

ARTICLE

Clearing the Air Above the East China Sea:
The Primary Elements of Aircraft Defense Identification Zones

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Abstract

In 2013, China unilaterally established an Air Defense Identification Zone (ADIZ) over the East China Sea (“ECS ADIZ”). The zone extends far into international airspace, overlaps with existing South Korean, Taiwanese, and Japanese ADIZs, and covers disputed territories in the region. China has defended the measure as consistent with state practice and international norms; other countries, including the United States, have challenged these claims. There is no express legal basis for establishing an ADIZ in international airspace. ADIZs are rooted in customary international law and are consequently subject to variances and countervailing state action. Given the legal and geopolitical dynamics involved, the ECS ADIZ has increased the risk of miscommunication and miscalculation among competing states. By defining and applying the primary elements of ADIZs, as derived from state practice and principles of international law, this Article aims to provide greater legal clarity on ADIZs. Such elucidation of ADIZ rules is necessary to standardize the practice of states, reduce the threat to civil aircraft in disputed airspace, preserve the freedoms associated with international airspace, and mitigate the risk of great power conflict in East Asia.

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Introduction

On November 23, 2013, China unilaterally declared the establishment of an extraterritorial Air Defense Identification Zone (ADIZ)¹ over the East China Sea (the “ECS ADIZ”),² increasing the tension in an already volatile region and raising objections from other states. According to China’s Ministry of National Defense, the purpose of the measure is to “[protect] state sovereignty and territorial and airspace security” in the East China Sea.³ The zone extends more than 300 miles from Chinese territory⁴ and overlaps with existing ADIZs in the area established by South Korea, Taiwan, and Japan.⁵ The ECS ADIZ also encompasses contested territory, including the Senkaku Islands, which are administered by Japan, but claimed by China and Taiwan.⁶ The ECS ADIZ also covers airspace above a submerged rock, Ieodo, which is under South Korean administration and is the site of an ocean research center.⁷ In addition, the zone

¹ An ADIZ is an area of airspace, adjacent to but beyond the national airspace and territory of the state, where aircraft are identified, monitored, and controlled in the interest of national security. *See, e.g.*, 14 C.F.R § 99.3 (2015) (defining ADIZ). Extraterritorial ADIZ are also labeled “coastal ADIZ” to distinguish from a “land-based ADIZ” or “domestic ADIZ.” FED. AVIATION ADMIN., AERONAUTICAL INFORMATION PUBLICATION UNITED STATES OF AMERICA (22d ed. 2013) (definitions), http://www.faa.gov/air_traffic/publications/atpubs/AIP/aip.pdf. For the purposes of this paper, the term “ADIZ” is used in reference to “coastal” or extraterritorial ADIZ, as opposed to ADIZ established in domestic or sovereign airspace.

² *Announcement of the Aircraft Identification Rules for the East China Sea Air Defense Identification Zone of the P.R.C.*, XINHUANET.COM (Nov. 23, 2013), http://news.xinhuanet.com/english/china/2013-11/23/c_132911634.htm [hereinafter *Announcement of the Aircraft Identification Rules for the ECS ADIZ*].

³ *China Exclusive: Defense Ministry Spokesman Responds to Air Defense Identification Zone Questions*, XINHUANET.COM (Nov. 23, 2013), http://news.xinhuanet.com/english/china/2013-11/23/c_132912145.htm [hereinafter *Defense Ministry Spokesman Responds to ADIZ Questions*].

⁴ The zone includes the airspace within the area enclosed by China’s outer limit of the territorial sea and the following six points: 33°11’N (North Latitude) and 121°47’E (East Longitude), 33°11’N and 125°00’E, 31°00’N and 128°20’E, 25°38’N and 125°00’E, 24°45’N and 123°00’E, 26°44’N and 120°58’E. *See Announcement of the Aircraft Identification Rules for the ECS ADIZ, supra* note 2.

⁵ The ECS ADIZ overlaps with nearly 50% of the Japanese ADIZ in the East China Sea. *IATA Operational Bulletin: China Air Defense Identification Zone Establishment in East China Sea*, INT’L AIR TRANSPORT ASSOC. (Nov. 28, 2013), www.iata.org [hereinafter *IATA Operational Bulletin*]. The ECS ADIZ also overlaps with the South Korean ADIZ in the East China Sea. *MND expresses regret at overlapped ADIZ*, MINISTRY OF DEFENSE, REPUBLIC OF KOREA (Dec. 4, 2013), http://www.mnd.go.kr/user/boardList.action?command=view&page=3&boardId=O_47261&boardSeq=O_56323&titleId=null&id=mnd_eng_030100000000. In response, Taiwan’s has threatened to use force to defend its ADIZ in the area. *Tsai Der-sheng: Taiwan will use force if needed to protect ADIZ*, TAIWAN NEWS (Dec. 4, 2013), http://www.taiwannews.com.tw/etn/news_content.php?id=2359759.

⁶ The Senkaku Islands are referred to as the Diaoyu Islands by China and Taiwan. *See Who really owns the Senkaku Islands?*, THE ECONOMIST (Dec. 3, 2013), <http://www.economist.com/blogs/economist-explains/2013/12/economist-explains-1>.

⁷ IAN E. RINEHART & BART ELIAS, CONG. RESEARCH SERV. R43894, *CHINA’S AIR DEFENSE IDENTIFICATION ZONE 7* (2015), <http://www.fas.org/sgp/crs/row/R43894.pdf> [hereinafter *CRS ADIZ Report*].

aligns with a Chinese exclusive economic zone (EEZ)⁸ – maritime areas adjacent to the territorial sea where coastal states exercise certain sovereignty rights related to the economic development and protection of natural resources.⁹

The ECS ADIZ came into force immediately and without any prior notice to, or coordination with, the international community.¹⁰ China requires that all aircraft, regardless of their civil or state character, follow procedures allowing for their identification, monitoring, and control when operating in the ECS ADIZ.¹¹ Although state practice varies, the category of “state” aircraft typically includes aircraft used for military, customs or police services. Notably, the scope of ECS ADIZ rules are not limited to aircraft operations intending to enter Chinese national airspace.¹² Thus, based on Chinese requirements, even U.S. military aircraft merely traversing international airspace in the zone are subject to ECS ADIZ requirements. In order to enforce the ECS ADIZ, China’s Defense Ministry has threatened to use “defensive emergency measures”—such as military interception—against any non-cooperating aircraft.¹³ According to China, such practice is consistent with “common international practice” and based upon a “sound legal basis.”¹⁴

Other countries, however, have challenged the legality of the ECS ADIZ. Australia voiced its opposition to “any coercive or unilateral actions” to change the status quo in the East China Sea.¹⁵ The European Union criticized the Chinese action as undermining the legitimate use of international waters and airspace enshrined in international law.¹⁶ Japan similarly asserted that the ECS ADIZ “unduly infringe[s] the freedom of flight in international airspace, which is the

⁸ See James Manicom, *Viewpoints: China air zone tensions*, BBC NEWS (Nov. 28, 2013), <http://www.bbc.com/news/world-asia-25116119>.

⁹ EEZ and other maritime zones will be covered in detail later in this article.

¹⁰ China’s announcement of the ECS ADIZ stated “these rules will come into force at 10 a.m. November 23, 2013.” See *Announcement of the Aircraft Identification Rules for the ECS ADIZ*, *supra* note 2.

¹¹ The rules demand that any aircraft flying in the ADIZ must: report a flight plan, maintain radio communication and respond to identification inquiries, maintain radar transponder function, and exhibit clear nationality and logo markings. See *Announcement of the Aircraft Identification Rules for the ECS ADIZ*, *supra* note 2.

¹² U.S. DEP’T OF DEFENSE, ASIA-PACIFIC MARITIME SECURITY STRATEGY 31 (Aug. 14, 2015), http://www.defense.gov/Portals/1/Documents/pubs/NDAA%20A-P_Maritime_Security_Strategy-08142015-1300-FINALFORMAT.PDF (“China professed to apply [the ADIZ] even to aircraft not intending to enter Chinese national airspace”).

¹³ See *Announcement of the Aircraft Identification Rules for the ECS ADIZ*, *supra* note 2.

¹⁴ See *Defense Ministry Spokesman Responds to ADIZ Questions*, *supra* note 3.

¹⁵ Julie Bishop, *China’s announcement of an air-defence identification zone over the East China Sea*, AUSTRALIAN MINISTRY OF FOREIGN AFFAIRS (Nov. 26, 2013), http://www.foreignminister.gov.au/releases/2013/jb_mr_131126a.html.

¹⁶ See *European Union declaration on the establishment by China of an ‘East China Sea Air Defence Identification Zone’*, BRITISH EMBASSY TOKYO (Nov. 28, 2013), <https://www.gov.uk/government/world-location-news/eu-declaration-on-east-china-sea-air-defence-identification-zone>.

general principle of international law” and threatens the “order of international aviation.”¹⁷ In conjunction with Japan, the Association of Southeast Asian Nations (ASEAN)¹⁸ issued a statement asserting the freedom of overflight in accordance with “universally recognized principles of international law” under the 1982 United Nations Convention on the Law of the Sea (“UNCLOS”)¹⁹ and the International Civil Aviation Organization (ICAO) standards and recommended practices²⁰ issued pursuant to the International Convention on Civil Aviation (the “Chicago Convention”).²¹

The United States has also rejected the ECS ADIZ as being inconsistent with international norms.²² The Obama Administration claims that China’s failure to distinguish between aircraft intending to enter national airspace and aircraft merely overflying the East China Sea gives the ECS ADIZ broader reach than is permitted under international law.²³ Invoking the freedom of overflight, the United States has²⁴ refused to modify the conduct of its military operations in the region.²⁵ In accord with this rejection of the ECS ADIZ²⁶, the United States

¹⁷ See *Statement by the Minister of for Foreign Affairs on the announcement of the ‘East China Sea Air Defense Identification Zone’ by the Ministry of National Defense of the People’s Republic of China*, MINISTRY OF FOREIGN AFFAIRS OF JAPAN (Nov. 24, 2013), http://www.mofa.go.jp/press/release/press4e_000098.html.

¹⁸ ASEAN member states include Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand, and Vietnam. *ASEAN Member States*, ASSOC. OF SOUTHEAST ASIAN NATIONS (Nov. 29, 2014), <http://www.asean.org/asean/asean-member-states>.

¹⁹ United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

²⁰ *Joint Statement of the ASEAN-Japan Commemorative Summit “Hand in hand, facing regional and global challenges”*, ASSOC. OF SOUTHEAST ASIAN NATIONS (Dec. 15, 2013), <http://www.mofa.go.jp/files/000022451.pdf>.

²¹ Convention on International Civil Aviation, Dec. 7, 1944, 61 Stat. 1180, 15 U.N.T.S. 295 [hereinafter Chicago Convention].

²² *Readout of Vice President Biden’s Call with Prime Minister Shinzo Abe of Japan*, OFFICE OF THE VICE PRESIDENT (Dec. 12, 2013), <http://www.whitehouse.gov/the-press-office/2013/12/12/readout-vice-president-bidens-call-prime-minister-shinzo-abe-japan>;

Reaffirming the Strong Support of the United States Government for Freedom of Navigation and other Internationally Lawful Uses of Sea and Airspace in the Asia-Pacific Region, and for the Peaceful Diplomatic Resolution of Outstanding Territorial and Maritime Claims and Disputes, S. Res 412, 113th Cong. (2014) (enacted).

²³ Marie Harf, *Daily Press Briefing*, U.S. DEP’T OF STATE (Dec. 6, 2013), <http://www.state.gov/r/pa/prs/dpb/2013/12/218491.htm> (“China’s new ADIZ purportedly applies to all aircraft, including those not intending to enter, depart, or transit China’s national air space.”).

²⁴ U.S. Secretary of State John Kerry, *Statement on the East China Sea Air Defense Identification Zone*, U.S. DEP’T OF STATE (Nov. 23, 2013), <http://www.state.gov/secretary/remarks/2013/11/218013.htm> [hereinafter Kerry Statement].

²⁵ *Hagel Issues Statement on East China Sea Air Defense Identification Zone*, AMERICAN FORCES PRESS SERVICE (Nov. 23, 2013), <http://archive.defense.gov/news/newsarticle.aspx?id=121223>.

²⁶ Since the early 1970s, the United States, through the Freedom of Navigation (FON) Program, has reaffirmed its long-standing policy of exercising and asserting its freedom of navigation and overflight rights in international waters and airspace, respectively. Under the FON Program, challenges of excessive maritime claims of other nations are undertaken both through diplomatic protests by the DOS and by operational assertions by the U.S. military. See U.S. DEPT. OF THE

promptly flew two B-52 bombers through the zone without complying with China's aircraft identification and control procedures.²⁷

China has rebutted criticism of the ECS ADIZ by citing the example of numerous other ADIZs, the first of which were promulgated by the United States in the 1950s.²⁸ Indeed, following China's establishment of the ECS ADIZ, South Korea announced the expansion of its ADIZ (the "KADIZ") to cover the country's southernmost island of Marado; Hongdo Island, an uninhabited island south of Geojedo Island; and Ieodo, a submerged rock within the overlapping EEZ of South Korea and China.²⁹ The expanded KADIZ also aligns with an existing Flight Information Region (FIR)³⁰—international airspace where South Korea administers air traffic control.³¹ The international response to South Korea's action has been supportive, due in part to Seoul's prior consultation with other states and strategic allies such as the United States.³² However, South Korea's extension of the KADIZ over a competing EEZ, following China's example, may also be viewed as a dangerous escalation of competing sovereignty claims in the East China Sea.

The problem with ADIZs is that there is no express basis in international law for establishing such zones in international airspace.³³ International regimes

NAVY, THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS, 2.8 (2007) [hereinafter U.S. Navy Commander's Handbook].

