ADIZ, INTERNATIONAL LAW, AND CONTIGUOUS AIRSPACE

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In 1923, when ocean liners were the sole medium of transport for all persons travelling between the continents of Europe and North America, the Supreme Court of the United States held that the XVIII Amendment was operative in United States territorial waters and that its provisions were, therefore, enforceable against all foreign vessels.[1] The reaction to this decision was immediate and unequivocal. Strong protests were delivered by ten foreign countries; some contended that "the universally accepted principles of international law" do not "in any way permit of such measures being adopted as they encroach upon the sovereignty" of the flag state over its ships.[2] Many admitted that the United States was not breaking international law but claimed it was nevertheless acting "contrary to the international usage and practice".[3] So strong was the reaction to this failure on the part of the United States to observe the comity then generally recognized among civilized nations in this respect that the United States was forced to negotiate a series of bilateral "Liquor Treaties" with those seafaring states which were affected by the Treasury regulations.[4]

In 1950, the airplane had become the medium of transport for a large, and ever-increasing, percentage of trans-Atlantic travellers. In that year the President of the United States promulgated an Executive Order[5] which placed certain restrictions on the freedom of passage of aircraft, not just over United States territory—but over the high seas, and demanded compliance on the part of all foreign aircraft flying in the delimited zones.[6] Despite the fact that this could be argued to be not merely a breach of comity, but a violation of international law, the attitude adopted by the many foreign states affected was not one of protest; it was one of quiet compliance.

It is not for a lawyer to speculate why an international incident arose out of the deprivation of a ship-passenger's evening cocktail, while the announcement by one nation that failure to comply with an extra-territorial law might result in an aircraft being shot down into the high seas brought forth only placid acquiescence. But complaisance will not be accepted by the writer as proof of the legality of this law when enacted and this paper attempts an examination of the legal basis of it and

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1 *Cunard S.S. Co.* v. *Mellon*, (1923) 262 U.S. 100. (The XVIII Amendment, proclaimed 29 Jan. 1919, repealed by the XXI Amendment, adopted in 1933. Section 1.—"After one year from the ratification of this article the manufacture, sale or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territories subject to the jurisdiction thereof for beverage purposes is hereby prohibited).

2 E.g., Note from the Spanish Ambassador to the Secretary of State, [1923] 1 For. Rel. U.S. 133 (1938).

3 E.g., Note from the Danish Ambassador to the Secretary of State, [1923] 1 For. Rel. U.S. 140 (1938).

4 1 Hackworth, *Digest of International Law*, 674 (1940).

5 Exec. Order No. 10197, 15 Fed. Reg. 9180 (1950), Directing the Secretary of Commerce to Exercise Security Control over Aircraft in Flight.

6 Part 620, Regulations of the Administrator, Security Control of Air Traffic. (U.S.A.)

its Canadian counterpart.[7] The examination will consider first whether a littoral state can, for some purposes, claim the right to control the airspace off its coasts and, second, under what circumstances this control (if it is established that it is proper) can actually be exercised.

I

The governments of the United States and Canada have, by means of the orders and regulations referred to above, established Air Defence Identification Zones off both the Atlantic and Pacific coasts of North America, as well as across the arctic extremities of Canada and Alaska. The initial letters of the Zones have given them their familiar name; ADIZ refers to the United States Zones and CADIZ to the Canadian Zones. Basically, the regulations with respect to the zones of each country are identical, but there is one difference which will bear further examination later.

The purpose of the Zones is stated to be the maintenance of national security. The Zones are designed to permit the positive identification of all aircraft approaching the shores of North America[7a] at a time when those aircraft are still far from shore. The regulations achieve this by demanding that all aircraft radio their identification to American or Canadian aeronautical facilities prior to entering a Zone, at a time when the airplane is still well out over the ocean. Unidentified aircraft are detected on the far-flung radar nets which now encircle the northern half of the continent and interceptor aircraft are dispatched to ensure the friendly purposes of the airplane in question. It is because these Zones extend into airspace superjacent to the high seas that they demand a legal examination.

The task imposed upon the pilot-in-command of an aircraft by Zone regulations is not inconsistent with the ordinary in-flight procedure on any long-distance flight. By virtue of long-accepted aeronautical regulations, all aircraft which fly westward across the Atlantic, or towards North America by means of the polar route, must comply with a specified routine. Because such aircraft are navigating by instruments rather than by visual reference to the ground, because they are flying over the ocean and uninhabited territory, because they are engaged in an international flight, and for certain other reasons, all such aircraft must file, prior to take-off, basic flight data with respect to the type of aircraft, the route intended to be followed, the proposed altitude and airspeed, the fuel reserves, etc. While en route, the aircraft make radio contact from time to time with various national ground aeronautical facilities located along the course of flight which are co-operatively run through the agency of the International Civil Aviation Organization.[8] By means of these procedures ground control is able to assign to each aircraft an exclusive 'slot' of airspace through which to fly in areas of dense traffic so as to avoid mid-air collisions. The ground agencies are also intermittently advised of the inflight position of the aircraft so that the latter may be

7 Information Circular No. 0/19/51, 12 May 1951, issued by Director of Air Services, Department of Transport, Civil Aviation Division. See also NOTAM 22/25—Rules for the Security Control of Air Traffic, since superseded by Air Navigation Order, Ser. V, No. 14 (Security Control of Air Traffic) 7 April 1961, 91 Canada Gazette (Part II) 601, and schedule amendments.

7a Only the North Atlantic Zones will be used as examples for the purposes of this examination.

