THE LAW OF INTERNATIONAL SPACES

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TABLE OF CONTENTS

GENERAL INTRODUCTION

The establishment of the international regime of the high seas, Antarctica and outer space has created a basic distinction between national spaces and international spaces in international law. In contrast with the national regime of land territory, territorial waters and national airspace, the international regime of the high seas, the polar regions and the cosmic spaces has been consolidated. This fundamental distinction between national spaces and international spaces determines the general nature of territorial problems in international law.

The law of international spaces includes the regulation of the following fundamental problems: delimitation, sovereignty, jurisdiction and force. The analysis of these fundamental problems is intended to manifest the basically common legal status of the high seas, the polar regions and the cosmic spaces. Moreover, the law of international spaces requires the establishment of uniform international legislation, administration and adjudication concerning the high seas, the polar regions and the cosmic spaces.

Chapter I examines problems arising from the delimitation of national spaces and international spaces. The land boundary between the continental shelf and the deep seabed, the water boundary between the territorial sea and the high seas, and the aerospace boundary between airspace and outer space constitute the boundary between national lands, waters and airspace, on the one hand, and the high seas, the polar regions and the cosmic spaces, on the other hand. The extent of the continental shelf, the breadth of the territorial sea and the height of airspace determine, accordingly, the boundary between national spaces and international spaces.

The interests of territorial sovereignty and international regimes conflict in the delimitation of national spaces and international spaces. While the interests of territorial sovereignty necessitate the extension of the limits of national land territory, the territorial sea and the national airspace, the interests of international regimes

necessitate the extension of the limits of the high seas, the polar regions and the cosmic spaces. Chapter I suggests the harmonization of these conflicting interests in the delimitation of national spaces and international spaces.

Chapter II analyses the rule of the prohibition of territorial sovereignty over international spaces. The high seas being open to all nations, no state may validly purport to subject any part of them to its sovereignty. Moreover, no new claim, or enlargement of an existing claim, to territorial sovereignty in Antarctica shall be asserted. Furthermore, outer space, including the moon and other celestial bodies, is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means.

Incapability of appropriation and the absence of effective control determine the prohibition of territorial sovereignty over the high seas, the polar regions and the cosmic spaces. Problems arise, however, from the exercise of the various freedoms of international spaces. Strategic interests conflict with scientific and commercial interests in the exploration and exploitation of the high seas, the polar regions and the cosmic spaces. Chapter II suggests the establishment of a coordinative international regulation securing the concerted exercise of the freedoms of international spaces.

Chapter III analyses the rule of the jurisdiction of the flag state in international spaces. Ships shall sail under the flag of one state only and, save in exceptional cases expressly provided for in international treaties, shall be subject to its exclusive jurisdiction on the high seas. Similarly, expeditions and stations on the Arctic Ocean and in Antarctica are subject to the jurisdiction of the flag state. Moreover, a state on whose registry an object launched into outer space is carried shall retain jurisdiction and control over such object, and over any personnel thereof, while in outer space or on a celestial body.

In the absence of territorial sovereignty, vehicles and installations are subject to the jurisdiction of the flag state in international spaces. Problems arise, however, from the exercise of flag jurisdiction over security zones around installations on the deep seabed, in Antarctica and on celestial bodies. Chapter III suggests a solution by distinction between the prohibition of territorial sovereignty and the permission of flag jurisdiction in international spaces.

Chapter IV examines problems arising from the use of force in international spaces. The general prohibition of the use of force and the inherent right of self-defense apply

to all international spaces. Similarly, the nuclear test ban applies to all international spaces. Moreover, while the military use of the high seas and outer space is generally permitted, the military use of Antarctica and celestial bodies is generally prohibited. Nevertheless, strategic observation is not prohibited in any international spaces.

The interests of national security and international security conflict in the regime of the use of force in international spaces. While the interests of national security necessitate the limitation of strategic activities in international spaces, the interests of international security necessitate a balance of power through the strategic use of international spaces. Chapter IV suggests a compromise between these conflicting strategic interests by distinguishing the universal permission of reconnaissance from various military limitations in international spaces.

Accordingly, the analysis of the law of international spaces indicates the necessity of the elaboration of further common rules. A generally accepted concrete delimitation of national spaces and international spaces, a coordinated exercise of the various freedoms of international spaces, the protection of the jurisdiction of the flag state over vehicles and installations in international spaces, and the maintenance of the balance of power in international spaces constitute the main objectives of this legal development. A satisfactory solution of these problems would consolidate the common legal regime of international spaces.

