territorial water. It has not been established that such a general agreement exists on this subject as to satisfy the test laid down by Lord Alverstone, in West Rand Central Gold Mining Company v. the King[3]".

Lord Simonds, however, apparently accepted the principle that a state had a right to exercise such jurisdiction; the only question raised was that there was no general agreement as to how far out to sea such jurisdiction might be exercised.

1 (1934) A.C. 586.

2 (1948) A.C. 51.

3 (1905) 2 KB 391, at 407. Lord Alverstone laid down that in order to prove a rule of international law it was necessary to show (1) that the particular proposition put forward has been recognized and acted upon by our country or (2) that it is of such a nature and has been so widely and generally accepted that it can hardly be supposed that any civilized state would repudiate it. The mere opinions of jurists, however eminent or learned, that it ought to be so recognized, are not in themselves sufficient. They must have received the express sanction of international agreement or gradually have grown to be part of international law by their frequent, practical recognition in dealings between various nations.

In the Fisheries Case[1] Judge Alvarez said:

> "Each State may determine the extent of its territorial sea and the way in which it is to be reckoned, provided it does so in a reasonable manner, that it is capable of exercising supervision over the zone in question, and of carrying out the duties imposed by International Law, that it does not infringe rights acquired by other states, that it does no harm to general interests and does not constitute an 'abus de droit'".

Another aspect of the Fisheries Case is the recognition by the International Court of Justice of the right of the state by virtue of its unusual coastline, to draw what are known as baselines from point to point; that is, the point at which the territorial sea is determined, rather than the historical low-water mark beginning. This was a complete departure from the traditional minimum three-mile rule we have previously mentioned, measured from low-water mark. Referring to the unusual coastline of Norway, the court said as follows[2]:

> "In such circumstances the line of the low-water mark can no longer be put forward as a rule requiring the coastline to be followed in all its sinuosities; nor can one speak of exceptions when contemplating so rugged a coast in detail. Such a coast, viewed as a whole, calls for the application of a different method. Nor can one characterize as exceptions to the rule the very many derogations which would be necessitated by such a rugged coast. The rule would disappear under the exceptions. The principle that the belt of territorial waters must follow the general direction of the coast makes it possible to fix certain criteria valid for any delimitation of the territorial sea; these criteria will be elucidated later. The court will confine itself at this stage to noting that, in order to apply this principle, several states have

1 International Court of Justice Reports 1951 p 150.

2 Ibid, pp 129 and 130.

deemed it necessary to follow the straight baselines method and that they have not encountered objections of principle by other states. This method consists of selecting appropriate points on the low-water mark and drawing straight lines between them. This has been done, not only in the case of well-defined bays, but also in cases of minor curvatures of the coastline where it was solely a question of giving a simpler form to the belt of territorial waters."

Part 5 - Views of Writers and Others

The views of writers are invariably as one in favour of a contiguous zone, or rather that the idea of a contiguous zone is a settled principle in maritime law, and the following is a brief summary of those views:

Wharton[1] says:

"The sovereign of the shore has a right, by international law, to require that no action be taken by ships of other friendly nations by which subjects should be injured or the peace of the shore disturbed.....this does not subject to a domestic jurisdiction all vessels passing within nine miles off our shores, nor does it by itself give us an exclusive right to fisheries within such a limit, nor would it authorize the executive to warn off within these extended limits, foreign ships, by a proclamation similar to that of President Jefferson, in 1807, so as to prevent them from communicating with the shore. For the latter purposes the three-mile limit is the utmost that can be claimed".

Twiss[2] says this:

"A state exercises, in matters of trade, for the protection of the maritime revenue, and in matters of health for the protection of the lives of her people, a PERMISSIVE JURISDICTION, the extent of which does not appear to be limited within any certain marked boundaries, further than that it cannot be exercised within the jurisdictional waters of any other state, and that it can only be exercised over her own vessels and over such foreign vessels as are bound to her ports. If, indeed, the revenue laws or the quarantine regulations

[1] 1 Wharton's Digest, pp 114 & 115.

[2] Edition of 1861 at p 261.

of a state should be such as to vex and harass unnecessarily foreign commerce, foreign nations will resist their exercise. If, on the other hand, they are reasonable and necessary they will be deferred to "ob reciprocam utilitatem". In ordinary cases, indeed, when a merchant ship has been seized on the open seas by the cruiser of a foreign power, when such ship was approaching the coasts of that power with an intention to carry on illicit trade, the nation, whose mercantile flag has been violated by the seizures, waives in practice its right to redress, those in charge of the offending ship being considered to have acted with mala fides, and consequently to have forfeited all just claims to the protection of their nation".

Piggott has this to say[1]:

"The question is, whether a state may, for a particular purpose, create an area outside its territorial waters within which it may declare certain acts to be offenses, even when committed by foreign vessels; such vessels being liable to "chase" on the high seas and to seizure. In this there is no question of toleration. It was the right of the state to take these measures of protection, that Cockburn, C.J., referred to in Rex versus Keyn. It was the right recognized and submitted to by other nations that Marshall, C.J., asserted in Church versus Hubbart. It was the right that Sir W. Scott emphasized in le Louis. Higher judicial authority to support the principle of international law cannot be found ..... I therefore submit that the Hovering Acts are sound in principle and warranged by the law of nations, so long as the essential conditions are fulfilled, that the provisions of the law and the distance to which they operate seaward, are reasonable".

Fulton[2], in 1911, said:

"With regard to the other questions of sovereignty, i.e., other than a belt for neutrality purposes, or exclusive rights in the seas washing the coasts of the country, it is becoming more and more recognized that there is no reason in nature why the boundary for one purpose should be the boundary for all purposes. Just as the three-mile limit is now obsolete in respect of belligerents and neutrals in time of war, so it is inadequate in all cases with regard to the protection and preservation of the sea fisheries".

1 Piggott's Nationality, Part 2, p 45.

2 The Sovereignty of the Sea, p 22.

Jessup[1], in speaking of the doctrine of freedom of the seas says:

> "This principle is subject to recognized exceptions. In time of war, a belligerent may lawfully exercise the high sovereign right of "visit and search" in denial of the usual freedom but without destroying the principle. Why should the thought of somewhat analagous acts in time of peace be rejected without consideration? The facts are that nations commonly exercise as of right an exclusive power over the three-mile zone and frequently exercise a limited power further from shore or on the high seas. The problem is really one of nomenclature".

Gidel[2] has said:

> "In reality, there is no rule of international law concerning the extent of the jurisdiction of the coastal state over its adjacent waters other than the minimum rule whereby every coastal state exercises all the rights inherent in sovereignty over the waters adjacent to its territory to a distance of three miles, and <u>partial jurisdiction beyond that distance in the case of certain specific interests</u>". (Underlining mine).

Two views of statesmen are worth noting, namely, Sir Charles Russell and Mr. Phelps. Sir Charles Russell, representing the British in the Fur Seal Arbitration, was asked what a state would do if they had notice of a foreign ship crossing the ocean for the purpose of violating its revenue laws replied:

> "It would probably do something before the vessel got within the three-mile limit if it was proved to be necessary, relying upon the non-interference of the state to which that foreign vessel belonged not to make any complaint[3]".

And Mr. Phelps, in the same Arbitration, asserted that if a nation's laws were enforced beyond the marginal seas, it would be permissible:

> "if they are reasonable and necessary for the defence of the national interest or right[4]".

1 Op cit, p 75.

2 UN Doc. A/CN 4/61 dated 19 Feb 1953.

3 Moore's Arbitrations, p 903.

Jessup has said[1]:

"Nations have quite generally, if not universally, attempted to exercise some authority on the high seas adjacent to their territorial waters. During the last war many neutral nations evidenced an inclination to assert a right to protect themselves by measures taken upon the high seas. Belligerents are apparently at this time not yet ready to acknowledge the validity of such war-time claims. Regarding the peace-time acts of extra-territorial jurisdiction or control, as applied particularly to customs matters, foreign acquiescence has usually been forthcoming if such acts were reasonable. As the writer has indicated in Chapter 2, it is not believed that customary international law has as yet stamped as lawful any definite category of such acts. The question, then, is, can an agreement be reached by international convention, i.e., is the time ripe for international legislation?".

Gidel[2] in a more recent work says this:

"La rapidité des avions, la hauteur à laquelle ils se tiennent et le moyen d'investigation indiscrète que la téléphotographie met à leur disposition exigent que l'Etat riverain puisse prendre à leur égard dans l'intérêt de sa sécurité des mesures de protection beaucoup plus poussées que celles qui peuvent lui donner satisfaction lorsqu'il s'agit de navires. Ce n'est donc pas seulement l'air surplombant la zone contigüe ou l'Etat riverain, a établi des mesures à l'égard des navires dans l'intérêt de sa sécurité; qui doit être considéré comme "air contigüe" et comme susceptible de prêter aux mesures de controle ou d'interdiction nécessaires en vue d'éviter sur son territoire ou dans sa mer territoriale les atteintes à sa sureté de la part d'aéronefs étrangers; c'est un espace sensiblement plus vaste et dont l'étendue peut être déterminée par l'Etat riverain de manière à prévenir de telles atteintes".

Masterton[3] has this to say:

"In the discussions of the English and American Law, diplomatic correspondence, and treaties, the distinction between the general jurisdiction of a state over a narrow strip of water near its coast and a wider special jurisdiction to protect its fiscal interests has been repeatedly pointed out. The so-called

1 Op cit p 459.

2 "Le droit international public de la mer" (1934 tome III, Book III, Ch. III p 461.

3 Op cit p 375.

> Hovering Laws have existed in the codes of most maritime states, including England and the United States, for many years and they have been maintained as distinct from the so-called zone of sovereignty or territorial waters near the Coast".

In Moore[1] we find, in reporting the Behring Sea Arbitration of 1893, that the precise limits of jurisdiction outside territorial waters have not been settled, yet no nation that has become a party to a treaty fixing three miles or cannon-shot as the limit, has ever agreed to surrender the right of self-defence beyond that distance, and the British representative said that while these laws had been acquiesced in by the United States and Great Britain, yet they do not extend the limit of territorial waters or assert any general claim to dominion beyond such waters.

As Masterton himself says[2]:

> "It is submitted that the real basis for the special jurisdiction and the test of its soundness from the standpoint of international law, is found in the theory of interests. The facts of life - needs of nations - must be considered in this connection. The State clearly must exercise jurisdiction in the waters adjacent to its coasts for the purpose of protecting its various interests".

In the so-called Schucking Report[3] we quote Article 2 of the draft convention recommended in the report:

> "The zone of the coastal sea shall extend for three marine miles (60 to the degree of latitude) from low-water mark along the whole of the coast. Beyond the zone of sovereignty, States may exercise administrative rights on the ground either of custom or vital necessity. There are included the rights of juris-

1 International Arbitrations, Vol 1, pp 892, 893.

2 Op cit, p 381.

3 Schucking was the rapporteur of a committee of experts set up by the League of Nations. For the report see 20 A.J.I.L. Supplement, p 141.

diction necessary for their protection. Outside the zone of sovereignty no right of exclusive economic enjoyment may be exercised. Exclusive rights to fisheries continue to be governed by existing practice and conventions".

And we find this comment[1]:

"States are in the habit of asserting special rights outside any fixed boundaries to meet various needs which arise unexpectedly".

In another scholarly and exhaustive study[2] we find the following Draft Article 20 on the law of territorial waters:

"The navigation of the high sea is free to all States. On the high sea adjacent to the marginal sea, however, a State may take such measures as may be necessary for the enforcement within the territory or territorial waters of its customs, navigation, sanitary or police laws and regulations, or for its <u>immediate protection</u> (underlining mine)".

In the comment to this draft article we find the following:

"It would seem to serve no useful purpose to attempt to state what is adjacent in terms of miles as the powers described in this article are not dependent upon sovereignty over the locus and are not limited to a geographic area which can be thus defined. The distance from shore at which these powers may be exercised is determined not by mileage but by the <u>necessity</u> (underlining mine) (see Chapter V) of the littoral State and by the connection between the interests of its territory and the acts performed upon the high seas"

and later on[3]

"the recognition that such measures are proper when they can be shown to be necessary for the enforcement of a State's customs, navigation, sanitary or police laws, or for its immediate protection, does, in some degree, modify the general principle of the freedom of navigation on the high seas, but the modification here is narrowly restricted and it is a modification which would seem to be entirely reasonable in view of the fact that it represents the long-established practice of many States".

1 Ibid, p 145.

2 Harvard Research on International Law, 1929, American Journal of International Law, Vol 23, Supplement at p 333.

3 Ibid, p 344.

We have found it necessary to go to considerable and perhaps tedious lengths to illustrate the historical aspect of maritime law and the trends it has taken in the past and while this part is by no means conclusive or exhaustive, we have endeavoured to show how this law has developed as circumstances required. It is submitted that the concept commonly held by many that there is a three-mile territorial limit for all purposes and that is the end of it is dead. It seems clear that the practice of States and the decisions of courts lead to the opposite conclusion. It is submitted that the most that can be said of the three-mile limit over which a state enjoys "sovereignty", subject always to the right of innocent passage, is a minimum rule only and outside that limit is a zone of the high seas adjacent to that limit in which a State may, and indeed does, exercise special jurisdiction over shipping, domestic as well as foreign. The next part will be devoted to an attempt to show the present-day practice of States and thereby arrive at a picture, more or less clear, of what the law is today.

## Part 6 - Maritime Law Today

As we have indicated in the last Part, it would be well at this stage to endeavour briefly to show what the maritime law is today in respect of territorial waters and the high seas, and in addition to what the law actually is, we will endeavour to show what States and writers consider the laws should be. We suggest that it could be successfully argued that the law as expressed heretofore in this Chapter is in no way restrictive of the law of today, whatever it may be; on the contrary,

it would appear that claims made by States today, which may or may not have hardened into a customary rule of international law, go perhaps even farther than the decisions of courts, the writings of publicists, and the practice of States, than they did in the past.

The International Law Commission of the United Nations, for example, has been engaged over the past few years in an attempt to draw up a draft convention on the regime of the high seas which eventually will be acceptable to all States, or at least those states that are members of the United Nations, and which will form a multilateral treaty, settling finally, it is hoped, the status of the high seas in international law.

From the report of this Commission on their works from the 1st of June to the 14th of August, 1953[1], we find the following:

> "The exercise of the rights of the coastal State, as here formulated, within the contiguous zone, does not affect the legal status of the sea outside the territorial sea, or the air space above the contiguous zone. Air traffic may necessitate the establishment of an air zone over which the coastal State may exercise control. However, this question is outside the subject of the regime of the high seas".

And from the same report[2] Chile has this to say:

> "The Government of Chile considers that the limit prescribed in Article 4 of the International Law Commission's draft should not be established, but that the contiguous zone should be extended and broadened so that the coastal state may take the steps necessary to prevent, within its territory or territorial waters, infringement of its customs, fishing or sanitary regulations, and attacks on its political or economic security by foreign vessels. The government of Chile believes this zone should be at least one hundred nautical miles measured from the coast".

[1] U.N. Doc, Supp No. 9 (A/2456), p 19, para 113.

[2] Ibid p 46.

Article 4 referred to provides for a limitation of twelve miles and also limits the reasons for a contiguous zone, being limited to customs, immigration, fiscal and sanitary matters.

The government of Jugoslavia[1] has this to say:

> "The Jugoslav government cannot at all agree with the formulation of this article, because it takes no account of the legitimate, defensive rights of the coastal states. The establishment of this zone without authorizing the coastal state to protect the security of its shores, in strictly limited and exactly specified scopes, is untenable in the view of the Jugoslav government".

In Francois' Fourth Report on the Regime of the High Seas[2] we are told that the Danish and Swedish governments, on the other hand, were of the opinion that the contiguous zone should not be established unilaterally by a coastal State, but only by treaties between the interested States. Other States, however, support the Commission's proposals that there should be control beyond the territorial waters unilaterally, and the following States have supported this principle with minor objections as to detail: The Netherlands, Norway, United Kingdom; and there is an interesting side-note, where the Jugoslav government[3] had proposed to the Commission that a contiguous zone should be provided for security purposes. 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, <u>if the State's security was, in fact, threatened, it could take security measures in accord-</u>

1 Ibid p 71.

2 U.N. Doc. A/CN.4/60.

3 Ibid p 122.

ance with its right of self-defence, not only within a twelve-mile zone, but, if necessary, even beyond that limit. (underlining mine).

The following States, however, and, it is submitted, properly so, have included in their unilateral legislation with respect to contiguous zones, the element of security. These States are Argentina, Bulgaria, Chile, Ecuador, El Salvador, Greece, Honduras, Iran, Italy, Poland, USSR, Venezuela and Jugoslavia[1]. Security, as here contemplated, means in the military sense.

One may be frankly puzzled at the refusal of the International Law Commission to consider the establishment of the contiguous zone for security purposes in a multilateral treaty. In addition to the reasons advanced by the Commission, it may be that where the security of the State is threatened, it would not be desirable for such State to be bound by the provisions of a multilateral treaty as to the extent of a contiguous zone, for security purposes, and consequently, where security was a factor and measures were taken just outside the zone contemplated by such treaty, a State would not wish to run the risk of committing an international delict by going outside the field laid down in the treaty. It may be that the International Law Commission recognized the unpleasant possibilities and for this reason refused to consider such a contiguous zone.

Be that as it may, however, the Fourth Report of the Commission[2] makes it clear that in the view of the Commission

[1] United Nations Laws & Regulations on the Regime of the High Seas, ST/LEG/SER.B/1.

[2] Op. cit. p. 13.

international law does not prohibit States from exercising a measure of protective or preventive jurisdiction for certain purposes over a belt of the high seas contiguous to its territorial sea and, indeed, the Commission is quite blunt in its view that it would be impossible to challenge the right of States to establish such zone. There is, however, some doubt as to the extent of the zone, and here, the Commission, significantly enough, reserves any comment on the legal status of the air space above such a zone, and we quote:

> "Air traffic control may necessitate the establishment of an air zone over which the coastal State may exercise control[1]".