8 ICAO: a UN Specialized Agency, Headquarters, Montreal.

advised of weather changes and traffic conditions, and to permit the commencement of search and rescue operations with some degree of accuracy if an aircraft fails to report over a check point on schedule. These basic regulations, then, are primarily designed for the safety of the aircraft. It is in his own interest that a pilot transmit this information; for this reason many pilots choose to take advantage of these various ground facilities even when flying under circumstances where flight regulations do not require them to do so, as for example, on short flights at low altitude in good weather.

In contrast to the routine just described, the information transmitted for ADIZ or CADIZ purposes is not for the benefit of the aircraft; it is used for security purposes. Furthermore, while ADIZ regulations demand identification and location reports from those aircraft approaching the United States with the intention of landing, CADIZ regulations require the same information not only from aircraft flying to Canada but as well from those which are flying elsewhere and which pass through the Zone en route.[10]

These Zone regulations affected directly more than a million persons during 1961. During this period the airlines which operate regularly scheduled flights across the Atlantic and the pole flew a total of 2,165,250 passengers in both directions.[11] Many of these airlines are owned and operated by the governments of various European countries as "flag carriers". The acquiescence which has thus far been displayed toward the regulations may possibly be regarded, therefore, as an expression of state policy and not merely a reflection of the views of foreign companies.

II

The basic rule of international air law which fixes the legal status of airspace has been stated by John C. Cooper to be as follows:

> If any area on the surface of the earth, whether land or water, is recognized as part of the territory of a State, then the airspace over such surface area is also part of the territory of the same State. Conversely, if an area on the earth's surface is not part of the territory of any State, such as the water areas included in the high seas, then the airspace over such surface areas are not subject to the sovereign control of any State and are free for the use of all States.[12]

The same writer states further that:

> . . . without question an attempt by a single State in time of peace to seize any part of the high seas or the airspace above and to maintain exclusive control in such areas would be an act of aggression against all other States.[13]

While the use by Professor Cooper of the term "aggression" may be somewhat injudicious, his statements leave little doubt that in ordinary circumstances the steps taken by the United States and Canada with respect to air defence identification zones could be regarded as not in accord with international law. It is the purpose of this paper to determine, if possible, whether or not such regulations can be legally

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9 i.e. in circumstances where he will be flying in accordance with Visual Flight Rules (VFR) rather than Instrument Flight Rules (IFR).

10 Air Navigation Order, 7 April 1961, *supra*, note 7, s. 11: "No person shall operate an aircraft into or within a coastal CADIZ unless he has filed an IFR flight plan, a DVFR flight plan or a Defence flight notification with an appropriate air traffic control unit." (DVFR; Defence Visual Flight Rules).

11 N.Y. Times, 9 Jan. 1962, p. 94, col. 1. Passenger traffic in the first 9 months of 1962 was up 21% over the same period in 1961: N.Y. Times, 4 Nov. 1962, Sec. V, p. 16, col. 1.

12 Cooper, *Airspace Rights Over the Arctic*, (1950) 3 Air Affairs 517.

13 *Id.* at 537.

justified. This is not the first such enquiry. One writer, Squadron Leader John Taylor Murchison of the Royal Canadian Air Force, in 1955 examined the Zones from several points of view (analogies with maritime law and continental shelves, self-preservation) and concluded:

> . . . it is submitted that 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 leave no doubt as to their validity.[14]

The picture may not be quite so clear as Murchison contends, however. Just 18 years prior to his study, the United States Naval War College answered a problem with respect to contiguous air space law with the straightforward assertion that a state "may lawfully prohibit the flight of aircraft above its territorial and maritime jurisdiction" but "it is not lawful to interfere with the flight of aircraft outside this space".[15] Has international law, by means of progressive development in both customary and conventional phases, so changed that what appeared to be the law in 1937 was completely contradicted in 1955?

The legality of ADIZ and CADIZ regulations does not depend solely upon customary international law. There have been three major international conventions dealing with air traffic since World War I: the Paris Convention of 1919,[16] the Havana Convention of 1928,[17] and the Chicago Convention of 1944.[18] Each of these recognized the principle as stated above by Professor Cooper, that airspace is subject to the sovereignty of the subjacent state. The Chicago Convention has been subscribed to by the great majority of the states of the world which engage in international air commerce. The recognition of sovereignty of airspace is spelled out in the first two articles:

> Article 1. The contracting States recognize that every State has complete and exclusive sovereignty over the airspace above its territory.
> Article 2. For the purposes of this Convention the territory of a State shall be deemed to be the land areas and territorial waters adjacent thereto under the sovereignty, suzerainty, protection or mandate of such State.

Thus the legal character of the air is determined by the legal character of the subjacent land or water. Because a state has exclusive control of the air above its territory, it may naturally establish "rules and regulations relating to the flight and manoeuvre of aircraft there," and this is provided by Article XII of the Convention. The same article provides that "Over the high seas, the rules in force shall be those

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14 Murchison, *The Contiguous Air Space Zone in International Law*, 77 (Rev. ed., 1955). See also Martial, *State Control of the Air Space Over the Territorial Sea and The Contiguous Zone*, (1952) 30 Can. Bar Rev. 245. Among the grounds to which Murchison refers is a rather tenuous analogy between zone regulations and continental-shelf claims. He contends that acquiescence has been the general reaction towards national assertions by littoral states of limited sovereignty seawards; as a result he states that such claims are likely now recognized in international law. Because ADIZ regulations also assert rights seawards, they too should be regarded as lawful, says Murchison. This reasoning is not here accepted, both because of the lack of similarity between an air defence identification zone and a continental shelf, and because it was presumptuous to suggest in 1955 that customary international law had embraced the shelf claims notwithstanding the fact they had been asserted only since 1945. Continental shelf claims have in certain respects been incorporated into conventional law, however. See the Convention on the Continental Shelf adopted by the United Nations Conference on the Law of the Sea, Geneva, April 28, 1958. Concerning the Convention, see Whiteman, *Conference on the Law of the Sea; Convention on the Continental Shelf*, (1958) 52 Am. J. Int. L. 629; Young, *The Geneva Convention on the Continental Shelf*, *id.* at 733; Gutteridge, *The 1958 Geneva Convention on the Continental Shelf*, [1959] B.Y.B.I.L. 102.