Moreover, the law of international spaces requires the establishment of new international institutions. The common legal regime of international spaces manifests the necessity of adopting a multilateral treaty on international spaces, establishing an organization for international spaces, and agreeing on the adjudication of disputes concerning international spaces. The international implementation of these objectives would create viable legal institutions for international spaces.

CHAPTER I

THE DELIMITATION OF INTERNATIONAL SPACES

INTRODUCTION

The rules of delimitation indicate a distinction between the regimes of national spaces and international spaces. The surface of national land territory constitutes the basis of territorial sovereignty over national spaces. Sovereignty over national land territory extends to both vertical directions. Accordingly, the entire subsoil of national land territory, down to the centre of the earth, and the entire airspace of national land territory, up to the limit of airspace and outer space, are subject to territorial sovereignty. Sovereignty over national land territory extends also to horizontal direction. The territorial sea, up to the limit of the territorial sea and the high seas, its entire subsoil and airspace form part of national spaces. Moreover, the continental shelf, up to the limit of the continental shelf and the deep seabed, and down to the centre of the earth, forms part of national spaces.

The limits of national spaces indicate the limits of international spaces. The outer limit of the territorial sea constitutes the limit of the high seas. The international regime of the high seas extends to both vertical directions. Accordingly, the entire subsoil of the high seas, down to the centre of the earth, is subject to the international regime of the high seas, except the continental shelf. The outer limit of the continental shelf constitutes the limit of the deep seabed. The entire airspace of the high seas, up to the limit of airspace and outer space, is subject to the international regime of the high seas. Similarly, the international regime of the Arctic Ocean extends to its deep seabed and subsoil, down to the centre of the earth, and to its airspace, up to the limit of airspace and outer space. The international regime of Antarctic lands and ice shelves extends to their subsoil, down to the centre of the earth, and to their airspace, up to the limit of airspace and outer space. The upper limit of airspace constitutes the limit of the cosmic spaces. Outer space and celestial bodies constitute the cosmic spaces. Outer space includes the entire space beyond celestial bodies and their atmospheres. Celestial bodies include all land

masses in space, and their atmospheres, except the earth.

The conflicting interests of territorial sovereignty and the international regime characterize the delimitation of national spaces and international spaces. The interests of territorial sovereignty require the extension of the limits of national land territory, the territorial sea and the national airspace. The interests of the international regime require the extension of the limits of the high seas, the polar regions and the cosmic spaces. These interests conflict in the delimitation of national spaces and international spaces.

The conflicting interests of territorial sovereignty and the international regime necessitate the international regulation of the delimitation of national spaces and international spaces. Considering that the extent of national land territory, the territorial sea and the national airspace affects the extent of the high seas, the polar regions and the cosmic spaces, the delimitation of national spaces and international spaces is subject to the generally accepted rules of international law. This consideration justifies the international character of the delimitation of national and international spaces.

Though every state is entitled to regulate the delimitation of its national territory, any unilateral national delimitation is subject to certain restrictions. The unilateral extension of national areas would violate the regime of international spaces. The expansion of national land territory, the territorial sea and the national airspace would diminish the high seas, the polar regions and the cosmic spaces. Accordingly, the extent of national spaces and the extent of international spaces have a mutual interdependence.

This rule indicates that the delimitation of national spaces has to be in conformity with the interests of the regime of international spaces. Considering that the unilateral extension of territorial sovereignty over national land territory, the territorial sea and the national airspace would violate the international regime of the high seas, the polar regions and the cosmic spaces, international law restricts the expansion of national spaces. Consequently, the validity of any unilateral delimitation of national spaces and international spaces depends upon international law.