A distinguished Dutch writer[2], in referring to the inter-American Treaty of Reciprocal Assistance[3], signed on September 2nd, 1947, holds the view that this treaty reflects the modern strategical conception that:

> "a front line is not the national frontier itself but some line outside, which, if passed by an aggressor, endangers the security of the State. This idea is expressed in General McArthur's address before Congress on April 19th, 1951. We quote the following passage, page 2: "Prior thereto, the western strategic frontier of the United States lay on the littoral line of the Americas, with an exposed island salient, extending out through Hawaii, Midway and Guam, to the Philippines. The salient proved, not an outpost of strength, but an avenue of weakness, along which the enemy could and did attack. The Pacific was a potential area of advance for any predatory force intent upon striking at the bordering land areas. All this was changed by our Pacific victory; our strategic frontier then shifted to embrace the entire Pacific Ocean, which became a vast moat to protect us as long as we held it. Indeed, it acts as a protective shield for all the Americas and all free lands of the Pacific Ocean area".

1 UN Doc Supp No. 9 (A/2456) p 19 para 113.

2 Mouton, "The Continental Shelf, 1952".

3 See Chapter on Necessity and Self-Preservation below.

The foregoing would seem to lend ample support to the doctrine of a contiguous zone for security purposes on a unilateral basis.

The views of the Government of Chile with respect to a contiguous zone we thinkare worth while quoting[1]:

> "By the term 'adjacent zone' or 'contiguous zone', international law recognizes the existence of a maritime belt, or area, between the high seas and the territorial waters, over which a coastal State may exercise certain limited rights of a generally administrative nature relating to sanitary and customs control, safety of navigation and the protection of fishing. Its legal nature should not be confused with that of the territorial sea, which is a part of the territory of the coastal State and therefore subject to its sovereignty. (underlining mine). The total jurisdiction of the coastal State is exercised over the territorial sea, but it has only partial and special powers over the contiguous zone. In the draft prepared by the United Nations International Law Commission the contiguous zone appears as a belt of the high seas, contiguous to the territorial sea, over which the coastal State may exercise the control necessary to prevent infringement within its territory, or territorial waters, of its customs or sanitary regulations and any attack of its security by foreign vessels".

After noting that the contiguous zone in Article 4 of the draft, is set at twelve miles, and remarking on the inadequacy of this distance, Chile goes on to say:

> "Moreover, how can these twelve miles be reconciled with the vast extent of ocean prescribed in Article 4 of the Inter-American Treaty of Reciprocal Assistance, an area of sea classified by doctrine as contiguous zone. The limit adopted by the International Law Commission seems contrary to the new tendency in international law not to give the zone an exact or well-defined limit, but rather to consider the jurisdiction which the coastal State must exercise on the high seas". (underlining mine).

[1] U.N. Doc, A/CN.4/60, d 19 February, 1953, p 92.

> "The Government of Chile considers that the limit prescribed in Article 4 of the International Law Commission's draft should not be established, but that the contiguous zone should be extended and broadened so that the coastal State may take the steps necessary to prevent, within its territory or territorial waters, infringement of its customs, fishing or sanitary regulations, and attacks on its political or economic security by foreign vessels. The Government of Chile believes that this zone should be at least one hundred nautical miles measured from the coast".

Jugoslavia's objection to Article 4[1] is based on the ground that the Article does not go far enough, and states in part:

> "The establishment of this zone without authorizing the coastal State to protect the security of its shores in strictly limited and exactly specified scopes, is untenable in the view of the Jugoslav Government. This question and the pro et contra reasons have been thoroughly discussed at the Hague Codification Conference in 1930, so that it would be unnecessary to repeat them now".

The United Kingdom[2] on the other hand was opposed to the principle of the contiguous zone as a matter of policy and objected to any extension to the breadth of territorial waters or to the exercise of jurisdiction beyond territorial waters, but watered it down to this extent, that they are satisfied on the basis of established practice that Article 4 is acceptable under international law, provided:

(1) that the jurisdiction within the contiguous zone is restricted to customs, fiscal or sanitary regulations only;

(2) such jurisdiction is not exercised more than twelve miles from the coast;

(3) the article is read in conjunction with another article stating that the territorial waters of the State shall not extend more than three miles from the coast unless in any particular case the State has an existing historic title to a wider belt.

[1] Ibid p 96.

[2] Ibid

Sweden[1] adhered to the view that contiguous zones have been established unilaterally by States, but it had grave doubt as to the right of such states to exercise control over foreign ships outside its territorial waters without the consent of the country to which the ship belonged.

France[2] agreed in principle with the idea of the contiguous zone, but with the reservation that such right of control as is envisaged in a contiguous zone should on no account be held to constitute an extension of the State's sovereignty beyond its territorial waters, and the Union of South Africa[3] agreed in principle with Article 4 so long as the control and jurisdiction of the littoral State should not go beyond what was necessary to prevent the infringement of its customs, fiscal or sanitary regulations, and in no case should it be exercised beyond the twelve-mile limit.

While the foregoing represents the views of the States mentioned from a policy standpoint, we have three States who actually enacted legislation recently with respect to contiguous zones, namely, Egypt, Lebanon and Jugoslavia.

In the case of Egypt we find[4]:

> "For the enforcement of statutes and regulations relating to security, navigation, revenue and health, maritime surveillance may be exercised in the contiguous zone outside the coastal sea, extending for a further distance of six nautical miles beyond the six nautical miles measured from the baselines of the coastal sea; but no provision of this article shall affect the rights of the Kingdom of Egypt with respect to fishing".

1 Ibid p 97.

2 Ibid p 98.

3 Ibid p 98.

4 U.N. Legislative Series, Laws and Regulations on the Regime of the High Seas, ST/LEG/SER.B/1 - original source, Degree Concerning the Territorial Waters of the Kingdom

And in the case of Lebanon[1]:

> "For the purposes of the application of penal law, the following shall be assimilated to Lebanese territory:
>
> (1) the territorial sea to the distance to 20 kilometres from the shore measured from the line of the low tides;
>
> (2) the air space over the territorial sea; ....."

In the case of Jugoslavia[2]:

> "No foreign nationals may engage in fishing on the coastal seas of the Federal People's Republic of Jugoslavia, or in the maritime zone four nautical miles wide, calculated from the outer edge of the territorial waters of the FBRY to the open sea, unless it is otherwise provided by law, by an international agreement, or by a convention which has been concluded by the Federal People's Republic of Jugoslavia".[3]

Part 7 - Conclusions

From the foregoing we submit that not only has the principle of a contiguous zone been accepted in the past, but that such zone, whatever its limit may be, is even more acceptable today in international law, and indeed, it may even be said that such zone is vital to the life of any State.

1 Ibid, original source, Penal Code, enacted by legislative decree No. 340-N1, dated 1 March 1943, Journal Officiel No. 4104, Supplement, p 2, "Article 17".

2 Ibid, original source, General Act on Maritime Fishing, dated 23 January 1950, Article 4.

3 See also appendix III for a list of those States who have enacted legislation in respect of contiguous zones from time to time and the distances seaward over which jurisdiction was claimed.

Young[1] states as follows, in referring to the draft prepared by the International Law Commission:

> "Of the four articles in Part 2 of the Commission's draft, that dealing with contiguous zones does no more than re-state a rule already widely recognized (underlining mine); that for customs, fiscal and sanitary purposes, a State may exercise measures of control up to a distance of not more than twelve miles from its coast".

Oppenheim[2] holds the view that insofar as revenue and sanitary laws are concerned, the

> "comity of nations admits tacitly that laws such as the Hovering Laws are in conformity with international law, provided that foreign States do not object to them, and provided that no action is taken within the territorial maritime belt of another nation ..... However, since municipal laws of the above kind have been in existence for more than a hundred years, and have not been opposed by other States, a customary rule of the law of nations may be said to exist which allows littoral States, in the interest of the revenue and sanitary laws, to impose certain duties in such foreign vessels bound for their ports as are approaching, although not yet within, their territorial maritime belt".

We have gone to considerable and perhaps tiresome length, it is admitted, to show that the contiguous zone in maritime law, that is the extent thereof, is by no means settled. Opinions between States may vary but it can be said, it is submitted, that it is generally agreed that a principle does exist to the effect that a contiguous zone in Maritime Law is now an established rule. How then, it may be asked, does the contiguous zone in Maritime Law affect the contiguous air space zone? There is ample authority for the traditional doctrine

1 The American Journal of International Law, Vol 46, No. 1.

2 International Law, Lauterpacht, 7th Ed, Vol 1, p 449.

of the so-called "freedom of the seas", which is modified, we submit, in proportion to the extent the seas are used by more than one ship, for at the risk of being facetious, if true freedom of the seas existed, then there would be only one ship on the seas, but the minute a second ship comes on the seas, then the freedom of the first ship is to some extent diminished. We have shown also, we submit, that this doctrine is modified to the extent that littoral States are permitted in international law to exercise certain limited jurisdictions on the high seas, and while these jurisdictions have been confined in the main to customs and sanitary regulations, it seems, indeed, strange that the most important consideration of all, i.e., the security of the State, has not been dealt with from a multilateral viewpoint, although as we have pointed out previously, it may be that where the security of a State is involved, the International Law Commission of the United Nations considered that unilateral action was the only practicable way of dealing with any given set of circumstances. We should point out that this is only a surmise on our part.

To return to the main question, how does the contiguous zone in Maritime Law affect the contiguous zone in Air Law? The open or high seas in Maritime Law are either "res communis" or "res nullius", subject to what we have said with respect to the doctrine of freedom of the seas and the contiguous zones. We think it can be accepted, therefore, as a customary rule of international law at least, that air space or flight space

above any particular area on the surface, by analogy, would enjoy at least the same status as the surface itself, from an international law viewpoint. For example, Article 1 of the Chicago Convention makes it clear that such space above the territory of a contracting state is subject to the sovereignty of the territory below, or rather, subject to the sovereignty of the State whose territory lies below. And territory, by Article 2 of the Convention is defined as including territorial waters. No mention is made in the Convention, however, of the status of such space over the high seas, and the only attempt in the Convention to deal with the high seas at all is contained in Article 12, which lays down that the International Civil Aviation Organization is charged with the duty and the contracting States are bound to obey rules set up for navigation in the air space over the high seas. There is no mention of a contiguous zone as such, and this last-mentioned article is the closest approach in the Convention to the idea of a contiguous zone.

It may be argued, therefore, that if contiguous zones are a recognized principle in international law, insofar as the sea is concerned, the flight space above those zones should enjoy at least the same status, in the absence of general agreement to the contrary, and indeed all indications would lead one to the conclusion that this status at least is enjoyed in the flight space above. It follows, therefore, that the air space or flight space over the contiguous zones at least, is either "res communis" or "res nullius" as the seas below.

If we argue that this flight space is "res nullius", then the first comer may appropriate such space for his own purposes, whatever they may be, and that would appear to end the matter. On the other hand, if it is argued that this space is "res communis", then, so long as the rights of other States are not infringed, no complaint can be made by any other State. The foregoing argument is based on the assumption that the status of the flight space over the high seas is a derivative one, i.e., that it enjoys such status by virtue of the status of the seas below, and no more. It is submitted, however, in spite of the foregoing, that this is not necessarily the case and the status of such space above the high seas is not necessarily, and indeed, perhaps should not be, bound or restricted in any way by the status of the waters below. We think we can safely say that the status of the air or flight space enjoys at least the same status as the waters below, but we must remember that this air space or flight space is a completely new medium of transport and if it should be in any way connected with the sea, it is by mere accident, and the rules governing transportation by air over the high seas could, and perhaps should be, as different from the rules governing transportation on the surface of the seas as the rules governing transportation on land, for example, rail and road transportation.

We think it true to say that CADIZ and ADIZ, which impose certain rules for air transport over the high seas, in no way interfere with surface transport. For example, rules could be formulated that all aircraft painted red should fly upside down

for the last fifty miles, when they are approaching our coasts. Ridiculous as such a rule would be, it would in no way interfere with Maritime Law and shipping. These rules would have the same effect on shipping as they would have on rail and road transport, which would be nil. As to the extent of the contiguous air space zone, this in itself is an illustration of the vast difference between the rules governing transport in the air and those on the surface, for things happen much faster in the air and it is necessary to have a much wider belt for purposes of identification and control, in the same manner as it was necessary under the old British Hovering Laws to increase the width of their jurisdiction for preventing smuggling as the speed of the smuggling craft increased. It might well be mentioned here 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 nations, may not be adequate, in view of the technical advances made in self-propelled guided missiles. In the recent words of Mr. John Foster Dulles the time may now be at hand for an "agonizing re-appraisal" of Maritime Law for presumably there would be nothing to prevent a ship with hostile intentions from approaching the coasts of Canada, or the United States, armed with such missiles, with atomic war heads, heaving to, for example one hundred miles off the coast, which is, a great deal more than one hour's sailing distance of any ship that exists today, discharge her rocket load at a big target like New York, and create incalculable damage, if not destroying, the entire metropolitan area.

As has been stated, flight space is a completely new medium of transport. This is, it is submitted, now recognized by virtue of the Chicago Convention of 1944, in which it was put in conventional form that a State enjoys sovereignty over the air space above it. The Paris Convention or Air Navigation Convention of 1919 had adopted the same principle[1]. Prior to this latter convention, however, no general agreement existed as to the status of the air space and John C. Cooper says[2]:

> "Between 1901 and the outbreak of World War I in 1914, the question was actively discussed. Various theories were brought forward. These included complete sovereignty through the whole air space over national territory, with resulting political control of flight and national air space; no sovereignty, with consequent complete freedom of flight; differing zone systems, generally with the upper air space free and the lower stratum next to the earth's surface under national control; variants of these. Questions of national security, rather than economic problems, were the basis of most of these early discussions[3]".

There is yet another distinction between Air Law and Maritime Law, and that distinction is this: while Maritime Law has generally recognized the right of innocent passage in territorial waters, no such right apparently exists in respect to the flight space above those waters. From the foregoing,

1 Article 1 reads "The high contracting parties recognize that every power has complete and exclusive sovereignty over the air space above its territory. For the purpose of the present convention the territory of the state shall be understood as including the national territory, both that of the mother country and of the colonies, and the territorial waters adjacent thereto".

2 Air Transport and World Organization, Yale Law Journal, Vol 55, 1946, p 1191.

3 The word "sovereignty" as here used is to denote the exclusive power of disposition and control which each nation possessing it exercises over its own land territory.

therefore, we submit that generally speaking the flight space over the surface derives at least the same status from the surface, but is not necessarily bound by restrictions on the surface, or indeed, as has just been illustrated, neither is it required to yield the privileges that the law of the surface affords, for example, the right of innocent passage. Further, even if it could be said that air law, in respect of flight space over the high seas, was bound by the rules applicable in Maritime Law, it may well be that considerations which motivated the thinking of yesterday, in respect of Maritime Law, may be completely outdated today, and today's considerations may be, and no doubt will be completely outdated tomorrow. International Air Law at the moment is an infant juridical being, going through a stage of evolution, the process of which may cause considerable growing pains.

## CHAPTER V

## NECESSITY AND SELF-PRESERVATION

### Part 1 - The Military Facts of Life

We have mentioned in the previous chapter that these contiguous air space zones are vital from a military point of view. But even today we are not fully cognizant, perhaps, of the incalculable damage that could be done by combining modern jet aircraft with nuclear weapons.

In addition to being a new medium of transport for peaceful purposes, flight space offers a terrifying avenue over which a potential enemy could send his hostile aircraft, and the numbers reaching a target or targets would be limited only by those available to such an enemy, plus the successful warning, interception and destruction by defending forces.

The latest and most distant radar warning plan, of which the public has knowledge on this continent, is known as DEW, and is a joint effort between Canada and the United States, and when completed will pick up unknown or hostile aircraft coming in from the north at roughly two thousand miles north of the United States-Canada border. At first glance this might seem a safe, comfortable distance, and would seem to give the defending forces plenty of time to cope with any invading aircraft, assuming they are identified two thousand miles away from the border, and consequently would have that distance to travel to reach the targets, but the hard military facts of life are that even assuming the distant warning unit picked up the aircraft when it was two thousand miles or more from, for example, Chicago or Toronto, the defenders at those cities would have approxima-

tely only three hours warning of an attack, and some hostile aircraft would be bound to get through to the targets, even under ideal conditions from the defender's point of view. From a purely military standpoint, and assuming that there were sufficient squadrons of interceptors available, the problem of getting civilians and other non-combatants to places of safety from the metropolitan areas is a vital task and a frightening prospect. If one has ever attempted to enter or leave a large metropolitan area during rush-hour traffic, for example, one is familiar with the frustrating delays and annoyances that one experiences. In a situation such as we have described above, where you have three hours warning to clear the whole city, in effect, the problem would be multiplied a thousandfold and it would not be merely a problem of getting out to the suburbs, but would mean getting away for a distance of miles from the target area, as the damaging effects of modern thermo-nuclear bombs extends over an unbelievably wide radius. It is no secret, either, that anti-aircraft guns, even the most modern ones, are no longer any defence against an attack of this nature, for the very reason that if the bomber is within range of the guns, it is already too close and the damage, perhaps to a lesser extent, it is true, will have been done. The only effective defence, therefore, is interception and destruction by defending fighter aircraft or guided missiles, and this before the attackers have come near to the target, and depends vitally on adequate identification in point of time.

Thus, the most important consideration of all, that is, the very existence of the state, makes these identification zones to sea a necessity. In considering the need for such zones seaward, "Time" Magazine, in an article on the defence of the North American Continent[1] states that the normal two hundred mile range of detection provided by radar in most cases would give very short notice of an attack. In other words, radar stations on the coast would extend outwards only approximately two hundred miles, and Time goes on to say that the Air Defence Command of the United States will not, with present installations, guarantee any warning at all in the case of hostile attack. It becomes apparent, then, that even the present limits of CADIZ and ADIZ are obsolescent if not obsolete. We are informed in the same article that on the east coast a chain of some twenty-five radar stations called Texas Towers, because they resemble oil-drilling platforms in the Gulf of Texas, are to be anchored on the continental shelf up to 125 miles off shore. But whether it is proposed to extend the compulsory zones of identification beyond those presently in existence is not known at the present time. According to Time, however, on both coasts, that is the east and west coasts of North America, flights of RC-121C's bulging with six tons of radar equipment, will soon maintain patrols around the clock, although it is not stated how far out these patrols will extend. In any event, however, an unknown aircraft could be detected, for example, one thousand or more miles off the coast, and tracked in until it got within the identification zone, whereupon, it would be compulsory for it to identify itself, or, in the alternative,

[1] Issue of December 20, 1954, p 16.

to be met with interceptors at a good safe distance from shore and consequently any intended target. In addition to the damage that could be created by an atomic or nuclear device from heat and blast, there exists a perhaps even more frightening possibility which has been recently labelled in the press as "fall-out". In an article in the Ottawa Journal[1] under the by-line of Joseph L. Myler and, and datelined Washington, United Press, he describes "fall-out" as radioactive atomic fragments and dust sifting down from the explosion cloud, and alleges that it could poison a region of four thousand square miles or larger. His article was based on a report issued by the State of California and deserves quotation at some length:

> "This new important anti-personnel effect of the H-bomb, the California study said, presents an urgent reason for re-examining all previous disaster planning.
>
> Authoritative sources here said today that the report's basic assumption is in substantial agreement with secret data on super bomb effects brought back from the Pacific Proving Ground after last Spring's H-bomb test series.
>
> These sources point out that the California Civil Defence Office has access to some of the world's foremost authorities on radiation and other atomic bomb effects. They are the scientists working in the University of California Radiation Laboratory at Berkeley.
>
> The California Report was issued last December 23rd and has just recently come under study here. It assumes that Russia can deliver atomic weapons ranging in power up to twenty million tons of TNT equivalent. There have been unofficial reports that the Atomic Energy Commission tested a weapon of that magnitude at Bikini last year.
>
> Given such a bomb, severe to total damage or destruction is probable out to a minimum of seven to eleven miles from the detonation point, the California report said. Lesser damage from blast and fire could occur out to forty miles away.