15 U.S. Naval War College, *International Law Situations*, 70 (1937).

16 Paris Convention on Aerial Navigation, Oct. 13, 1919, 11 L.N.T.S. 174.

17 Convention on Commercial Aviation, Feb. 20, 1928, 47 Stat. 1901, T.S. 840.

18 Convention on International Civil Aviation, Dec. 7, 1944, T.I.A.S. No. 1591.

established under this Convention." Thus one state does not have the power within itself to enact regulations effective over the high seas. This in itself would appear to be the answer to any question concerning the legality of ADIZ or CADIZ regulations unless it can be argued that these Zones are actually confined to the space above the territorial waters. To so argue it would be necessary to extend the character of the territorial seas seaward to the same distance as ADIZ and CADIZ project. At first glance such a supposition appears untoward inasmuch as ADIZ (Atlantic) extends outward from shore as far as 200 miles in some places, while the outward extremity of Atlantic CADIZ extends at times 250 miles offshore. There is no question, however, that there is an uncertainty to the legal extent of both territorial waters and airspace. Jean A. Martial, who was one of the first to comment on ADIZ regulations, stated in 1952 that:

> 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, and, in view of the difficulty of setting the limits of the territorial sea, the extent of the national air space is also uncertain.[19]

III

There is no unanimous acceptance of three miles as being the proper width of the territorial sea. Some states contend that this distance is a maximum limit, while many others argue that it is a minimum.[20] The usually accepted theory for the original establishment of the limit at three miles is based upon the range of a cannon-ball fired seawards from the coast. As long ago as 1910 Westlake regarded this limit as outmoded, however. He said:

> The principle of a presumed limit to occupation was laid down by Bynkershoek, 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.[21]

Oppenheim is inclined toward a similar opinion, that the three mile limit may be extended as the range of shore batteries increases.[22] The official United States view, on the other hand, has been opposed to such a flexible theory. Secretary of State Seward, in reply to a Spanish claim to a six-mile limit off Cuba based on the then range of cannon, stated in 1862:

> There are two principles bearing on the subject which are universally admitted, namely, first, that the sea is open to all nations, and secondly, that there is a portion of the sea adjacent to every nation over which the sovereignty of that nation extends to the exclusion of every other political authority.
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> A third principle bearing on the subject is also well established, namely, that this exclusive sovereignty of a nation, thus abridging the universal liberty of the seas, extends no farther than the power of the nation to maintain it by force,

19 Martial, *op. cit. supra*, n. 14, at 261.

20 For the table of the laws and regulations in force in the 86 states represented at the 1958 Conference on the Law of the Sea, see Sorensen, *The Law of the Sea*, Int'l. Conciliation, No. 520 (1958).

21 1 Westlake, *International Law*, 188 (2d ed. 1910).

22 1 Oppenheim, *International Law*, 488 (8th ed. Lauterpacht 1955). And see Walker, *Territorial Waters: The Cannon Shot Rule*, [1945] B.Y.B.I.L. 210; Kent, *Historical Origins of the Three-Mile Limit*, (1954) 48 Am. J. Int. 537.

> stationed on the coast, extends. This principle is tersely expressed in the maxim, *Terrae dominium finitur ubi finitur armarum vis.*
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> But it must always be a matter of uncertainty and dispute at what point the force of arms exerted on the coast can actually reach. The publicists rather advanced towards than reached a solution when they laid down the rule that the limit of the force is the range of a cannon-ball. The range of a cannon-ball is shorter or longer according to the circumstances of projection, and it must be always liable to change with the improvements of the science of ordnance Such uncertainty upon a point of jurisdiction or sovereignty would be productive of many and endless controversies and conflicts. A more practical limit of national jurisdiction upon the seas was indispensably necessary, and this was found, as the undersigned thinks, in fixing the limit at three miles from the coast. This limit was early proposed by the publicists of all maritime nations.[23]

The views of Secretary Seward are of course confined to the limitation of the territorial sea, a zone of near-absolute sovereignty, and not to 'control' or similar contiguous zones, but it illuminates the United States attitude with respect to the three-mile limit a century ago.

It is questionable, however, whether the territorial limits to marginal seas can authoritatively be traced only to theories dealing with cannon balls. The Judicial Committee of the Privy Council had occasion to enquire into the history of off-shore limits when it was asked to deal with a question concerning the territorial dominion over Conception Bay in Newfoundland. Lord Blackburn stated:

> The earliest authority on the subject is to be found in the grand abridgment of Fitzherbert "Corone", 399, whence it appears that in the 8 Edw. II., in a case in Chancery (the nature and subject-matter of which does not appear), Staunton, J., expressed an opinion on the subject.
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> . . . it is clear Staunton thought some portions of the sea might be in a county, and at that early time, before cannon were in use, he can have had in his mind no reference to cannon shot.[24]

This excerpt indicates that as early as the reign of Edward II (1307-1327) jurists rgarded some part of the sea as being within the jurisdiction of the littoral state.[25]

Whatever the source of the theory for determining width, and whatever the accepted width of the territorial sea, it is apparent that such seas are not sufficiently wide to act as subjacent support for ADIZ and CADIZ. We must look elsewhere for their legal justification.