SECTION 1

THE DELIMITATION OF THE HIGH SEAS

A. The Traditional Breadth of the Territorial Sea

The delimitation of the territorial sea and the high seas has been a controversial problem of international law. Certain principles concerning the determination of the breadth of the territorial sea have been adopted in international jurisprudence. In 1625 Grotius determined effective control as the basis of the extent of the territorial sea: "The empire of a portion of the sea is ... belonging to a territory in so far as those who sail in that part of the sea can be compelled from the shore as if they were on land." [1]

This principle was adopted by Bynkershoek in 1702: "The power of the land ends where the power of arms ends." In those times, the coastal state was able to exercise effective control over the sea within the range of a cannon shot, namely, three miles. The three-mile limit has become thus the traditional breadth of the territorial sea. [2]

National legislation has adopted the three-mile limit of the territorial sea. In 1878, Section 7 of the British Territorial Waters Act regulated the breadth of the territorial sea: "Any part of the sea within one marine league of the coast measured from low-water mark shall be deemed to be within the territorial waters of Her Majesty's dominions." The practice of states concerning the breadth of the territorial sea has been thus confirmed by national legislation. The three-mile limit of the territorial sea and the high seas has become a general rule of customary international law. [3]

The customary three-mile limit of the territorial sea was enunciated in the bilateral agreement between the United Kingdom and the United States at Washington on 23 January 1924. Article 1 of the Treaty regulates the breadth of the territorial sea: "The High Contracting Parties declare that it is their firm intention to uphold

the principle that three marine miles extending from the coast-line outwards measured from low-water mark constitute the proper limits of territorial waters." Accordingly, the principal maritime powers have confirmed the traditional breadth of the territorial sea.[4]

B. The Failure of Delimitation at the Hague Conference

International organizations have recognized the customary delimitation of the territorial sea and the high seas. On 11 August 1926 the Vienna Conference of the International Law Association adopted a Draft Convention on the Laws of Maritime Jurisdiction in Time of Peace. Article 5 of the Draft Convention provides for the three-mile limit of the territorial sea: " ... the territorial jurisdiction of each State shall extend over the waters along its coasts for three marine miles from low-water mark at ordinary spring tide."[5]

A similar regulation was adopted by the Institute of International Law. On 28 August 1928 the Stockholm Session of the Institute of International Law adopted a Draft Regulation on the Territorial Sea in Time of Peace. Article 2 of the Draft Regulation provides for the three-mile limit of the territorial sea: "L'etendue de la Mer Territoriale est de trois milles marins." In conformity with the general practice of the principal maritime powers, the above mentioned draft regulations demonstrate the recognition of the traditional breadth of the territorial sea.[6]

Convened by the Council of the League of Nations, a Conference on the Codification of International Law was held at the Hague in 1930. On 12 April 1930 a Draft Resolution on the Legal Status of the Territorial Sea was embodied in the Final Act of the Conference. Article 1 of the Draft Resolution recognizes the sovereignty of the coastal state over the territorial sea. No agreement was reached, however, on the breadth of the territorial sea. National claims varied from three to twelve miles, and no proposal got the required majority of the Conference. The principal maritime powers intended to maintain a maximum extent of the high seas, for the purposes of freedom of navigation. This consideration motivated the traditional claim to a three-mile breadth of the territorial sea. On the other hand, certain coastal states preferred their national security to the interests of international navigation. Such states intended to secure a maximum extent of the territorial sea.

This consideration motivated various national claims up to a twelve-mile breadth of the territorial sea. The antagonistic interests of national security and international navigation could not be reconciled at the Conference. This controversy caused the failure of delimitation at the Hague Conference.[7]

C. International Delimitation in the Fisheries Case

The method and nature of the delimitation of the territorial sea and the high seas were examined by the International Court of Justice in the Fisheries Case. On 28 September 1949 the Government of the United Kingdom filed in the Registry an application instituting proceedings before the International Court of Justice against Norway, the subject of the proceedings being the validity, under international law, of the lines of delimitation of the Norwegian fisheries zone laid down by the Norwegian Royal Decree of 12 July 1935. The British argument was that the baseline of the territorial sea should follow the sinuosities of the coast. The Norwegian argument was that a straight baseline connecting the outer points of the coast should constitute the inner limit of the territorial sea. In its Judgment of 18 December 1951, the Court found, by ten votes to two, that the method employed for the delimitation of the fisheries zone by the Royal Norwegian Decree was not contrary to international law, and, by eight votes to four, that the baselines fixed by the said Decree in application of this method were not contrary to international law. The Judgment adopted the historic title of Norway concerning the application of straight baselines to the delimitation of the territorial sea, thus considering the waters between the coast and the straight baseline as internal waters. Nevertheless, the Court emphasized the international nature of the delimitation of the territorial sea and the high seas: "The delimitation of sea areas has always an international aspect; it cannot be dependent merely upon the will of the coastal State as expressed in its municipal law. Although it is true that the act of delimitation is necessarily a unilateral act, because only the coastal State is competent to undertake it, the validity of the delimitation with regard to other States depends upon international law." The postulate of the international nature of delimitation constitutes the most significant contribution of the Judgment. As the breadth of the territorial sea affects the extent of the high seas, delimitation determines not only

the extent of national sovereignty over the territorial sea, but also the extent of the international regime of the high seas. Therefore, a unilateral act of delimitation by the coastal state shall be in conformity with international law. That is how the postulate of the international nature of delimitation in the Fisheries Case has constituted a general basis of analogy for the delimitation of national spaces and international spaces. [8]