²⁷ *US B-52 bombers challenge disputed China air zone*, BBC NEWS (Nov. 26, 2013), <http://www.bbc.com/news/world-asia-25110011>.

²⁸ *See Defense Ministry Spokesman Responds to ADIZ Questions*, *supra* note 3.

²⁹ *South Korea declares expanded ADIZ overlapping with other zones*, JAPAN TIMES (Dec. 8, 2013), <http://www.japantimes.co.jp/news/2013/12/08/asia-pacific/south-korea-declares-expanded-adiz-overlapping-with-other-zones/#.Ux3QdHfP75M>. South Korea's actions followed its statement regretting China's unilateral establishment of the ECS ADIZ. *See S. Korea Expresses Regrets over China's ADIZ*, YONHAP (Nov. 25, 2013), <http://english.yonhapnews.co.kr/national/2013/11/25/46/0301000000AEN20131125004252315F.html>.

³⁰ Choe Sang-Hun, *South Korea Announces Expansion of Its Air Defense Zone*, NEW YORK TIMES (Dec. 8, 2013), <http://www.nytimes.com/2013/12/09/world/asia/east-china-sea-air-defense-zone.html>.

³¹ An FIR is an area assigned to an ICAO member state for civilian air traffic control purposes under a regional air navigation agreement with ICAO. INT'L CIVILIAN AVIATION ORG., Air Traffic Services, Annex 11 to the Convention on Int'l Civil Aviation 2.1.2 (13th ed. 2001) [hereinafter Annex 11].

³² *Background Briefing By Senior Administration Officials on the Vice President's Trip to Asia*, OFFICE OF THE VICE-PRESIDENT (Dec. 7, 2013), <http://www.whitehouse.gov/the-press-office/2013/12/07/background-briefing-senior-administration-officials-vice-president-s-tri> ("The Vice President expressed understanding for Korea's approach to China's announcement, including potential adjustments to its zone, and both of them talked at some length about the importance of freedom of overflight and the lowering of tensions.").

³³ In contrast, the right to establish ADIZ in national airspace is expressly grounded in international aviation law. *See Chicago Convention*, *supra* note 21, art. 9 (For reasons of military necessity or public safety, states are allowed to restrict or prohibit flights by aircraft over certain designated areas within their territory).

governing international airspace and waters neither prescribe nor prohibit ADIZs.³⁴ Instead, ADIZs arise from state practice³⁵ and are consequently subject to development and variances associated with customary international law.³⁶ Customary principles of international law, such as the high seas freedoms, including freedom of overflight, are subject to proposed amendments or objection through countervailing state action. The freedom of the high seas ensures that the high seas are open to all states, whether coastal or landlocked.³⁷ No state may validly purport to subject any part of the high seas to its sovereignty.³⁸ Despite this limitation, states may attempt to couple ADIZs with accepted forms of coastal state jurisdiction associated with subjacent maritime zones in an effort to bolster controversial sovereignty claims.

In the past China has attempted to invoke security rights in relation to its EEZ in the South China Sea.³⁹ The extraterritorial layering of sovereignty rights reverses the underlying rationale of ADIZ from defensive to offensive, from the protection of national sovereignty to the coercive extension of sovereignty beyond territorial limits. Beijing recently threatened to establish an ADIZ above the South China Sea,⁴⁰ a vast maritime space where China has asserted “indisputable sovereignty” and related “rights and jurisdiction.”⁴¹ The ECS ADIZ may represent Beijing’s first proposal to establish a new state practice in which ADIZs are used for a prescriptive purpose: for the administration and effective

³⁴ Ruwantissa Abeyratne, *In search of a theoretical justification for air defense identification zones*, J. TRANSP. SEC. (Sept. 2011) (observing that ADIZ’s has never been challenged as being inconsistent with international law); Peter A. Dutton, *Caelum Liberum: Air Defense Identification Zones Outside Sovereign Airspace*, 103 AM. J. INT’L L. 691 (Oct. 2009) (reviewing state practice and development of ADIZ in conjunction with international aviation law); Kimberly Hsu, AIR DEFENSE IDENTIFICATION ZONE INTENDED TO PROVIDE CHINA GREATER FLEXIBILITY TO ENFORCE EAST CHINA SEA CLAIMS, U.S.-CHINA ECONOMIC AND SECURITY REVIEW COMMISSION 1 (2014) (noting that ADIZ are not prohibited under international law, nor are they explicitly addressed in international conventions); cf. Christopher Petras, *The Law of Air Mobility: The International Legal Principles Behind the U.S. Mobility Air Forces’ Mission*, 66 A.F. L. REV. 1, 63 (2010) (noting that whether the Convention on International Civil Aviation provides a legal basis for ADIZ is subject to debate).

³⁵ See IATA Operational Bulletin, *supra* note 5.

³⁶ See Roncevert Almond, *Troubled Skies Above the East China Sea*, THE DIPLOMAT (Nov. 24, 2014), <http://thediplomat.com/2014/11/troubled-skies-above-the-east-china-sea/> [hereinafter *Troubled Skies*].

³⁷ See UNCLOS, *supra* note 19, art. 2.

³⁸ See *id.* art. 89.

³⁹ China invoked security rights within the EEZ following the collision above the South China Sea between a Chinese F-8 military aircraft intercepted and a U.S. EP-3 military reconnaissance aircraft on April 1, 2001. *Chinese FM Spokesman Gives Full Account of Air Collision Between US*, XINHUANET (Apr. 4, 2001), <http://news.xinhuanet.com/english/20010404/393124A.htm>.

⁴⁰ *Foreign Ministry Spokesperson Hua Chunying’s Regular Press Conference*, MINISTRY OF FOREIGN AFFAIRS OF THE P.R.C. (May 7, 2015), http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2511_665403/t1261660.shtml.

⁴¹ *Note Verbale CML/8/2011*, PERMANENT MISSION OF THE PEOPLE’S REPUBLIC OF CHINA TO THE UNITED NATIONS, (April 14, 2011), http://www.un.org/Depts/los/clcs_new/submissions_files/vnm37_09/chn_2011_re_phl_e.pdf.

occupation of disputed territory.⁴² According to the U.S.-China Economic and Security Commission, the ECS ADIZ is the “boldest of China’s recent attempts to demonstrate control, sovereignty, and administration of disputed areas in the East China Sea.”⁴³ At the very least, the ECS ADIZ increases the opportunity for miscommunication and miscalculation and, thus, raises the risk of great power conflict. More generally, competing security zones in international airspace that are linked to disputed claims regarding natural resources and territory undermine the existing international legal order. Ultimately, the unrestrained use of ADIZs threatens the universal freedoms and benefits of the global commons.

The debate over the ECS ADIZ provides an important opportunity to address these threats by examining the basis and characteristics of ADIZs. The purpose of this Article is to provide greater clarity on the primary elements of ADIZs, consistent with state practice and principles of international law. Such elucidation of ADIZ rules is necessary to standardize the practice of states, reduce the threat to civil aircraft in disputed airspace, preserve the freedoms associated with international airspace, and mitigate the risk of great power conflict in East Asia. Part II introduces the principle legal sources used throughout this paper to analyze ADIZs. Part III is organized into six Sections, each corresponding to one of the six primary elements of ADIZs. Within each Section, these elements will be traced from their incipience as state practice of the United States through to their refinement under corresponding customary and conventional international legal principles. Part IV evaluates whether China’s actions are consistent with international law by applying each of the six elements to the ECS ADIZ. In Part V, this Article concludes by recommending the standardization of ADIZs in international airspace through a clear articulation of the primary elements of ADIZs in an appropriate international legal forum, such as the ICAO Council. However, responsibility for developing and clarifying international law in this area primarily rests with states with or seeking to establish ADIZs.

I. Sources of Law

ADIZs may be reduced to six fundamental elements: (1) protecting national security; (2) regulating entry into national airspace; (3) administration through aircraft identification and control procedures; (4) application to all aircraft regardless of civil or state character; (5) enforcement through interception; and (6) extensive temporal and geographic scope. These elements arise from four sources of international law: state practice, as exemplified by the lead actor, the United States; the right of self-defense under customary international law; international aviation law set forth in the Chicago Convention; and international

⁴² See Roncevert Almond, *Mandate of Heaven: An ADIZ in the South China Sea*, THE DIPLOMAT (Jul.

25, 2015), <http://thediplomat.com/2015/07/mandate-of-heaven-an-adiz-in-the-south-china-sea/>.

⁴³ 2014 ANNUAL REPORT TO CONGRESS, U.S.-CHINA ECONOMIC AND SECURITY REVIEW COMMISSION 239 (2014), [hereinafter USCC 2014 Report].

maritime law set forth in UNCLOS. This Article first examines these origins before further examining and defining the basic elements of ADIZs.

The six characteristic elements of ADIZs, as a development of customary international law, have their origin in the policies and practice of the United States.⁴⁴ Legally-binding custom is derived from the practice of states and *opinio juris*, as evidenced by states' expressed recognition of the validity and legally binding nature of customary rules.⁴⁵ The United States was the first state to establish ADIZs during the Cold War as a means of countering the threat posed by the long-range bombers of the Soviet Union.⁴⁶ Following the lead of the United States, more than 20 states have developed ADIZ of their own.⁴⁷ The United States also plays an important role in monitoring and enforcing the Canadian ADIZ.⁴⁸ More specific to the East China Sea, the United States was responsible for the establishment of the Japanese ADIZ in 1951 during U.S. occupation of Japan and the South Korean ADIZ in 1951 during the Korean War.⁴⁹ China has cited prior state practice, and in particular the actions of the United States, as the basis for creating the ECS ADIZ.⁵⁰

In addition, the United States is the world's leading maritime power and regularly uses its navy to ensure access to the global commons by maintaining the freedoms of navigation and overflight in and above international waters.⁵¹ The concept of *mare liberum* (the free sea) and the freedom of navigation were

⁴⁴ The United States currently has four designated ADIZ: Contiguous U.S. ADIZ; Alaska ADIZ; Guam ADIZ; and Hawaii ADIZ. 14 C.F.R. § 99(B) (2015). In February 2003, the United States designated a special flight rules area around Washington, DC, as an ADIZ, via a Notice to Airmen (NOTAM). 73 Fed. Reg. 76,213 (Dec.

18, 2008). These special flight rules were made permanent in 2008, and the airspace is referred to as the Washington, DC Metropolitan Area Flight Restricted Zone (DC FRZ). 14 C.F.R. § 93.335 (2008) (defining "DC FRZ").

⁴⁵ See *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14, ¶ 184 (June 27) [hereinafter *Nicaragua* case].

⁴⁶ Elizabeth Cuadra, *Air Defense Identification Zone: Creeping Jurisdiction in the Airspace*, 18 VA. J. INT'L L. 485, 492 (1978) (noting that the United States was the first nation to adopt ADIZ).

⁴⁷ States that have declared ADIZ include Japan, where the United States established ADIZs while it was an occupying military power. See Hsu, *supra* note 34, at 3.

⁴⁸ The United States and Canada jointly monitor and enforce the Canadian ADIZ and Contiguous U.S. ADIZ through the North American Aerospace Defense Command (NORAD), based at Peterson Air Force Base in Colorado. CRS ADIZ Report, *supra* note 7, at 3.

⁴⁹ Raul Pedrozo, *The Bull in the China Shop: Raising Tensions in the Asia-Pacific Region*, 90 INT'L L. STUD. 66, 72 nn. 26–27 (2014).

⁵⁰ See *Defense Ministry Spokesman Responds to ADIZ Questions*, *supra* note 3.

⁵¹ Since the early 1970s, the United States, through DoD Instruction C2005.1 Freedom of Navigation (FON) Program, has reaffirmed its long-standing policy of exercising and asserting its freedom of navigation and overflight rights on a worldwide basis. Under the FON Program, challenges of excessive maritime claims of other nations are undertaken both through diplomatic protests by the Department of State and by operational assertions by the U.S. military. See U.S. Navy Commander's Handbook, *supra* note 26 at ¶ 2.8; see also White House, *National Security Directive 49, Freedom of Navigation Program* (Oct. 12, 1990), <http://fas.org/irp/offdocs/nsd/nsd49.pdf>.

codified in UNCLOS in 1982, but the articulation of these customary principles date back to the establishment of modern international law⁵² and have origins in antiquity.⁵³ The initial and most prominent rationale underlying *mare liberum* has been maintaining free access to markets.⁵⁴ Indeed, the waters of the Asia-Pacific have played a critical role in world trade and, thus, the development of the high seas freedoms.⁵⁵ But much more is at issue than the global exchange of goods.⁵⁶ Claims by coastal states to sovereignty or jurisdiction in and above the high seas ultimately may be reduced to the power to exclude others—for economic, political, or strategic reasons. Given the number of territorial and maritime conflicts in the Asia-Pacific, the United States views itself as the indispensable guarantor for security and stability in the region—an outcome best achieved through Washington’s active sustainment of a rule-based order centered on the high seas freedoms.⁵⁷

In sum, as the lead and most influential actor in creating and maintaining ADIZs, analysis of U.S. state practice is critical to evaluating the essential characteristics of ADIZs.

The elements of ADIZs can be further defined and refined through corresponding principles of international law. In this regard, ADIZs arise from the inherent right to self-defense, the second source of law used in this analysis. The right to self-defense, as part of the law of war (*jus ad bellum*), also developed through customary international law.⁵⁸ As the International Court of Justice (ICJ) observed in the *Nicaragua* case, *opinio juris* may be deduced from the ratification

⁵² Hugo Grotius, considered a founding father of modern international law, noted in his seminal work *Mare Liberum* (1608) that the “sea is a thing so clearly common to all, that it cannot be the property of any one save God alone.” HUGO GROTIUS, *MARE LIBERUM* 34 (Oxford University Press, 1916).