IV

The character of the sea does not change, for all purposes, to that of high seas at the outward edge of the territorial sea. Instead, all states recognize a zone of indefinite proportions which extends seaward therefrom and over which the littoral state exercises certain limited

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23 1 Moore, *International Law Digest*, 706, 707 (1906).

24 *Direct U.S. Cable Co.* v. *Anglo-American Telegraph Co.*, (P.C. (Nfld.) 1887) 2 App. Cas. 394, 416-17. Lord Blackburn further stated, "Lord Coke recognizes this authority, 4th Institute, 140, and so does Lord Hale. The latter, in his treatise, *De Jure Maris*, p. 1, c. 4, uses this language: 'That arm or branch of the sea which lies within the *fauces terrae*, where a man may reasonably discerne between shore, is, or at least may be, within the body of a county, and therefore within the jurisdiction of the sheriff or coroner. Edward II, Corone, 399.'

"Neither of these great authorities had occasion to apply this doctrine to any particular place, nor to define what was meant by seeing or discerning. If it means to see what men are doing, so, for instance, that eye-witnesses on shore could say who was to blame in a fray on the waters resulting in death, the distance would be very limited; if to discern what great ships were about, so as to be able to see their manoeuvres, it would be very much more extensive; in either case it is indefinite."

25 And see U.N. Gen. Ass. Conf. on the Law of the Sea, (A/Conf. 13/L. 52) (1958); League of Nations Doc. No. C. 73.M. 38 1929. V, (1930) 24 Am. J. Int. L. Supp. 3, 26-29.

rights of control which fall short of those of actual sovereignty.[26] This region is usually referred to as a contiguous zone, and its extent can only be described as subject to violent disagreement among states. There appears to be no rule.[27] But if any distance is accepted as a norm, it is 12 miles (measured from shore) which traditionally represents the distance that a ship can steam in one hour.[28] It is at this point that we are invited to draw a parallel with the air space zones. If nations recognize that the littoral state has certain interests extending into the ocean as far as one hour's sailing distance, then it seems reasonable to argue that the littoral state also has certain interests extending over the ocean, not to the same distance, but to the distance that an aircraft can fly in one hour. That distance has been, until recently, in the neighborhood of 300 miles; the most far-flung ADIZ (that out over the North Pacific) extends approximately 300 miles off-shore. As will be seen, this distance was not chosen fortuitously.[29]

The littoral states claim that this additional expanse of water beyond the territorial sea is necessary to permit them to carry out the state activities to which they are entitled. The activities include, among others, maintenance of security and anti-smuggling operations.[30] One right involved in these operations is that of "visit and search", and the earliest precedent for it is found in the English Hovering Acts of the 18th century.[31] The Hovering Acts were designed to permit British patrol vessels to board and search all British-owned vessels which lay off the three-mile limit and which were suspected of being there for the purpose of either receiving English wool for illegal export or unloading contraband merchandise to be smuggled ashore in breach of the custom laws. As the smugglers devised new techniques and employed ever-faster boats in their efforts to avoid capture, Parliament progressively increased the seaward limits within which it claimed the right to exercise some control. By 1794 some areas of the sea as far as 12 miles from shore were included;[32] in 1805 jurisdiction for these purposes was extended to 100 leagues.[33] The exercise of jurisdiction in this far-flung fashion was widened even further in 1819 when it was extended to foreign vessels which carried on board one or more British subjects.[34] The English legislation was repealed in 1876,[35] but similar laws still exist in the United States; these are of the nature of the English Acts, purporting to affect

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26 *The Grace and Ruby*, (D. Mass. 1922) 283 Fed. 475 at 477-78, (per Morton, Dis. J.): "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. [Quotes from judgment of the Supreme Court in *Church* v. *Hubbart*, per Marshall, C.J., then continues:] . . . *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 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."

27 *Op. cit supra*, n. 20, at 26.

28 But this distance is by no means uniform; *op. cit. supra*, n. 20, at 11-24.

29 See Martial, *supra*, n. 14, at 258.

30 Dean, *The Geneva Conference on the Law of the Sea: What Was Accomplished*, (1958) 52 Am. J. Int. L. 607, 610-11, 623.

31 See, *e.g.*, Customs and Excise Laws Offences Act, 1736, (Imp.) 9 Geo. 2, c. 35, s. 22.

32 Importation Act, 1794, (Imp.) 34 Geo. 3, c. 50, s. 5.

33 Smuggling Act, 1805 (Imp.) 45 Geo. 3, c. 121.

34 Smuggling Act, 1819, (Imp.) 59 Geo. 3, c. 121.

35 Customs Consolidation Act, 1876 (Imp.) 39 & 40 Vict. c. 36, s. 179.

all craft regardless of nationality.[36] The U.S. laws were applied with the greatest fervor in an attempt to stop that most insidious of all menaces to the American people, the import of alcoholic beverages. It is now an historic fact that the U.S. Coast Guard was much more efficient at preventing the importation of quality foreign spirits than were the various municipal forces at stopping the manufacture of low-grade domestic liquor which came on the market to fill the demand created by the absence of the former.

This concern over liquor smuggling was not confined to the United States. In 1925 the Helsinki Convention for the Suppresion of Contraband in Alcoholic Goods was signed.[37] A 12-mile limit was agreed upon for the purposes of the convention.

