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The Contiguous Air Space Zone in International Law, by John Taylor Murchison

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BOOK REVIEW

THE CONTIGUOUS AIR SPACE ZONE IN INTERNATIONAL LAW. By John Taylor Murchison, B.C.L. (U.N.B.) L.L.M. (McGill). Published by Department of National Defense, Ottawa, October, 1955, Revised to December 1, 1956, 113 pp.

Squadron Leader Murchison has written an interesting, informative, and provocative work rationalizing the creation by United States and Canadian authorities of the ADIZ's and CADIZ's—those towering chunks of air space forming a mid-century Maginot Line around the greater part of the North American Continent, extending seaward up to three hundred miles.

The Air Defense Identification Zones—ADIZ (U.S.), CADIZ (Canadian) —were established by parallel regulatory action of the Civil Aeronautics Administration (Part 620) and of the Canadian Department of Transport, Air Services Branch (NOTAM 22/55) respectively. These zones are described in detail in each regulation and are laid out with reference to coordinates of longitude and latitude. Most of the zones extend well out over the high seas, and this fact is the basis for the book. Obviously to the extent these zones are descriptive only, they are well within the power of any state to create. Any country may describe any geographic area, bounded in any way it sees fit, and give it whatever name it likes. It is only the application or attempted application of rules within such zones that poses problems. Since the Regulations referred to do impose certain rules for aircraft operating in or into these zones, problems of jurisdiction exist.

Author Murchison approaches his task by briefly describing the regulations of the two governments. He then discusses the rules laid down with reference to the Chicago Convention of 1944 and concludes that there is no violation of that treaty. Thereafter he approaches the problem as one of international law apart from treaty and analogizes the rules to the claims made to the subsoil of the continental shelf, and to the broader aspects of Maritime Law. He finally justifies them as proper governmental action based on the doctrines of necessity and of self-preservation.

In dealing with the question whether the rules are properly grounded in the municipal laws of Canada and the United States respectively, Author Murchison concludes that the legal basis in Canada is highly doubtful and that "it would appear that legally speaking, a violation of these rules outside the territorial waters of Canada would lead to nothing but an exercise in frustration for the conclusion must be reached that the punitive provisions of the Act would not apply for the reason that a violation of the NOTAM which lacks the authority or sanction of the Act, would not be a violation of that Act."

With respect to the American rules, the author states "The establishment of ADIZ, on the other hand, is solidly founded on American municipal law for Part 620 is based on an executive order by the President, and as such has the force of law in the United States." It may be questioned whether this is not too charitable a conclusion. The executive order to which he refers in turn finds its authority in Title 12 of the Civil Aeronautics Act, as amended. Section 1203 of that Title reads in part as follows:

> "The Secretary of Commerce is authorized to establish such zones or areas in the air space above the United States, its Territories and possessions (including areas of land or water administered by the United States under international agreement) as he may find necessary in the interests of national security. . . ."

Consequently the validity of the action by the Secretary of Commerce, insofar as these zones are established over the high seas, depends on whether these are areas of "water administered by the United States under international agreement." They quite obviously are not. Consequently the basis for American action would appear to be no sounder than the Canadian.

Murchison finds that there are minor differences in detail between the two sets of regulations, and points out that the American rules apply only to aircraft which subsequently enter United States territory, whereas the Canadian rules purportedly apply to all aircraft passing through the zone irrespective of destination. This is true at least in part. The Canadian regulations require position reporting of all aircraft passing through the zones, whereas such reporting in the case of the ADIZ is required only for aircraft entering the United States. However, both sets of regulations require that flight plans be filed by all aircraft prior to penetrating an ADIZ (Section 620.11 Regulations of the Administrator) or a CADIZ (Section 2.3 Canadian NOTAM). Each set of regulations requires reasonable adherence to the flight plan both with respect to time, location and altitude. Consequently each set of rules applies, to some extent, to aircraft traversing the identification zone as well as to aircraft destined for the territory of the country concerned.