⁵³ See generally, David J. Bederman, *The Sea*, in *THE OXFORD HANDBOOK OF THE HISTORY OF INTERNATIONAL LAW* 359–370 (Bardo Fassbender et al., eds, 2012). For example, under Roman Emperor Justinian’s *Institutes* the principle of *res communis* (public domain) noted: “By the law of nature then the following things are common to all men; air, running water, the sea, and consequently the shores of the sea.” *Id.*, at 362 (citing JUSTINIAN INST. II.1.1 and II.1.5). See also Daniel-Erasmus Khan, *Territory and Boundaries*, in *THE OXFORD HANDBOOK OF THE HISTORY OF INTERNATIONAL LAW* 241 (Bardo Fassbender et al., eds, 2012) (citing script from ancient Egypt, approximately 1086 BC, branding the sea as terrain forbidden from human appropriation).

⁵⁴ See PETER BORSCHBERG, *HUGO GROTIUS, THE PORTUGUESE, AND FREE TRADE IN THE EAST INDIES* (2011).

⁵⁵ See generally, CHARLES H. ALEXANDROWICZ, *AN INTRODUCTION TO THE HISTORY OF THE LAW OF NATIONS IN THE EAST INDIES (16TH, 17TH, AND 18TH CENTURIES)* (1967).

⁵⁶ As technology has increased the human footprint, international law has developed to preserve common or shared areas beyond state territory from claims of jurisdiction and sovereignty claims, even if the commercial gain is not obvious or immediate. See e.g., Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies art. 2, Jan. 27, 1967, 610 UNTS 205 (prohibiting claims of sovereignty to outer space, the Moon, and other celestial bodies).

⁵⁷ See U.S. DEP’T OF DEFENSE, *ASIA-PACIFIC MARITIME SECURITY STRATEGY*, *supra* note 12.

⁵⁸ See *Nicaragua* case, *supra* note 45, ¶¶ 183–86.

of international conventions and declared support for the rules therein.⁵⁹ With regard to state practice, the ICJ found it to be sufficient that the “conduct of states should, in general, be consistent with such rules,” for the rule to be binding as customary international law.⁶⁰ For instance, the customary right to self-defense is codified in the United Nations Charter⁶¹ and supporting General Assembly resolutions.⁶² Customary principles limiting the right to self-defense, namely necessity and proportionality, materially impact the scope and enforcement of ADIZ.

The third major source of law for ADIZs is international aviation law as set forth in the Chicago Convention. The Chicago Convention is the primary legal regime governing international aviation and sets forth principles for the safe and orderly development of the aviation industry.⁶³ The Chicago Convention includes rules relevant to ADIZs, including the use of international airspace,⁶⁴ and sets forth norms that condition the application of ADIZs.⁶⁵ The treaty is administered by ICAO, a specialized UN agency based in Montreal.⁶⁶ Through the Council’s quasi-legislative powers,⁶⁷ ICAO adopts Standards and Recommended Practices (SARPs),⁶⁸ which serve as Annexes to the Chicago Convention.⁶⁹ Both the United States and China are ICAO-contracting states and members of the Council.⁷⁰ All contracting states are under a legal obligation to implement standards established by ICAO.⁷¹

As important as the Chicago Convention is with regard to establishing the rules of international aviation, the treaty regime does not fully resolve claims of airspace sovereignty and freedom of overflight, particularly with regard to the

⁵⁹ See *id.*, ¶¶ 188–90.

⁶⁰ See *id.*, ¶¶ 186.

⁶¹ U.N. CHARTER, art. 51.

⁶² See *Nicaragua* case, *supra* note 45, ¶ 193 (reviewing GA Resolution 2625 (XXV) entitled “Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations”).

⁶³ See Chicago Convention, *supra* note 21, pmb1.

⁶⁴ See Chicago Convention, *supra* note 21, art. 12 (“Over the high seas, the rules in force shall be those established under this Convention”).

⁶⁵ Cf. MYRES S. MCDUGAL, ET AL., *Law and Public Order in Outer Space*, 306–11 (1963) (suggests that claims to impose ADIZ for security purposes cannot be inconsistent with principles of international law).

⁶⁶ See Chicago Convention, *supra* note 21, arts. 43–66.

⁶⁷ See *id.*, art. 50.

⁶⁸ See *id.*, arts. 37, 54(1).

⁶⁹ See *id.*, art. 90.

⁷⁰ *Member States*, INT’L CIVIL AVIATION ORG. (Oct. 31, 2013), <http://www.icao.int/MemberStates/Member%20States.English.pdf>.

⁷¹ See, e.g., INT’L CIVIL AVIATION ORG., RULES OF THE AIR, ANNEX 2 TO THE CONVENTION ON INT’L CIVIL AVIATION vi (10th ed. 2005) (defining “Standard”) [hereinafter Annex 2]. In the event that full compliance with a standard is impracticable, the contracting State must provide notice to the Council of the difference. Chicago Convention, *supra* note 21, art. 38.

jurisdictional claims of coastal states to airspace above subjacent waters.⁷² Examination of international maritime law, as codified in UNCLOS, the fourth source of law governing ADIZs, is necessary.⁷³

UNCLOS entered into force in 1994 and has been ratified by 166 states,⁷⁴ including all major maritime powers except for the United States (which nevertheless recognizes many of the customary norms set forth in the treaty).⁷⁵ Of relevance to ADIZs, the treaty codified the aforementioned customary high seas freedoms, with the principal freedoms being overflight and navigation.⁷⁶ In codifying the progressive development of maritime law, UNCLOS also established legal regimes governing ocean and airspace areas that determine the degree to which a coastal state may exercise sovereignty over foreign vessels and aircraft operating in these zones.⁷⁷ Given that some states, like China, have asserted security rights in connection with maritime coastal zones, UNCLOS serves as an important source for evaluating ADIZs.

II. Primary Elements

This section explores the six primary elements of ADIZs: (1) protecting national security; (2) regulating entry into national airspace; (3) administration through aircraft identification and control procedures; (4) application to all aircraft regardless of civil or state character; (5) enforcement through interception; and (6) extensive temporal and geographic scope. The major sources of law governing ADIZs are used to establish each element. First, the primary elements are defined using the state practice of the United States, the lead actor in developing ADIZs, and then further measured under principles of international law.

A. Protecting National Security

The protection of national security is the fundamental objective of ADIZs under U.S. law. This objective is consistent with the right to self-defense under customary international law, as well as the right to self-defense set forth in the

⁷² Cuadra, *supra* note 46, at 489–93.

⁷³ Kay Hailbronner, *Freedom of the Air and the Convention on the Law of the Sea*, 77 A.J.I.L. 490, 493 (1983).

⁷⁴ United Nations, UNCLOS, Status (As of Oct. 10, 2014) http://www.un.org/Depts/los/reference_files/status2010.pdf.

⁷⁵ Andrew S. Williams, *The Interception of Civil Aircraft Over the High Seas in the Global War on Terror*, 59 A.F. L. REV. 73, 92–93 (2007).

⁷⁶ UNCLOS, *supra* note 19, art. 87. Although the United States is not party to UNCLOS, it considers the navigation and overflight provisions therein reflective of customary international law and thus acts in accordance with UNCLOS on these issues. President Ronald Reagan, *Statement on United States Oceans Policy* (Mar. 10, 1983), <http://www.state.gov/documents/organization/143224.pdf> [hereinafter U.S. Oceans Policy Statement].

⁷⁷ See U.S. Navy Commander's Handbook, *supra* note 26, ¶ 1.3.

UN Charter. As a form of self-defense, ADIZs are limited by the principles of necessity and proportionality. The Chicago Convention preserves the right to self-defense and recognizes the security risk posed by international civil aviation. UNCLOS also affirms the right to self-defense, but requires states to use the high seas and international airspace for peaceful purposes. There is no legal support to use ADIZs above the high seas in an offensive or coercive manner.

1. The Fundamental Objective of ADIZs under U.S. law is to Protect National Security

The United States is the lead actor in utilizing ADIZs and created the first zone in the 1950s in response to the existential threat posed by long-range Soviet aircraft equipped with nuclear weapons.⁷⁸ The Federal Aviation Act of 1958 (the “Federal Aviation Act”)⁷⁹ serves as the statutory basis for U.S. ADIZ. The Federal Aviation Act established the Federal Aviation Administration (“FAA”)⁸⁰ and assigns the agency the responsibility for control and use of navigable airspace of the United States. The Administrator of the FAA is empowered to “prescribe air traffic regulations” for “navigating, protecting, and identifying aircraft” and “using the navigable airspace efficiently.”⁸¹

In order to encourage and allow maximum use of navigable airspace by “civil aircraft consistent with national security,” the FAA Administrator, in consultation with the Secretary of Defense, is mandated to:

- (A) establish areas in the airspace the Administrator decides are necessary in the *interests of national defense*; and
- (B) by regulation or order, restrict or prohibit flight of civil aircraft that the Administrator cannot identify, locate, and control with available facilities in those areas.⁸²

The Federal Aviation Act further affirms the United States Government’s “exclusive sovereignty of airspace of the United States.”⁸³ This exclusive

⁷⁸ Cuadra, *supra* note 46, at 492–93 (noting that the United States was the first nation to adopt ADIZ). The origins of the U.S. ADIZs date back to offshore areas designated by the U.S. Air Force in 1948 as “active defense areas” or “defense zones.” CRS ADIZ Report, *supra* note 7, at 2.

⁷⁹ Federal Aviation Act of 1958, Pub. L. No. 85-726; 72 Stat. 731

⁸⁰ 49 U.S.C. § 106 (2014).

⁸¹ *Id.* § 40103(b)(2).

⁸² *Id.* § 40103(b)(3) (emphasis added). The phrase “in the airspace” previously had the additional qualifier “of the United States” but this language has since been dropped. *Cf.* 49 U.S.C. § 1510 (1970); *see also* Cuadra, *supra* note 46, 493 Fn. 43.

⁸³ 49 U.S.C. § 40103(a) (2014).

jurisdiction is limited to the “territories and possessions of the United States, including the territorial sea and the overlying airspace.”⁸⁴

In addition, the Federal Aviation Act’s mandate with regard to establishing national defense areas states that such areas may be applied *extraterritorially*.⁸⁵ Specifically, the President may extend the application of the Federal Aviation Act, governing air commerce and safety,⁸⁶ *beyond* the national airspace of the United States when: (1) an international arrangement gives the United States Government authority to make the extension; and (2) the President decides the extension is in the national interest.⁸⁷ When first establishing ADIZs, President Truman signed an Executive Order 10197⁸⁸ to this effect under the preceding statute to the Federal Aviation Act.⁸⁹ Notably, Executive Order 10197 failed to cite any international arrangement for support.⁹⁰

Subsequently, pursuant to the Federal Aviation Act,⁹¹ the FAA issued 14 C.F.R. Part 99, which addresses security control of air traffic and firmly establishes the national security objective of the security zones.⁹² Under Part 99, an ADIZ is defined as: “an area of airspace over land or water in which the ready identification, location, and control of all aircraft (except for Department of Defense and law enforcement aircraft) is required in the *interest of national security*.”⁹³

⁸⁴ *Id.* § 40102(a)(46) (definition of “United States”).

⁸⁵ *Id.* § 40120(b).

⁸⁶ The Federal Aviation Act states, in pertinent part, that: “The President may extend . . . the application of *this part* to outside the United States.” *Id.* § 40120(b) (emphasis added). The authority for extra-territorial application is linked to Part A (49 U.S.C. §§ 40101-40123) relating to air commerce and safety, which includes the statutory provisions supporting the establishment of ADIZs. *See, e.g., id.* § 40103.

⁸⁷ *Id.* § 40120(b).

⁸⁸ *See Cuadra, supra* note 46, at 493; *see also* Exec. Order No. 10197, 15 Fed. Reg. 9,180 (Dec. 20, 1950), <http://www.trumanlibrary.org/executiveorders/index.php?pid=100&st=&st1=>

⁸⁹ Civil Aeronautics Act of 1938, Pub. L. 81-778, 64 Stat. 825 (1950).

⁹⁰ President Truman could have turned to the Chicago Convention for support, at least with respect to regulation of civil aircraft in international airspace. As further explored below, an “international arrangement” that affects the identification, location and identity of aircraft in international airspace is a Flight Information Region (FIR). FIRs are established pursuant to regional air navigation agreements with ICAO in accordance with Annex 11 to the Chicago Convention. The ICAO Council adopted the first edition of Annex 11 to the Chicago Convention on May 18, 1950, only a few months before President Truman issued Executive Order 10197 on December 20, 1950. *See* Annex 11, *supra* note 31, foreword. The Chicago Convention specifically excludes state aircraft from the scope of the treaty’s application; in contrast, states, including the United States, apply ADIZs to state aircraft—such as foreign military aircraft—in addition to civil aircraft. Chicago Convention, *supra* note 21, art. 3.

⁹¹ In support of Part 99, FAA cites the following provisions of the Federal Aviation Act: 49 U.S.C. §§ 106(g), 40101, 40103, 40106, 40133, 40120, 44502, 44721.

⁹² *See also Aeronautical Information Manual*, U.S. FEDERAL AVIATION ADMINISTRATION § 5-6-1 (Apr. 3, 2014), http://www.faa.gov/air_traffic/publications/media/aim_basic_4-03-14.pdf [hereinafter FAA Manual].

⁹³ 14 C.F.R. § 99.3 (2015) (emphasis added).