[1] Issue of February 19, 1955.

> The March 1st H-bomb explosion at Bikini last year spread radioactive fall-out more than one hundred miles from the test site. But neither the AEC nor any other federal agency until this week published an authoritative report on effects of the super bomb".

The article concludes with five propositions, they are:

(1) fall-out in dangerous amounts may spread downwind from the H-bomb-burst for distances of fifty to three hundred miles, depending on windspeeds aloft;

(2) the fall-out path may vary from ten to fifty or more miles in width;

(3) dangerous radioactivity is to be expected from fifteen to twenty miles of the burst in all directions, regardless of local weather conditions;

(4) intensity of fall-out radioactivity will diminish sharply with time and distance, but for defence planning purposes it is unwise to count on operations during the ensuing several days or longer in areas of heavy fall-out; and

(5) it will be unwise to plan on the tenability or usability of any place or facility within twenty-five to forty miles in any direction from therme nuclear (H-bomb) bursts.

In addition, the report estimated that in the event of an H-bomb attack, ten to twenty percent of California's total area would be significantly affected by fall-out radioactivity.

When one considers the possible effects of such a fall-out on water supplies or food supplies, for example, it makes a terrifying prospect.

In another report in the same paper[1] by James M. Minifie and also datelined Washington we learn that Mr. Val Peterson, head of the Federal Civil Defence Administration, testified before the Senate Armed Services Sub-Committee studying civil

[1] Ottawa Journal dated February 28, 1955.

defence, that with intensive training and education in what to do and how to do it, it was possible to evacuate cities of three quarters of a million population given about four hours warning (underlining mine), and he went on to say that neither the training or the warning are at present to be had. Assuming this to be so, therefore, CADIZ and ADIZ, and indeed the Pine-Tree and Mid-Canada line and the contemplated Dew Line are even now inadequate for purposes of evacuating potential target cities of a population of a quarter of a million or more, and consequently the only practicable means of defence at the moment is early identification in point of time and interception and destruction by fighter forces or guided missiles, or both. Even assuming an attack from the Arctic, and complete interception and destruction of hostile forces prior to their reaching heavily populated areas, Mr. Minifie states in his article that testimony was given before the same Senate Armed Services Sub-Committee that a medium-sized hydrogen bomb rated at ten megatons, which is equivalent to ten million tons of TNT, could (a) kill everybody and destroy everything by heat and blast within ten miles from the point of impact, or about three hundred square miles; (b) kill every animal and human by radioactive fall-out in an area of some seven thousand square miles, unless they remained under adequate shelter for the first two days, and then evacuated the area; (c) render unuseable all surface water originating in or crossing (underlining mine) such an area.

Then he goes on to say:

> "The first conclusion now being drawn from these facts is that the continental defence plan which envisages interception of bombers with accompanying jettisoning of bombs in the comparatively thinly populated western plains of Canada and the United States would in fact have the effect of paralyzing the chief food production area of the continent. Fall-out, sifting down in prevalent northwestern winds would reduce the prairie farms to a zooic wilderness in which only plants survived. Saskatchewan, for example, has about ninety six thousand square miles of farm land. It would not take the fall-out from many H-bombs to take care of that at seven thousand square miles apiece".

Again, he alleges in the same article that Mr. Peterson testified that under successful major attack, if evacuation was successful, there might be seventy million Americans out in the countryside, homeless, foodless and well-nigh hopeless. We have stated earlier in this work that serious consideration might even now have to be given to extending the distances seaward of CADIZ and ADIZ, and assuming these articles to reflect the truth, or even only half of the truth, it can be seen that perhaps the time is even now at hand when the distances laid down by CADIZ and ADIZ are obsolescent, if not obsolete militarily, and afford no absolute protection against enemy aircraft coming in from the flight space over the high seas.

<u>Part 2 - The Nature of Necessity combined with Self-Preservation</u>

From the foregoing we submit that we have shown that a real necessity exists, militarily speaking at any rate, for the establishment of CADIZ and ADIZ. We shall endeavour to

combine the doctrine of necessity with the doctrine of self-preservation and thereby justify the establishment of these two zones under the rules of International Law.

The doctrine of necessity, combined with self-preservation, is favoured over the better-known theory of self-defence for the reason that, in the writer's judgment at any rate, self-defence connotes some positive effort on the part of the State to repel an attack, when such an attack is either imminent or in being, whereas necessity and self-preservation, as is understood by the writer, is that theory that permits a State on those grounds, to build up a set of circumstances that would make such an attack impossible, and consequently, discourage or deter any ulterior designs of a threatening enemy.

In the draft declaration on rights and duties of states prepared by the International Law Commission of the United Nations[1], Article 12, thereof states as follows:

> "Every state has the right of individual or collective self-defence against armed attack".

Indeed, the right of self-defence is inherent in any sovereign state and is implicit in all its dealings with other states[2], and so in the negotiations leading up to the Kellogg-Briand Pact, Secretary of State Frank B. Kellogg said this[3]:

1 U. N. Doc A/1251, p 67.

2 See Art. 51 U.N. Charter which however qualifies the right to the extent that measures of self-defence may continue as of right only until the Security Council takes its measures which conceivably reserves the power to judge and if necessary suspend the measures taken by the State or States in self-defence in the first instance.

3 Briggs, the Law of Nations, p 978.

> "Every nation is free at all times, regardless of treaty provisions, to defend its territory from attack or invasion, and it alone is competent to decide whether circumstances require recourse to war in self-defence. If it has a good case the world will applaud and not condemn its action".

Article 51 of the United Nations Charter states in part as follows:

> "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".

Then it goes on to make provision for reporting to the Security Council. Nonetheless, however, the right is inherent at least in the first instance[1]. So, too, in the American Treaty of Reciprocal Assistance[2] which as of 1951 was in force between twenty-one American republics, and the Western European Treaty for Collaboration and Collective Self-Defence (Benelux)[3], which was signed at Brussels on March 17th, 1948, contemplate an armed attack on one or more of the parties to the Treaty before the doctrine of self-defence comes into play. It is interesting to note that when we examine the North Atlantic Treaty, which was signed at Washington on April 4th, 1949, Article 3[4], thereof, provides the first departure from this principle of self-defence and gets closer to what we are endeavouring to point out as necessity coupled with self-preservation being the governing factor rather than self-defence as contemplated by Article 51 of the Charter, for Article 3 states as follows:

1 But cf. Kelsen "The Law of the United Nations" p 791 ff

2 U.S. Dept. of State Publication 3016.

3 Command 7599.

4 T.I.A.S. 1964.

"In order more effectively to achieve the objectives of this Treaty, the parties, separately and jointly, (underlining mine) by means of continuous and effective self-help, and mutual aid, will maintain and develop their individual and collective capacity to resist armed attack". (Underlining mine).

Article 5[1] of the same Treaty is the equivalent of the articles in the other treaties referred to dealing with the right of self-defence, and indeed specifically refers to Article 51 of the Charter of the United Nations. It may be of some interest to recall that while CADIZ and ADIZ did not come into effect until 1950, as early as 1948 thinking on the American Continent was along the lines of some means of effective air defence, and one might be forgiven the suspicion, and it is no more than that, that Article 3 of the NATO Treaty may have had its conception in this type of thinking, insofar as in this right of collective, preventive self-defence is written into the Treaty.

Part 3 - The Doctrine of Necessity

The Doctrine of Necessity is not new in International Law and goes back at least to the time of Machiavelli and, though we do not cite Machiavelli as an authority, we think it of interest historically to mention him[2].

[1] The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all; and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defence recognized by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic Area.

Any such armed attack and all measures taken as a result thereof shall immediately be reported to the Security Council. Such measures shall be terminated when the Security Council has taken the measures necessary to restore and maintain international peace and security.

[2] taken from "Works", Translated by Alice Farnworth, 2nd Ed, London 1775.

"There has been a dispute, it seems, for some time, which may be at least very probably attended with bad consequences, betwixt the community of Vinca and your jurisdiction on one side, and the people of Fornole, who are subject to the Marquis of Massa, on the other, on account of Mount Rutainia ..... we hereby order you to acquaint the said Marquis as soon as possible, that you have a Commission from us to treat and confer with him in behalf of our subjects at Vinca, on the spot, concerning the lands in dispute, and after an ocular survey, and hearing the claims on both sides, to determine in a summary way, taking good care at the same time, however, to support the just rights of our subjects in a proper manner. But if he still persists in shuffling and evading a fair accommodation, as usual, and will come to no reasonable composition in favour of his people, but suffers them to use force and violence, as they have hitherto been accustomed to do, you are then (since it is lawful to repel force by force) to send forth Grannesino, Captain of the Battalion di Castigline, and employ the forces under his command to prevent our subjects at Vinca from having any further violence committed upon them, contrary to all justice and equity, taking heed to act rather upon the defensive than the offensive, and to support our people instead of attacking others. We would have you nevertheless, in the first place, to make use of all gentle and persuasive arguments; according to your usual prudence, in order to bring about a fair and amicable adjustment in the matter".

The first classical publicist we shall cite as authority is Alberico Gentilli, (born 1552)[1], who, while speaking of the laws of war, and indeed, appears to be confining his remarks to war, did say this, in part, in speaking of honour and justice:

"And yet it would seem that cases may exist in which injustice would be tolerated for the sake of advantage. Have I not said that it should be permitted for the sake of honour? ..... A just and unavoidable necessity makes <u>anything</u> (underlining mine) lawful ..... moreover, when justice is but slightly violated, he who is aiming at a great advantage is all the more deserving of excuse .....".

[1] Classics of International Law - Carnegie Endowment for International Peace, Vol 2 (Translation) p 351.

The next great publicist who should be mentioned is Richard Zouche, who was born in 1589 in Wiltshire, England, and who, in discussing the question of whether Elizabeth justly assumed protection of the Netherlands against the King of Spain, declared that:

> "fearing also lest the power of the Spaniard might spread more dangerously than ever, in territories which were almost contiguous to her own realm, and conveniently situated for effecting an invasion of England, she resolved that religion called her to succor the persecuted people of the Netherlands and prudence to take thought for the safety of the people committed to her charge, by frustrating the disastrous machinations of her enemies. Accordingly, she openly undertook the protection of the Netherlands"[1].

The views of the next great publicist in respect of the doctrine of necessity are those of Cornelius van Bynkershoek, who was born in 1673[2], and who said, in dealing with the right of eminent domain of the sovereign:

> "And if the public highway is destroyed by a flood of water from a stream, or the fall of a building, the nearest landowner must afford a passage, according to Javolenus's extracts from Cassius. As much as taken from the land of the neighbouring owner as the road requires, and this, the public necessity demands".

Pufendorff, who was born in 1632[3], held that necessity was exceptional by its nature, and was not to be employed unless there was actual danger, and that it was imminent, and

[1] Classics of International Law, Carnegie Foundation for International Peace, 1911, Vol 2 (translation), p 113.

[2] Classics of International Law, Carnegie Foundation 1930, Vol 2 (translation), p 220.

[3] Book 2, Chapter 6, p 202, Basil Kennett's Translation, 1729.

that the act complained of was necessary to avert the danger. And while it is true that Pufendorff applies his rules to individuals only, he maintained that there was no distinction between the law of nature and the law of nations. Pufendorff's philosophy appears to have been not that he admitted that a rule of law existed, and did the circumstances warrant the suspension of the rule, but rather, first things first, i.e. an emergency had arisen and what course was proper under the circumstances, irrespective of any rule of law. We think it worthwhile to quote Pufendorff[1]:

> "Now our business on this subject lies chiefly in examining and stating the necessity of safety, and considering what force it hath to exempt any action from the obligation of Common Laws, that is, whether we may not sometimes do things forbidden, and omit things commanded by the Laws, when we are (not by our own Fault) cast into such Straights, that we cannot otherwise secure our own Preservation? And here it is apparent, that the Favour, the Right, the Leave, or whatever it is that in such Cases we attribute to necessity, doth spring from this single Principle, that it is impossible for a Man not to apply his utmost Endeavour towards preserving himself; and that therefore we cannot easily conceive or suppose such an Obligation upon him, as ought to Outweigh the Desire of his own Safety".

Pufendorff's philosophy may not be conducive to good law, but Pufendorff lived in difficult times. In other words, according to Pufendorff the plea of necessity could only successfully be advanced when a set of exceptional circumstances made the unusual action necessary.

1 Ibid p 202.

Grotius himself, who was born about 1600, says in his famous "de Jure Praedere[1]:

> "Indeed, as we observed at the outset, necessity is the first law of Nature".

In de Jure belli ac pacis[2], Grotius says:

> "In war things which are necessary to attain the end in view are permissible".

Also in de Jure Belli ac Pacis[3], it would seem that Grotius said that any laws may be broken in cases of extreme and imminent peril for to quote:

> "Even some lawsof God, although stated in general terms, carry a tacit exception in cases of extreme necessity",

and finally[4]:

> "that in cases of necessity men have the right to use things which have become the property of another".

Wolff, born 1679, inclined to the view that in cases of necessity one nation acquired a right to the grain, for example, of another nation, during a period of unendurable famine, that a nation had the right to seize ships, horses and other goods for the purpose of warding off imminent danger, and even went so far as to state that a nation had the right to seize maidens from another nation for the purposes of procreation. But we feel this is carrying the doctrine a little too far, unless the nation pleading the necessity was suffering from an unendurable famine of maidens. Wolff's reasoning, however, is worth while quoting[5]:

1 Classics of International Law, Carnegie Foundation for International Peace, 1950, Vol I (translation) p 73.

2 Classics of International Law, Carnegie Foundation for International Peace, Vol II, Book 3, (trans)(1925) p 599.

3 Classics of International Law, Carnegie Foundation for International Peace, Vol II, Book 1 (trans)(1925) p 148.

4 Ibid Book II (trans) p 193.

5 Classics of International Laws - Carnegie Foundation for International Peace, (Trans) Vol. 2, p 174.

"Since by nature some right belongs to an outside nation over those things which are subject to the ownership of another nation, if, in case of an emergency it should happen that the necessary use of those things is absolutely denied it, since, consequently, only extreme necessity, which cannot be avoided in another way, makes a place for this right, since, moreover, this necessity itself turns the right of seeking into the right of compelling another nation to do or to give; the right of necessity of nations is a perfect right, consequently the force is legal, whether it be secret or open, which is employed for obtaining that which is denied the one asking it, or which cannot be asked for on account of imminent danger ....."•
"The right of necessity has frequent application in war ....., nevertheless, instances can occur in time of peace also ....."•

The last great publicist we shall mention is Vattel, who attacked the problem a little differently from the others, in that his reasoning appears to be that the first duty owed by a State is to itself, and anything consequently done with the intention of carrying out that duty justifies it, vis a vis, other states. Vattel, who was born in 1714, is perhaps the last of the classical publicists. We quote as follows[1]:

"In the act of association, by virtue of which a multitude of men form together a state or nation, each individual has entered into engagements with all, to promote the general welfare; and all have entered into engagements with all to promote the general welfare; and all have entered into engagements with each individual, to facilitate for him the means of supplying his necessities, and to protect and defend him. It is manifest that these reciprocal engagements cannot otherwise be fulfilled than by maintaining the political association. The entire nation is then obliged to maintain that association; and as their preservation depends on its continuance; it thence follows that every nation is obliged to perform the duty of self-preservation ..... If a nation is obliged to preserve itself, it is no less obliged carefully to preserve all its members. The nation owes this to itself, since the loss of even one of its members weakens it, and is injurious to its preservation. It owes this also to the members in particular; in consequence of the very act of association; for those who compose a nation are united for their defence and common advantage ..... Since, then,

[1] Book 1, Chap 2, p 5, Chitty's Ed, 1834.

> a nation is obliged to preserve itself, it has a right to everything necessary for its preservation (underlining mine) ..... A nation or state has a right to everything that can help to ward off imminent danger, and keep at a distance whatever is capable of causing its ruin (underlining mine); and that from the very same reasons that establish its right to the things necessary to its preservation".

To sum up briefly, it is submitted that the following principles can be derived from the classical publicists:

(1) a just and unavoidable necessity makes anything lawful (Gentilli);

(2) necessity may compel disregard of the sovereign rights of another state, as for example, Elizabeth's assuming protection of the Netherlands against Spain in order to ward off potential attack by Spain (Zouche);

(3) necessity may require that the rights of an individual be subordinated to the public good (Van Bynkershoek);

(4) where self-preservation is the issue, no higher law overrides the duty of self-preservation (Puffendorff);

(5) any laws may be broken by reason of extreme and imminent peril (Grotius);

(6) necessity is the first law of nature (Grotius);

(7) the plea of necessity may perhaps be more successfully maintained in war than in peace (Grotius);

(8) necessity excuses the infringement of the rights of another state or the disregard of such rights (Wolff);

(9) each state has an obligation to preserve itself and consequently has the right to everything necessary for carrying out that obligation (Vattel).

From the foregoing principles and from the above quotations, we submit it is extremely difficult, if not impossible, to separate the doctrine of necessity and the doctrine of self-preservation. One is a corollary of the other and in

the writer's judgment, at least, it is unrealistic to attempt to divorce the one from the other.