In some respects then, these "hovering" and anti-smuggling statutes form some precedent for ADIZ regulations. They were found necessary to secure adequately the nation against those persons seeking to interfere with what was regarded as the integrity of the state, and they were aimed at citizen and alien alike. They did not purport to exclude entry into the contiguous zone, and they did not interfere with the right of innocent passage, or of fishing. The observations of the English writer Twiss can be referred to for an appraisal of the view taken in the late 19th century:

> A State exercises in matters of trade for the protection of her 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 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 . . .[38]

If the parallel to maritime practices is valid, and if the distinction drawn by Twiss (that jurisdiction can only be exercised over such foreign vessels as are bound for the ports of the controlling state) is correct, then a distinction should here be noted between the regulations with respect to ADIZ and those with respect to CADIZ. What Twiss has said is that the littoral state cannot interfere with innocent passage[39] (ships bound to the port of a state are not engaged in innocent passage as far as that state is concerned according to international law) but CADIZ regulations do purport to interfere with the passage of aircraft not bound for Canadian airports.[40] This, then, affords an additional point on which to take legal issue with CADIZ regulations. Indeed, the wording of the Chicago Convention appears to be directed against such control. Article XI reads:

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36 Anti-Smuggling Act, s. 1, 49 Stat. 517 (1938), 19 U.S.C. s. 1701 (1952 ed.). The U.S. has avoided any controversy with respect to the extra-territorial provisions by negotiating bilateral Customs Treaties with several nations.

37 42 L.N.T.S. 75.

38 Twiss, *The Law of Nations*, 311 (2d ed. 1884).

39 1 Oppenheim, *International Law*, 493-94 (8th ed. Lauterpacht 1955).

40 It should be noted that the aerial "passage" here referred to is not employed as a word of art synonomous with maritime innocent passage. It is rather used in a similar sense only; i.e., passage free from interference—but through the airspace over the contiguous seas, not over the territorial seas. This is an important distinction for, as Cooper says, *supra*, n. 12, at 523, "No right of innocent passage in the airspace over territorial waters exists in favour of foreign aircraft although such right of innocent passage does exist in the territorial waters themselves for sea-going vessels in time of peace. To this extent the law of the sea and the law of the air are not in accord." See also the Chicago Convention, *supra*, n. 18 at Art. 2.

> . . . 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, or while within the territory of that State.[41]

Provision for the regulation of flight of aircraft extends only to those aircraft approaching, departing from, or flying within, the territory. No right is extended to control such aircraft as are flying near the territory, as the Canadian regulations attempt to do.

Notwithstanding this possible Canadian defect, the contiguous zone analogy is worthy of serious consideration. Certainly if it is permissible for a state to exercise certain controls on the surface of the sea beyond its normal territorial jurisdiction, then it may be equally permissible to exercise similar controls in the air so long as these are, as Twiss has said, reasonable. And if one hour's sailing time has been accepted as a determining factor for these purposes by a number of maritime states,[42] it might be natural to expect that one hour's flying time would be accepted as a similar factor by states engaged in aerial navigation. This ingredient of speed is germane to air defence identification zone regulations. In addition to the fixing of Zone boundaries in many instances from 200 to 300 miles off-shore (the former flying time of a large aircraft in one hour), it is provided that, notwithstanding the actual Zone boundary as delimited upon a chart, all approaching aircraft are required to establish radio contact with the appropriate aeronautical facility not less than one hour's flying time distant from the U.S.[43] A high speed aircraft is thus required to identify itself well out over the ocean. This is an attempt on the part of the United States, which has opposed any flexibility attaching to the limit of the territorial sea,[44] to impose flexibility in contiguous airspace zones.

But even if a plausible analogy based on the time factor can be drawn between contiguous zones in the sea and those in the air,[45] can the latter be justified under the circumstances claimed by the United States and Canada and evidenced in ADIZ and CADIZ? In other words, does the right to inspect a vessel suspected of smuggling at the 11½ mile mark justify a demand for an aircraft to identify itself, on pain of possible destruction, at the 200-mile mark when there is no reason whatever to suspect that the aircraft is other than a regularly scheduled Swissair flight inbound to New York? Or, even worse, the case of a CADIZ regulation demanding the same information for the same aircraft under identical circumstances, *i.e.*, when it is headed for New York?[46] A right is not a licence; the proper circumstances for its exercise must exist.

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41 *Supra*, n. 18.

42 See the various U.S. Liquor Treaties, referred to *supra*, n. 36.

43 *Supra*, n. 6.

44 Moore, *supra*, n. 24. See also Dean, *supra*, n. 30 at 610: "The United States . . . adopted as its first goal in the Conference the preservation of the traditional limit of the territorial sea at three miles except as modified by reasonably greater historical limits."

45 Martial, *supra*, n. 14.

46 Presuming, for purposes of argument, that the Swissair flight has deviated from its great circle route and is following a rhumb line course which will keep it outside the territorial limits of Newfoundland and Nova Scotia, but which nevertheless penetrates a CADIZ en route to New York.