2. The National Security Objective of ADIZs is Consistent with the Customary Right to Self-defense under International Law

- a) The right to self-defense is set forth in the UN Charter and customary international law

The right of self-defense is codified in Article 51 of the United Nations Charter, which states in part: “Nothing in the present charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs.”⁹⁴ The right to self-defense serves as an important exception to the prohibition on the threat or use of force under Article 2(4).⁹⁵ As noted by the ICJ, Article 51 generally contemplates self-defense in the event of an actual armed attack.⁹⁶ However, customary international law permits protective measures to prevent or even preempt an armed attack.⁹⁷ The rationale underlying anticipatory self-defense is that states should not be forced to absorb an initial and potentially crippling first strike before taking those military measures necessary to thwart an imminent attack.⁹⁸ The principles of necessity and proportionality limit the scope and application of any defensive measure, including anticipatory actions.⁹⁹

The legal basis for anticipatory self-defense, as conditioned by the principles of necessity and proportionality, is set forth in the *Caroline* doctrine.¹⁰⁰ In order to prevent future rebel attacks, British forces crossed the Niagara River, entered U.S. territory, boarded the *Caroline*, a U.S.-registered ship, killed two Americans, and sent the ship aflame over Niagara Falls.¹⁰¹ U.S. Secretary of State Daniel Webster protested the British action and set forth a legal justification for self-defense:

A necessity of self-defense, *instant, overwhelming, leaving no choice of means, and no moment for deliberation*. It will be for it to show, also, that the local authorities of Canada, even supposing the necessity of the moment authorized them to enter the territories

⁹⁴ U.N. CHARTER, art. 51.

⁹⁵ “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.” U.N. CHARTER, art. 2(4).

⁹⁶ See *Nicaragua* case, *supra* note 45, at ¶¶ 230–31.

⁹⁷ In the *Nicaragua* case, the ICJ evaluated customary international law regarding the prohibition on the use of force and the right to self-defense. *Nicaragua* case, *supra* note 45, at ¶¶ 183–225. For an aggressive and controversial assertion of anticipatory self-defense see, e.g., THE WHITE HOUSE, *The National Security Strategy of the United States of America* (Sep. 2002), <http://www.state.gov/documents/organization/63562.pdf>.

⁹⁸ See U.S. Navy Commander’s Handbook, *supra* note 26, ¶ 4.4.3.1.

⁹⁹ See *Nicaragua* case, *supra* note 45, at ¶ 176 (stating that the principles of necessary and proportionality are “well established in customary international law”).

¹⁰⁰ See generally, DANIEL WEBSTER, LETTER FROM MR. WEBSTER TO MR. FOX, (Apr. 24, 1841) reprinted in THE WORKS OF DANIEL WEBSTER 261 (1851) [hereinafter Webster Letter].

¹⁰¹ R.Y. Jennings, *The Caroline and McLeod Cases*, 32 AM. J. INT’L L. 82, 83–89 (1938).

of the United States at all, did nothing unreasonable or excessive; since the act, *justified by the necessity of self-defense, must be limited by that necessity and kept clearly within it.*¹⁰²

Necessity requires that the use of force be in response to a hostile act or demonstration of hostile intent.¹⁰³ Under the *Caroline* doctrine, the threat must be “instant, overwhelming, leaving no choice of means, and no moment for deliberation.”¹⁰⁴ With the increased risk of terrorism and the devastating quality of weapons of mass destruction, some commentators have argued that the threat of armed attack need no longer be imminent before preventative or preemptive action is lawfully taken.¹⁰⁵ Proportionality demands that the use of force in all circumstances be limited in intensity, duration, and scope to that which is reasonably required to counter the attack or threat of attack and to ensure the continued safety of the state.¹⁰⁶

In relation to the principles of anticipatory self-defense, ADIZs may be understood a necessary and proportional response to a potential threat to sovereign territory. Through the identification, location, control, and potential interception of aircraft in international airspace, states can anticipate, evaluate, deter and respond to the threat posed by incoming aircraft. Given the speed of aircraft and the potential payload of devastating weapons (including potential weapons of mass destruction), these expansive buffer zones provide time and space for appraising hostile intent and nature of the threat. If the flight is determined to be hostile, the state can intercept the aircraft or take other self-help measures to mitigate the risk presented. ADIZs also provide the opportunity and potential justification for preventive or preemptive measures against entering aircraft even though an armed attack by the aircraft may not be imminent or the hostile intent of the flight may be undetermined or ambiguous. The existence of ADIZs, recognized and accepted by the international community, may also serve to deter aggressive behavior and prevent future conflict.¹⁰⁷ Examining whether other characteristics of ADIZs – such as the extensive scope of ADIZs or enforcement through military interception of aircraft – comply with the right to

¹⁰² *Id.* at 89 (emphasis added).

¹⁰³ See U.S. Navy Commander’s Handbook, *supra* note 26, ¶ 4.4.3.

¹⁰⁴ Webster Letter, *supra* note 100.

¹⁰⁵ Some observers have argued that the so-called “Bush Doctrine” reduced the test for “imminence” under the necessity prong of the right of anticipatory self-defense. See generally, John Yoo, *Using Force*, 71 U. CHI. L. REV. 729 (2004); Thomas R. Anderson, *Legitimizing the New Imminence: Bridging the Gap Between the Just War and the Bush Doctrine*, 8 GEO. J.L. & PUB. POL’Y 261 (2007).

¹⁰⁶ See U.S. Navy Commander’s Handbook, *supra* note 26, ¶ 4.4.3; Webster Letter, *supra* note 100.

¹⁰⁷ “Buffer zones” and clear boundaries have long been used as a means of deterrence and were incorporated into the earliest recorded example of an “inter-state” agreement (approximately 2470 BC in the ancient Middle East). DANIEL-ERASMUS KHAN, *Territory and Boundaries*, in THE OXFORD HANDBOOK OF THE HISTORY INTERNATIONAL LAW, 230 (Bardo Fassbender et al., eds, 2012).

self-defense requires a separate analysis.¹⁰⁸ What is clear is that the purpose of ADIZs is to protect national security, which is consistent with the customary right of self-defense.

- b) The Chicago Convention preserves the right to self-defense and recognizes the security risk posed by civil aviation

Consistent with the national security objective of ADIZs, the Chicago Convention fully preserves the “freedom of action” of states to respond to national emergencies and conditions of war.¹⁰⁹ Although the treaty was later amended to expressly prohibit the use of weapons against civil aircraft in flight and provide specific safeguards for interception of civil aircraft,¹¹⁰ this prohibition did not modify in any way the rights set forth in the United Nations Charter, including the right of self-defense under Article 51.¹¹¹

The Chicago Convention sets forth the concept of ADIZs, but does not provide an express legal basis for their *extraterritorial* application. The treaty provides that for reasons of military necessity or public safety, states are allowed to restrict or prohibit flights by aircraft over certain designated areas *within* their territory.¹¹² Such zones include ADIZs, danger areas (e.g., areas temporarily designated for military exercises, training or weapons testing) and other prohibited or restricted areas.¹¹³ Annex 15, which relates to aeronautical information services,¹¹⁴ defines an ADIZ as a “special designated airspace of defined dimensions within which aircraft are required to comply with special identification and/or reporting procedures additional to those related to the provision of air traffic services (ATS).”¹¹⁵ Aircraft must not be flown in a prohibited area, or in a restricted area, except in accordance with duly published¹¹⁶ conditions of the restrictions or by permission of the state over whose

¹⁰⁸ This analysis is undertaken in sections II(E) and II(F) below.

¹⁰⁹ Exercising the principle of freedom of action in the case of a declared national emergency follows notice to the Council. Chicago Convention, *supra* note 21, art. 89.

¹¹⁰ *See id.*, art. 3 *bis*.

¹¹¹ *See id.*, art. 3 *bis*(a).

¹¹² Chicago Convention, *supra* note 21, art. 9. Article 9 authorized the overflown state to intercept and ground non-authorized aircraft intruding on national airspace, but did not establish guidelines for interception of civil aircraft. Additionally even though Article 9 addressed flights over restricted or prohibited areas, it did not address the scenarios involving non-authorized flights into non-restricted and non-prohibited areas. Article 3 *bis*, amending the Chicago Convention, may be viewed as an attempt to address these omissions in Article 9. *See* John T. Phelps II, *Aerial Intrusions By Civil and Military Aircraft In Time Of Peace*, 107 MIL. L. REV. 255, 273 (1985).

¹¹³ *See generally* Annex 2, *supra* note 71, Appx. 2.

¹¹⁴ *See* ICAO Annex 15 provides standards and recommended practices to ensure the flow of aeronautical data and aeronautical information necessary for global air traffic management (ATM) system safety, regularity, economy and efficiency in an environmentally sustainable manner. *See* ICAO Annex 15, Ch. 1. [hereinafter Annex 15].

¹¹⁵ *Id.* § 1.1.

¹¹⁶ The phrase “duly published” in this context is understood to mean published in accordance with the

territory the areas are established.¹¹⁷ The Chicago Convention permits the overflown state to force aircraft entering a restricted or prohibited area in national airspace to land as soon as practicable at a designated airfield within its territory.¹¹⁸ At all times, state aircraft must exercise due regard for the safety of civil aircraft.¹¹⁹

The Chicago Convention also recognizes the risk posed by civil aircraft conducting international flights and, thus, tacitly recognizes the defensive basis of ADIZs. In its preamble, the Chicago Convention directly addresses the threat to national security posed by civil aviation: “The future development of international civil aviation can greatly help to create and preserve friendship and understanding among nations . . . yet its abuse can become a threat to general security.”¹²⁰ The Chicago Convention prohibits the use of civil aviation for “any purpose inconsistent with the aims of this Convention,”¹²¹ such as ensuring the “safe and orderly growth of international civil aviation” and encouragement of the operation of aircraft for “peaceful purposes.”¹²² The use of civil aircraft as weapons, such as during the terrorist attacks of September 11, 2001, violates these norms.¹²³ Each contracting state is also obligated to take appropriate measures to prohibit the deliberate use of its civil aircraft for any purpose inconsistent with the aims of the Chicago Convention.¹²⁴ This responsibility applies wherever national aircraft are operating, including in international airspace, and is in addition to the regulatory operating authority contracting states have over the world-wide operations of national aircraft.¹²⁵ Due to the foregoing responsibilities imposed by the Chicago Convention, ADIZs can further be justified as means of ensuring the continued peaceful use of civil aviation.

- c) UNCLOS affirms the right to self-defense and establishes the peaceful use of the high seas and international airspace

UNCLOS also affirms the continuity of the right of self-defense, which underlies the national security objective of ADIZs. Although the right to self-

provisions of Annex 15. ICAO, Manual Concerning Interception of Civil Aircraft (Consolidation of current ICAO Provisions and Special Recommendations), Doc. 9433-AN/926, 2nd ed. (1990), at 3.2.4.2 [hereinafter ICAO Civil Aircraft Interception Manual].

¹¹⁷ Annex 2, *supra* note 71, Std. 3.1.10.

¹¹⁸ Chicago Convention, *supra* note 21, art. 9.

¹¹⁹ *See id.*, art. 3(d).

¹²⁰ Chicago Convention, *supra* note 21, preamble.

¹²¹ *See id.*, art. 4.

¹²² *See id.*, art. 44.

¹²³ *See* ICAO Assembly Res. A33-1, A33-2, A33-3 and A33-4, *Declaration of Misuse of Civil Aircraft as Weapons of Mass Destruction and Other Terrorist Acts Involving Civil Aviation*.

¹²⁴ Chicago Convention, *supra* note 21, art. 3 *bis* (d).

¹²⁵ *See id.*, art. 12; *see also id.*, art. 17 (“Aircraft have the nationality of the State in which they are registered”); Chicago Convention, *id.* art. 20 (Aircraft engaged in international operations are required to bear nationality and registration markings for identification purposes).

defense is not specifically regulated by the regime,¹²⁶ UNCLOS further requires that contracting states, when exercising rights and duties under the treaty, “refrain from any threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the principles of international law embodied in the Charter of the United Nations,”¹²⁷ including Article 51.

UNCLOS also recognizes the threat posed by activities in international waters and airspace, which serves as the national security rationale of ADIZs. For example, as a preventive measure, UNCLOS reserves the high seas for “peaceful purposes.”¹²⁸ The peaceful use principle is not absolute.¹²⁹ UNCLOS, for instance, permits states to take enforcement action against pirate aircraft in international waters and airspace.¹³⁰ On the high seas, or any other place outside the jurisdiction of any state, action may be taken to seize ships or aircraft involved in piracy.¹³¹ Only military aircraft or warships may be involved in the seizure of pirates.¹³² ADIZs can be used as a means of detecting and responding to pirate aircraft.

The maritime zones defined in UNCLOS also serve defensive functions. For example, UNCLOS codified the territorial sea – the twelve (12) nautical mile belt extending from the coast – which initially served as a recognized defensive zone for littoral states¹³³, but is now considered part of the sovereign territory.¹³⁴ The contiguous zone serves a formal buffer in the high seas under UNCLOS. The zone extends contiguous to the territorial sea,¹³⁵ measured seaward from the baseline up to twenty-four (24) nautical miles.¹³⁶ The coastal state may exercise

¹²⁶ See UNCLOS, *supra* note 19, preamble (affirming that “matters not regulated by this Convention continue to be governed by the rules and principles of general international law”).

¹²⁷ UNCLOS, *supra* note 19, art. 301.

¹²⁸ The high seas include all parts of the ocean seaward of the territorial sea, unless a coastal nation has proclaimed an EEZ, and then seaward from the EEZ. See UNCLOS, *supra* note 19, arts. 86–87.

¹²⁹ Hailbronner, *supra* note 73, at 513.

¹³⁰ “Piracy is an international crime consisting of illegal acts of violence, detention, or depredation (robbery) committed for private ends by the crew or passengers of a private ship or aircraft in or over international waters against another ship or aircraft or persons and property on board.” U.S. Navy Commander’s Handbook, *supra* note 26, ¶ 3.5.2.” See also UNCLOS, *supra* note 19, art. 101.

¹³¹ See UNCLOS, *supra* note 19, art. 105.