In dealing with the question of necessity and self-preservation we think it worthwhile to quote at some length from, Hall[1]:

> "In the last resort almost the whole of the duties of states are subordinated to the right of self-preservation. Where law affords inadequate protection to the individual he must be permitted, if his existence is in question, to protect himself by whatever means may be necessary; and it would be difficult to say that any act not inconsistent with the nature of a moral being is forbidden, so soon as it can be proved that by it, and by it only, self-preservation can be secured. But the right in thisform is rather a governing condition, subject to which all rights and duties exist, and the source of specific rules, and probably perhaps it cannot operate in the latter capacity at all. It works by suspending the obligation to act in obedience to other principles. If such suspension is necessary for existence, the general right is enough; if i t is not strictly necessary, the occasion is hardly one of self-preservation. There are, however, circumstances falling short of occasions upon which existence is immediately in question, in which through a sort of extension of the idea of self-preservation to include self-protection against serious hurt, states are allowed to disregard certain of the ordinary rules of law in the same manner as if their existence were involved. This class of case is not only susceptible of being brought under distinct rules, but evidently requires to be carefully defined, lest an undue range should be given to it".

And then he goes on to give an example of the simplest case where self-preservation may be invoked, where an overt attack is being made upon a state by persons enjoying the protection afforded by the territory of another state. In such cases

[1] Hall's International Law, 8th Ed, p 322.

the attacked state may take exceptional measures against the state who is harbouring the attackers. Westlake[1] tells us:

> "But it often happens that the injury or the danger will not admit of the delay which the normal course of action would involve. If within a state it is a matter of daily necessity that the citizen should repel an actual or avert a threatened attack by his own force, because the police cannot be present everywhere, much more must a corresponding necessity be liable to arise between states; an international police being wholly wanting. In such cases a state may take its defence into its own hands, even to the extent of employing force within the territory of another state, on condition of limiting its abnormal action to what the emergency requires. Whatever right of action outside the physical limits of its own sovereignty is allowed to a state by these rules may be described as a right of self-preservation".

Referring to the case of the Caroline he said:[1A)]

> "The United States complained of the violation of territory, and declared that it lay on England 'to show a necessity of self-defence, instant, overwhelming, leaving no choice of means and no moment for deliberation ..... also that the local authorities of Canada, even supposing the necessity of the moment authorized them to enter the territory of the United States at all, did 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'. This was a correct statement of the law, except so far as concerns the emergencies, leaving no moment for deliberation, which is an unnecessary condition if the emergency is such that deliberation can only confirm the propriety of the act of self-preservation[2]".

And further on he says this:[3]

> "When a state is unable of itself to prevent a hostile use being made of its territory or its resources, it must either be deemed to allow proper measures of self-

[1] Westlake, Chapters on International Law (1894) p 114.

[1(A)] Ibid p 116.

[2] Westlake is quoting Hall, Treatise of International Law, 3rd Ed, p 267.

[3] op. cit. p 119.

preservation to be taken by the state against which such a use is manifestly impending, or it must be deemed to intend the hostile use as being the necessary consequence of refusing the permission. This principle covers the seizure of the Danish fleet by England after the Treaty of Tilsit in 1807, when there was irresistible reason for believing that Napoleon and Alexander would have compelled, by force if necessary, its addition to the naval armaments arrayed against them. The act of self-preservation must, in this, as in all other cases, be limited to what is strictly imposed by the emergency, and in the instance cited, England offered to Denmark the most solemn pledge that, on the conclusion of a general peace, the fleet of which the surrender was asked, should be restored in the same condition and state of equipment as when received ..... . The Institute of International Law, at Brussels in 1879, by nineteen votes against seven, and reaffirmed at Munich in 1883 by a large majority a resolution containing a principle in which this may be supported. Every State has the right to punish acts committed even out of its territory, and by foreigners, in violation of its penal laws, when those acts attack the social existence of the state in question, and endanger its security, and are not provided against by the penal law of the country on the territory of which they have taken place".

and Westlake comments on this:

"The principle thus invoked is that of self-preservation but not as an abstract and absolute right. The right of self-preservation is allowed by the resolution where the penal law of the locus delicti does not prohibit the noxious act but where such prohibition is forthcoming, the state which is threatened is not allowed to supplement a sanction which it may deem insufficient".

Fauchille[1] has said:

"A state incontestably has a right to take all measures designed to guarantee its existence against the dangers which menace it".

Hyde says this[2]:

"When acts of self-preservation on the part of a state are strictly acts of self-defence, they are permitted by the law of nations and are justified in principle, even though they may conflict with the normal rights of other states".

1 Fauchille, Traite de Droit International Publique (1922) Tome 1, 1st Part No. 242.

2 Hyde, International Law, 1922, Vol 1, p 106.

In our discussions here, however, it is submitted that the rights of other states are not being violated; certainly the theory of the inviolability of sovereign territory is not being trammelled on for the reason that CADIZ and ADIZ, if they are violating any rights at all, it is not the right enjoyed by any particular state, vis-a-vis, the so-called doctrine of freedom of the seas, for two reasons: (a) the principle of freedom of the seas is not being infringed upon, and (b) the status of the air space or flight space over the high seas is not, as yet, settled juridically.

Part 4 - Cases

In addition to the foregoing opinions expressed by eminent publicists, the doctrine of necessity, coupled with other considerations such as self-preservation, have been recognized in a number of cases.

In the North Atlantic Fisheries case, for example[1], the Tribunal agreed with Great Britain that:

> "conditions of national and territorial integrity, of defence, of commerce and industry, are vitally concerned with the control of the bays penetrating a national coastline"

and consequently the three mile rule would be modified to the extent that in the case of every bay not specifically provided for in the treaty (Oct 1818 between Great Britain and the United States) the limits of exclusion should "be drawn three miles seaward from a straight line across the bay in the part nearest the entrance at the first point where the width does not exceed ten miles".

[1] The Hague Court Reports, Carnegie Endowment for International Peace (Scott) 1916, pp 183 & 188.

In the case of the Virginius[1] the British view on this combination of necessity and self-defence was as follows:

> "In demanding reparation for the execution of certain British subjects who were on the Virginius when she was seized by the Spanish authorities, more than three miles from the Cuban coast, the British Government declared it did not take the ground of complaining of the seizure of the Virginius, nor of the detention of the passengers and crew". "Much may be excused in acts done under the expectation of instant damage in self-defence by a nation as well as an individual. But after the capture of the Virginius and the detention of the crew was effected, no pretence of imminent necessity or self-defence could be alleged.

The facts in the Virginius case were briefly that she was registered as an American vessel. In 1870 she sailed from Jamaica, ostensibly for Costa Rica, but in reality bound for Cuba to assist insurgents there by supplying them with munitions. She was pursued and captured by a Spanish warship and taken into a Cuban port, where some members of her crew, both British and American, were tried and executed for piracy. The point is that neither the British nor American Government protested as to Spain's right to search, and even capture the ship, but they did protest vehemently against the executions. In other words they had carried the thing too far. Necessity and self-preservation justified the seizure and capture of the vessel but not the execution of the crew.

While the doctrine of self-preservation cannot be invoked willy-nilly by itself, it is submitted that the doctrine of self-preservation, combined with the doctrine of necessity, is one that is perfectly justified in international law, even though the act done under these combined grounds violates the rights of another state. As for self-preservation by itself

[1] Moore's Digest, Vol 2, p 983.

Oppenheim, on the other hand, puts it very logically and succinctly as follows:[1]

> "Most writers maintain that every state has a fundamental right of self-preservation. However, if every state really had a right of self-preservation, all the states would have the duty to admit, suffer and endure every violation done to one another in self-preservation. But such duty does not exist. On the contrary, although self-preservation is in certain cases an excuse recognized by international law, no state is obliged patiently to submit to violations done to it by such other state as acts in self-preservation, but can repel them. It is a fact that in certain cases, violations committed in self-preservation are not prohibited by the law of nations. But, nevertheless, they remain violations, may therefore be repelled, and indemnities may be demanded for damage done".

And Oppenheim goes on as follows, on the same page:

> "But it becomes more and more recognized that violations of other States in the interests of self-preservation are excused in cases of necessity only".

One of the more interesting cases where necessity was pleaded with at least a measure of success is that of the Caroline[2], where the Canadian government sent forces into American territory to destroy the Caroline, which had gone to the American side to carry supplies for the purpose of aiding the insurgents during the Canadian Rebellion of 1837. They were successful in their mission and eventually burned the Caroline and sent what was left of her on her last voyage down the Niagara River. Great Britain pleaded necessity plus self-preservation on the ground that there was insufficient time to prevent the invasion of her territory through the

[1] International Law, Lauterpacht, 7th Ed, p 265.

[2] Moore's Digest, Vol 2, para 217.

normal diplomatic representations to the United States government, and the latter admitted that if this had been the case, that is, on the facts, which they did not admit, she would have been justified, that is, Great Britain would have been justified in her plea. The matter ended when Great Britain apologized for the violation of American territory.

Another example of where the doctrine of necessity plus self-preservation was pleaded, not so successfully, and in fact unsuccessfully, at least before the court of world opinion, was the German invasion of Belgium in 1914, and again, the Japanese invasion of Manchuria in 1931. Indeed, in the latter case Japan's action was specifically condemned by the League of Nations[1].

The case of the British sinking of the French Fleet in July, 1940, at Oran, in North Africa, was, it is submitted, a case where necessity and self-preservation could have been successfully pleaded, although this case must be distinguished from the former cases, i.e., the Japanese invation of Manchuria, and the German invasion of Belgium in 1914, because Great Britain was at war whereas neither Manchuria nor Belgium was at war with Japan or Germany. During the second World War Germany pleaded necessity in the invasion of Norway and the low countries.

A very recent case which should be noted is the Corfu Channel case[2] where Great Britain, in attempting to defend

[1] Oppenheim, Vol 1, 7th Ed, p 270.

[2] United Kingdom v Albania, I.C.J. Reports, 1949.

its mine-sweeping operations in the channel, pleaded a form of necessity unsuccessfully when it alleged that it was necessary to secure the mines as quickly as possible for fear they should be taken away without leaving traces by the authors of the mine-laying or by the Albanian authorities; and although the Court referred to this as a new and special application of the theory of intervention, we submit that the reasoning back of the intervention was necessity. Alternatively Great Britain pleaded self-protection or self-help, which the Court also rejected. We quote:

> "The Court cannot accept this defence either. Between independent States, respect for territorial sovereignty is an essential foundation of international relations. The Court recognizes that the Albanian Government's complete failure to carry out its duties after the explosions, and the dilatory nature of its diplomatic notes, are extenuating circumstances for the action of the United Kingdom Government. But to ensure respect for international law, of which it is the organ, the Court must declare that the action of the British Navy constituted a violation of Albanian sovereignty".

The Court would seem to have been begging the question, for while they found that Great Britain had indeed violated Albanian sovereignty, they subsequently held, that the Albanian Republic was responsible for the explosions which occurred on October 22nd, 1946, in Albanian waters, a nd for the damage and loss of human life that resulted therefrom. The facts in this case were briefly as follows: On October 22nd, 1946, a squadron of British warships left the port of Corfu and proceeded northward through a channel previously swept for mines in the north Corfu Strait. Two of the ships

were seriously damaged by striking mines, the explosions causing death and injuries to personnel on board. On November 13th, 1946, British minesweepers swept the north Corfu channel and cut twenty-two moored mines and took two to Malta for expert examination, and this resulted in the subsequent proceedings before the International Court of Justice.

The so-called Monroe doctrine of the United States was a child of necessity and when it was first conceived in 1821, was a unilateral act by the United States, based on necessity plus self-preservation[1], or so it was supposed, at least. And while today the Monroe doctrine is largely unilaterial on the part of the United States, it is perhaps fast becoming a multilateral policy for all the American republics, and one might cite it as an example of a policy designed to encourage preventive self-defence and to this end more specifically to say to the outside world "hands off the Americas", even though the necessity for such a doctrine today is not too clear. We think particularly of a European power, for example, gaining a sphere of influence, or indeed, an actual foothold, military-wise, in the Argentine Republic, for example. A potential enemy such as the Soviet Union would be less dangerous militarily in Argentina (having established a military base or bases there), than she would with a military base in, say, Siberia or China.

[1] Oppenheim, op. cit. pp 280, 281, 282.

The United States did, indeed, plead necessity in connection with the Monroe doctrine relating to affairs in Mexico in 1861 to 1865[1], on her northern frontier in 1867[2], and in relation to Cuba in 1848[3], and in the lower California[4].

The British and Japanese also have proclaimed a principle similar to the Monroe doctrine over certain areas outside their own boundaries. We quote from the British note of May 19th, 1928, addressed to the United States as follows[5]:

> "There are certain regions of the world the welfare and integrity of which constitute a special and vital interest for our peace and safety. His Majesty's government has been at pains to make it clear in the past that interference with these regions cannot be suffered. Their protection against attack is to the British Empire a measure of self-defence. It must be clearly understood that His Majesty's government and Great Britain accept a new treaty on the distinct understanding that it does not prejudice their freedom of action in this respect. The government of the United States have comparable interests, any disregard of which by a foreign power they have declared that they would regard as an unfriendly act".

1 H Ex.Doc. No.73 39th Congress 1st Session part 2 p 347.

2 "The people of the U.S. cannot regard the proposed confederation of the provinces on the northern frontier of this country without extreme solicitude". Resolution of House of Rep. March 27, 1867, Diplomatic Corr. 1867 Congressional Globe 40th Congress 1st Sess. p 392.

3 "The highest and first duty of every independent nation is to provide for its own safety; and acting upon this principle, we should be compelled to resist the acquisition of Cuba by any powerful maritime State, with all the means which Providence has placed at our command". Mr. Buchanan quoted in Moore's digest Vol 6 p 451.

4 See Hall op. cit p 91.

5 Oppenheim, Vol 1, p 286; original source Command 3109, p 25 and Command 3153, p 10.

Finally, with respect to the Monroe doctrine, we should like to quote in part from Elihu Root[1]:

> "The principle which underlies the Monroe doctrine, that is to say ..... the right of every sovereign state to protect itself by preventing a condition of affairs in which it will be too late to protect itself".

Part 4 - Treaties and State Policy

If we keep in mind Mr. Root's classic statement that every sovereign State has a right to protect itself by preventing a condition of affairs in which it will be too late to protect itself, we find that this principle is supported by various multilateral treaties.

We have already referred to the North Atlantic Treaty, and in particular to Article 3 thereof, where it is quite clear that the principle can be drawn that States, at least those States parties to the Treaty, may indulge in an "arms race" with all States who are not parties to the Treaty, so long as the object of such a policy is to develop their individual and collective capacity to resist armed attack. While it may be argued that this of itself does not establish a customary or conventional rule of international law, applicable to all States, and for the purposes of argument admitting that the principle involved is not a settled rule of international law by virtue of this multilateral treaty, yet the cumulative effect of the other multilaterals which will be mentioned later drives one to the conclusion that the right of preventive self-defence in the sense that we understand it, is now recognized and accepted by States generally, quite apart from the views held by eminent publicists and

1 AJIL Vol 8 (1914) p 432.

the individual sets of circumstances that have arisen as between States, where necessity or preventive self-defence, or both, were pleaded; in short necessity plus self-preservation.

We have previously mentioned that the NATO Treaty was the only one that specifically provided that the parties to the treaty could maintain and develop their capacity for self-defence. However, the so-called Benelux Treaty referred to above, the Inter-American Treaty of Reciprocal Assistance[1] signed in September, 1947, in Rio de Janeiro and commonly referred to as The Rio Treaty, the Bogota Charter of the Organization of American States signed April 30th, 1948[2], are all treaties which support the principle of the right of States to enter into collective self-defence pacts. The Rio Treaty differs from the others, however, in this respect, in that it embraces wide areas stretching as far as the Poles, and also embraces large parts of the high seas. Any armed attack within this area would bring the operation of the Treaty into force. Indeed, Article 6 of the Treaty seems to provide an extremely wide scope for bringing the Treaty into operation, for it states as follows:

> "If the inviolability or the integrity of the territory or the sovereignty or political independence of any American state should be affected by an aggression <u>which is not an armed attack, or by an extra-continental or intra-continental conflict, or by any other fact or situation that might endanger the peace of America,</u> (underlining mine) the organ of consultation shall meet

[1] U.S. Dept. of State Publications 3016.

[2] Pan-American Union, Law & Treaty Series No. 23 (not in force as of April 1st, 1949).

immediately in order to agree on the measures which must be taken in case of aggression to assist the victim of the aggression, or in any case, the measures which should be taken for the common defence and for the maintenance of the peace and security of the continent".

The wording of this article is wide enough, it is submitted, to allow almost any imaginable measure to be taken by the parties to the Treaty, so long as it could be said to be in fulfilment of the objects of Article 6. Therefore, it is submitted, this is an example of what we call preventive self-defence or self-preservation coupled with necessity, for the armed attack or even the other unnamed incident giving rise to the meeting of the organ of consultation could happen anywhere outside the boundaries of the States that are parties to the Treaty, but within the region defined by Article 4[1]. Article 6, therefore, would appear to have accomplished in an oblique way what Article 3 of the NATO Treaty accomplishes in a direct way.

While Article 51 of the United Nations Charter by itself does not contemplate anything less than an armed attack before a State or a group of States may exercise the "inherent" right, Article 52[2] contemplates at least by implication much more than

[1] Article 4 states in part as follows: "The region to which this Treaty refers is bounded as follows: beginning at the North Pole, thence, due south to a point 74° north latitude, 10° west latitude, thence by a rhumb line ..... thence due south to the South Pole, thence due north to a point 30° south latitude, 90° west longitude, thence by a rhumb line ..... thence by a rhumb line to a point 65° 30 minutes north latitude, 168° 58 minutes 5 seconds west longitude; thence due north to the North Pole".

[2] Nothing in the present charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for

> regional action, provided that such arrangements or agencies and their activities are consistent with the purposes and principles of the United Nations.
>
> Members of the United Nations entering into such arrangements or constituting such agencies shall make every effort to achieve pacific settlement of local disputes through such regional arrangements or by such regional agencies before referring them to the Security Council".

an armed attack of any of the members and provides that States may enter into regional arrangements for international peace and security, or putting it another way, for collective self-defence and by the article authorizing such arrangements it is another way of saying, it is submitted, that it is a right to preventive self-defence, for that is, in fact, what it is. By entering into such arrangements the parties to the transaction increase their capacity to resist armed aggression. Indeed, the treaties we have mentioned above were all made purportedly at least under the authority of Chapter 8 of the United Nations Charter.

