State Control of the Air Space Over the Territorial Sea and the Contiguous Zone

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I. *Introduction*

The problem of the legal status of the air space over national territory and over the high seas has been, particularly since the beginning of controlled flight, the subject of great controversy among international lawyers. At the beginning of the twentieth century, the world was faced with a choice between two conflicting theories: (1) freedom of the air; (2) national sovereignty over the air. Books were written, international meetings were held, new theories were formulated, until finally on October 13th, 1919, twenty-seven nations meeting at Paris signed the Paris Convention, under which they accepted the doctrine of national sovereignty over the air space. Article 1 provides:

> 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 a 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.

Twenty-five years later, the same principle was affirmed by the signing of the Chicago Convention 1944, of which the first article provides:

> The contracting states recognize that every state has complete and exclusive sovereignty over the air space above its territory.

and the second:

> For the purpose of this convention the territory of a state shall be deemed to be land areas and territorial waters adjacent thereto under the sovereignty, suzerainty or mandate of such state.

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The Chicago Convention, and to some extent the Paris Convention,[1] represent a crystallization of present international thinking acceptable to the majority of the nations of the world on the subject of international air law. Although the two conventions have solved the main problem of the status of the air space over national territory, there are some phases of sovereignty in the air space that still remain obscure. The air space over the arctic regions and the territorial waters of states presents difficult problems of sovereignty. The Chicago Convention has used the term "air space" without defining it. Does this limit the sovereignty of states upwards to include only regions where air is present? Do states have any rights in those upper regions beyond the air space where rocket flights are possible? Professor John Cobb Cooper,[2] director of the Institute of International Air Law at McGill University, has suggested a change in terminology to include such regions. He recommends the use of the term "flight space", which, if it were adopted, would allow states to control "so much of universal space above and beyond the surface of the earth as is now used or may hereafter be used as the area in which flight takes place".[3] The adoption of this definition would certainly help to solve one of the problems in air law by defining more accurately the extent of sovereignty of states upwards.

Article 2 of the Chicago Convention includes in the territory of a state the territorial waters adjacent to the land areas under the sovereignty, suzerainty or mandate of such state. The words "territorial waters" have been used by various authors to qualify those bodies of water that are part of the territory of the state. They refer to the bodies of water that according to Kelsen[4] make up the "territorial sphere of validity" of a state, where one state to the exclusion of other states can carry out its coercive acts. They include the maritime belt and inland waters. In order to make clear whether inland waters or the maritime belt is meant, I shall when referring to the maritime belt use the term "territorial sea", reserving the term "territorial waters" in its broader meaning for all water areas that form part of the territorial sphere of validity of the state.

> The observer who leaves the shore going in the direction of the high seas meets successively the following maritime areas, each endowed of a dif-

[1] In so far as its principles have been incorporated in the Chicago Convention 1944.

[2] J. C. Cooper, Air Law: Subject Matter, Terminology, Definition (Institute Study No. 1, September 15th, 1951).

[3] Definition of flight space by J. C. Cooper.

[4] Kelsen, General Theory of Law and State (1945 translation) p. 208.

ferent juridical status: (a) the interior maritime waters, (b) the territorial sea, (c) the contiguous zone, (d) the high sea.[5]

Maritime law has recognized that littoral states have rights of full sovereignty in the interior maritime waters and the territorial sea to a distance of at least three miles from the coast; it has further recognized limited rights beyond the territorial sea in a zone that I shall call the contiguous zone. In the high seas international law has allowed the exercise of exceptional rights in certain cases.

The territory of the state for purposes of sovereignty does not end at a point rigidly fixed at three miles from the coast. If it did, there would be full sovereignty within three miles from the coast, and absence of sovereignty outside the three mile limit, assuming that three miles is the limit set by international law. This I submit is not the situation.

Whether we accept the supremacy of national law over international law or of international law over national law, there is no clear cut distribution of powers when the two meet in the same jurisdiction. The extent of the territorial sea is far from settled, the claims ranging from three to twelve miles from the coast; in the contiguous zone we have the same problem, many states even refusing to recognize the existence of the zone at all. Because of article 2 of the Chicago Convention and the conventional rules of international law, the territorial sea and the air space over the territorial sea are part of the territory of the state and are therefore under the full sovereignty of the state. Since the territorial sea, so far as sovereignty rights are concerned, does not present any problem, I shall in the second part of this article discuss its extent and try to establish that the three mile limit is not a universal rule set by international law, but only a minimum limit recognized by states generally. In the third part I shall consider the basis for the exercise of certain rights in the so-called contiguous zone in maritime law and whether it is necessary that states should have similar rights in the contiguous air space corresponding to the contiguous zone. The fourth and last part will contain an analysis of the recent Canadian and United States security regulations, under which the two countries have claimed the right to control air traffic outside their territorial waters in the air space over portions of the high seas.