¹³² See *id.*, art. 107.

¹³³ The initial outer limit of the territorial sea of three miles was based on the utmost range of a cannon ball: the so-called “cannon-shot rule”. See DANIEL-ERASMUS KHAN, *Territory and Boundaries*, in THE OXFORD HANDBOOK OF THE HISTORY INTERNATIONAL LAW, 241 (Bardo Fassbender et al., eds, 2012) (citing U.S. Secretary of State Thomas Jefferson’s Nov. 8, 1793 letter).

¹³⁴ See UNCLOS, *supra* note 19, arts. 2–4.

¹³⁵ The territorial sea is a belt of ocean that extends up to twelve (12) nautical miles measured from the baseline of the coastal nation. See UNCLOS, *supra* note 19, art. 3.

¹³⁶ See *id.*, art. 33(2).

sovereign control on the high seas located within its “contiguous zone”, but only to the extent necessary to prevent or punish infringement of its customs, fiscal, immigration, and sanitary laws and regulations that occur within its territory or territorial sea.¹³⁷ Consistent with this right, the United States has used ADIZs to intercept illicit flights for customs and border control purposes.¹³⁸

However, UNCLOS limits contiguous zone enforcement to instances where it is “reasonably apparent” that the offending vessel or aircraft is about to enter or has just exited the territorial sea.¹³⁹ In other words, with the exception of pirates, the nexus to *sovereign territory* provides the justification for a coastal state’s interruption of high seas freedoms, including freedoms of navigation and overflight, in the contiguous zone.¹⁴⁰ As will be discussed below, one of the critical limitations of ADIZs is their use as a condition for entry into the national airspace.

B. Regulating Entry Into National Airspace

The second fundamental characteristic of ADIZs is that the zones can only be legally established to regulate entry into the national airspace. This element is reflected in U.S. practice with regard to ADIZ and is consistent with the well-established principle of exclusive sovereignty under international law.¹⁴¹ International law further refines the principle of exclusive sovereignty as it relates to traffic rights in national airspace and waters. The Chicago Convention codifies the right to exclusive sovereignty and authorizes the establishment of rules for the admission of aircraft into the national airspace. UNCLOS affirms the right to

¹³⁷ See *id.*, art. 33(1).

¹³⁸ 47 Fed. Reg. 12324 (2014) (“this amendment responds to . . . aircraft operating illegally with respect to transportation of drugs through airspace . . .”); 53 Fed. Reg. 18216 (May 20, 1988) (“the primary benefits . . . are . . . increased efficiency in the detection of aircraft engaged in drug smuggling . . .”); 55 Fed. Reg. 8390 (Mar. 7, 1990) (“allowing the appropriate government entities to concentrate on aircraft suspected of being involved in illegal drug transportation . . .”); 66 Fed. Reg. 49818, 49819 (“ . . . assist law enforcement agencies in their efforts to stop the use of aircraft for the illegal transportation of drugs . . .”).

¹³⁹ D.G. Stephens, *The Impact of the 1982 Law of the Sea Convention on the Conduct of Peacetime Naval/Military Operations*, 29 CAL. W. INT’L L.J. 283, 290 (1999). Contiguous zones were designed to address the problem of foreign smugglers who sought to avoid coastal state enforcement by “hovering” larger vessels beyond the territorial sea limit and sending smaller ships inshore to transship illicit goods. See DAVID J. BEDERMAN, *The Sea*, in THE OXFORD HANDBOOK OF THE HISTORY OF INTERNATIONAL LAW, 375–376 (Bardo Fassbender et al., eds, 2012) (noting the examples of the United Kingdom 1736 Hovering Act and the United States Hovering Act of 1799).

¹⁴⁰ See UNCLOS, *supra* note 19, arts. 86, 87; U.S. Navy Commander’s Handbook, *supra* note 26, ¶ 2.6.1; RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 521, cmt. a (1987).

¹⁴¹ The ICJ observed in the *Nicaragua* case that the “basic legal concept of State sovereignty in customary international law, expressed in, *inter alia*, Article 2, paragraph 1, of the United Nations Charter, extends to the internal waters and territorial sea of every State and to the air space above its territory.” *Nicaragua* case, *supra* note 45, at ¶ 212.

exclusive sovereignty and permits actions to prevent unauthorized aircraft from entering national airspace.

Given that no state may validly purport to subject any part of the high seas to its sovereignty, application of ADIZ solely to aircraft intending or signaling an intention to enter national airspace serves as a critical limitation. The legal basis for ADIZs is the protection of territorial sovereignty, not the extension of it into international airspace. Application of an ADIZ to aircraft merely traversing international airspace within the zone would violate international law.

1. ADIZs Regulate Entry into U.S. National Airspace

ADIZs in the United States are used as a condition for entry into U.S. national airspace. Specifically, 14 C.F.R. part 99 limits the application of ADIZ requirements to aircraft entering, operating within or departing from U.S. territory or national airspace.¹⁴² U.S. policy also reaffirms that ADIZ requirements only apply to aircraft operating in international airspace as a condition for entry approval into the national airspace and territory of the United States.¹⁴³ This practice is consistent with the exclusive sovereignty of the United States Government, as set forth in the Federal Aviation Act.¹⁴⁴

Correspondingly, the United States does not recognize the right of a coastal nation to apply ADIZs to foreign aircraft not intending to enter national airspace.¹⁴⁵ Secretary of State John Kerry reaffirmed this policy in responding to China's establishment of the ECS ADIZ.¹⁴⁶ Accordingly, the United States instructs U.S. military aircraft not intending to enter the national airspace of other states not to self-identify or otherwise comply with ADIZ procedures established by other states, unless the United States has specifically agreed to do so.¹⁴⁷

¹⁴² 14 C.F.R. § 99.1 (2015) (“into, within, or out of the United States through an Air Defense Zone”). The definition of the “United States” under the Federal Aviation Act does not include international airspace or waters. “United States” means “the States of the United States, the District of Columbia, and the territories and possessions of the United States, including the territorial sea and the overlying airspace.” 49 U.S.C. § 40102(a)(46) (2014).

¹⁴³ See U.S. Navy Commander's Handbook, *supra* note 26, ¶ 2.7.2.3; see also FAA Manual, *supra* note 92, § 5-6-1.

¹⁴⁴ See 49 U.S.C. § 40103(a)(1) (2014); see also the Chicago Convention, *supra* note 21, art. 1.

¹⁴⁵ See U.S. Navy Commander's Handbook, *supra* note 26, ¶ 2.7.2.3.

¹⁴⁶ “We don't support efforts by any State to apply its ADIZ procedures to foreign aircraft not intending to enter its national airspace. The United States does not apply its ADIZ procedures to foreign aircraft not intending to enter U.S. national airspace.” See Kerry Statement, *supra* note 24.

¹⁴⁷ See U.S. Navy Commander's Handbook, *supra* note 26, ¶ 2.7.2.3.

2. Regulating Entry into National Airspace is Consistent with the Principle of Exclusive Sovereignty under International Law

- a) The Chicago Convention codifies the right to exclusive sovereignty and authorizes the establishment of rules for the admission of aircraft into the national airspace

By regulating aircraft entering into the national airspace, ADIZs provide a means for preserving the exclusive sovereignty of states as set forth under international law. The Chicago Convention codifies the fundamental principle that every state has “complete and exclusive sovereignty” over the airspace above its territory.¹⁴⁸ “Territory” is defined by “land areas and territorial waters adjacent thereto under the sovereignty, suzerainty, protection or mandate” of the state.¹⁴⁹ This reflects customary international law regarding sovereignty of national airspace,¹⁵⁰ as first articulated in the 1919 Convention Relating to the Regulation of Aerial Navigation (the “Paris Convention”)¹⁵¹ and later codified in Article 2 of the United Nations Charter.¹⁵²

Under the Chicago Convention, sovereignty refers to the exclusive competence of a state to exercise its legislative, administrative, and judicial powers within its national airspace. In accordance with this principle, each nation may prohibit foreign aircraft from being operated over its territory without its consent.¹⁵³ Special permission is required for scheduled commercial flights over the territory of another state.¹⁵⁴ State aircraft, including military, customs and police aircraft, must obtain authorization for overflight above another state’s territory.¹⁵⁵

¹⁴⁸ Chicago Convention, *supra* note 21, art. 1.

¹⁴⁹ *See id.*, art. 2.

¹⁵⁰ *See Phelps, supra* note 112, at 269 (concluding that the practice in World War I established that a neutral nation had complete sovereignty over its airspace and could take action, including hostile action, to counter violations of its territorial airspace). The United States did not ratify the Paris Convention, but adopted the principle of sovereignty over territorial airspace in the Air Commerce Act of 1926, Pub. L. 69-254, 44 Stat. 568. Cuadra, *supra* note 46, at 488.

¹⁵¹ “The High Contracting Parties recognize that every Power has complete and exclusive sovereignty over the air space above its territory.” *See* Convention Relating to the Regulation of Aerial Navigation, Oct. 13, 1919, 11 L.N.T.S. 173, art. 1 (hereafter Paris Convention).

¹⁵² The ICJ observed in the *Nicaragua* case that the “basic legal concept of State sovereignty in customary international law, expressed in, *inter alia*, Article 2. paragraph 1, of the U.N. Charter, extends to the internal waters and territorial sea of every State and to the air space above its territory.” *See Nicaragua* case, *supra* note 45, at ¶ 212.

¹⁵³ For example, states may intercept and force the landing of civil aircraft flying in national airspace without authority. Chicago Convention, *supra* note 21, art. 3 *bis*. States enjoy a general right of transit and stops for non-scheduled air traffic, but even in such cases the over-flown state can, in the interest of safety, require that non-scheduled aircraft obtain prior permission for such flights or follow prescribed routes for operations in areas deemed inaccessible or without adequate air navigation facilities. Chicago Convention, *supra* note 21, art. 5.

¹⁵⁴ Chicago Convention, *supra* note 21, art. 6.

¹⁵⁵ *See id.*, art. 3.

Overflight rights “may be flight-specific, as in the case of diplomatic clearance for the visit of a military aircraft, or general, as in the case of rights for commercial air navigation pursuant to the Chicago Convention.”¹⁵⁶ In the first decades of international air travel, authority for scheduled commercial service was negotiated through bilateral air transport or air service agreements with specific traffic rights.¹⁵⁷ This so-called “Bermuda” model of air transport agreement has given way to more liberalized bilateral and multilateral air service arrangements known as “Open Skies” agreements.¹⁵⁸

Directly relevant to the implementation of ADIZs, international aviation law also allows states to regulate the admission and departure of aircraft into and from national airspace. Specifically, the Chicago Convention authorizes the non-discriminatory application of laws and regulations relating to the “admission to or departure” of aircraft from its territory.¹⁵⁹ Compliance with such rules is necessary “upon entering or departing from or while within the territory of the state.”¹⁶⁰

¹⁵⁶ See U.S. Navy Commander’s Handbook, *supra* note 26, ¶ 4.4.2. The “Five Freedoms of the Air” are regularly exchanged through bilateral negotiations and were articulated in the International Air Transport Agreement, December 7, 1944, art. 1, § 1, 59 Stat. 1701, 171 U.N.T.S. 387, as follows: (1) The privilege to fly across territory without landing; (2) The privilege to land for non-traffic purposes; (3) The privilege to put down passengers, mail and cargo taken on in the territory of the State whose nationality the aircraft possesses; (4) The privilege to take on passengers, mail and cargo destined for the territory of the State whose nationality the aircraft possesses; (5) The privilege to take on passengers, mail and cargo destined for the territory of any other Contracting State and the privilege to put down passengers, mail and cargo coming from any such territory. Only the first two freedoms were agreed to in a multilateral agreement. See Dec. 7, 1944, art. 1, § 1, 59 Stat. 1693, 84 U.N.T.S. 389.

¹⁵⁷ See, e.g., Agreement between the Government of the United Kingdom and the Government of the United States relating to Air Services between their Respective Territories, U.S.-U.K., Feb. 11, 1946, 60 Stat. 1499, 3 U.N.T.S. 253 (“Bermuda I”); Agreement between the Government of the United States of America and Government of the United Kingdom of Great Britain and Northern Ireland concerning Air Services, U.S.-U.K., Jul. 23, 1977, 28 U.S.T 5367 (“Bermuda II”).

¹⁵⁸ Open Skies agreements permit contracting states’ airlines to operate between any point in the territory of one party and any point in the territory of the other party with no restrictions on routes, flights, aircraft, or prices. The parties also agree to provide, upon request, all necessary assistance to each other to prevent acts of unlawful seizure of civil aircraft and other unlawful acts against the safety of such aircraft, of their passengers and crew, and of airports and air navigation facilities, and to address any other threat to the security of civil air navigation. *E.g.*, *Current Model Open Skies Agreement Text*, U.S. State Dept. (Jan. 12, 2012), <http://www.state.gov/documents/organization/114970.pdf>. Although the United States initiated the Open Skies policy, many other states have used this liberalized structure to develop international air operations and increase competition. For example, the Gulf States have used Open Skies arrangements with the European Union and United States to effectively expand their national carriers’ access and operations to Western markets. See generally, RACHEL Y. TANG, CONG. RESEARCH SERV. R44016, INTERNATIONAL AIR SERVICE CONTROVERSIES (2015), <https://www.fas.org/sfp/crs/misc/R44016.pdf>.

¹⁵⁹ Chicago Convention, *supra* note 21, art. 11.

¹⁶⁰ See *id.*, art. 11.

In cases of unauthorized entry or other airspace violations, the intruding aircraft is subject to the risk of interception and potential use of force, particularly with regard to specified security zones.¹⁶¹ During a national emergency or under exceptional circumstances, a state may even restrict or prohibit flights over the entirety of its territory.¹⁶² ADIZs may be considered an application of this right to prohibit access to and take enforcement action against unauthorized entry into the national airspace.