It is of interest to compare CADIZ and ADIZ and the comparatively limited regions over the high seas covered by them with the vast regions covered by the Rio Treaty above, to which, as far as is known, there have been no protests, although a distinction may be drawn between the two in that the former are unilateral acts by the United States and Canada.

## Part 6 - Conclusions

We have used the word "necessity" in this chapter at considerable length, and from the discussion so far it will be seen that necessity was used to describe, for the most part, those cases where a set of circumstances had arisen

that warranted some unusual act by a State which might be outside the general rules of international law but which could be excused by virtue of the unusual circumstances[1].

Necessity, as we have used the word, means that a set of circumstances has arisen which compels a State to pursue one course of action and leaves room for no alternative, but not necessarily to the detriment of any State or group of States. Coupled with self-preservation, we submit that CADIZ and ADIZ are completely justified by International Law, perhaps even to the extent that they infringed on the rights of other States, which is not the case at present but may be in the foreseeable future; for example, as between England and France. The solution in this case would appear to be by a bilateral treaty. Our problem will perhaps be confined to those States which have large bodies of water contiguous to their coasts.

We quote Rodick[2]:

> "A distinction may perhaps be made between certain acts which for want of a better name may be called acts of passive self-defence, such as the expulsion of aliens and laws against counterfeiting, in which the execution of the law takes place largely within the national jurisdiction, and active self-defence

[1] With the exception of the discussion above in respect to the mutual assistance treaties, all cases where necessity was pleaded, were of a class whereby the action of the State pleading necessity had actually violated the right of another sovereign State.

[2] Rodick, The Doctrine of Necessity in International Law (1928) p 36.

> as illustrated by the pursuit of marauders across the borders of the neighbouring country. The legal right to exercise such exceptional measures is clear in both cases; it may, with reason be argued that a greater degree of care in establishing the facts should be exercised in the second situation, because it involves a violation of the law of territorial inviolability".

In dealing with our problem, while it may be argued that we are not acting within the limits of national jurisdiction by establishing CADIZ and ADIZ, which we do not admit, (see the chapter on the Maritime Law Analogy) we do submit that we are not infringing on the rights of any other nation as is contemplated in the second illustration by Rodick.

If it is contended that the rights of other States are being infringed upon, we feel bound to ask "which is the State whose rights are violated?" On the other hand, it may be answered that they violate a rule of international law generally, namely, freedom of the sea. We submit that this is not so; namely, that the freedom of the seas is in no way interfered with by these rules. It may be argued, then, that the freedom of the air space over the high seas is being interfered with, and even if it is admitted that this so-called freedom is being to some extent interfered with by the element of control as laid down in CADIZ and ADIZ, the answer to this would be, it is submitted, that if the control envisaged by CADIZ and ADIZ is invoked, apart from any security considerations, it is for the mutual benefit and safety both of the incoming aircraft and the State towards which the aircraft is approaching, i.e., either the United States or Canada. Moreover, with the increase of Transatlantic and Transpacific air travel, control is becoming

increasingly necessary even over the high seas, for the safety of aircraft flying these areas, quite apart from the security considerations involved insofar as the adjacent State is concerned. Collisions in the air are, unfortunately, becoming all too commonplace. It may well be that the drafters of the Chicago Convention, when they drafted Article 12, had this consideration in mind, as indeed Annex 2 would seem to indicate which deals with rules for flight over the high seas.

We have said before, and we think it to be true, that CADIZ and ADIZ do not infringe on the sovereignty, certainly of any one nation, at any rate, and we have also pointed out that it in no way interferes with the doctrine of the so-called freedom of the seas. The only infringement, if such it can be called, is in the flight space above the high seas, and it is submitted that this space is, like the high seas themselves, either res communis or res nullius, and like the high seas, assuming them to be free, the flight space above them enjoys at least that status. But it is well known that jurisdiction is extended in Maritime Law over the high seas for certain narrow, limited purposes, as we have already pointed out in this work.

Although the Paris and the Chicago Conventions have no doubt made the doctrine of sovereignty of the air space above the territory of the State a settled rule of international law, no attempt has been made[1] in the conventions themselves

[1] The drafters of the Paris Convention did consider the matter as is indicated in their report, and concluded that the air space over the high seas was free (Conference de la paix, 1919-20, minutes, pp 428, 429).

to define or theorize on the nature of the air space over the high seas. It is true that Article 12 of the Chicago Convention, which deals with rules of the air, states that the rules in force over the high seas shall be those established under the Convention. And even though the parties to the Convention control all known flying in areas covered by CADIZ and ADIZ, i.e., the Atlantic and Pacific, and rules have been established for flight over the high seas by ICAO[1], it is significant that no protest has come, so far as is known, from the International Civil Aviation Organization, and neither have protests been received from any foreign country, either in Canada or the United States, to this date.

It must be agreed that the high seas are either res communis or res nullius. Therefore it follows that the flight space above the high seas must enjoy the same status at least, unless it can be shown to the contrary, and it is submitted that this cannot be done. Assuming, then, for the purposes of argument, that the flight space above the seas enjoys the same status as the seas themselves, we have the Maritime Law analogy for exercising limited jurisdiction. However, it may well be that we are not even bound by this analogy, for International Law of the Air is still an infant compared to Maritime Law and the established principle now universally recognized of freedom of the seas may have no parallel in the air. In other words, it may be an open field and States may be permitted to declare that flight space over the high seas adjacent to their territory may be, or is exclusively theirs,

[1] Example, Annex 2, Rules of the Air - in force 1/1/49.

for certain purposes, much in the same manner as States acquired territory by discovery. For international law of the air is a branch that is growing and evolving as circumstances permit, or, indeed requires. This being so, i.e., that there are no prohibitions or restrictions, then, of course, this thesis may be unnecessary; then each State consequently will be permitted to legislate freely with respect to the flight space over the high seas, so long as the rights of other States are not interfered with.

We have previously mentioned that there have been no protests from foreign governments, or from the International Civil Aviation Organization, in respect of these rules. This would seem to indicate that there is a general acquiescence among the States that these rules are not only necessary and proper, but that under International Law, even if a State considered them improper, they would have no basis under International Law for making a protest. Comparing the juridical aspect of the high seas themselves, and the flight space over the high seas, it cannot be disputed that we have not the historical concept and general agreement among nations, time-tested and adjudicated-on by the courts, as to the juridical status of the air space over the high seas, as we have in the case of the high seas themselves, but this may not be necessary.[1]

[1] See Briggs op. cit p 47.

In the circumstances which we have been discussing it cannot be argued that we have no necessity of defending our State in point of fact. Indeed, in other words, to increase our capacity to resist attacks, we have the views of the publicists that we have a duty of self-preservation, and bearing in mind the world situation, and the terrible weapons with which it is possible to perhaps exterminate an unbelievably large number of people, the measures that Canada and the United States have taken, therefore, in establishing CADIZ and ADIZ, is no more than is what is absolutely necessary to carry out that duty and even if the rights of other States were interfered with, the course of action pursued would, it is submitted, be no less valid.

As for Grotius' principle, that the danger must be imminent, it is submitted that today, by virtue of the very great speeds that can be attained by modern aircraft, not to mention the possibilities of intercontinental rocket weapons that imminence of danger in point of time is no longer a necessary ingredient to the doctrine of necessity[1].

In conclusion, therefore, it is submitted, at least in the first instance, that Canada and the United States had an absolute right to establish CADIZ and ADIZ on the ground of necessity plus self-preservation. It is true that in a portion of the flight space over the high seas a limited jurisdiction has been asserted for purposes of identification and control, but as we have said before, no protest has been received by the government of Canada, after nearly six years, and to the writer's knowledge no such protest has been received by the

[1] See above, in the discussion of the military facts of life.

government of the United States.

We have, therefore, a general negative acquiescence among the nations of the world in these two unilateral actions taken by these two countries. It may perhaps be said that friendly or allied nations have not raised the question in the interests of amicable relations between allies. On the other hand, however, it is a certainty that the Iron Curtain countries are fully aware of these rules, but even here, no protest has been received, the reason being, perhaps, that they recognize the need for such rules and may wish to enact similar laws in zones contiguous to their own territories. Indeed, in the case of the Soviet Union and the Republic of China, it is all too plain that they regard the approach of an unidentified aircraft in proximity to their shores as a hostile act, and experience has shown us that the life expectancy of such aircraft is none too good, especially when unarmed, as witness the unfortunate incidents in the Far East during the past few years, where aircraft, both British and American, have been shot down when they were near the Soviet or Chinese mainland. Such stringent measures have not as yet been adopted by the American or Canadian Air Forces, but, it is submitted, if an approaching aircraft which was unidentifiable, refused on challenge to identify itself when within CADIZ or ADIZ, then our fighter aircraft would be quite justified in taking the utmost measures at their command.

Canada and the United States have taken these steps in the interests of self-defence, or self-preservation, or both;

they have been necessary, and even vital, and there have been no known protests. It is a new field, heretofore unexplored in International Law, and there is a general principle that action taken on the grounds of self-preservation is legal in the first instance and determinable by the country taking such action. But the justification for such action must ultimately be determined by a judicial authority or a political body, i.e., internationally speaking. We have pointed out before that no State has sought to bring the validity of these zones into question before such a judicial body as the International Court of Justice, for example, or the Security Council or General Assembly of the United Nations. Therefore the conclusion must be reached that what has been done is approaching, if not now, an established rule of International Law, namely, that States may extend what we shall call their intelligence or safety area requiring identification and control in the flight space over the high seas to the extent of requiring all aircraft flying within that zone or designated area to identify themselves and submit to control.

Although we are not in a state of war, whatever war in the legal sense may be, we are in a state, or living under conditions, whereby we might be forgiven for comparing the effect of these rules with the doctrine of visit-and-search in Maritime Law.

We have today in the world a situation unprecedented in its history, the world being divided roughly into two armed camps, each possessing perhaps the power to exterminate the

other half. It may be that military and political thinking of today will be obsolete by tomorrow. Unusual circumstances therefore require unusual measures to deal with them.

We have shown, it is submitted, that on the ground of necessity and self-preservation alone CADIZ and ADIZ do not violate any rule of international law. We have also shown in previous chapters, it is submitted, that these rules do not violate the Chicago Convention, and by analogy to the Continental Shelf Claims they are valid in international law and lastly again by analogy with Maritime Law and jurisdiction practised outside territorial waters that they are also valid. To repeat, it is submitted they are valid on each of the foregoing grounds, but should it be doubted that they are valid on any one ground, the cumulative effect of the argument presented on each of these grounds would, it is submitted, leave no doubt as to their validity.

APPENDIX I

**NOTAM**
CLASS 2

**CANADA**
**DEPARTMENT OF TRANSPORT**
**AIR SERVICES BRANCH**

22/54
19 NOV.

# 22 / 54 RULES FOR THE SECURITY CONTROL OF AIR TRAFFIC

(Superseding NOTAM 13/54)

Effective - 1st December, 1954.

The attached Rules for the Security Control of Air Traffic contain a number of revisions to the Rules issued previously. The more important changes are explained hereunder:

a) A Security Identification Zone (SIZ) has been introduced. This requires that the pilot of any aircraft operating within this zone in southerly direction, regardless of altitude, must comply with the Rules. This means that any such flight will, in effect, enter a CADIZ when it enters the SIZ below 4000 feet, and the pilot must therefore file a flight plan and make all required position reports. A pilot who is unable to comply with the Rules which apply when entering the SIZ, shall follow the alternative procedure specified in paragraph 2.9.

b) A flight plan must be filed at least fifteen minutes prior to operating within the SIZ in a southerly direction.

c) The proposed cruising altitude is to be included in DVFR flight plans.

d) The boundaries of most CADIZs have been revised.

e) The southern boundary of the Toronto CADIZ has been moved northward to the 44th parallel, thus relieving all flights operating south of this line from conformance with these Rules.

f) The Canadian Boundary ADIZ has been cancelled between the point where the 46th parallel meets the U.S.-Canadian Boundary in Lake Huron and the State of Maine.

(A. de Niverville),
Director of Air Services.

# RULES FOR THE SECURITY CONTROL OF AIR TRAFFIC

## EFFECTIVE DATE - 1 MAY, 1954

1. INTRODUCTION

1.1 Purpose - The rules contained herein have been found necessary, in the interest of national security, to identify, locate and control aircraft operated within areas designated as Canadian Air Defence Identificatinn Zones.

1.2 Definitions

1.2.1 Appropriate Aeronautical Facility - The normal communications facility with which flight plans, arrival reports or position reports are filed.

1.2.2 Canadian Air Defence Identification Zone (CADIZ) - An airspace of defined dimensions extending upwards from the surface of the earth, and designated by the Department of Transport.

1.2.3 Security Identification Zone (SIZ) - An airspace of defined dimensions, designated by the Department of Transport, extending upwards from the surface of the earth to an altitude of 4000 feet above the immediate terrain, through which southbound flights must be conducted in accordance with certain rules designed to facilitate ready identification of the aircraft.

NOTE: The Canadian Air Defence Identification Zones and the Security Identification Zone are designated in the Designated Airspace Handbook, and are depicted in the Canada Air Pilot, R.C.A.F. radio facility charts and the attached map.

1.2.4 DVFR Flight - A VFR flight conducted in accordance with the Rules for the Security Control of Air Traffic.

2. OPERATING RULES

2.1 Application - The rules contained in this document shall apply only to aircraft:

a) At or above 4000 feet above the immediate terrain, which are operating within a CADIZ;

b) At or above 4000 feet above the immediate terrain, which are about to enter a CADIZ;

c) At any altitude which will operate through the Security Identification Zone in a southerly direction.

2.2 Equipment - Any aircraft which is operated in accordance with 2.1 shall be equipped with functioning two-way radio, which will permit the pilot to communicate with an appropriate aeronautical facility.

2.3 Flight Plans - A flight plan shall be filed for any flight with an appropriate aeronautical facility.

a) Prior to penetrating a CADIZ, or
b) Prior to take-off from a point within a CADIZ, or
c) At least 15 minutes prior to entering the SIZ southbound.

2.3.1 IFR Flights - Unless an abbreviated flight plan is authorized by Air Traffic Control, the flight plan shall contain the following information:

a) Aircraft identification
b) Type of aircraft
c) Point of departure
d) Flight altitude and route to be followed
e) Point of first intended landing
f) Time of departure
g) True airspeed
h) Estimated elapsed time
i) Alternate airport
j) Radio frequencies

k) Approach aids to be used
l) Number of persons on board
m) Pilot's name
n) Fuel
o) Remarks.

2.3.2 VFR Flights - Unless an abbreviated flight plan is authorized by Air Traffic Control, the flight plan shall contain the information specified in 2.3.1, except items (i), (k), (l) and (n). Such a flight plan shall be designated by the pilot as a Defence Visual Flight Rule (DVFR) flight plan.

NOTES: 1. Pilots of aircraft which are operated below 4000 feet above the immediate terrain within the lateral boundaries of a CADIZ are urged to comply with the flight plan requirements of 2.3.

2. Pilots are urged to file a flight plan either in person or by telephone. Flight plans filed by radio while in flight (AIRFILE) may result in interception of the aircraft to confirm its identify.

3. In completing a DVFR flight plan, the abbreviation "DVFR" shall be inserted immediately preceding item (d) in 2.3.1.

2.4 Notification of Arrival - If a DVFR flight plan has been filed, or an IFR flight plan has been filed for a flight for which an air traffic control clearance is not required, the pilot, upon landing, or upon completion of the flight, shall file an arrival report with the appropriate aeronautical facility, unless the pilot states in the flight plan that no arrival report will be filed.

2.5 Position Reports - Flights operated within a CADIZ, which are about to penetrate a CADIZ or which will operate through the SIZ, southbound, shall conform to the position reporting procedures contained herein.

2.5.1 IFR Flights

a) Within controlled airspace - Position reports shall be made as required by the Instrument Flight Rules.

b) Outside controlled airspace - Position reports shall be made as required for DVFR flights in paragraph 2.5.2.

2.5.2 DVFR Flights

a) Penetrating a CADIZ - No aircraft shall be operated into a CADIZ unless:

i) The pilot has reported to an appropriate aeronautical facility the time, position and altitude at which the aircraft passed the last reporting point along the flight path of the aircraft prior to penetration of the CADIZ, and his estimated time over the next reporting point along the intended flight path of the aircraft, or, if it is not practicable to comply with this procedure;

ii) A report which contains the estimated time, position and altitude at which the aircraft will penetrate the CADIZ has been made to an appropriate aeronautical facility, at least 15 minutes prior to penetration.

b) Operating within a CADIZ - No position report is required, except as in 2.5.3.

c) Leaving a CADIZ - No position report is required.

2.5.3 Operating Through the SIZ Southbound - No aircraft shall be operated through the SIZ in a southerly direction, unless:

a) The pilot has reported, to an appropriate aeronautical facility, the time, position and altitude at which the aircraft passed the last reporting point along the flight path of the aircraft prior to entering the SIZ, and the estimated time over the next reporting point along the intended flight path of the aircraft or, if it is not practicable to comply with this procedure;

b) A report which contains the estimated time, position and altitude at which the aircraft will enter the SIZ has been made to an appropriate aeronautical facility, at least 15 minutes prior to penetration.

2.6 Adherence to Flight Plans or Air Traffic Clearances

2.6.1 IFR Flights

a) Within controlled airspace - No deviation shall be made from an air traffic clearance unless an amended clearance is obtained from Air Traffic Control. In case emergency authority is used to deviate from the provisions of an air traffic clearance, the pilot shall notify Air Traffic Control as soon as possible and, if necessary, obtain an amended clearance. However, nothing in this paragraph shall prevent a pilot, operating on an IFR clearance, from notifying Air Traffic Control that he is cancelling his IFR flight plan and is proceeding in accordance with the Visual Flight Rules, provided that he is operating in VFR weather conditions when he takes such action.

NOTE: A pilot who cancels his IFR flight plan shall file a DVFR flight plan if any of the remainder of the flight will be a DVFR flight.

b) Outside controlled airspace - When an IFR flight is conducted within or into any portion of a CADIZ where an air traffic clearance is not required by The Air Regulations, no deviation from the flight plan shall be made unless prior notification is given to an appropriate aeronautical facility.