II. *The Territorial Sea*

The territorial sea, being at the outer boundary of the state, af-

[5] Gidel, Académie de Droit International, Recueil des Cours 1934, vol. 48, p. 138.

fords more difficulties than other bodies of water in the territory of the state. The maritime belt has always been conceived of as a zone of protection, a buffer zone against a possible invader from the sea. With the coming of aviation and the rapid development of intercontinental flights, resulting in increased facility and frequency of intercourse between the peoples of the world, nations no longer feel secure *within* their territory. National boundaries, whether natural or artificial, have lost their significance. An air barrier is a pretty fluid rampart. The air spaces over the high seas, the frozen arctic regions and the great deserts are but new avenues to the invader. It remains to be seen whether the boundaries set by international law will stand the test of these new developments.

We know that the air space over the territory of the state is under the sovereignty "complete and exclusive" [6] of the subjacent state. "It is only when the column of air rests upon a *res nullius* or *communis*, the sea, that freedom becomes the rule of the air. The air space shares the jurisdiction of the underlying territory." [7] In view of the recognition by international law of the principle of the freedom of the high seas, and conversely the sovereignty of the littoral state over the marginal sea, I shall try to place the line of demarcation between the marginal sea and the high seas in an attempt to determine the extent of the territory of the state.

When Grotius' *Mare Liberum* was published, the high seas were controlled by a number of states, many of which claimed exclusive rights of navigation. Grotius set out to correct these claims. The time was favourable, his arguments were forceful and irrefutable. More than a hundred years after the appearance of his book, his plea for the freedom of the seas was answered:

> These vague and unfounded claims of the 18th, 17th and earlier centuries disappeared and there was nothing left of them. The sea became, in general, as free internationally as it was under Roman Law. But the new principles of freedom when it approached the shore, met with another principle, the principle of protection, not a residuum of the old claim, but a new independent basis and reason for modification, near the shore, of the principle of freedom. The sovereign of the land washed by the sea asserted a new right to protect his subjects and citizens against attack, against invasion, against interference and injury, to protect them against attack threatening their peace, to protect their revenues, to protect their health, to protect their industries. This is the basis and the sole basis on which is established the territorial zone that is recognized in the international law of today. Warships may not pass without consent into this

[6] Chicago Convention 1944, Article 1.
[7] Conférence de la Paix 1919–20, Rapport de la Sous-Commission, Recueil des Actes de la Conférence, p. 418.

zone because they threaten. Merchant ships may pass and repass because they do not threaten.[8]

Is the three mile limit a rule of international law? To answer this question I shall study the claims of states in the marginal sea. It will be necessary to study only those claims to full and exclusive sovereignty, subject to the right of innocent passage for merchant vessels, and not claims to limited jurisdiction and control for special purposes. Gidel expressed this idea very clearly when he said:

> Dans la mer territoriale, l'état riverain peut prétendre sous les limitations résultant du droit international, à l'exercise du faisceau des compétences dont l'ensemble constitue la souveraineté.[9]

And Jessup, in discussing the concept of jurisdiction, remarks:

> There is a vital distinction between that maritime belt which is claimed as a part of territory of the state and the limited rights of control or jurisdiction claimed upon the high seas.[10]

> The word 'sovereignty' is used to connote a freedom to perform governmental acts to the exclusion of all other authority, subject to such limitations as are self imposed or imposed by International Law.[11]

Max Huber, sole arbitrator in the Island of Palmas (Miangas) Arbitration of 1928, said in part:

> Sovereignty in the relation between states signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other state, the function of a state.

It is admitted by most authors that, though the three mile limit has been accepted by leading nations of the world, it is not today recognized by international law as a rule governing the extent of the territorial sea. Jessup, however, after making a survey of national claims, concludes that the traditional three mile limit was in 1927 an established rule of international law.[12]

Many authors disagree with Jessup on this point. Although they agree that the three mile limit may be considered as a minimum, they refuse to accept it as the official international boundary for coastal waters. Westlake belongs to this group. He holds that the three mile limit considered as a minimum is accepted universally:[13]

> The principle of a presumed limit to occupation was laid down by Byn-

[8] Argument of Elihu Root in XI Proceedings, North Atlantic Fisheries Arbitration, p. 2006.
[9] Gidel, Le Droit International Public de la Mer (1934), Vol. 3, p. 14.
[10] Jessup, The Law of Territorial Waters and Maritime Jurisdiction (1927) p. xxxiii.
[11] Jessup, *op. cit.*, p. xxxiv.
[12] Jessup, *op. cit.*, p. 66.
[13] Westlake, International Law (1904), Part I (Peace) p. 188.

kershoek, who, taking into account only force exercisable from the shore, taught, first, as a general maxim, *imperium terrae finiri ubi finitur armorum potestas*, and secondly as the application of that maxim to his own time, the range of cannon, then considered to be three sea miles of sixty to a degree of latitude. Hence that distance, measured from low water mark, became a commonplace among authors for the width of the littoral sea, and we may say that the agreement on it as a minimum is universal: no state claims less. As a maximum the agreement is not universal, and it may be doubted whether it is so nearly such as to make it a rule of International Law, while the increased range of cannon-shot, as well as the increased need of protection for shore fisheries against trawl nets and other destructive devices, has made the reason for it quite obsolete and inadequate.