- b) UNCLOS affirms the right to exclusive sovereignty and permits actions to prevent unauthorized aircraft from entering national airspace

Similar to the Chicago Convention, UNCLOS provides that the coastal state enjoys the same exclusive sovereignty over the territorial sea and subjacent airspace as it does with regard to the state's territory and internal waters.¹⁶³ ADIZs serve as a means to ensuring such exclusive sovereignty of national airspace.

In determining rights and obligations, UNCLOS distinguishes between national waters (internal waters and territorial seas) and international waters (such as the high seas). The territorial sea is a belt of ocean that may not exceed twelve (12) nautical miles, measured from the baseline of the coastal state.¹⁶⁴ All maritime zones are measured from the baseline, which is typically determined by the low water line along the coast,¹⁶⁵ but also may reflect natural conditions, such as bays¹⁶⁶, and historic claims following long-term and conspicuous use.¹⁶⁷ In contrast, no state may validly purport to subject any part of the high seas to its sovereignty.¹⁶⁸

The exercise of exclusive territorial sovereignty under UNCLOS is subject to other rules of international law.¹⁶⁹ For example, UNCLOS codified the customary right of foreign vessels to innocent passage in the territorial sea¹⁷⁰ in order to enjoy access to ports.¹⁷¹ With regard to ships, "passage is innocent so long as it is not prejudicial to the peace, good order, or security of the coastal

¹⁶¹ See *id.*, art. 9(c).

¹⁶² See *id.*, art. 9(b).

¹⁶³ UNCLOS, *supra* note 19, art. 2(2); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 512 (AM. LAW INST. 1987).

¹⁶⁴ *Id.*, art. 3.

¹⁶⁵ *Id.*, art. 5.

¹⁶⁶ *Id.*, art. 10.

¹⁶⁷ *Id.*, art. 7.

¹⁶⁸ *Id.*, art. 89. Some commentators have interpreted this principle as being *prima facie* opposed to any claim of control over foreign aircraft on a permanent basis. See, e.g., Hailbronner, *supra* note 73, at 516–517.

¹⁶⁹ UNCLOS, *supra* note 19, art. 1.

¹⁷⁰ *Id.*, art. 17; See U.S. Navy Commander's Handbook, *supra* note 26, ¶ 1.3.2.

¹⁷¹ *Nicaragua* case, *supra* note 45, at ¶ 214.

State.”¹⁷² Non-innocent activities include: intelligence gathering; any weapons use; the “launching, landing or taking on board of any aircraft or military device”; “any threat or use of force against the sovereignty, territorial integrity, or political independence of the coastal State”; or “any other activity not having a direct bearing on passage.”¹⁷³

Notably, the right of innocent passage does not include an analogous right for aircraft overflight above the territorial sea within national airspace.¹⁷⁴ Consistent with the Chicago Convention,¹⁷⁵ under UNCLOS no foreign aircraft may fly over the territorial sea of a coastal state without the permission of that state.¹⁷⁶ This flight limitation is important when viewed in the context of a coastal state’s right to self-help under UNCLOS. UNCLOS provides that a coastal state may take the “necessary steps” to prevent non-innocent passage or suspend innocent passage of vessels temporarily in specified areas of its territorial sea when it is “essential for the protection of its security.”¹⁷⁷ ADIZs effectively extend this security right under UNCLOS to prevent non-innocent and unauthorized aircraft from entering national airspace.

The use of ADIZs as a means of regulating entry into the national airspace is a critical limitation for ADIZs. No state can legally deny access to international airspace subject to this condition. Application of ADIZs to aircraft not intending to enter, or demonstrating such intent to enter, national airspace violates the freedom of overflight under UNCLOS.¹⁷⁸ The use of ADIZs to regulate air traffic merely traversing international airspace represents an invalid claim to the high seas.¹⁷⁹ As clearly set forth in international law, the exercise of exclusive sovereignty only extends to territorial airspace and waters.¹⁸⁰

C. Administration Through Aircraft Identification and Control Procedures

States administer ADIZs through procedures designed to locate, identify, and control aircraft within the zones. To this end, the United States ADIZ rules include the use of flight plans, position reports, two-way communication via transponder and radio, and special air traffic instructions.¹⁸¹

¹⁷² UNCLOS, *supra* note 19, art. 19.

¹⁷³ *Id.*, art. 19.

¹⁷⁴ See U.S. Navy Commander’s Handbook, *supra* note 26, ¶¶ 1.3.2, 2.7.1.

¹⁷⁵ Chicago Convention, *supra* note 21, art. 5.

¹⁷⁶ Permission can be granted either *ad hoc* or by a general or bilateral international agreement. RESTATEMENT (3D.) OF FOREIGN RELATIONS LAW §§ 512, 513, Comment *i* (1987) (citing UNCLOS, *supra* note 19, arts. 1, 2).

¹⁷⁷ UNCLOS, *supra* note 19, art. 25.

¹⁷⁸ *Id.*, art. 87.

¹⁷⁹ *Id.*, art. 89.

¹⁸⁰ Chicago Convention, *supra* note 21, art. 1; UNCLOS, *supra* note 19, art. 2; U.N. CHARTER, art. 2.

¹⁸¹ See, e.g., 14 C.F.R. § 99(A) (2015).

International law also provides rules for the identification and control of aircraft in international airspace, and specific procedural requirements for the establishment of ADIZs. ICAO standards proscribe rules for the identification, location, and control of civil aircraft over the high seas. States may also take responsibility for providing air traffic services in regions of international airspace, but this functional responsibility does not create sovereignty or security rights. Additionally, ICAO standards require proper coordination and prior notice to the international community when implementing aircraft identification and control procedures in international airspace such as an ADIZ. States asserting jurisdiction for control of aircraft above areas subject to conflict and dispute have an increased responsibility for providing information on potential threats to civil aviation (such as military interception) in a timely and structured manner.

1. The United States Administers ADIZs Through Procedures Designed to Identify, Locate, and Control Aircraft within the Zones

In order to administer ADIZs, the United States has issued a number of procedures to ensure the ready identification, location and control of aircraft. The FAA publishes information and rules concerning its ADIZs in the U.S. Aeronautical Information Publication.¹⁸²

First, “no person may operate an aircraft within, or from a departure point within an ADIZ, unless the person files, activates, and closes a flight plan with the appropriate aeronautical facility, or is otherwise authorized by air traffic control.”¹⁸³ No pilot may deviate from the flight plan, without prior notice, or deviate from the air traffic control clearance, with certain exceptions, such as in emergencies.¹⁸⁴

Second, the pilot must make timely position reports.¹⁸⁵ For example, “no pilot in command of a foreign civil aircraft may enter the United States through an ADIZ unless that pilot makes the reports required...when it is not less than one hour and not more than two hours average direct cruising distance from the United States.”¹⁸⁶

Third, all civil aircraft conducting operations into or out of the United States into, within, or across an ADIZ must be equipped with a transponder with automatic altitude reporting equipment.¹⁸⁷ All civil aircraft, equipped with an

¹⁸² See, e.g. FED. AVIATION ADMIN., U.S. AERONAUTICAL INFORMATION PUBLICATION 15 (22d ed. 2013), http://www.faa.gov/air_traffic/publications/atpubs/AIP/aip.pdf.

¹⁸³ 14 C.F.R. § 99.11 (2015).

¹⁸⁴ *Id.* § 99.17.

¹⁸⁵ *Id.* § 99.15.

¹⁸⁶ *Id.* § 99.15(c).

¹⁸⁷ *Id.* § 99.13(b)–(c). Balloons, gliders, and aircraft not equipped with an engine driven electrical system are excepted from this requirement. *Id.* § 99.13(d).

operable radar beacon transponder, must have the transponder turned on and replying on the appropriate code or on a code assigned by ATC.¹⁸⁸

Fourth, a person who operates a civil aircraft into an ADIZ must maintain a continuous listening watch, using a functioning two-way radio, on the appropriate aeronautical facility's frequency.¹⁸⁹

Finally, each person operating an aircraft must "comply with special security instructions issued by the Administrator in the interests of national security, pursuant to agreement between the FAA and the Department of Defense ["DoD"], or between the FAA and a U.S. federal security or intelligence agency."¹⁹⁰

These aircraft identification and control procedures are designed to improve the surveillance and tracking of aircraft for national security purposes,¹⁹¹ consistent with the mandate set forth in the Federal Aviation Act.¹⁹² For example, requiring continuous operation of the transponder greatly assists in the identification and tracking of aircraft, and enables the "correlation of radar information with associated flight plan and position reporting information..."¹⁹³ ADIZs allow the United States government to efficiently identify legitimate civil operations and effectively identify and intercept those aircraft suspected of being involved in threats to national security.¹⁹⁴

¹⁸⁸ *Id.* § 99.13(a).

¹⁸⁹ *Id.* § 99.9.

¹⁹⁰ *Id.* § 99.7.

¹⁹¹ The FAA has also identified public benefits that do not necessarily involve national security. For example, use of flight plans allow pilots to "avail themselves of search and rescue services initiated on an overdue aircraft." Security Control of Air Traffic; Modification of Flight Plan Filing Requirements for Operation in Coastal ADIZ, 47 Fed. Reg. 12,324, 12,324 (Mar. 22, 1982). Increased detection can also allow rescuers to more easily and precisely locate the site of an accident. Flight Plan and Transponder Requirements in an Air Defense Identification Zone, 53 Fed. Reg. 39,842, 39,844 (Oct. 12, 1988). More generally, dangerous flight methods used by drug smugglers also posed a threat to aviation safety. *See* Security Control of Air Traffic; Modification of Flight Plan Filing Requirements for Operation in Coastal ADIZ, 47 Fed. Reg. at 12,324. According to the National Transportation Safety Board data, drug-related aviation accidents resulted in 127 fatalities and 33 serious injuries during the period 1975-1984. *See* Transponder Requirements in an Air Defense Identification Zone (ADIZ), 55 Fed. Reg. 8,390, 8,394 (Mar. 7, 1990); *see also* Flight Plan and Transponder Requirements in an Air Defense Identification Zone, 53 Fed. Reg. at 39,844 (citing similar NTSB data). If such hazards are curtailed, then overall aviation safety is improved for "legitimate operations and for persons and property on the ground." 66 Fed. Reg. 49,818, 49,819 (Sept. 28, 2001).

¹⁹² The basis for an ADIZ is to meet the "interest of national security." 14 C.F.R. § 99.3 (2015) (defining ADIZ).

¹⁹³ Flight Plan and Transponder Requirements in an Air Defense Identification Zone, 53 Fed. Reg. at 39,843.

¹⁹⁴ For example, the U.S. Court Guard reported in 1990 that it launched approximately 225 unnecessary interception flights per year, as the targets were legal flights. This result which could be avoided if each aircraft were equipped with a transponder. Transponder Requirements in an Air Defense Identification Zone (ADIZ), 55 Fed. Reg. at 8,393.

2. International Law Provides Rules for the Identification, Location, and Control of Aircraft in International Airspace, and Specific Procedural Requirements for the Establishment of ADIZs

- a) ICAO standards proscribe rules for the establishment of aircraft identification and control procedures in international airspace similar to ADIZs

States have exclusive jurisdiction in their national airspace, but ICAO standards govern civil operations in the international airspace above the high seas.¹⁹⁵ Accordingly, ICAO has adopted Annex 2 (“Rules of the Air”)¹⁹⁶ which apply to flights above the high seas, without exception.¹⁹⁷ States are also required to apply Annex 2 to flights in sovereign airspace to the “highest practicable degree.”¹⁹⁸ Annex 2 sets forth procedures for the identification, location, and control of aircraft over the high seas that are similar to ADIZ rules.

For example, Annex 2 prescribes that a flight plan must be submitted prior to operating any flight across international borders or operating any flight within or into designated areas, or along designated routes, when so required by the appropriate air traffic services authority to facilitate co-ordination with appropriate military units or with air traffic services units in adjacent states in order to avoid the possible need for interception for the purpose of identification.¹⁹⁹ The flight plan contains information such as the aircraft’s identity and equipment, applicable flight rules (e.g., Instrument Flight Rules), the point and time of departure, the route and altitude to be flown, the destination and estimated time of arrival, and alternate aerodromes in case of contingencies.²⁰⁰

ICAO standards also allow states to be assigned responsibility for providing air traffic services in regions of international airspace. Annex 11 to the Chicago Convention establishes a regime for assigning responsibility for air traffic services for airspace above high seas or in airspace of undetermined sovereignty when a contracting state accepts the responsibility of providing air traffic services²⁰¹ In contrast to ADIZs, which serve a national security purpose, these FIRs exist to assist international coordination to ensure safe and efficient air traffic management²⁰² through the provision of flight information²⁰³ and alerting

¹⁹⁵ Chicago Convention, *supra* note 21, art. 12.

¹⁹⁶ Annex 2, *supra* note 71.

¹⁹⁷ *Id.*, Std. 2.1.1.

¹⁹⁸ Chicago Convention, *supra* note 21, arts. 12, 37.

¹⁹⁹ Annex 2, *supra* note 71, ¶ 3.3.1.2.

²⁰⁰ *Id.*, at ¶ 3.3.2.

²⁰¹ Annex 11, *supra* note 31, ¶ 2.1.2.

²⁰² *Id.*, at ¶ 2.2(d).