2.6.2 DVFR Flights - No deviation shall be made from a DVFR flight plan, unless:

a) Prior notification is given to an appropriate aeronautical facility, or

b) Such deviation is required to comply with the Visual Flight Rules, in which case, such deviation shall be reported to an appropriate aeronautical facility as soon as possible.

2.6.3 Tolerances - Whenever it shall appear that the flight will not be within the following tolerances, the appropriate aeronautical facility shall be advised:

a) Time Tolerance

5 minutes from an estimated time over

i) A reporting point,
ii) A point of penetration of a CADIZ,
iii) A point of penetration of the SIZ, or
iv) The airport of destination.

b) Distance Tolerance - 10 miles from the centreline of the route of flight indicated in the flight plan.

2.7 Emergency Situations - In emergency situations which require immediate action for the safety of the flight, the pilot may deviate from the provisions of these rules to the extent required for such emergency. When such a deviation is made, the pilot shall report the deviation and the reasons therefor, as soon as practicable, to an appropriate aeronautical facility.

2.8 Radio Failure

2.8.1 IFR Flights - If unable to maintain two-way radio communications, the pilot of an IFR flight shall follow the procedure specified in Air Navigation Order No. 5, Series V.

2.8.2 DVFR Flights - If unable to maintain two-way radio communications, the pilot of a DVFR flight:

a) May proceed in accordance with the current DVFR flight plan, or

b) Shall land at a suitable airport along the route of flight specified in the flight plan, and the pilot shall report such radio failure as soon as possible to an aeronautical facility.

2.9 Alternative Procedure

2.9.1 Where it would not be possible to comply with the rules contained herein as they apply to the Security Identification Zone, the pilot of an aircraft proposing a flight in a southerly direction through the Security Identification Zone shall, immediately upon entering the SIZ, maintain a track between 170° True and 190° True for at least 5 minutes at an indicated airspeed not exceeding 100 knots.

2.9.1.1 When a southbound flight originates from within the Security Identification Zone, the procedure specified in 2.9.1 shall be complied with as soon as the cruising altitude has been reached.

2.10 Violations

2.10.1 A violation of these rules will render the pilot of an aircraft liable to in-flight interception by military interceptor aircraft.

2.11 Designation of CADIZs

2.11.1 The following described areas are designated as CADIZs

Vancouver CADIZ - The area bounded by a line 57°00'N, 123°00'W; 49°00'N, 116°00'W, along the United States-Canadian boundary to 48°29'38"N, 124°43'35"W; 48°30'N, 125°00'W; 48°30'N, 132°10'W; 51°30'N, 134°00'W to 57°00'N, 123°00'W, the point of beginning.

Lethbridge CADIZ - The area bounded by a line 57°00'N, 115°00'W, 51°00'N, 115°00'W; 51°00'N, 110°00'W, 49°00'N, 110°00'W; 49°00'N, 116°00'W; 57°00'N, 123°00'W, 57°00'N, 115°00'W, the point of beginning.

Winnipeg CADIZ - The area bounded by a line 51°00'N, 80°00'W; 46°07'N, 84°00'W, along the U.S.-Canadian boundary to 49°00'N, 110°00'W; 51°00'N, 110°00'W; 51°00'N, 80°00'W, the point of beginning.

Toronto CADIZ - The area bounded by a line 51°00'N, 80°00'W; 44°00'N, 77°06'W; 44°00'N, 82°13'W, along the U.S.-Canadian boundary to 46°07'N, 84°00'W; 51°00'N, 80°00'W, the point of beginning.

Montreal CADIZ - The area bounded by a line 51°00'N, 70°00'W; 46°42'N, 70°00'W, along the U.S.-Canadian boundary to 44°00'N, 76°31'W; 44°00'N, 77°06'W; 51°00'N, 80°00'W; 51°00'N, 70°00'W; the point of beginning.

Moncton CADIZ - The area bounded by a line 51°00'N, 61°00'W; 45°00'N, 58°00'W; 43°00'N, 65°00'W; 43°00'N, 65°47'W; 44°30'N, 66°45'W; 44°30'N, 67°07'W; 44°46'36"N, 66°54'11"W, along the U.S.-Canadian boundary to 46°42'N, 70°00'W; 51°00'N, 70°00'W; 51°00'N, 61°00'W, the point of beginning.

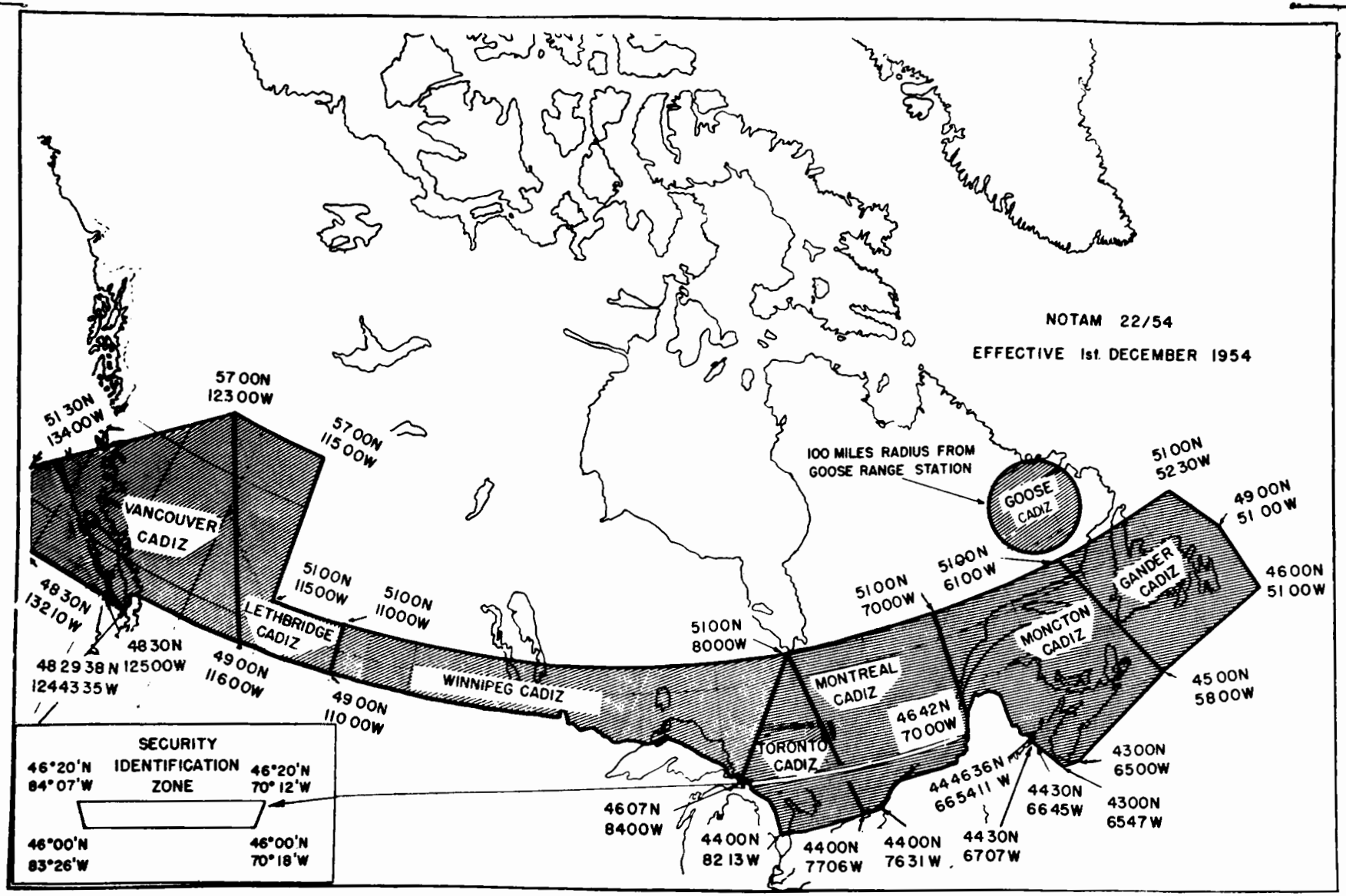
Gander CADIZ - The area bounded by a line 51°00'N, 52°30'W; 49°00'N, 51°00'W; 46°00'N, 51°00'W; 45°00'N, 58°00'W; 51°00'N, 61°00'W; 51°00'N, 52°30'W; the point of beginning.

Goose CADIZ - The area within a radius of 100 miles of the Goose, Lab. Range Station.

2.12 Designation of the Security Identification Zone

2.12.1 The following area is designated as the Security Identification Zone

The area bounded by a line 46°20'N, 70°12'W; along the U.S.-Canadian boundary to 46°00'N, 70°18'W; 46°00'N, 83°26'W, along the U.S.-Canadian boundary to 46°20'N, 84°07'W, to 46°20'N, 70°12'W, the point of beginning.


NOTAM 22/54
EFFECTIVE 1st. DECEMBER 1954
100 MILES RADIUS FROM GOOSE RANGE STATION
GOOSE CADIZ
VANCOUVER CADIZ
LETHBRIDGE CADIZ
WINNIPEG CADIZ
MONTREAL CADIZ
TORONTO CADIZ
MONCTON CADIZ
GANDER CADIZ
SECURITY IDENTIFICATION ZONE
46°20'N 64°07'W
46°20'N 70°12'W
46°00'N 83°26'W
46°00'N 70°18'W
5130N 13400W
5700N 12300W
5700N 11500W
5100N 11500W
5100N 11000W
4830N 13210W
4829 38N 12443 35W
4830N 12500W
4900N 11600W
4900N 11000W
5100N 8000W
5100N 7000W
5100N 6100W
5100N 5230W
4900N 5100W
4600N 5100W
4500N 5800W
4642N 7000W
4607N 8400W
4400N 8213W
4400N 7706W
4400N 7631W
4430N 6707W
444636N 665411W
4430N 6645W
4300N 6547W
4300N 6500W

Civil Aeronautics Administration — U. S. Department of Commerce

# REGULATIONS OF THE ADMINISTRATOR

## PART 620 - *Effective January 15, 1953*

## Security Control of Air Traffic

SUBPART A—INTRODUCTION



SUBPART B—OPERATING RULES



SUBPART C—DESIGNATED AIR DEFENSE IDENTIFICATION ZONES



AUTHORITY: §§ 620.1 to 620.23 issued under sec. 205, 52 Stat. 984; 49 U. S. C. 425. Interpret or apply secs. 1201–1204, 64 Stat. 825; 49 U. S. C. Sup. 701–704.

### SUBPART A—INTRODUCTION

§ 620.1 *Basis and purpose*—(a) *Basis.* This part is issued pursuant to sections 205 and 1201–1204 of the Civil Aeronautics Act of 1938, as amended (52 Stat. 984, 64 Stat. 825; 49 U. S. C. and Sup. 425, 701–704); Executive Order 10197 (15 F. R. 9180); and Department of Commerce Order 86, Amendment 5 (16 F. R. 99).

(b) *Purpose.* This part establishes rules which have been found necessary in the interest of national security to identify, locate, and control United States and foreign aircraft operated within areas designated by the Administrator of Civil Aeronautics as Air Defense Identification Zones (ADIZ).

§ 620.2 *Definitions.* As used in this part, the following words shall mean:

(a) *Aircraft.* Any contrivance now known or hereafter invented, used or designed for navigation of or flight in the air.

(b) *Air Defense Identification Zone; (ADIZ).* Airspace of defined dimensions designated by the Administrator of Civil Aeronautics within which the ready identification, location, and control of aircraft is required in the interest of the national security.

(1) *Domestic Air Defense Identification Zone.* An Air Defense Identification Zone within the United States.

(2) *Coastal Air Defense Identification Zone.* An Air Defense Identification Zone over the coastal waters of the United States.

(3) *International Boundary Air Defense Identification Zone.* An Air Defense Identification Zone adjacent to an international boundary line of the United States.

(c) *Appropriate aeronautical facility.* The normal communications facility with which flight plans or position reports are filed.

(d) *CAA-Airways operations' facility.* A Civil Aeronautics Administration control tower, air route traffic control center, or communications station.

(e) *Flight plan.* Specified information which is filed either verbally or in writing with an appropriate aeronautical facility relative to the intended flight of an aircraft.

(f) *Foreign aircraft.* An aircraft other than a United States aircraft defined in paragraph (l) of this section.

(g) *IFR flight.* A flight conducted under the instrument flight rules of the air traffic rules of Part 60 of this title.

(h) *Operate aircraft.* The use of aircraft, for the purpose of air navigation and includes the navigation of aircraft. Any person who causes or authorizes the operation of aircraft, whether with or without the right of legal control (in the capacity of owner, lessee, or otherwise) of the aircraft, shall be deemed to be engaged in the operation of aircraft.

(i) *Person.* Any individual, firm, copartnership, corporation, company, association, joint-stock association, or body politic; and includes any trustee, receiver, assignee, or other similar representative thereof.

(j) *Reporting point.* A geographical location in relation to which the position of an aircraft is reported.

(k) *United States.* The several States, the District of Columbia, and the several Territories and possessions of the United States (including areas of land or water administered by the United States under international agreement), including the Territorial waters and the overlying airspace thereof.

(l) *United States aircraft.* (1) An aircraft registered with the Administrator of Civil Aeronautics as a "civil aircraft of the United States", (2) an aircraft of the national-defense forces of the United States, or (3) an aircraft of the Federal Government, or of a State, Territory or Possession of the United States, or the District of Columbia, or of any political subdivision thereof which has been registered with the Administrator of Civil Aeronautics.

(m) *VFR Flight.* A flight conducted under the visual flight rules of the air traffic rules of Part 60 of this title.

### SUBPART B—OPERATING RULES

§ 620.10 *Scope.* Aircraft shall not be operated into or within an Air Defense Identification Zone (ADIZ) prescribed by the Administrator in Subpart C of this part in violation of the rules stated in this subpart.

NOTE: These Air Defense Identification Zones are depicted in CAA Flight Information Manual, Radio Facility Charts published by the Coast and Geodetic Survey, and USAF and Navy Radio Facility Charts.

§ 620.11 *Flight plans.* Unless otherwise authorized under § 620.13, prior to penetrating an ADIZ or prior to take-off from a point within an ADIZ, a flight plan shall be filed with an appropriate aeronautical facility.

(a) *IFR flights.* Unless an abbreviated flight plan is authorized by air traffic control, the flight plan shall contain the following information:

(1) Aircraft identification, and if necessary, radio call sign;

(2) Type of aircraft, or in the case of a formation flight, the types and number of aircraft involved;

(3) Full name, address, and number of pilot certificate of pilot in command of the aircraft, or of the flight commander if a formation flight is involved;

(4) Point of departure;

(5) Cruising altitude, or altitudes, and the route to be followed;

(6) Point of first intended landing;

(7) Proposed true air speed at cruising altitude in miles per hour;

(8) Radio transmitting and receiving frequencies to be used;

(9) Proposed time of departure;

(10) Estimated elapsed time until arrival over the point of first intended landing;

(11) Alternate airport or airports;

(12) Amount of fuel on board expressed in hours;

(13) Any other information which the pilot in command of the aircraft, or air traffic control, deems necessary for air traffic control purposes;

(14) For international flights, the number of persons on board.

For Sale by Superintendent of Documents, U. S. Government Printing Office, Washington 25, D. C. Price 5 cents

(b) *VFR flights.* Unless an abbreviated flight plan is authorized by air traffic control, the flight plan shall contain the information specified in paragraphs (a) (1) through (10) of this section. Such a flight plan shall be designated by the pilot in command as a Defense Visual Flight Rules (DVFR) flight plan.

(c) *Notification of arrival.* If a DVFR flight plan has been filed, or if an IFR flight plan has been filed for a flight for which an air traffic control clearance is not required, the pilot in command of the aircraft, upon landing or completion of the flight, shall file an arrival or completion notice with the nearest CAA communications station or control tower, unless the pilot in command states in the flight plan that no arrival notice will be filed.

NOTE: Pilots are urged to file flight plans either in person or by telephone. Flight plans filed by radio while in flight may result in interception of the aircraft to confirm its identity.

§ 620.12 *Reporting points*—(a) *Flights within or penetrating a Domestic ADIZ or entering the United States across an International Boundary ADIZ.* Unless otherwise authorized under § 620.13:

(1) *IFR flights*—(i) *Within control zones and areas.* Position reports shall be made as required by the Instrument Flight Rules of Part 60 of this title.

(ii) *Outside control zones and areas.* The reporting procedures specified for DVFR flights will apply.

(2) *DVFR flights.* The pilot in command of an aircraft shall not operate an aircraft into or within an ADIZ unless the aircraft is equipped with a functioning two-way radio and shall not enter an ADIZ until:

(i) He has reported to an appropriate aeronautical facility the time, position, and altitude at which the aircraft passed the last reporting point along the flight path of the aircraft prior to penetration of an ADIZ and his estimated time over the next reporting point along the intended flight path of the aircraft; or if it is not practicable to comply with this reporting procedure.

(ii) A report which contains the estimated time, position, and altitude at which he will penetrate the ADIZ has been made to an appropriate aeronautical facility at least fifteen minutes prior to penetration.

(b) *Aircraft entering the United States through a Coastal ADIZ*—(1) *United States aircraft.* The reports prescribed in paragraph (a) of this section are required.

(2) *Foreign aircraft.* The pilot in command of a foreign aircraft shall not operate an aircraft into the United States without:

(i) Making position reports as prescribed for United States aircraft in subparagraph (1) of this paragraph, or

(ii) Reporting to an appropriate aeronautical facility when the aircraft is not less than one hour and not more than two hours average cruising distance via the most direct route, from the United States. Thereafter, reports shall be made as instructed by the facility receiving the original report.

NOTE: Operators of foreign aircraft who exercise the optional position reporting method described in subdivision (ii) of this subparagraph are cautioned that this procedure does not eliminate the position reporting requirements prescribed for the control of air traffic.

§ 620.13 *Authorized exceptions*—(a) *Altitudes excepted*—(1) *Continental United States.* The provisions of this part are not applicable to aircraft operating within any domestic ADIZ located within the continental limits of the United States at altitudes less than 4,000 feet above the immediate terrain or to aircraft entering these same zones from within the continental limits of the United States at altitudes less than 4,000 feet above the terrain.

NOTE: Pilots of aircraft equipped with functioning two-way radio are urged to comply with the flight plan and reporting requirements of this part regardless of altitude.