Hall[14] shares Westlake's views but goes one step further. He recognizes the theoretical right of a state to extend its territorial sea:

It may be doubted in view of the very diverse opinions which have been held until lately as to the extent to which marginal seas may be appropriated, of the lateness of the time at which much more extensive claims have been fully abandoned, and of the absence of cases in which the breadth of territorial water has come into international questions, whether the three mile limit has ever been unequivocally settled; but in any case, as it has been determined, if determined at all, upon an assumption which has ceased to hold good, it would be pedantry to adhere to the rule in its present form; and perhaps it may be said without impropriety that a state has theoretically the right to extend its territorial waters from time to time at its will with the increased range of guns.

In Oppenheim's *International Law* it is said:[15]

With regard to the breadth of the maritime belt various opinions have in former times been held, and very exorbitant claims have been advanced by different States, such as a range of sixty or a hundred miles, or a range of vision (about fourteen miles). Although Bynkershoek's rule that *terrae potestas finitur ubi finitur armorum vis* is now generally recognized by theory and practice, and consequently a belt of such breadth is considered under the sway of the littoral state as is within effective range of the shore batteries, there is still no unanimity on account of the fact that such range is day by day increasing.

Gidel expresses what I consider the correct view when he recognizes the three mile limit, but qualifies his recognition by saying that it is a rule "à contenu négatif":[16]

D'autre part la limite de 3 milles est plus qu'une simple coutume particulière liant un groupe d'Etats: elle est une règle du droit international mais *à contenu négatif*, c'est-à-dire qu'aucun état ne peut se refuser à respecter la zone d'eaux territoriales établie par un autre état lorsque la largeur de cette zone n'excède pas trois milles. Ainsi, d'une part, les trois milles constituent un minimum sur lequel l'accord général des états doit

[14] Hall, International Law (7th ed.,.1917) p. 157.
[15] Vol. 1 (7th ed.) p. 444.
[16] Gidel, Le Droit International Public de la Mer, Vol. 3, pp. 134-135.

être considéré comme établi. Mais le droit international laisse aux Etats là compétence de fixer pour leur mer territoriale une étendue supérieure à trois milles.

Philip Marshall Brown in articles written in 1923[17] and 1927[18] comes to the conclusion that the three mile limit is not accepted generally. The final argument against the three mile limit is to be found in the proceedings of the 1930 Conference for the Codification of International Law, which broke down on this very question.[19] The states represented at the Conference could not agree on the extent of the territorial sea. They were divided into three groups which either (1) accepted the three mile limit without any rights beyond;[20] (2) accepted the three mile limit with the institution of a contiguous zone;[21] (3) refused to accept the three mile limit with or without a contiguous zone.[22] Today the situation has not changed. States are still divided on these vital issues. The claims to territorial seas range from three to twelve miles, with some additional claims to a contiguous zone and even to the entire continental shelf.[23]

It is not unreasonable to conclude that the three mile limit is not at present recognized as a rule of international law, though it is submitted that, as a minimum, it has been generally accepted by the nations of the world, few states, if any, having claimed less than three miles of territorial sea. It follows, therefore, that a state can be said to have full sovereignty in the air space above its territorial sea to a distance of *at least* three miles from the coast.

III. *The Contiguous Zone*

What are the rights of states beyond their territorial waters? Are there any exceptions to the doctrine of the freedom of the seas? If restrictions can be found on the doctrine of freedom, by analogy these or similar exceptions may also apply to the airspace above the high seas, since the air space shares the jurisdiction of the underlying territory. It will be necessary, therefore, to study the regime of that part of the high seas contiguous to the territorial

[17] (1923), 17 Am. J. Int'l L. 89.
[18] (1927), 21 Am. J. Int'l L. 101.
[19] Rapport François, Second Commission of the Conference on Codification.
[20] Britain and Commonwealth countries, the United States, Japan and Holland.
[21] Germany, Belgium, Chili, Cuba, Egypt, Estonia, France, Greece, Ireland and Poland.
[22] Brazil, Colombia, Spain, Finland, Norway, Sweden and others.
[23] S. W. Boggs, National Claims in Adjacent Seas (1951), 41 Geographical Review 185.

sea, over which states have claimed certain jurisdictional rights of control for special purposes.