²⁰³ Flight information includes meteorological information and operational information concerning radio navigational services and aerodromes. Annex 11, *supra* note 31, ¶ 4.2.

services.²⁰⁴ In addition, the recommended geographic scope of FIR corresponds with route structure and the need for efficient air traffic control services as opposed to national boundaries and security needs.²⁰⁵

However, responsibility for air traffic services in the FIR creates only functional responsibility for activity in the region and does not create sovereignty or security rights. ICAO standards do not provide states responsible for administering FIR with a corresponding right to intercept non-compliant aircraft, as is the case when enforcing ADIZs.²⁰⁶ Instead, authority over air navigation services beyond a state's territorial airspace is limited to technical and operational considerations for the safe and expeditious use of the concerned airspace.²⁰⁷ In this functional capacity, ICAO standards do allow for a limited extraterritorial application of aircraft identification and control procedures in international airspace: a state accepting responsibility for air traffic service in international airspace may apply Annex 11 standards in a manner consistent with those standards adopted in its national airspace.²⁰⁸ In effect, states "are not required to distinguish between sovereign domestic airspace and international airspace for those aircraft to which they provide air traffic services, including aircraft" entering or departing sovereign airspace through an ADIZ.²⁰⁹

- b) ICAO standards require proper coordination with and prior notice to the international community before the establishment of aircraft identification and control procedures such as ADIZ rules

States must publish aeronautical information concerning its FIR in the Aeronautical Information Publication (AIP),²¹⁰ the state's official publication that defines and describes the airspace, aeronautical facilities, services, and national rules and practices pertaining to air traffic.²¹¹ In order to reduce the need for interception and ensure proper coordination, ICAO also advises air traffic services units in charge of adjacent flight information regions to share flight plan and flight progress information for flights along specified routes or portions of routes in close proximity to flight information region boundaries.²¹²

²⁰⁴ Alerting services involve responding to aircraft determined to be in a state of emergency, such as search and rescue. Annex 11, *supra* note 31, ¶ 5.1.

²⁰⁵ Annex 11, *supra* note 31, ¶ 2.10.1.

²⁰⁶ *Id.*, ¶ 2.1.2.

²⁰⁷ *Id.*, ¶ 2.1.1, note.

²⁰⁸ *Id.*, Foreword.

²⁰⁹ CRS ADIZ Report, *supra* note 7, at 6.

²¹⁰ AIP is defined as a "publication issued by or with the authority of a State and containing aeronautical information of a lasting character essential to air navigation." Annex 15, *supra* note 114, Chapt. 1.

²¹¹ FED. AVIATION ADMIN., ADVISORY CIRCULAR 91-70A: OCEAN AND INTERNATIONAL OPERATIONS ¶ 3-1 (2010).

²¹² ICAO Civil Aircraft Interception Manual, *supra* note 116, at ¶ 3.1.4.4.

Annex 11 further requires close cooperation between air traffic authorities and military authorities responsible for activities that may affect flights of civil aircraft.²¹³ For example, air traffic services units must, “either routinely or on request, in accordance with locally agreed procedures, provide appropriate military units with pertinent flight plan and other data concerning flights of civil aircraft.”²¹⁴ “In order to eliminate or reduce the need for interceptions, air traffic services authorities must designate any areas or routes where the requirements of Annex 2 concerning flight plans, two-way communications and position reporting apply to all flights to ensure that all pertinent data is available in appropriate air traffic services units specifically for the purpose of facilitating identification of civil aircraft.”²¹⁵

Additionally, states must establish special procedures in order to ensure that: “(a) air traffic services units are notified if a military unit observes that an aircraft which is, or might be, a civil aircraft is approaching, or has entered, any area in which interception might become necessary; and (b) all possible efforts are made to confirm the identity of the aircraft and to provide it with the navigational guidance necessary to avoid the need for interception.”²¹⁶

To assist in this goal, ICAO has issued specific procedures, similar to ADIZ rules, to reduce the need for interception of civil aircraft operating “within given portions of airspace where national sovereignty and security are prime considerations”: (1) submission and forward transmission of flight plans; (2) transmission of related air traffic service messages; (3) maintenance of two-way radio communications between aircraft and air traffic services units; (4) transmission of position reports from aircraft and notification of significant deviations from planned flight track; (5) provision of facilities for rapid and reliable communications between air traffic service units and between such units and intercept control units; and (6) exchanges of information regarding civil flights either on a routine basis or on request.²¹⁷

When establishing security zones, such as ADIZs, ICAO standards proscribe specific notice periods and duties to avoid threats to civil aviation and mitigate risk of interceptions. For example, Annex 11 requires states to coordinate with the appropriate air traffic services authorities when arranging activities that are potentially hazardous to civil aircraft over the high seas.²¹⁸ With regard to responsibility for such activities over the high seas, the state with responsibility for the FIR is responsible for initiating the promulgation of the information.²¹⁹

²¹³ Annex 11, *supra* note 31, ¶ 2.17.1.

²¹⁴ *Id.*, ¶ 2.17.3.1.

²¹⁵ *Id.*, ¶ 2.17.3.1.

²¹⁶ *Id.*, ¶ 2.17.3.2.

²¹⁷ ICAO Civil Aircraft Interception Manual, *supra* note 116, at ¶¶ 3.1.1.1, 3.1.1.2.

²¹⁸ Annex 11, *supra* note 31, ¶ 2.18.1.

²¹⁹ *Id.*, ¶ 2.18.3. The state responsible for the FIR designates the appropriate air traffic services authority. The “appropriate ATS authority” is, by definition, “the relevant authority designated by

The coordination must be “effected early enough to permit timely promulgation of information regarding the activities in accordance with the provisions of Annex 15.”²²⁰

The establishment of security zones must occur following sufficient notice²²¹ and coordination as set forth in Annex 15.²²² States must provide advance notice of at least seven (7) days through a Notice to Airmen (“NOTAM”)²²³ when establishing a restricted area where the possibility of interception exists, such as an ADIZ.²²⁴ Annex 15 requires a greater lead-time of at least twenty-eight days regarding the establishment and withdrawal of, and *premeditated* significant changes to an ADIZ or danger area.²²⁵

States must also publish in their respective AIPs descriptions and graphic portrayals of the ADIZ that include:

- (1) geographical coordinates of the lateral limits in degrees, minutes and seconds if inside and in degrees and minutes if outside control area/control zone boundaries; (2) upper and lower limits and system and means of activation announcements together with information pertinent to civil flights and applicable ADIZ procedures; and (3) remarks, including time of activity and risk of interception in the event of penetration of the ADIZ.²²⁶

Adhering to ICAO notice and coordination standards regarding restrictions in international airspace and control of aircraft is critical to the safety of international aviation. Such prior consultation and coordination regarding potential or even uncertain threats to civil aviation is even more important in air space above territory subject to dispute and conflict. This was a main conclusion

the State responsible for providing air traffic services in the airspace concerned.” Int’l Civil Aviation Org. [ICAO], *Manual Concerning Safety Measures Relating to Military Activities Potentially Hazardous to Civil Aircraft Operations*, at ¶ 3.1, ICAO Doc. 9554-AN/932 (1st ed. 1990).

²²⁰ Annex 11, *supra* note 31, ¶ 2.18.1.

²²¹ Annex 15, *supra* note 114, ¶ 5.1.1, ¶ 5.1.1.4.1; *see also* Annex 15, *supra* note 114, appendix 4, ¶ 6.1.1.

²²² Annex 11, *supra* note 31, ¶ 2.15, 2.16.

²²³ A NOTAM is defined as “notice distributed by means of telecommunication containing information concerning the establishment, condition or change in any aeronautical facility, service, procedure or hazard, the timely knowledge of which is essential to personnel concerned with flight operations.” Annex 15, *supra* note 114, Chapt. 2.

²²⁴ *See* Annex 15, *supra* note 114, ¶¶ 5.1.1.1, 5.1.1.4.

²²⁵ *See* Annex 15, *supra* note 114, appendix 1, ¶ 6.1.1. The notice comes through the AIRAC, the aeronautical information regulation and control system aimed at advance notification, based on common effective dates, of circumstances that necessitate significant changes in operating practices. Annex 15, *supra* note 114, ¶ 1.1.

²²⁶ *See* Annex 15, *supra* note 114, appendix 1 (Contents of the AIP includes ADIZ).

of Dutch Safety Board following its official investigation of the tragic crash of Malaysian Airlines Flight (MH17).²²⁷

On July 17, 2014, MH17, a scheduled international passenger flight traveling within Ukrainian airspace near Donetsk, was shot down by a Russian-manufactured missile, killing all 298 passengers and crew on board.²²⁸ The United Nations Security Council condemned the attack in disputed airspace.²²⁹ Subsequently the United States extended its no-fly zone in the region to include the airspace near Donetsk, the Dnepropetrovsk (UKDV) Flight Information Region.²³⁰

The international community had received notice that the conflict and territorial dispute in Ukraine had expanded to airspace. For example, following the invasion of Crimea, Russia issued a NOTAM attempting to unilaterally establish a new FIR in a significant portion of the Simferopol (UKFV) FIR, which includes international airspace administered by Ukraine pursuant to an air navigation agreement with ICAO.²³¹ Ukraine rejected Russia's new FIR within the existing Simferopol UKFV FIR.²³² Ukraine and Russia then exchanged conflicting NOTAMs and competing restrictions on flight operations closed various air traffic services (ATS) route segments.²³³ Consequently, ICAO issued a recommendation to states to implement measures to avoid the airspace and to circumnavigate the Simferopol (UKFV) FIR with alternative routings.²³⁴ The United States declared Russia's actions in violation of the Chicago Convention and ICAO standards.²³⁵ Citing the risk of interception and military engagement, the United States issued a flight prohibition in the disputed airspace.²³⁶

However, even as the conflict expanded to the eastern part of Ukraine, not a single state or international organization extended such a warning or issued flight restrictions applicable to the airspace above the eastern Ukraine, specifically the UKDV FIR.²³⁷ In particular, the state that managed the airspace,

²²⁷ See Dutch Safety Board, *Crash of Malaysian Airlines Flight MH17* (Oct. 13, 2015), <http://mh17.onderzoeksraad.nl/> [Hereinafter MH17 Report]. The Dutch Safety Board investigated the crash of MH17 pursuant to the mandate of Security Council Resolution 2166 and the international regulations for accident investigations set forth in Annex 13 to the Chicago Convention. *Id.*, at 7.

²²⁸ *Id.*, at 253.

²²⁹ S.C. Res. 2166, para.1, U.N. Doc. S/RES/2166 (July 21, 2014).

²³⁰ Fed. Aviation Admin., FAA Statement—Expanded Notice to Airmen Released (July 17, 2014) (http://www.faa.gov/news/press_releases/news_story.cfm?newsId=16655).

²³¹ MH17 Report, *supra* note 227, at 177–180.

²³² *Id.*

²³³ *Id.*

²³⁴ 79 Fed. Reg. 22862–3 (Apr. 25, 2014).

²³⁵ The United States claims that Russia's actions contradict “international law, including provisions of the Convention on International Civil Aviation...and standards established in Annex 11 to the Chicago Convention.” *Id.*

²³⁶ 14 C.F.R. § 91.1607 (2015).

²³⁷ MH17 Report, *supra* note 227, at 259–261.

Ukraine, had access to specific information on threats to flight safety in the UKDV FIR (surface-to-air missiles), but still allowed civil aircraft to operate through this airspace.²³⁸ As a result, the Dutch Safety Board recommended that the system of responsibilities for safeguarding civil aviation be improved to allow for an adequate means to assess the risks associated with flying over conflict areas.²³⁹

Currently, states use NOTAMs to publish information concerning potential hazards to civil aviation (military interceptions) or airspace restrictions, such as ADIZs, but even this mechanism may not be adequate to provide warnings of hazards in areas of conflict and disputed airspace.²⁴⁰ The essential principle is that states and operators must be given sufficient time and means to assess the risks of flying in airspace above conflict zones.²⁴¹ Ultimately, the burden is on states that have access to information relevant to that risk assessment to share this information in a “timely and structured process.”²⁴² For a state that has or is asserting responsibility for the management of aircraft in a conflict zone, there is a “first level” responsibility: provide information on the possible risks to civil aviation “as quickly as possible.”²⁴³

In this case, the establishment of an ADIZ involves the assertion of a right to control aircraft in a given airspace and represents a hazard to civil aviation because of the threat of military interception. Thus, if a state is planning to establish an ADIZ, the state, at the very least, should strictly adhere to ICAO standards and procedures regarding prior notice and consultation. States establishing ADIZs above conflict zones have an increased responsibility for providing information on the potential threat to civil aviation (the ADIZ) in a timely and structured manner.

D. Application to All Aircraft Regardless of Civil or State Character

States purport to apply ADIZs to all aircraft regardless of their character. In the case of U.S. state practice, ADIZ requirements apply broadly to all aircraft, except for U.S. military and law enforcement aircraft. This is a departure from the standard regulation of aviation under international law, which typically distinguishes between civil and state aircraft. The distinction between civil and state aircraft under international law impacts the enforcement of ADIZs. The Chicago Convention standards, procedures, and protections apply to civil aircraft, but exclude state aircraft. However, state practice in applying the civil-state distinction is inconsistent. For the purposes of enforcing ADIZs, this lack of consistency can result in significant legal consequences and political conflict. The

²³⁸ *Id.*, at 177–190.

²³⁹ *Id.*, at 263–265.

²⁴⁰ *Id.*, at 262.

²⁴¹ *Id.*, at 263.

²⁴² *Id.*, at 265.

²⁴³ *Id.*, at 263–264.

legality of any interception within international airspace of an ADIZ could turn on whether the intercepted aircraft is deemed “state” as opposed to “civil.”