In discussing the rules applicable in the CADIZ's and ADIZ's in relation to commitments under the Chicago Convention, the author points out that the subject of sovereignty over the high seas is not dealt with in that Convention. He does advert to Article 12 of the Chicago Convention, dealing with rules of the air, which provides in part that "over the high seas, the rules in force shall be those established under this Convention." He concludes that this provision has no relationship to the rules promulgated for the identification zones, since he is of the opinion that the rules of the air are "rules of the road" only and that security considerations lie outside their purview.

While we can join with the author in his conclusion that security rules would be compatible with obligations under the Convention, this would be true only so long as the rules for the security control of air traffic do not conflict with the international rules of the road laid down by the Convention. In this case it is to be noted that both the Canadian and the American regulations call for the filing of a flight plan including a statement of cruising altitude. In each case adherence to the flight plan is mandatory. If this requirement is applied to mean maintenance of a fixed altitude above the surface, it could very easily conflict with the international rules, which call for cruising at a constant *indicated* altitude at a fixed barometric setting of the altimeter. Flight levels consequently vary with the barometer. The indicated altitude under the international rules could differ by as much as a thousand feet from the absolute altitude over the surface. Consequently it is submitted that to the extent the security rules may be in direct conflict with the rules of the air laid down by ICAO they are violative of the provisions of the Convention, notwithstanding the difference in purpose of the regulations concerned.

The most interesting parts of the book are Chapters IV and V dealing with analogies in the Maritime Law and with the doctrine of necessity and self-preservation. In the former the author discusses the doctrine of the freedom of the seas as limited by the "hovering laws" and the doctrine of hot pursuit. However, as the author appears to agree, the doctrine based on the hovering acts and similar enactments of the past have been largely limited to matters concerning customs and sanitary laws.

In Chapter V the author takes even a broader view of the subject and justifies the regulations in the ADIZ's and CADIZ's under the doctrine of

self-preservation combined with the doctrine of necessity, quoting Elihu Root's statement that "every sovereign State has a right to protect itself by preventing a condition of affairs in which it will be too late to protect itself."

The crux of the author's discussion in regard to necessity and self-preservation is that "the very existence of the State makes these identification zones seaward a necessity." But since an air attack may come from any direction, over either land or water, there would appear to be equal necessity for such an identification zone over land areas under the sovereignty of other states. While the problem does not arise in connection with the common defense of the North American Continent, it would become a very real one in connection with certain European countries. Is landlocked Switzerland to be entitled any less to avail itself of the doctrine of necessity than water-surrounded Australia? Yet if Switzerland were to enact SADIZ's, they would perforce have to lie over territories of neighboring states. Such an application of the doctrine of necessity would be completely incompatible with the sovereign rights in the air space of the neighboring states.

In one respect the book is disappointingly silent. There is no discussion of, nor justification based upon, the fact that the rules, in both instances, are designed to aid in identifying aircraft. The approach of the book has been a geographical one, rather than one based on the subject matter of the rules themselves in their application to conduct over the high seas.

Yet one of the traditions of the seas is the obligation of vessels plying them to identify themselves. In the *Marianna Flora*, 11 Wheat. 1, 6 L. Ed. 405 (U. S. Sup. Ct. 1826), the Court, speaking through Mr. Justice Story, held that an overtly hostile act on the high seas by a Portuguese merchantman, coupled with failure to identify herself, completely excused an attack made by a U. S. naval vessel on her, even though the hostile act was committed under the mistaken belief that the American vessel was a pirate. Moreover, the Court held that the further action of the American commander in putting a prize crew aboard the Portuguese ship and sailing her to a U. S. port for adjudication was not an act for which damages should lie under the circumstances. The equivocal conduct on the part of the merchantman, including the failure to show its flag, was complete justification for the attack, capture, and detention by the U. S. vessel, which had been commissioned to sail against pirates.