In 1922 in the case of the *Grace and Ruby*, a British schooner charged with violating certain United States statutes,[24] the district court of the United States for the district of Massachusetts stated in part:

> 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.

The United States in their anti-smuggling acts and liquor statutes have assumed jurisdiction outside their coasts to a distance of twelve miles. The width of debatable waters mentioned in the case cited is what Gidel calls the "contiguous zone". Gidel[25] recognizes that it is part of the high seas, but maintains that the rule of freedom must give way to certain limited rights belonging to the riparian state:

> La zone contigue est incluse dans la haute mer, mais le régime de liberté qui est celui de la haute mer se trouve entamé, au détriment des autres états, par l'existence, au profit de l'état riverain, de certaines compétences limitées.

Jessup under the chapter heading "Jurisdiction and Control of the High Seas Adjoining Territorial Waters"[26] discusses the exercise of certain rights by littoral states in the high seas adjoining their territorial sea. Although he does not call this area "a contiguous zone", it is obvious that he is referring to the same thing. Jessup recognizes exceptions to the principle of the freedom of the seas[27] for certain special purposes, of which the most important are: (1) customs jurisdiction and control; (2) neutrality and national safety. But, according to him, even if the state is legislating on one of those subjects, the law must pass Chief Justice Marshall's test of reasonableness:[28]

> If these laws are such as unnecessarily to vex and harass foreign lawful commerce, foreign nations will resist their exercise. If they are such as are reasonable and necessary to secure their laws from violation, they will be submitted to.

Although the attitude of states to claims of jurisdiction and con-

[24] Sections 2872 and 2874, Revised Statutes of the United States, and the National Prohibition Act (41 Stat. 305).
[25] Gidel, Le Droit International Public de la Mer, Vol. 3, p. 15.
[26] Jessup, *op. cit.*, p. 75.
[27] *Ibid.*
[28] *Church* v. *Hubbart* (1804), 2 Cranch 187, at p. 234.

trol is a little confused, and although there is no uniformity in the claims, it seems that if the claim is reasonable it will be accepted by other nations, the nation whose mercantile flag has been violated by acts of the littoral state waiving in practice its right to redress. This test would probably be applied more strictly to customs jurisdiction and control than to neutrality and national safety.

When the safety of the state is menaced, it is possible that more extensive control would be allowed by international law:

> Un état a incontestablement le droit de prendre toutes les mesures désignées à garantir son existence contre les dangers qui la menacent.[29]

There is no doubt that the right of self preservation is one that is inherent in each state. Judge Cochran, in the case of *The Vinces*, a vessel which had been apprehended carrying liquor within twelve miles of the coast of the United States, recognized the right of a state to exercise its authority, on certain occasions, beyond the three mile limit:

> The high seas, however, are the common property of all nations. The authority of a nation within its own territory is of course absolute and exclusive. The authority of a nation over the high seas is not exclusive, but must be exercised with due regard to the rights of other nations therein. Every nation has the inherent right to protect itself and to provide for the enforcement of its laws and the security of its territorial jurisdiction. For the purpose of self protection and the due execution of its laws and for the prevention of frauds on its revenue, it may exercise an authority on the high seas beyond the three mile limit.[30]

It is interesting, at this point, to note that the claims made by states over the contiguous zone are not claims to territorial sovereignty but limited claims for certain defined purposes, such as customs or safety. In my discussion of the extent of sovereignty in the territorial sea, many divergent claims were mentioned. If the doctrine of the contiguous zone had been accepted by the proponents of the three mile limit, a compromise could have been reached on the extent of sovereignty over the territorial sea. With a distinction made between the territorial sea and the contiguous zone the problem is simplified. Up to a certain distance from the coast the littoral state has all the attributes of sovereignty. Beyond that distance, we reach the high seas, but, on some parts of the high seas, the littoral state may exercise certain powers recognized by international law. These two notions, according to Gidel,

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[29] Fauchille, Traité de Droit International Public (8th ed., 1922), Vol. 1, no. 242.

[30] Hackworth, Digest of International Law (1941), Vol. 2, p. 656.

complete each other and explain factual situations which could not juridically be explained otherwise.[31]

Before the distinction was made, states used to call the "contiguous zone" territorial waters for fisheries, territorial waters for customs, and the like. There was no definition of territorial waters. The necessity of such a zone was recognized by several states which claimed a territorial sea of twelve miles, because they failed to distinguish between the exercise of rights of sovereignty and the exercise of control rights, and feared that unless they claimed an extended zone as territorial sea they would lose their special rights. It was at this time (1925) that de La Pradelle, speaking before the Institute of International Law, said: "Dire qu'il y a plusieurs mers territoriales, c'est avouer qu'il n'y a pas de mer territoriale au sens objectif du mot". We can understand his reasoning in the light of the contiguous zone theory formulated by Gidel.