(2) *Hawaiian ADIZ.* The provisions of this part are not applicable to aircraft operating within the Hawaiian ADIZ on inter-Hawaiian Island flights on Red Civil Airway No. 87 southeast of the Island of Oahu, below seven thousand (7,000) feet MSL.

(3) *Alaskan Domestic ADIZ.* The provisions of this part are not applicable to aircraft operating within the Alaskan Domestic ADIZ on a VFR flight originating from within the Alaskan Domestic ADIZ if:

(i) The flight is confined to altitudes of 2,000 feet or less above the immediate terrain; and

(ii) The aircraft is flown no closer than 500 feet to any other aircraft.

(b) *Areas or routes excepted*—(1) *General.* A CAA air route traffic control center may exempt certain flights from the requirements of this part. Such flights shall be operated in accordance with the instructions, if any, issued at the time the exemption is granted.

NOTE: Flights which may be exempted, after approval has been obtained from appropriate military commanders, are (a) local flights, (b) flights wholly within the boundaries of an ADIZ, (c) flights from points within an ADIZ to points outside thereof, (d) flights not currently of significance to the air defense system, or (e) military flights which are conducted in accordance with special procedures prescribed by appropriate military authorities.

(2) *Hawaiian ADIZ.* The provisions of this part are not applicable to aircraft operating within the Hawaiian ADIZ over any island or within three miles of the coastline of any island.

§ 620.14 *Adherence to flight plans or air traffic clearances*—(a) *IFR flights*—(1) *Within control zones and areas.* No deviation shall be made from an air traffic clearance unless an amended clearance is obtained from CAA air traffic control. In case emergency authority is used to deviate from the provision of an air traffic clearance, the pilot in command shall notify air traffic control as soon as possible and, if necessary, obtain an amended clearance. However, nothing in this paragraph shall prevent a pilot, operating on an IFR traffic clearance, from notifying air traffic control that he is canceling his IFR flight plan and proceeding under VFR: *Provided,* That he is operating in VFR weather conditions when he takes such action.

NOTE: A pilot who cancels an IFR flight plan should not neglect to file a DVFR flight plan if any of the remainder of the flight will be conducted in an Air Defense Identification Zone.

(2) *Outside control zones and areas.* When a flight is conducted in accordance with IFR within or into an ADIZ where an air traffic clearance is not required by the Civil Air Regulations, no deviation from the flight plan, as filed, shall be made unless prior notification is given to an appropriate aeronautical facility.

(b) *DVFR flights.* No deviation shall be made from a DVFR flight plan unless prior notification is given to an appropriate aeronautical facility.

NOTE: The requirements of the air defense of the United States make it imperative that pilots adhere to their flight plans or air traffic clearances within the following time distance, and altitude tolerances. Failure to meet these requirements may jeopardize the effective identification of aircraft and thereby the national defense effort. Flights which are operated in excess of these tolerances may be subject to interception:

(a) Five minutes from an estimated time over a reporting point or point of penetration of an ADIZ; or, in the case of a flight originating within an ADIZ, five minutes from the proposed time of departure specified in the flight plan, unless the actual time of departure is reported to the appropriate aeronautical facility.

(b) Ten mile from the centerline of the route of flight if the flight is entering or operating within a domestic ADIZ or entering the United States across an International Boundary ADIZ, or 20 miles from the centerline of the route of flight if the flight is entering or operating within a coastal ADIZ.

(c) A pilot in command of an aircraft when on a DVFR flight plan or an IFR flight plan for which air traffic clearance is not required should not deviate from the cruising altitude specified in the flight plan unless prior notification is given to an appropriate aeronautical facility, except that he may begin descent from the altitude specified in the flight plan within reasonable distance of destination without reporting change of altitude.

§ 620.15 *Emergency situations.* In emergency situations which require immediate decision and action for the safety of the flight, the pilot in command of the aircraft may deviate from the provisions of this part to the extent required for such emergency. When a deviation is exercised, the pilot in command shall report such deviation and the reasons therefor, as soon as practicable to an appropriate aeronautical facility.

§ 620.16 *Radio failure*—(a) *IFR flights.* If unable to maintain two-way radio communications, the pilot in command of the aircraft shall:

(1) If operating under VFR conditions, proceed under VFR and land as soon as practicable, or

(2) Proceed according to the latest air traffic clearance to the radio facility serving the airport of intended landing, maintaining the minimum safe altitude or the last acknowledged assigned altitude whichever is higher. Descent shall start at the expected approach time last authorized or, if not received and acknowledged, at the estimated time of arrival indicated by the elapsed time specified in the flight plan.

NOTE: Detailed procedures to be followed by the pilot are contained in the CAA Flight Information Manual, for sale by the Superintendent of Documents, U. S. Government Printing Office, Washington 25, D. C.

(b) *DVFR flights.* In case of the failure of two-way radio communications the flight may proceed in accordance with the original DVFR flight plan, and the pilot in command of the aircraft shall make a report of such failure, as soon as possible, to an appropriate aeronautical facility.

§ 620.17 *Air defense security instructions.* Under emergency air defense conditions which may involve the national security, aircraft shall be operated into or within an ADIZ in accordance with such additional special security instructions as may be issued by the Administrator. Such instructions will be con-

sistent with the provisions of the "Plan for the Security Control of Air Traffic During a Military Emergency," 15 July 1952, as approved.

§ 620.18 *Violations.* In addition to the penalties otherwise provided for by the Civil Aeronautics Act of 1938, as amended, any person who knowingly or wilfully violates any provision prescribed in this part, or any order issued thereunder shall be deemed guilty of a misdemeanor and upon conviction thereof, shall be subject to a fine of not exceeding $10,000 or to imprisonment not exceeding one year, or to both such fine and imprisonment.

### SUBPART C—DESIGNATED AIR DEFENSE IDENTIFICATION ZONES

§ 620.20 *General.* Airspace above the following described areas is established by the Administrator of Civil Aeronautics as Domestic, Coastal and International Air Defense Identification Zones.

§ 620.21 *Domestic ADIZ's*—(a) *Seattle (Domestic) ADIZ.* The area bounded by a line 49°00′ N., 114°00′ W.; 47°00′ N., 114°00′ W.; 43°00′ N., 119°00′ W.; due west to 43°00′ N., 124°40′ W.; 46°15′ N., 124°30′ W.; 48°00′ N., 125°15′ W.; 48°29′38″ N., 124°43′35″ W.; along the U. S.-Canadian international boundary line to 49°00′ N., 114°00′ W. (point of beginning).

(b) *San Francisco (Domestic) ADIZ.* The area bounded by a line 40°00′ N., 120°00′ W.; 39°00′ N., 120°00′ W.; 37°00′ N., 119°00′ W.; 34°50′ N., 121°10′ W.; 38°50′ N., 124°00′ W.; 40°00′ N., 124°35′ W.; due east to 40°00′ N., 120°00′ W. (point of beginning).

(c) *Los Angeles (Domestic) ADIZ.* The area bounded by a line 37°00′ N., 119°00′ W.; 35°00′ N., 116°00′ W.; due east to 35°00′ N., 115°00′ W.; 32°42′ N., 115°00′ W.; along the U. S.-Mexican international boundary line to 32°32′03″ N., 117°07′25″ W.; 32°30′ N., 117°20′ W.; 32°30′ N., 117°45′ W.; 33°15′ N., 118°30′ W.; 34°00′ N., 120°30′ W.; 34°50′ N., 121°10′ W.; 37°00′ N., 119°00′ W. (point of beginning).

(d) *Albuquerque (Domestic) ADIZ.* The area bounded by a line 38°45′ N., 108°30′ W.; 38°14′ N., 104°50′ W.; 37°15′ N., 104°30′ W.; 37°15′ N., 104°14′ W.; 35°40′ N., 103°25′ W.; 34°15′ N., 103°25′ W.; 33°00′ N., 105°10′ W.; due west to 33°00′ N., 110°45′ W.; 35°00′ N., 110°55′ W.; 37°02′ N., 110°52′ W.; 38°45′ N., 108°30′ W. (point of beginning).

(e) *Knoxville (Domestic) ADIZ.* The area bounded by a line 38°16′ N., 82°00′ W.; 35°38′ N., 81°00′ W.; 35°13′ N., 81°34′ W.; 34°53′ N., 82°11′ W.; 34°53′ N., 82°15′ W.; 35°06′ N., 82°15′ W.; 35°06′ N., 82°25′ W.; 34°45′ N., 82°27′ W.; 34°15′ N., 83°23′ W.; due west to 34°15′ N., 84°38′ W.; 35°07′ N., 85°06′ W.; 36°08′ N., 86°30′ W.; 36°25′ N., 86°30′ W.; 36°52′ N., 86°10′ W.; 37°40′ N., 85°30′ W.; 38°06′ N., 83°35′ W.; 38°16′ N., 82°00′ W. (point of beginning).

(f) *Alaskan (Domestic) ADIZ.* Area bounded by a line 70°00′ N., 141°00′ W.; 58°30′ N., 141°00′ W.; 58°30′ N., 150°00′ W.; 56°35′ N., 153°00′ W.; 54°35′ N., 163°00′ W.; 59°30′ N., 168°30′ W.; 68°30′ N., 168°30′ W.; 71°45′ N., 156°30′ W.; and 70°00′ N., 141°00′ W. (point of beginning).

(g) *Great Falls (Domestic) ADIZ.* The area bounded by a line 49°00′ N., 104°00′ W.; 46°00′ N., 104°00′ W.; due west to 46°00′ N., 110°39′ W.; 46°18′ N., 110°55′ W.; 46°41′ N., 111°54′ W.; 46°43′ N., 113°09′ W.; 46°59′ N., 114°00′ W.; 49°00′ N., 114°00′ W.; due east along the U. S.-Canadian international boundary line to 49°00′ N., 104°00′ W. (point of beginning).

(h) *Minneapolis (Domestic) ADIZ.* The area bounded by a line 49°00′ N., 104°00′ W.; easterly along the U. S.-Canadian international boundary line to 48°03′ N., 90°00′ W.; 44°00′ N., 90°00′ W.; 41°46′ N., 92°00′ W.; 41°35′ N., 95°59′ W.; 41°17′ N., 98°00′ W.; 46°00′ N., 98°00′ W.; due west to 46°00′ N., 104°00′ W.; 49°00′ N., 104°00′ W. (point of beginning).

(i) *Traverse City (Domestic) ADIZ.* The area bounded by a line 48°03′ N., 90°00′ W.; easterly along the U. S.-Canadian international boundary line to 44°00′ N., 82°12′ W.; due west to 44°00′ N., 90°00′ W.; 48°03′ N., 90°00′ W. (point of beginning).

(j) *Bangor (Domestic) ADIZ.* The area bounded by a line 44°00′ N., 76°31′ W.; easterly along the U. S.-Canadian international boundary line to 44°46′36″ N., 66°54′11″ W.; 44°30′ N., 67°07′ W.; 43°10′ N., 70°00′ W.; 43°45′ N., 70°00′ W.; due west to 43°45′ N., 76°00′ W.; 44°00′ N., 76°31′ W. (point of beginning).

NOTE: Prohibited areas within these ADIZ's remain out of bounds for all aircraft.

§ 620.22 *Coastal ADIZ's*—(a) *Atlantic (Coastal) ADIZ.* The area bounded by a line 44°30′ N., 66°45′ W.; 40°00′ N., 64°00′ W.; 32°00′ N., 74°00′ W.; 33°30′ N., 78°00′ W.; 35°10′ N., 75°10′ W.; 36°10′ N., 75°10′ W.; 37°00′ N., 75°30′ W.; 39°30′ N., 73°45′ W.; 40°15′ N., 73°30′ W.; 41°15′ N., 69°30′ W.; 42°00′ N., 69°30′ W.; 42°40′ N., 70°10′ W.; 43°10′ N., 70°00′ W.; 44°30′ N., 67°07′ W.; 44°30′ N., 66°45′ W. (point of beginning).

(b) *Pacific (Coastal) ADIZ.* The area bounded by a line 51°00′ N., 130°00′ W.; 48°30′ N., 125°00′ W.; 48°29′38″ N., 124°43′35″ W.; 48°00′ N., 125°15′ W.; 46°15′ N., 124°30′ W.; 43°00′ N., 124°40′ W.; 40°00′ N., 124°35′ W.; 38°50′ N., 124°00′ W.; 34°50′ N., 121°10′ W.; 34°00′ N., 120°30′ W.; 33°15′ N., 118°30′ W.; 32°30′ N., 117°45′ W.; 32°30′ N., 117°20′ W.; along a line parallel to, and approximately 12 miles from, the Mexican Coast to 29°00′ N., 114°51′ W.; 27°00′ N., 121°30′ W.; 38°00′ N., 129°00′ W.; 50°00′ N., 132°00′ W.; 51°00′ N., 130°00′ W. (point of beginning).

(c) *Hawaiian (Coastal) ADIZ.* The area bounded by a line 24°15′ N., 158°00′ W.; 22°30′ N., 155°30′ W.; 19°45′ N., 153°30′ W.; 19°00′ N., 155°00′ W.; 18°15′ N., 158°00′ W.; 20°00′ N., 161°00′ W.; 22°30′ N., 161°00′ W.; 24°15′ N., 158°00′ W. (point of beginning).

(d) *Alaskan (Coastal) ADIZ.* The area bounded by a line 73°00′ N., 141°00′ W.; 70°00′ N., 141°00′ W.; 71°45′ N., 156°30′ W.; 68°30′ N., 168°30′ W.; 59°30′ N., 168°30′ W.; 54°35′ N., 163°00′ W.; 56°35′ N., 153°00′ W.; 58°30′ N., 150°00′ W.; 58°30′ N., 141°00′ W.; 50°00′ N., 160°00′ W.; 50°00′ N., 170°00′ E.; 52°30′ N., 170°00′ E.; 65°00′ N., 169°00′ W.; 73°00′ N., 169°00′ W.; 73°00′ N., 141°00′ W (point of beginning).

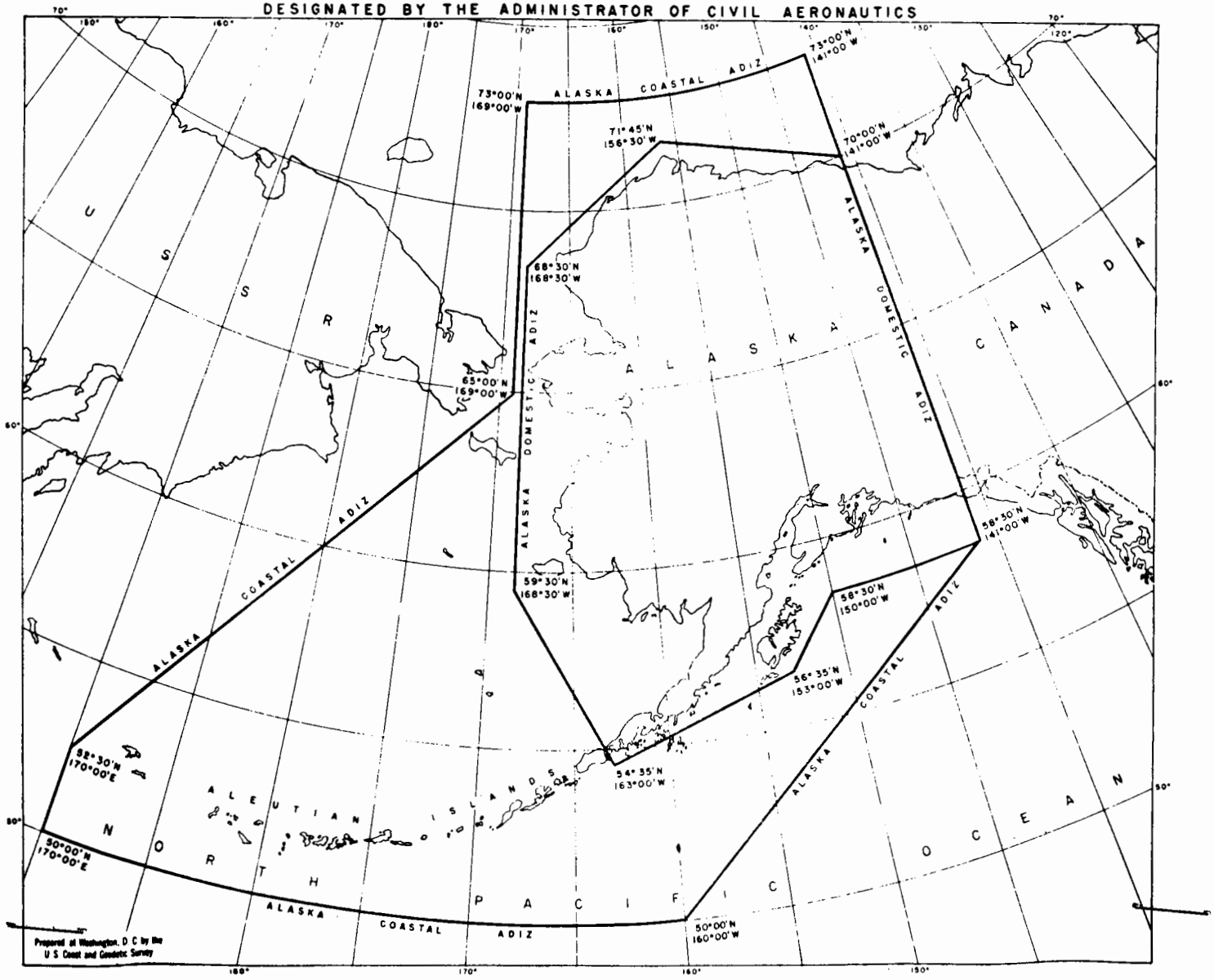
§ 620.23 *International Boundary ADIZ's*—(a) *Canadian (International) Boundary ADIZ.* A line from 44°30′ N., 66°45′ W; 44°30′ N., 67°07′ W.; 44°46′36″ N., 66°54′11″ W.; westerly along the U. S.-Canadian international boundary line to 48°29′38″ N., 124°43′35″ W.