V

Justification for the extra-territorial exercise of the jurisdiction claimed in the ADIZ and CADIZ regulations is rooted in "security". The title of the Canadian NOTAM (notification to airmen) which pronounced the CADIZ rules included the phrase "security control of air traffic"; the text stated that the rules were necessary "in the interest of national security".[47] The U.S. ADIZ regulation employed a similar title, but also defined the Zone 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.[48]

We may presume for these purposes that the term "security" is synonomous with "protection of national existence". And, according to Moore, states do have certain inherent rights in matters relating to their existence. He states:

> . . . 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.[49]

It may be argued in support of ADIZ regulations that advance notice of approaching aircraft is more important to a state than is the keeping of the contiguous waters clear of potential smugglers. This follows, according to the argument, because it is virtually impossible to determine from a distance the intention of an approaching aircraft. Indeed this was the case even during World War I, when airspeeds were a fraction of what they are today. In 1915 the Netherlands Foreign Minister made manifest this attitude on the part of his government in a note replying to a complaint made by Germany following the capture and internment by Holland of a German flier who had landed on Dutch soil. The Netherlands statement read:

> The great liberty of action of an airplane, the facility with which it reconnoiters and escapes all control, have necessitated in its respect a special and severe treatment . . . the case where an aviator crosses the aerial frontier by mistake differs essentially from that of the soldier who crosses it by mistake on the ground. The circumstances in which the latter enters Netherlands territory permit the authorities guarding the frontier to find out whether or not his presence within the territory of the Kingdom is due to a mistake unconnected with military operations.
>
> On the other hand the circumstances which have caused a belligerent aviator to land on Netherlands territory or to fly over it escape the control of Netherlands authorities. That is why the Government cannot admit with respect to aviators any exception to the rule which prescribes their internment.[50]

But does the admitted right of a nation to preserve its own existence, coupled with the admitted inability of a nation under ordinary circumstances to ascertain the *mens* of a pilot navigating his aircaft towards the shores of that nation, justify the enactment in peacetime of regulations such as those establishing ADIZ and CADIZ? Unquestionably a state always has had the right of self-defence to preserve its existence, and this right is guaranteed to member nations by the United Nations Charter[51] but only in the event of armed attack. ADIZ regulations do not purport

47 NOTAM 22/55, *supra*, n. 7.
48 *Supra*, n. 6, para. 620.2b.
49 1 Moore, *International Law Digest*, 60 (1906).
50 7 Hackworth, *Digest of International Law*, 549, 551 (1940).
51 Art. 51.

to operate only in the event that the United States or Canada is attacked by an armed force. For this reason they cannot be regarded by even their most ardent advocates as a form of self-defence, but must rather instead fall into the much broader category of "self-protection". Self-defence is distinct from self-protection; the former is exercised in order to repel an attack, whereas the latter involves the taking of preventive measures.[52] Proponents of self-protection support their arguments with the old adage, sometimes attributed to Grotius, that "necessity is the first law of nature". Vattel, too, is relied upon:

> . . . a nation ought carefully to avoid, as much as possible, whatever may cause its destruction . . .
> A nation or state has a right to every thing that can secure it from such a threatening danger, and to keep at a distance whatever is capable of causing its ruin.[53]

What though, if there is no imminent danger and all that exists is the brooding presence of an ability to destroy? It is this ability, possessed by another state, which ADIZ and CADIZ are designed to meet. They do so by detecting in advance any sign that the latent ability has become active. Hall, years prior to the conception of nuclear weapons said:

> There are . . . 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.[54]

But not all writers would agree with this freedom of action. Twiss, speaking before the turn of the century in an age far removed from ours in terms of weapons and striking force, required the other nation to "exhibit[ed] unmistakeable signs of undue ambition or rapacity"[55] before preventive steps could be justified. Westlake, in 1910, said there is no such thing as a general right of self-protection which would interfere with the rights of other states. He spoke of the necessity of an emergency:

> The act of self-preservation must be limited to what is strictly imposed by the emergency.[56]

A recent authority of the same opinion is Hyde. He argues that the act of self-protection must really be an act of self-defence.[57] If not, self-protection becomes self-help.

The International Court of Justice dealt with the principle of self-help in *The Corfu Channel Case*.[58] The Court was worried about the possible consequences of acts taken under this principle when they amounted to intervention, and accordingly refused to accept the United Kingdom's argument that it was entitled in international law to take steps to assist both itself and an international tribunal by entering territorial waters of Albania for the purpose of procuring evidence of an alleged international delinquency. The Court said:

> The Court can only regard the alleged right of intervention as the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and

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52 See U.N. Doc. No. A/C.6/L.332/Rev. 1 (1954); U.N. Gen. Ass. Off. Rec. 9th Sess. Annexes, Agenda Item 51 at 6-7 (1954) (*USSR Draft Resolution Defining Aggression*); and Stone, *Aggression and World Order, passim* (1958).
53 1 Vattel, *The Law of Nations*, c. 2, ss. 19-20 (1st ed. 1758, repr. 1916).
54 Hall, *International Law*, 322 (8th ed. 1924).
55 Twiss, *supra*, n. 38, at 184.
56 Westlake, *supra*, n. 20, at 309.
57 1 Hyde, *International Law*, 237 (2d ed. 1947).
58 [1949] I.C.J. Rep. 4.

> such as cannot, whatever be the present defects in international organization, find a place in international law. Intervention is perhaps still less admissible in the particular form it would take here; for, from the nature of things, it would be reserved for the most powerful States, and might easily lead to perverting the administration of international justice itself.[59]

When self-protection reaches the status of "intervention", it becomes colourable.