Gidel recognizes the necessity of establishing a contiguous zone based on the protection of three groups of interests: (1) customs and fiscal interests; (2) security interests (sanitary, navigation, general); (3) fisheries. It is interesting that Jessup has recognized exceptions to the doctrine of freedom of the seas in favour of customs, navigation and security interests. Jessup, however, did not consider fisheries as a true exception; he believed that fisheries had to be regulated by convention. Gidel goes further than Jessup when he assumes that the protection of fisheries is a proper basis for the establishment of a contiguous zone. But the fact that Gidel accepts fisheries is not too important. Both Jessup and Gidel fundamentally agree on the important thing, namely, that certain rights require protection. They both recognize the necessity of exercising limited control beyond the territorial sea and they both believe that a customary rule of international law exists covering the right to exercise this control.

Although the 1930 Codification Conference did not result in general acceptance of the contiguous zone theory, an imposing number of members did accept the principle as an institution of customary international law. Another group recognized the necessity of exercising certain rights outside the territorial sea, but asserted that they could only be exercised by conventional arrangements among nations, so that whether we accept or reject the contiguous zone, there is unanimity on certain exceptions to the freedom of the seas.

Great Britain, the United States, France and Russia, the lead-

[31] Gidel, Académie de Droit International, Recueil des Cours, Vol. 48, p. 143.

ing maritime nations, as well as other nations, have at present, or at least have had if we consider the repeal of the British Hovering Acts, some legislation on customs, revenue or security which warrants the assertion that a customary rule of international law exists and is recognized today. If we add special rights to fisheries, claimed by some nations and recognized conventionally by others, we find that the exceptions to the freedom of the seas are sufficient to establish a tentative zone beyond the territorial sea, where, according to the evidence, states exercise some kind of control.

The extent of this zone is far from established, though the claim of a zone of twelve miles seems to be most popular. The United States claim twelve miles for customs purposes when the ship is bound to the United States.[32] Russia claims twelve miles as territorial sea for security purposes. Many other states, mostly in South America, claim twelve miles for security purposes or customs, or for both. The Convention for Suppression of Contraband in Alcoholic Goods signed at Helsinki on August 19th, 1925, established a twelve mile zone between contracting states.

The main objections to rights of control by the littoral state in the high sea beyond the territorial sea were the doctrines of freedom of the seas and of commerce. It was felt that the necessities of international commerce required that a ship be able to travel without being subject to control or interference by the coastal states. The recognition of the right of innocent passage in the territorial sea is an application of this principle. It was for this reason that even in the British Hovering Acts of 1763 the relationship between the coastal state and the ship at sea had to be established before the littoral state would claim any jurisdiction over the ship.[33] Today no such distinction is made and the United States, particularly, assume jurisdiction whenever the ship is bound to a United States port.

What are the conditions of control in the air space contiguous to the territorial air space? Do the rules and exceptions which apply for the high seas apply also in the air space above the high seas? I submit that a state must have, for the protection of its interests, both fiscal and security, the same if not more rights in the air as it has at sea. In the air, the same interests are involved but to an even greater extent.

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[32] This and the claims that follow are given in the tables prepared by S. W. Boggs (1951), 41 Geographical Review 192.

[33] The ship had to be registered in Britain or at least partly owned by British subjects; later, the nationality of persons on board was sufficient to give jurisdiction: Jessup, *op. cit.*, p. 79.

Customs and Immigration

The problem with respect to customs and immigration is, it seems to me, more difficult in the air than at sea. A plane that has penetrated into the territory of a state can easily drop objects or even persons in uninhabited territory; it is true that very much the same thing can be done from a ship, but the risks are greater at sea because the chances of discovering and capturing a ship are greater. I am not suggesting that the right of search existing in maritime law be given in the case of aircraft — for one thing it might be more difficult of application — but, because of the speed of planes and the altitude at which they can fly, it is essential that states, to protect their interests, have the power to control incoming aircraft. In order to exercise sovereignty in and over their own territory, states must be permitted to control and direct an aircraft before it enters their territory. The time element is important. A plane flying at two hundred miles an hour covers in a few minutes the distance a boat would cover in one hour. Since the maximum distance allowed by international law for customs control at sea is twelve miles, or approximately one hour sailing time from the coast, by analogy, if we adapt this figure to control of the air space, a state should be allowed to control between two and three hundred miles from its coast for customs and immigration purposes.

Security

Although Jessup[34] mentioned security as one of the recognized exceptions to the doctrine of the freedom of the seas, Gidel's treatment of the notion of security is more complete.[35] He breaks down security interests into (1) sanitary; (2) navigation; and (3) general.