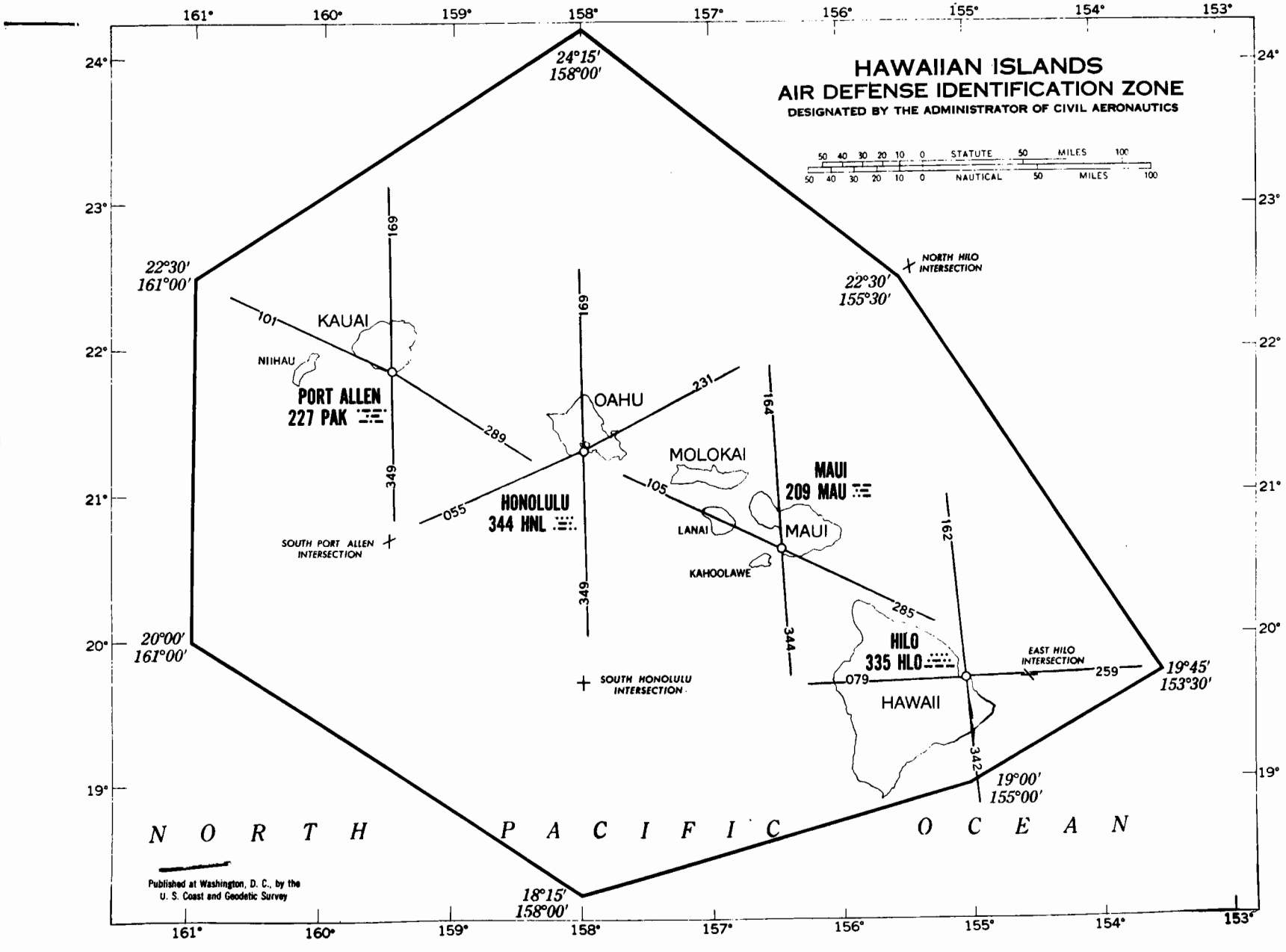
(b) *Mexican (International) Boundary ADIZ.* A line from 32°42′ N., 115°00′ W.; westerly along the U. S.-Mexican international boundary line to 32°32′03″ N., 117°07′25″ W., thence to 32°30′ N., 117°20′ W.

( See maps on pages which follow.)

# ALASKA COASTAL AND DOMESTIC AIR DEFENSE IDENTIFICATION ZONES

DESIGNATED BY THE ADMINISTRATOR OF CIVIL AERONAUTICS




HAWAIIAN ISLANDS
AIR DEFENSE IDENTIFICATION ZONE
DESIGNATED BY THE ADMINISTRATOR OF CIVIL AERONAUTICS
50 40 30 20 10 0 STATUTE 50 MILES 100
50 40 30 20 10 0 NAUTICAL 50 MILES 100
161° 160° 159° 158° 157° 156° 155° 154° 153°
24° 23° 22° 21° 20° 19°
24°15' 158°00'
22°30' 161°00'
22°30' 155°30'
20°00' 161°00'
19°45' 153°30'
19°00' 155°00'
18°15' 158°00'
NORTH HILO INTERSECTION
KAUAI
NIIHAU
PORT ALLEN
227 PAK
OAHU
HONOLULU
344 HNL
SOUTH PORT ALLEN INTERSECTION
SOUTH HONOLULU INTERSECTION
MOLOKAI
MAUI
209 MAU
LANAI
KAHOOLAWE
HILO
335 HLO
EAST HILO INTERSECTION
HAWAII
101
169
289
349
055
231
164
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285
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079
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N O R T H P A C I F I C O C E A N
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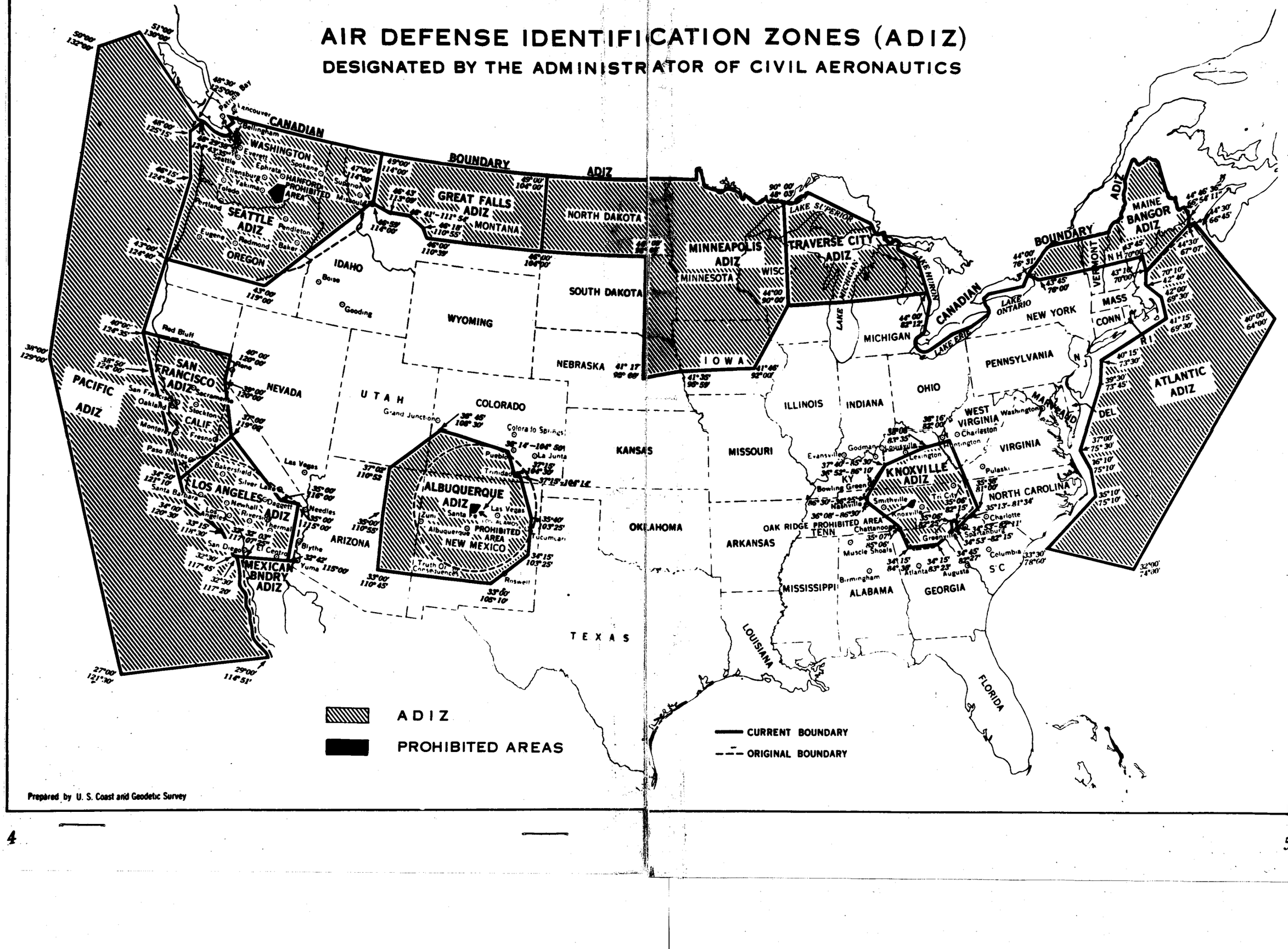
# AIR DEFENSE IDENTIFICATION ZONES (ADIZ)

## DESIGNATED BY THE ADMINISTRATOR OF CIVIL AERONAUTICS



## APPENDIX III

The following states have established contiguous zones by unilateral action (1): (These contiguous zones are established for various reasons such as fishing, policing, sanitation, etc.):

Argentina, by Civil Code dated 1st January 1871, and Fishing Regulations enacted by Decree No. 148119 of 19th April, 1943 (2);

Belgium, Law Establishing a single customs zone, 7th June 1832, a distance of 10,000 metres (3);

Bulgaria, Decree Law concerning territorial waters on 25th August 1935, six miles (4);

Canada, Customs Act of 13th July 1906, as amended, twelve miles (5);

Ceylon, Customs Ordinance, 1st January 1870, Revised Edition 1938, six miles (6);

Chile, Civil Code 14th December, 1855, and Police Regulations dated 1941, 12 miles, and the Water Code annexed to Law No. 8944 dated 21st January 1948, claims a territorial sea of fifty kilometres and the right of policing with respect to matters concerning the security of the country and the observance of fiscal laws to a distance of one hundred kilometres (7).

NOTES: 1 Laws & Regulations on the Regime of the High Seas, United Nations Legislative Series ST/LEG/SER.B/1 d 1951.

2 Ibid p 51

3 " " 52

4 " " 53

5 " " 54 & p 55 (This distance is claimed as "Territorial waters").

6 " " 58

7 " " 61

China, By Customs Preventive Law 19th June, 1934 12 miles, (1);

Columbia, Law No. 14, amending the law concerning the deposits of hydro carbons, 31st January 1923, 2nd Edition, dated 1941, twelve miles, the Customs Law dated 19th June 1931, twenty kilometres (2);

Cuba, Customs Regulations dated 22nd June 1901, four leagues, General Law on Fisheries enacted by Decree Law No. 704 dated 28th March 1936, as amended five miles (3);

Dom. Republic, Law No. 55 27th Dec 1938, makes a "military area" for 3 leagues from the coast and refers to them as "territorial waters" (4);

Ecuador, Civil Code, 21st November 1857, twelve miles (5);

regulations concerning maritime fishing and hunting enacted by Decree No. 607 dated 29th August 1934, as amended, provide that territorial waters for fishing purposes shall be considered the waters contained within 15 miles of the coast of the Colon archipelago; in other respects the distance is six miles, that is, other parts of the territory of Ecuador. The Presidential Decree No. 53, establishing the limits of the maritime zone of security, dated 7th October 1939, (6) referring to the "Declaration of Panama", states in part as follows: "That the aforesaid Declaration fixed the limits of the maritime zone of security adjacent to American territory; limits which comprised approximately a region of 250 to 300 miles, lying to the west of our archipelago of Columbus...;

Egypt, Customs Regulations, 2nd April 1884, ten Kilometres (7);

El Salvadore, Law of Navigation & Marine, 23rd October 1933, police rights twelve miles (8);

Finland, Customs Regulations 8 September 1939, six miles (9)

NOTES: 1 Ibid p 62

2 " p 63

3 " pp 64 & 65

4 " p 66

NOTES: 5 Ibid p 68

6 " p 68

7 " p 69

8 " p 71

9 " p 72

France, by decree prescribing certain rules of neutrality in maritime warfare dated 18th October 1912 (1), for neutrality purposes French territorial waters six miles; for customs purposes the customs code annexed to decree, No. 45/1985, of the Ministry of Finance and Economic Affairs, 8th December 1948, 20 kilometres (2);

Indo-China, Presidential Decree dated 22nd September 1936 in respect of fishing, 20 kilometres, (2a);

Greece, Law No. 4141 concerning passage and sojourn of merchant vessels along the Greek shores and policing of the ports and harbours in time of war, 26th March 1913, ten miles (3), the territorial waters of Greece are fixed generally at six nautical miles but Article 1 of Law No. 230 dated 17th September 1936, is interesting and should be quoted: "The extent of the territorial sea is fixed at six nautical miles from the coast, without prejudice to provisions in force concerning special matters, with respect to which the territorial zones shall be delimited at a distance either larger or smaller than six miles (4);

NOTES: 1 Ibid p 72

2 " p 74

2a " p 75

3 " p 78

4 " p 79

Guatemala, Regulations concerning the administration and the police of the ports of the Republic, 21st April 1939, twelve miles, (1);

Honduras, Civil Code 8th February 1906, twelve miles, or four marine leagues (2); and by Constitution of 28th March 1936, Article 153, claims complete sovereignty up to a distance of twelve miles;

Iran, Act relating to the breadth of the distance of the territorial waters and to the zone of supervision, 19th July 1934, provides for a territorial sea of six nautical miles and a contiguous zone of twelve nautical miles (3);

Italy, Law No. 612, relating to the passage and state of merchant vessels, 16th June 1912, ten miles (4); Customs Law No. 1424 dated 25th September 1940, twelve miles (5);

Japan, Port Regulations enacted by Law No. 174 of 1948, as amended, 10,000 metres, (6);

Lebanon, Code of Customs Regulations, 15th June 1935, 20 kilometres, (7);

Mexico, Fisheries Regulations, 5th March 1927, 20 kilometres (8), and by Regulations dated 30th January 1940 Mexico claims a territorial sea of nine miles for the purposes of construction of works, such as oil-drilling equipment, and by National Property Act dated 31st December 1941, (9), Mexico finally claims as territorial sea all coastal waters to a distance of nine nautical miles from the low-water mark;

Norway, Customs Law of 22nd June 1928, 10 nautical miles, (10);

Poland, Presidential Decree concerning the sea boundary of the state, 21st October 1932, six miles, (11);

Portugal, Customs Reform, 22nd November 1951, six miles, (12);

Saudi-Arabia, Decree No. 6/4/5/3711 dated 28th May 1949, twelve miles, (13);

NOTES: 1 Ibid pp 79, 80

2 " p 80

3 " p 81

4 " p 81

5 " p 82

NOTES: 6 Ibid p 83

7 " p 83

8 " p 84

9 " p 85

10 " p 87

11 " p 87

12 " p 88

13 " p 89

Sweden, (1) Act No. 463 unlawful dealing in alcoholic beverages, 27 Nov 1925, 12 miles; Customs territory is fixed by Customs Decree #391, 7 Oct 1927 - 4 miles (2);

Turkey, Customs Law 30 June 1926 No. 408 - 4 miles (3);

United Kingdom, Customs Consolidation Act 1876 generally 4 leagues, (4);

United States, Anti-Smuggling Act, 5th August 1935, as amended, (5) provides, in the case of a hovering vessel, that United States jurisdiction may, on a declaration of the President, extend to a distance of fifty nautical miles outwards from the outer limit of customs waters. By presidential proclamation No. 2668, 28th September 1945, the United States proclaimed a policy whereby she would set up zones for the protection and conservation of fisheries in areas of the high seas contiguous to the coasts of the United States and by Executive Order No. 9634, dated the same date, the Secretary of State and the Secretary of the Interior were authorized to make recommendations to the President on receipt of which he would issue executive orders declaring the policy of the United States with respect to coastal fisheries in certain areas of the high seas (6). In a press release accompanying the proclamation (7), it was stated in part "In areas where fisheries have been or shall hereafter be developed and maintained by nationals of the United States alone, explicitly-bounded zones will be set up

NOTES: 1 Ibid p 94

2 " p 96

3 " p 98

NOTES: 4 Ibid p 99

5 " p 107 (U.S. Code 1946 Title 19)

6 " pp 112, 113

7 " p 484 (Dept. of State Bulletin, Vol. 13 (1945))

United States, (cont'd) in which the United States may regulate and control all fishing activities. In other areas where the nationals of other countries, as well as our own, have developed or hereafter legitimately develop, fisheries, zones may be established by agreements between the United States and such other states, and joint regulations and control will be put into effect.

In the United States versus Louisiana, the Supreme Court said in part as follows (1): "We intimate no opinion on the power of the State to extend, define, or establish its external territorial limits, or, on the consequences of any such extension, vis-a-vis, persons other than the United States, or those acting on behalf of, or pursuant to, its authority. The matter of state boundaries has no bearing on the present problem. If, as we held in California's case, the three-mile belt is in the domain of the nation, rather than that of the separate states, it follows, a fortiori, that the ocean beyond that limit also is. The ocean seaward of the marginal belt is perhaps even more directly related to the national defence, the conduct of foreign affairs and world commerce, than is the marginal sea. Certainly, it is not less so. So far as the issues presented here are concerned, Louisiana's enlargement of her boundary emphasizes the strength of the claim of the United States to this part of the ocean and the resources of the soil under that area, including oil". USSR Decree Concerning the Protection of Fisheries and Game Reserves in the Artic Ocean and the White Sea, 24th May 1921, twelve miles (2); Also, Act No. 431, dealing with the use of radio equipment, dated 24th July 1928, which provides that foreign military and non-military vessels in the marginal seas or inland waters of the USSR at a distance of ten miles from the shore may use their radio equipment only in accordance with the provisions of this order;

NOTES: 1 Official Reports of the Supreme Court, Vol 339, pp 699, 701 & 705.

2 Ibid p 116

Uruguay, By presidential decree dated 7th August 1914, provides that the territorial waters of the Republic will be considered as territorial waters to a distance of five miles from the coast of the mainland and islands from the visible outlying shoals (1);

Venezuela, In the case of Venezuela, they claim a contiguous zone of twelve miles by Navigation Law 9th August 1944 (2);

Jugoslavia, By its act concerning the coastal waters of the Federal People's Republic of Jugoslavia, 1 December 1948, in Article 8, lays down a contiguous zone of ten miles. The territorial sea is claimed as 6 miles (Art 5) (3).

NOTES: 1 Ibid p 130

2 " p 131

3 " p 133

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