D. Delimitation in the International Law Commission

Various proposals manifested the absence of agreement concerning the controversial problem of the breadth of the territorial sea in the International Law Commission. On 4 April 1952 the Special Rapporteur, Francois, submitted his First Report on the Regime of the Territorial Sea to the International Law Commission. Article 4 of the Report provides for a six-mile limit of the territorial sea: "La largeur de la zone de mer designee dans l'article premier sera fixee par l'Etat riverain, mais elle ne saurait depasser six milles marins." [9]

Subsequent proposals modified this draft concerning the breadth of the territorial sea. On 19 February 1953 Francois submitted his Second Report on the Regime of the Territorial Sea to the International Law Commission. Article 4 (1) of the Report substitutes a maximum twelve mile limit for the maximum six-mile limit of the territorial sea, compared to the First Francois Report: "La largeur de la mer territoriale sera fixee par l'Etat riverain, mais elle ne saurait depasser 12 milles marins a partir de la ligne de base de la mer territoriale." [10]

However, even this draft was modified subsequently. On 4 February 1954 Francois submitted his Third Report on the Regime of the Territorial Sea to the International Law Commission. Article 4 (1) of the Report recognizes the traditional three-mile limit, as a general rule, but Article 4 (2) admits of a maximum twelve mile limit of the territorial sea, in conformity with the Second Francois Report: "La largeur de la mer territoriale sera de 3 milles marins a partir de la ligne de base de cette mer. Cependant, l'Etat riverain est autorise a etendre, sous reserve des conditions ci-apres enumerees, la mer territoriale jusqu'a une limite de 12 milles au maximum de sa ligne de base." [11]

In the absence of agreement, the International Law Commission was not able to

adopt a breadth of the territorial sea. On 8 July 1955, in its Seventh Report to the General Assembly, the International Law Commission submitted Draft Articles on the Regime of the Territorial Sea. Draft Article 3 (2) provides for the maximum limit, while Draft Article 3 (3) provides for the minimum limit of the territorial sea: "The Commission considers that international law does not justify an extension of the territorial sea beyond twelve miles. ... international law does not require States to recognize a breadth beyond three miles." [12]

No agreement was reached even subsequently in the International Law Commission concerning the breadth of the territorial sea. On 4 July 1956, in its Eighth Report to the General Assembly, the International Law Commission submitted Draft Articles concerning the Law of the Sea, as the final result of its codificative activity in this field. The Draft Articles do not regulate, however, the breadth of the territorial sea. Draft Article 3 (2) provides for the maximum twelve-mile limit of the territorial sea and prohibits any claim exceeding this breadth: "The Commission considers that international law does not permit an extension of the territorial sea beyond twelve miles." However, the admissibility of claims to a breadth between three and twelve miles was not regulated by the International Law Commission. Draft Article 3 (3) merely states the absence of a definite rule concerning the breadth of the territorial sea: "The Commission, without taking any decision as to the breadth of the territorial sea up to that limit, notes, on the one hand, that many States have fixed a breadth greater than three miles and, on the other hand, that many States do not recognize such a breadth when that of their own territorial sea is less." The conflict of coastal sovereignty and international navigation characterized thus the preparatory works of the International Law Commission, as regards the delimitation of the territorial sea and the high seas. Certain coastal states asserted the admissibility of claims to a breadth of the territorial sea up to twelve miles, while several states, including the principal maritime powers, refused the recognition of claims to a breadth of the territorial sea beyond the traditional three-mile limit. The preparatory works of the International Law Commission reflected the antagonistic interests of states in the delimitation of the territorial sea and the high seas. Accordingly, the International Law Commission was not able to decide on the breadth of the territorial sea, between the minimum three-mile limit and the maximum twelve-mile limit. Therefore, the question remained open whether the validity of a claim to a breadth of the territorial sea between three and twelve miles depends upon recognition by other states. This