The problem of security of navigation has no doubt been partly solved by the Chicago Convention of 1944.[36] But in countries or regions where air circulation is extensive, where because of the proximity of large industrial centres there is intensive air traffic,

[34] Jessup, *op. cit.*, p. 75.

[35] Gidel, Le Droit International Public de la Mer, p. 455.

[36] Article 12 of the Chicago Convention reads: "Each contracting state undertakes to adopt measures to insure that every aircraft flying over or manoeuvring within its territory and that every aircraft carrying its nationality mark, wherever such aircraft may be, shall comply with the rules and regulations relating to the flight and manoeuvre of aircraft there in force. Each contracting state undertakes to keep its own regulations in those respects uniform, to the greatest possible extent, with those established from time to time under this convention. Over the high seas, the rules in force shall be those established under this convention. Each contracting state undertakes to insure the prosecution of all persons violating the regulations applicable."

it is possible that further regulation by the subjacent state will be necessary, if not essential, for the safety of air navigation. It may thus be necessary, because of the speed of planes, to exercise some control over approaching aircraft before they enter the territorial air space or even the contiguous air space. This would permit air control officers to give directional orders to incoming planes and thus prevent the danger of collision.

Besides security of navigation there is what Gidel calls "sécurité tout court". It is a notion closely allied to self preservation, which is given by right to every state. If a state has a right to exist, it undoubtedly has the right to preserve its existence:

> The ultimate foundation of International Law is an assumption that States possess rights and are subject to duties corresponding to the facts of their postulated nature. In virtue of this assumption it is held that since States exist, and are independent beings, possessing property, they have the right to do whatever is necessary for the purpose of continuing and developing their existence, of giving effect to and preserving their independence, and of holding and acquiring property, subject to the qualification that they are bound correlatively to respect these rights in others.[37]

How far states can go in the exercise of this right of protection, and the nature of the preventive measures that can be taken, are not accurately defined, although it is admitted that an invasion of a *res nullius* or *communis*, the high sea, is less serious than the invasion of the national territory of one state to protect the rights of another.

IV. *Canadian and United States Security Regulations*

The United States Government, by the adoption of a new regulation in December 1950, assumed jurisdiction for security purposes in the air spaces over large areas of the high seas adjoining the United States.[38] These areas were called "Air Defence Identification Zones" (ADIZ), and were defined in sub-part A of the introduction at section 620. 2b as:

> Air space 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 national security.

The legislation provides for position reports and flight plans to be given to appropriate aeronautical facilities by United States or foreign aircraft before entering the United States, but the pro-

[37] Moore, Digest of International Law (1906), Vol. 1, p. 60, section 23.
[38] Part 620, Regulation of the Administrator, Security Control of Air Traffic.

cedure must be followed by foreign aircraft only if they intend to enter United States territory.

Although the limits of the coastal ADIZ are defined in the regulation, foreign aircraft may report either when they enter the ADIZ or "when the aircraft is not less than one hour and not more than two hours cruising distance via the most direct route, from the United States".[39] 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, where the twelve mile limit, equivalent to one hour sailing distance from the shore, is recognized for customs and immigration purposes.

The note that immediately follows section 620.12(b) 2 indicates clearly that these new regulations are distinct from other previous "requirements prescribed for the control of air traffic". There is no doubt, therefore, that this legislation has been enacted for a special purpose, the protection of national security, and not merely to supplement legislation for the safety of air navigation or the control of air traffic. Section 620. 1 of Sub-Part (A), Introduction, states:

> *Basis and Purposes.* The regulations prescribed in this part contain rules and regulations 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 Defence Identification Zones. (ADIZ)

The legality of this legislation does not seem to have been questioned by any other nation since its enactment. I doubt if it could be successfully claimed that it is an encroachment on the principle of freedom of the seas, in view of the legal link established by the condition that the foreign aircraft must be bound for the United States. Thus, the regulations do not apply to foreign aircraft which though crossing an ADIZ are not bound for the United States, and in such a case the United States Government would not attempt to assume jurisdiction over them. There is, therefore, no real interference with the freedom of the air space over the high seas. Furthermore, the United States government by this legislation is merely exercising partial and limited jurisdiction; it is not in any way claiming rights of sovereignty in the air space over the high seas.

The Canadian government, about five months later, enacted

[39] Section 620. 12 (b) 2, Foreign Aircraft.

legislation similar in many respects to the United States Part 620.[40] By this order Canadian Air Defence Identification Zones (CADIZ) were established and special regulations were issued governing flights within them. The basis and purpose of the regulations are stated in paragraphs 1 and 3 of the information circular:

> (1) It has been found necessary in the interest of national security to establish zones within which aircraft will conform to certain regulations.
> (3) The regulations have been prescribed in order that aircraft may be readily identified, located and controlled within a CADIZ.