United States Secretary of State Webster, delivering his opinion at the time of the arbitral proceedings in *The Caroline Case* and speaking with respect to the right of self-preservation claimed on behalf of Canada in defence of the steps taken by Canadian citizens in crossing into United States territory to destroy the facilities used by armed raiders to attack Canada, said:

> Undoubtedly it is just, that, while it is admitted that exceptions growing out of the great law of self-defence do exist, those exceptions should be confined to cases in which the 'necessity of that self-defence is instant, overwhelming, and leaving no choice of means, and no moment for deliberation'.[60]

The official view of the United States, as expressed in the Monroe Doctrine, has been in favour of the wider theory of self-protection, as opposed to mere self-defence. The position of the Doctrine in international law was on one occasion discussed by Elihu Root:

> 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 right of every sovereign state to protect itself by preventing a condition of affairs in which it will be too late to protect itself.[61]

Thus for more than a century the United States has asserted an extra-territorial power based on an assumption that international law recognizes the right of self-protection. And the sphere encompassed by the Monroe Doctrine exceeds by far the areas contained within ADIZ; indeed it includes the territory of foreign states in the western hemisphere whether or not these states have aligned themselves with the policies of the United States. The best continuing example of such a state is Canada which has conspicuously refrained from joining any union or organization of American states because of the possible conflicts which such an association might engender with Canada's Commonwealth obligations. (If any doubt existed as to whether or not the Monroe Doctrine encompassed Canada, it was removed by President Franklin D. Roosevelt on 18th August, 1938, in an address at Queen's University, Kingston, Ontario when he said:

> . . . I give to you assurance that the people of the United States will not stand idly by if domination of Canadian soil is threatened by any other empire.[62]

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[59] *Id.* at 35.

[60] 2 Moore, *op. cit. supra*, n. 23, p. 409 at 412.
Judgment of October 1, 1946, International Military Tribunal, Nuremburg, 22 *Trial of the Major War Criminals before the International Military Tribunal* 448 (1948), adopted this same standard for justification of preventive military action in foreign territory. The tribunal did so in considering the arguments of the defendants that Germany was compelled to attack Norway to forestall an Allied invasion, and that this action was therefore preventive and an extension of the principle of self-defence.

[61] Root, *The Real Monroe Doctrine*, (1914) 8 Am. J. Int. L. 427, 432 (Opening address as President of the American Society of International Law at the 8th Annual Meeting of the Society, April 22, 1914, Washington, D.C.).

[62] 5 Hackworth, *supra*, n. 50, at 457.

Hackworth reports that:

> On the following day the President indicated to the press that this statement implied no enlargement of the Monroe Doctrine. He said that he interpreted the doctrine as including Canada within its scope and that he found no justification for a contrary conclusion from the text of President Monroe's statement.[63])

The Monroe Doctrine has remained an integral part of United States foreign policy since its pronouncement in 1823. In the interval between then and now it has not been the subject of litigation in any international tribunal nor, because of its nature, is it likely to be. The nature of the Doctrine insures this. It is simply declaratory. Any act taken by the United States pursuant to the Doctrine would be dealt with on the ground that the act, not the Doctrine, was an alleged international delinquency. The nation's policy statements by themselves are not, at least at this stage of the development of international law, subject to legal process.

Another example of the manifestation of the principle of self-protection by the United States is found in the Inter-American Treaty of Reciprocal Assistance,[64] signed at Rio de Janeiro on 2 September 1947 and ratified by the United States on December 12 of the same year. This treaty provides for collective self-defence and mutual assistance in the event of attack. Its relevance to this paper, however, arises from the geographical area which the high contracting parties have signified as being within their defence orbits. No longer are the American states content to place their first lines of defence at the three-mile mark; they now threaten retaliation if they are attacked much further away. Article 3(3) includes within the definition of an armed attack not only those attacks which occur upon the territory of an American state but also those which occur "within the region described in Article 4". This latter article reads:

> The region to which this Treaty refers is bounded as follows: beginning at the North Pole; thence due south to a point 74 degrees north latitude, 10 degrees west longitude; thence by a rhumb line to a point 47 degrees 30 minutes north latitude, 50 degrees west longitude; thence by a rhumb line to a point 35 degrees north latitude, 60 degrees west longitude; thence due south to a point in 20 degrees north latitude; thence by a rhumb line to a point 5 degrees north latitude, 24 degrees west longitude; thence due south to the South Pole; thence due north to a point 30 degrees south latitude, 90 degrees west longitude; thence by a rhumb line to a point on the Equator at 97 degrees west longitude; thence by a rhumb line to a point 15 degrees north latitude, 120 degrees west longitude; thence by a rhumb line to a point 50 degrees north latitude, 170 degrees east longitude; thence due north to a point 54 degrees north latitude; thence by a rhumb line to a point 65 degrees 30 minutes north latitude, 168 degrees 58 minutes 5 seconds west longitude; thence due north to the North Pole.

This defined area commits the United States to action if a unit of the naval or air force of any American state is attacked anywhere west of a point 35° North latitude, 60° West longitude. This particular point is situated in the Atlantic Ocean over 800 miles due east of Cape Hatteras. Thus the right of self-protection has extended the first line of contact ever outward from the shores of a nation.

The Rio de Janeiro Treaty is also a pronouncement of policy directed against acts which no foreign power is likely to admit it intends to commit. As a result, the legality of the Treaty in this territorial concept has never been challenged.

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63 *Ibid.*

64 62 Stat. 1681, 1699, T.I.A.S. No. 1838 (effective Dec. 3, 1948).