From sailing vessels to aircraft is a long step, but the need for identification in the new element is still recognized by the international community. Thus, Article 20 of the Chicago Convention requires that "Every aircraft engaged in international air navigation shall bear its appropriate nationality and registration marks."

Thus, provision is made for identification to the eye. However, with radar now in general use, is there not a further obligation incumbent upon both vessels and aircraft operating on or over international waters to take reasonable measures to identify themselves to the radar eye *under circumstances where failure to do so could give all the signs of a hostile or illegal mission?* Perhaps with further development of IFF transponders it will be possible for ships and aircraft to identify themselves automatically and specifically. However, in the present state of the art, the flight plan filed in advance is the best method for linking up the blips on the radar screen with the airplanes in the sky.

Basically the regulations for the CADIZ's and the ADIZ's do no more than require such identification—even the position reporting requirement of the Canadians is justifiable under this objective. Admittedly filing a flight plan and reporting are a burden—but so is hoisting a flag, and both are reasonable obligations.

Under such an approach the CADIZ's and ADIZ's cease to be zones within which Canada and the United States attempt to exercise extra-territorial power. They become merely descriptive of one of the conditions which would make the failure to identify oneself an equivocal and suspicious act. In this connection there is a vast difference between mid-ocean operations, in the present state of the art, and operations within 15 minutes' cruising range of the coast by supersonic bomber. Aircraft operating outside the territorial jurisdiction of any state, but within so short a distance of the nearest country's coast, place themselves in an equivocal and suspicious position if they refuse to identify themselves—particularly in view of the history of Pearl Harbor.

In other words, given the present international climate, the history of the last 20 years, 1200 mile per hour bomber speeds, atomic and fission bombs, and radar search, is it not incumbent upon a craft flying within easy attacking range of a country's coast to say who he is and allow himself to be identified as a blip on the radar screen? Obviously, the closer the aircraft comes to the coast line, the greater is the duty to identify himself. The ADIZ's and CADIZ's over the high seas can be regarded as declarations on the part of Canada and the United States that foreign aircraft in those areas will be regarded as acting suspiciously, equivocally, and with apparent hostile intent if they do not identify themselves. Apparent hostility was the conduct of the *Marianna Flora* which justified Lieutenant Stockton's attack and seizure. It is equal justification, it is submitted, for "inflight interception by military interceptor aircraft" (Sec. 2.10.1 Canadian NOTAM).

As for the criminal penalty provision of the United States regulation, it is most doubtful whether this could be enforced in respect of a violation of an ADIZ regulation over the high seas. Apart from international law, the Civil Aeronautics Act does not give the Secretary of Commerce the right to proclaim any such penalty outside the jurisdiction of the United States. But "interception by military interceptor aircraft" would, it is submitted, be entirely justifiable for the United States as well as Canada.

The foregoing criticisms, however, do not adversely affect the value of the book. It is a definite contribution to learning in a field where the literature is sparse, and the promise of further writing dim because of the transitory nature of the specific problem. At the outset of this review, the identification zones were likened to the Maginot Line. Already the intercontinental ballistic missile is making them obsolescent. True space flight will render them virtually useless in their present configurations.

One continuing principle, however, appears clear. Freedom to use international channels of communication—the high seas, the air above, or the space beyond—does not include freedom to prey upon other commerce or to mount an attack against any nation; and it devolves upon those who would use such channels in peace to so conduct themselves that their *bona fides* are apparent. Included is the obligation of identifying craft and mission by whatever reasonable means is appropriate, wherever failure to do so would prompt the observer, under the surrounding circumstances, to conclude the mission was hostile. This is true whether such surrounding circumstances point to attacks by pirates on the Spanish Main in 1825, enemy activity in a coastal ADIZ in 1957, or surprise action by space marauders who war upon the interplanetary commerce of a time yet unborn.

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