Both the Canadian and United States legislation have the same aim, national security, and both seek to achieve it by the same general method, the creation of Air Defence Identification Zones. The main differences between them appear in details. The first is the extent of the zones. The United States ADIZ on the Atlantic coast extends out into the high sea more than two hundred miles. In the Pacific, the zone, though only seventy-five to a hundred miles wide, is still three times the width of the corresponding Canadian western CADIZ. Along the eastern coast of Nova Scotia, the eastern CADIZ does not extend over the high sea more than some thirty miles from the coast.

The second difference between the regulations of the two countries is the altitude limitation imposed by Canada in both CADIZ. The Canadian regulation at section 2.1 states:

> *Application.* The following rules shall apply only to flights at or above 4000 feet above the immediate terrain, and which are about to enter a CADIZ or are conducted within a CADIZ.

The United States regulations do not impose any altitude limitation for flights entering the Atlantic ADIZ, though the same 4,000 feet limitation is imposed in the other United States ADIZ. It seems that the United States are anxious to exercise stricter control in the Atlantic ADIZ. This may be understandable, because of the greater traffic and the greater importance of the adjoining industrial region.

Although the two differences just mentioned are of some importance, a more significant one can be found by comparing the wording of section 2.1 of the Canadian regulation with section 620.12(b) 2 of the United States regulation. The validity of the United States regulation from the viewpoint of international law depends to some extent on the fact that the littoral state, while assuming partial jurisdiction over a portion of the high seas, is not

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[40] Information Circular no. O/19/51, May 12/51, issued by the Director of Air Services, Department of Transport, Air Services Branch, Civil Aviation Division.

interfering with the freedom of the air space over the high seas. In fact, according to section 620. 12(b) 2 of the United States regulation, unless an aircraft is destined for the United States, the regulations do not apply, since foreign aircraft are requested to submit only "prior to entering the United States". Thus an aircraft on a flight from Cuba to New Brunswick, though passing through the Atlantic Coastal ADIZ, would not be required to submit to the provisions of part 620 if it passed outside the territorial air space of the United States.[41]

There is no such condition in section 2.1 of the Canadian regulations. Canada assumes jurisdiction as soon as the aircraft enters a CADIZ. No question of destination arises. Admittedly, the Canadian Air Defence Identification Zones extending over portions of the high seas are not as wide as those of the United States Atlantic Coastal ADIZ, but the sea is just as much high sea thirty miles, as it is two hundred miles from the coast.

An aircraft flying from the Miquelon Islands to New York on a course parallel to the coast of Nova Scotia, at a distance of twenty miles from the coast and at an altitude of 5,000 feet, would be passing through the eastern CADIZ and the Atlantic coastal ADIZ. In such a case, and it has already happened in practice, Canada would assume jurisdiction, and the unidentified aircraft would probably find itself surrounded or at least escorted by Canadian military aircraft.

Looking at the two sets of regulations, therefore, we find that the Canadian regulations, though they appear milder, in that they do not attempt to control such a large portion of air space over the high seas, are in fact stricter than the American regulations. It is no doubt true that in practice a strange aircraft could easily prevent unpleasant encounters by flying at an altitude below 4,000 feet, where it could be more readily located and identified from the ground or the surface of the water. But in part V, section 1, of the Canadian Air Regulations, 1951, at subsection 5. 1. 2, it is said:

> Aircraft shall while over the high seas comply with the provisions of annex 2 'Rules of the Air' to the Convention on International Civil Aviation (1944), and any amendment thereto.

It may be difficult to reconcile Canada's attitude in the application of these regulations with article 12 of the Chicago Convention, 1944, and the principle of freedom of the seas.

Since the field of international air law is relatively new and

[41] There has been administrative opinion in the United States to that effect.

therefore lacking in precedents to support what may appear to be new rules, I believe it is proper to turn to the ordinary rules of international law and maritime practice. The only reason in international law for the existence and recognition of the territorial sea is the protection of the littoral state. It was felt, when the territorial sea was first recognized that the protection of the state and its citizens required that a state be given the power to exercise its sovereignty over that portion of the sea which it could effectively control from the coast. The then range of cannon being three miles, the three mile limit was adopted. This three mile limit, with the increase in the range of cannon, no longer filled its original purpose, and though it still remained the official limit for coastal waters, it was no longer a universal rule. States began to claim control beyond three miles for various reasons, and gradually they were allowed to exercise limited control beyond the three mile limit.

It is admitted by many authors that the three mile limit is not a maximum but a minimum limit recognized by international law. With the recognition by many states of the doctrine of the contiguous zone, and the exercise by others of rights of control for certain purposes beyond the three mile limit, it is difficult to persist in the three mile rule although there is hardly agreement on what the maximum limit should be.