The United States has been party to a declaration based on the principle of self-protection and which encroached upon the actual movements of other states in areas outside of the territorial jurisdiction of the U.S. This protestation of rights by the United States was met by opposition on the part of those nations against whom it was directed (some of the belligerents of World War II) who refused to recognize the declaration as binding upon them.[65] This "Declaration of Panama" was dated 3 October 1939[66] and was prompted in part by the scuttling of the "Admiral Graf Spee" in the estuary of the River Plate. The American republics declared in this document that:

> 1. As a measure of continental self-protection, the American republics, so long as they maintain their neutrality, are as of inherent right entitled to have those waters adjacent to the American continent, which they regard as of primary concern and direct utility in their relations, free from the commission of any hostile act by any non-American belligerent nation, whether such hostile act be attempted or made from land, sea or air.[67]

The adjacent waters were then circumscribed so as to enclose an area extending out into the Atlantic for a distance of several hundred miles.[68]

One of several comments[69] on this declaration came from the United States Naval War College:

> The Declaration of Panama is not a part of international law. Neutral jurisdiction for defence purposes over a part of the ocean extending 300 miles from the coast is without precedent and has not been generally accepted . . . Great Britain, France and Germany were acting within their legal rights when they refused to recognize the binding nature of the Panama Declaration.[70]

This zone of self-protection, even though claimed by neutrals and directed against belligerents, was not accepted by the belligerents. Indeed the American republics indicated in the Declaration that they could not unilaterally effect such a change in international law, but rather that they would negotiate with the belligerents and endeavor

> . . . to secure the compliance by them with the provisions of this Declaration, without prejudice to exercise of the individual rights of each State inherent in their sovereignty.[71]

The three belligerents acknowledged that the Declaration was in the form of a request rather than a demand, requiring the "consent of the belligerents"[72] (Great Britain), inasmuch as the renunciation of "the exercise could only result from an agreement among all the States interested"[73] (France); such a renunciation "would mean a change in existing international law"[74] (Germany).

VI

In direct contrast with the procedure followed by the American republics following the enunciation of the Declaration of Panama, the governments of the United States and Canada have, in time of peace and

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65 The protesting nations were the United Kingdom, France, and Germany. The texts of their replies to the Declaration will be found in 2 Dept. State Bull. 199-205 (1940).

66 1 Dept. State Bull. 331 (1939).

67 *Id.* at 332.

68 *Ibid.*

69 See e.g., Masterson, *The Hemisphere Zone of Security and the Law*, (1940) 26 A.B.A.J. 860; Brown, *Protective Jurisdiction*, (1940) 34 Am. J. Int. L. 112; Fenwick, *The Declaration of Panama*, id. at 116.

70 Op. cit. *supra*, n. 15, at 80.

71 Op. cit. *supra*, n. 67.

72 2 Dept. State Bull. 200 (1940).

73 *Id.* at 202.

74 *Id.* at 204.

therefore without any recognized rights of neutrals upon which to rely, unilaterally forced their will with respect to air defence identification zones upon foreign states. No suggestions were made by them that ADIZ or CADIZ regulations be negotiated. The acquiescence of the foreign states to the regulations does not indicate that the regulations were in accord with international law when promulgated. Rather it is suggested that the regulations were quite without legal foundation; they transgressed accepted principles of international law limiting the "right" of self-defence. Self-defence justifies conduct otherwise illegal and must therefore be jealously confined both in scope and in application. Brierly warns that:

> . . . self-preservation is not a legal right but an instinct, and no doubt when this instinct comes into conflict with legal duty either in a state or an individual, it often happens that the instinct prevails over the duty. It may sometimes even be morally right that it should do so. But we ought not to argue that because states or individuals are likely to behave in a certain way in certain circumstances, therefore they have a right to behave in that way . . . The credit of international law has more to gain by candid admission of breaches when they occur, than by attempting to throw a cloak of legality over them.[75]

"Self-defence" cannot be permitted to extend so far as to include "self-protection" or "self-preservation" unless these are carefully evolved as international principles.

Unquestionably, the subsequent acceptance of the ADIZ and CADIZ regulations by a large number of important states has had the effect of endowing these rules with a cloak of respectability which in due course will come to be regarded as a part of international law. Acquiescence to the regulations on the part of the affected states was unanimous.[76] But to contend that no objections were raised against the regulations because they were legal is an act of rationalization which overlooks the cohesive fear that was shared by the nations of the western world during the Korean War and which was exploited in the form of ADIZ and CADIZ.

It is suggested that the international legality of the Zone regulations, at the time of their implementation in 1950 and 1951, depended on the then accepted interpretation of the "right of self-defence" by the nations of the world. And the legality of similar regulations in the future, enacted as necessary measures in the rocket age, will depend as well on the then current interpretation of the same phrase. This article does not purport to do other than to indicate that the right of self-defence does not now, in the view of the writer, stretch as far as some contend. Indeed, wide acceptance of an inflated doctrine of self-defence creates a distinct, and dangerous, possibility of overlapping jurisdictional claims. This possibility should warn all states to consider carefully the status of the doctrine in international law.[77] It is hoped that the lack of opposition to the air defence identification zones will not encourage states to regard them as precedents for further unilateral manifestations of extra-territorial supervisory activities.[78]

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[75] Brierly, *The Law of Nations*, 319 (5th ed. 1955).

[76] MacGibbon, *Scope of Acquiescence in International Law*, [1954] B.Y.B.I.L. 143; *Norwegian Fisheries Case (United Kingdom v. Norway)*, [1951] I.C.J. Rep. 115.

[77] For a recently published, exhaustive treatise on this subject, the reader is referred to Bowett, *Self-Defence in International Law, passim* (1958).

[78] The unilaterally proclaimed right of quarantine and search off Cuba is an example. For full discussions of the legal implications of the Cuban quarantine, see: Meeker, *Defensive Quarantine and the Law*, (1963) 57 Am. J. Int. L. 515; Christol and Davis, *Maritime Quarantine*, id. at 525; Wright, *The Cuban Quarantine*, id. at 546.