It would be fantasy to say that there is any accepted rule governing the conditions of control of the territorial and contiguous air spaces. The air space shares the jurisdiction of the underlying territory, but it also shares the problems of the underlying territory, and, in view of the difficulty of setting the limits of the territorial sea, the extent of the national air space is also uncertain. With respect to rights beyond the territorial air space, in the contiguous air space, an analogy might be drawn with the rights exercised by states beyond their territorial sea, but even these are uncertain and vague. Perhaps the best method of ascertaining the rights of states in the air space adjoining their coasts would be to go back to the fundamental basis for the recognition of rights in the territorial sea and the contiguous zone, the doctrine of self-protection.

The right of a state to enact legislation for its protection is not questioned:

> 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 ordinary rules of law in the same manner as if their existence were involved.[42]

Jessup[43] agrees with this statement and believes that the principles of self-preservation are well established in international law:

> They apply even when the act of self-defence involves the invasion of the territory of a neighboring state; a fortiori they apply upon the ocean.

Westlake disagrees with Jessup on this point. He asserts that the right of self-protection is a fiction of law; in his view what authors call self-protection is the old right of self-defence: "What we take to be pointed out by justice as the true international right of self protection is merely that of self-defence".[44] In another part of his book[45] Westlake discusses the case of the *Virginius*. This ship, belonging to Cuban insurgents and loaded with munitions and arms, was on her way to Cuba to take part in an insurrection. The Spanish ship *Tornado* arrested the vessel on the high seas and shot the crew. In this case, while claims were entered by Great Britain concerning ill treatment of members of the crew, some of whom were British subjects, the right of Spain to arrest the vessel on the high seas was not disputed. Westlake agrees that this decision is justified on the basis of self-defence.

Other authors have favoured self-preservation, a principle that is capable of broader interpretation. Whereas in self-defence a state must be in imminent danger of attack before taking measures for its protection, the concept of self-preservation is not so strict and would permit preventive measures for the safety of the state. A clear distinction exists between these two concepts, though, as shown by the case of the *Virginius*, the distinction is slight. If we are to carry the doctrine to its conclusion, while there was danger of attack, Spain should not have acted before the insurgent ship entered its territorial waters or at least the contiguous zone. The doctrine of self-preservation is an extension of the concept of self-defence to include preventive security measures. Elihu Root, when discussing the basis for the Monroe Doctrine, said:[46]

> The doctrine is not International Law but it rests upon the right of self-protection and that right is recognized by International Law. The right is a necessary corollary of independent sovereignty. It is well understood that the exercise of the right of self-protection may and frequently does extend in its effect beyond the limits of territorial jurisdiction of the state exercising it. The principle which underlies the Monroe Doctrine is the

[42] Hall, International Law (7th ed., 1917) p. 278.
[43] Jessup, *op. cit.*, p. 97.
[44] Westlake, International Law (Peace) (1904), Vol. 1, p. 312.
[45] Westlake, *op. cit.*, p. 171.
[46] In an address before the American Society of International Law, April 22nd, 1944.

right of every sovereign state to protect itself by preventing a condition of affairs in which it will be too late to protect itself.

J. Reuben Clark, at one time Under-Secretary of State in the United States, in his memorandum of December 17th, 1928, on the Monroe Doctrine discussed self-preservation:

> There is a broad domain occupied by self-preservation which is incapable of definite boundary as to its extent or of definition as to the kind of act which lies within it, because new conditions, new advances in the arts and sciences, new instrumentalities of international contact and communication, new political theories and combinations vary from age to age and cannot be certainly foretold.

In the light of the present international situation, if we consider the geographical position of the two countries, and the nature of the instrumentalities of international contact, it should not be too difficult to justify the Canadian and United States security regulations on the sole basis of self-preservation. While there is no doubt that self-preservation may displace the doctrine of freedom of the seas in certain cases, in view of Westlake's theory of self-defence, the question of imminence of danger may be important; if, however, we follow Jessup, there is no longer any doubt that the Canadian and United States security regulations are valid.

The Charity of the Lawyer

It is impossible in the profession of the law but that many opportunities must occur for the exertions of charity and benevolence: I do not mean the charity of money, but the charity of time, labour and attention; the protection of those whose resources are feeble, and the information of those whose knowledge is small. In the hands of bad men, the law is sometimes an artifice to mislead, and sometimes an engine to oppress. In your hands it may be from time to time, a buckler to shield, and a sanctuary to save: you may lift up oppressed humility, listen patiently to the injuries of the wretched, vindicate their just claims, maintain their fair rights, and show, that in the hurry of business, and the struggles of ambition, you have not forgotten the duties of a Christian — and the feelings of a man. It is in your power, above all other Christians, to combine the wisdom of the serpent with the innocence of the dove, and to fulfil, with greater energy and greater acuteness, and more perfect effect, than other men can pretend to, the love, the lessons, and the law of Christ. (Sydney Smith: The Lawyer That Tempted Christ. 1824)