1. The United States Applies ADIZ to All Aircraft Except Specifically Excluded U.S. State Aircraft

The United States applies ADIZs to all aircraft, except for specifically excluded U.S. state aircraft. 14 C.F.R. Part 99 “prescribes rules for operating *all* aircraft (except for Department of Defense and law enforcement aircraft) in a defense area, or into, within, or out of the United States through an Air Defense Zone (ADIZ) designated in subpart B.”²⁴⁴ Part 99 defines an ADIZ as: “An area of airspace over land or water in which the ready identification, location, and control of *all* aircraft (except for Department of Defense and law enforcement aircraft) is required in the interest of national security.”²⁴⁵ The FAA guidance material implementing Part 99 notes that the purpose of an ADIZ is to “facilitate early identification of *all* aircraft in the vicinity of U.S. and international airspace boundaries.”²⁴⁶ In addition, the specific rules of Part 99 fail to distinguish their application between civil aircraft and non-civil aircraft. For example, certain flight plan²⁴⁷ and position reporting²⁴⁸ requirements are directed to any persons or pilots operating “an aircraft.”²⁴⁹

In 2004 the FAA amended the definition of an ADIZ to remove the modifier “civil” and replaced it with the parenthetical phrase excluding DoD and law enforcement aircraft.²⁵⁰ The regulatory scope of a U.S. ADIZ now extends to all aircraft unless expressly excluded²⁵¹ such as other types of U.S. public aircraft and foreign state aircraft.²⁵² The purpose of the amendment was to reflect the increased emphasis on aviation security following the terrorist attacks of September 11, 2001 and role of federal security agencies, including the newly formed U.S. Department of Homeland Security, in addressing threats.²⁵³ In effect, the rule change created a unique and broader class of aircraft than typically identified under U.S. law: aircraft subject to ADIZ rules. By not exempting public aircraft or state aircraft from ADIZ requirements, the United States acknowledged that all aircraft (except U.S. enforcement aircraft) present a potential threat to national security.

²⁴⁴ 14 C.F.R. § 99.1 (2015) (emphasis added).

²⁴⁵ *Id.* § 99.3 (emphasis added).

²⁴⁶ See FAA Manual, *supra* note 92, § 5-6-1.

²⁴⁷ 14 C.F.R. § 99.11 (2015).

²⁴⁸ *Id.* § 99.15.

²⁴⁹ A textual review of Part 99 indicates that the modifier “civil” is in fact only used in requirements related to specific radio equipment (*see id.* § 99.9(a)) and transponder requirements (*see id.* § 99.13(b)–(c)).

²⁵⁰ 69 Fed. Reg. 16754 (2004) (discussing the nature of the amendment to § 99.3).

²⁵¹ *But see* 49 U.S.C. § 40103(b)(3).

²⁵² Dutton, *supra* note 34, at 699.

²⁵³ 69 Fed. Reg. 16754–5 (2004).

Understanding how the United States normally defines different types of aircraft operations—civil, public or state—is important given the consequence of these types of classifications under U.S. and international law. The Federal Aviation Act²⁵⁴ and other parts of the Federal Aviation Regulations (FARs)²⁵⁵ traditionally distinguish between “civil aircraft” and “public aircraft.” Public aircraft are exempt from many U.S. civil aviation regulations.²⁵⁶ The distinction between civil and public aircraft is generally based on whether the operation of the aircraft is exclusively for a government function such as national defense or law enforcement.²⁵⁷ In the case of public aircraft, the flights cannot be for a commercial purpose—transportation of persons or property for compensation or hire, including impermissible reimbursements to the government.²⁵⁸ “Civil aircraft” are defined as “aircraft except a public aircraft.”²⁵⁹ Aircraft that qualify as “public aircraft” when operating within the territory of the United States do not necessarily qualify as “state aircraft” when operating outside the United States. Public aircraft status exists only within U.S. airspace.²⁶⁰ Designation as a state aircraft requires action by the U.S. Department of State.²⁶¹ Without such designation, all aircraft outside the United States are considered civil.²⁶²

2. The Distinction Between Civil and State Aircraft Under International Law Impacts the Enforcement of ADIZs

- a) The Chicago Convention standards, procedures and protections apply to civil aircraft and exclude state aircraft

Pursuant to Article 3, the Chicago Convention applies only to civil aircraft, and not state aircraft.²⁶³ Even given this limitation, the Chicago Convention establishes important conditions on the operations of state aircraft in relation to civil aircraft. Namely, state aircraft must exercise “due regard” for the

²⁵⁴ 49 U.S.C. § 40102(a).

²⁵⁵ 14 C.F.R. § 1.1 (2015).

²⁵⁶ See FED. AVIATION ADMIN., Order 8900.1 CHG 0 3-558 (Aug. 29, 2013) (“Public aircraft are exempt from many types of Federal Aviation Administration (FAA) regulations”).

²⁵⁷ “The term ‘governmental function’ means an activity undertaken by a government, such as national defense, intelligence missions, firefighting, search and rescue, law enforcement (including transport of prisoners, detainees, and illegal aliens), aeronautical research, or biological or geological resource management.” 49 U.S.C. § 40125(a)(2) (2014).

²⁵⁸ *Id.* § 40125(a)(1).

²⁵⁹ *Id.* § 40102(a)(16); 14 C.F.R. § 1.1 (2014) (defining “civil aircraft”).

²⁶⁰ U.S. FED. AVIATION ADMIN., Advisory Circular No. 00-1.1A, ¶7 (Feb. 12, 2014).

²⁶¹ According to U.S. policy, such a designation requires DOS to obtain diplomatic clearances from the various foreign countries where the operations will occur and issue special regulations for the conduct of those operations internationally. U.S. FED. AVIATION ADMIN., Order 8900.1 CHG 380 3-39(A)(3) (Nov. 27, 2012).

²⁶² *Id.*

²⁶³ Chicago Convention, *supra* note 21, art. 3(a) (“This Convention shall be applicable only to civil aircraft, and shall not be applicable to state aircraft”).

safety of navigation of civil aircraft.²⁶⁴ The Chicago Convention codified this customary norm, which is applicable in times of peace as well as during armed conflict.²⁶⁵ States must refrain from the use of weapons against civil aircraft in flight and must not endanger the lives of persons on board and the safety of aircraft.²⁶⁶

However, identifying whether a particular flight qualifies as one by “state aircraft” or “civil aircraft” is subject to interpretation and inconsistently applied. This ambiguity has led to controversy regarding the protective cover provided by the Chicago Convention and its Annexes to specific flights in international airspace. Article 3 of the Chicago Convention states that “aircraft used in military, customs and police services shall be deemed to be state aircraft.”²⁶⁷ This definition is not necessarily exhaustive as aircraft are used to fulfill other sovereign functions such as transportation of heads of state and diplomatic personnel, humanitarian missions, meteorological services, agricultural services, and firefighting or emergency medical response.²⁶⁸

When studying the civil-state distinction, ICAO found that the predominant view was that all such other aircraft—other than for the specified services of military, customs, and police—would fall under the Chicago Convention.²⁶⁹ The Chairman of the drafting committee for Article 3 noted that: “[t]he determining factor...is whether a particular aircraft is, at a particular time, actually used in one of the three special types of services [military, customs or police]. If so, it is a ‘state aircraft’. Otherwise, it is a ‘civil aircraft.’”²⁷⁰ In other words, Article 3 focuses on purpose rather than ownership (i.e. state or civil) and creates a rebuttable presumption that an aircraft used in specified activities at a particular time will be deemed to be a state aircraft.²⁷¹ Thus, even a civil-registered aircraft leased, used and designated by governments for purposes of customs, police or military services may still qualify as state aircraft.²⁷²

²⁶⁴ *Id.*, art. 3(d). Even though the United States does not strictly comply with ICAO flight procedures in military contingency operations, classified or politically sensitive missions, or during carrier operations, the United States military aircraft nevertheless adhere to the principle of due regard for the safety of civil aviation. See U.S. Navy Commander’s Handbook, *supra* note 26, ¶ 2.7.2.1.

²⁶⁵ Williams, *supra* note 75, at 131.

²⁶⁶ See, e.g., Chicago Convention, *supra* note 21, art. 3 *bis*; U.N. SCOR, 51st Sess., 3653th mtg., U.N. Doc. S/PRST/1996/9 (Feb. 27, 1996) (citing art. 3 *bis*).

²⁶⁷ Chicago Convention, *supra* note 21, art. 3(b).

²⁶⁸ Int’l Civil Aviation Org., *Secretariat Study on “Civil/State Aircraft,” Attachment 1*, ¶ 1.4, ICAO Doc. LC/29-WP/2-1 (Mar. 3, 1994) [hereinafter Study on Civil/State Aircraft].

²⁶⁹ See *id.* ¶ 5.2.3.

²⁷⁰ See *id.* ¶ 5.2.4.

²⁷¹ Michel Bourbonniere & Louis Haeck, *Military Aircraft and International Law: Chicago Opus 3*, 66 J. AIR L. & COM. 885, 896 (2001).

²⁷² *Id.* at 905.

A review of other public international law instruments suggests that all aircraft, other than those specified in Article 3, are deemed civil aircraft. For example, the Paris Convention, which preceded the Chicago Convention, used a similar approach where “state aircraft” was defined as “military aircraft” and aircraft “exclusively employed in a State service, such as Posts, Customs or Police.”²⁷³ “Military aircraft” must be “commanded by a person in military service detailed for the purpose.”²⁷⁴ Other international aviation treaties²⁷⁵ also exclude from the scope of application aircraft “used in military, customs, or police services.”²⁷⁶

Despite relative consistency in multilateral treaties, actual state practice remains inconsistent in defining terms such as “state aircraft,” “public aircraft,” “civil aircraft,” or “private aircraft.”²⁷⁷ As an ICAO report on the subject concluded, there are no precise and generally accepted international rules, whether conventional or customary, as to what constitutes “state aircraft” versus “civil aircraft.”²⁷⁸ Instead, each state exercises sovereignty over the airspace above its territory and will make a determination as to the status of an aircraft in accordance with its own laws.²⁷⁹ For the purposes of enforcing ADIZs, the lack of consistency in defining “state aircraft” and “civil aircraft” can result in significant legal consequences and political conflict.

- b) State practice suggests that aircraft that are characterized as state aircraft are more likely to be intercepted in international airspace

On October 10, 1985, U.S. military aircraft intercepted Egypt Air Flight MS 2843 en route from Cairo to Tunis, forcing the aircraft to land in Sicily.²⁸⁰ Among the passengers aboard were members of the Palestinian Liberation Front who had hijacked an Italian cruise liner and killed an American citizen. The pilot-in-command considered the flight to be a civil flight, a “charter VIP flight”, but the United States held it was a “state aircraft” flight at the time of interception.²⁸¹ The United States supported its position by identifying the “relevant factors—including the exclusive State purpose and function of the mission, the presence of

²⁷³ Paris Convention, *supra* note 151, art. 30.

²⁷⁴ *Id.*, art. 31.

²⁷⁵ These include: the Convention on the International Recognition of Rights in Aircraft (Geneva, 1948), the Convention on Offenses and Certain Other Acts Committed on Board Aircraft (Tokyo, 1963), the Convention on the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Montreal, 1971), and the 1978 Protocol to the Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface (Rome, 1952). *See Study on Civil/State Aircraft, supra* note 268, ¶¶ 3.1–3.2.

²⁷⁶ *Study on Civil/State Aircraft, supra* note 268, ¶ 5.2.5.

²⁷⁷ *Id.*, ¶ 1.1.

²⁷⁸ *Id.*, ¶ 1.1.

²⁷⁹ *Id.*, ¶ 6.1.4.2.

²⁸⁰ *See Williams, supra* note 75, 90–91.

²⁸¹ *See Study on Civil/State Aircraft, supra* note 268, ¶ 4.8.3.

armed military personnel on board and the secrecy under which the mission was attempted.”²⁸²

Egypt publicly protested, but otherwise declined to formally challenge the action before the ICAO Council.²⁸³ This suggests that the United States successfully used the legal character of Egypt Air Flight MS 2843 as a state aircraft to avoid the jurisdiction of the ICAO Council and a potential resolution under the Chicago Convention.²⁸⁴ If the ICAO Council had determined that the flight was of a civil nature, then this could have led to a finding that the United States violated international law.

In a contrasting example, on February 4, 1986, the Israeli military intercepted a Libyan Arab Airlines charter flight over international water near Cyprus, forced the aircraft to land in Israel, and searched it for Palestinian leaders thought to be on board.²⁸⁵ The aircraft instead was carrying Syrian Government officials on an unscheduled flight to Damascus.²⁸⁶ The matter came before the ICAO Council where Israel argued that the Council lacked competence as the Libyan aircraft was state aircraft; in turn, Libya produced civil registration and certificates of airworthiness with regard to the aircraft.²⁸⁷ The ICAO Council rejected Israel’s interpretation and condemned the interception and diversion of the Libyan private aircraft within international airspace as “an act against international civil aviation in violation of the principles of the Chicago Convention.”²⁸⁸

In each case, the United States and Israel attempted to justify their respective interceptions in international airspace on the basis of the “state” character of the aircraft. In the case of Egypt Air Flight MS 2843, the facts supported the United States position and it avoided censure from the ICAO Council. In contrast, with regard to the Libyan charter flight, the ICAO Council viewed the aircraft as a civil aircraft and condemned Israel for violating the Chicago Convention. Both examples suggest that states are more willing to intercept aircraft operations with characteristics of “state aircraft” in international airspace, whereas interception of a civil aircraft has the increased risk of international censure given protections afforded under the Chicago Convention. In turn, the legality of enforcing ADIZ requirements in international airspace could turn on whether the aircraft is deemed “state” as opposed to “civil.”

²⁸² Study on Civil/State Aircraft, *supra* note 268, ¶ 4.8.3.

²⁸³ See Williams, *supra* note 75, 90–91.

²⁸⁴ *Id.*, at 126.

²⁸⁵ *Id.*, at 91–92.

²⁸⁶ See Study on Civil/State Aircraft, *supra* note 268, ¶ 4.8.3.

²⁸⁷ *Id.*, ¶ 4.8.3.

²⁸⁸ *Id.*, ¶ 4.8.3.

E. Enforcement Through Interception

The chief means of enforcing ADIZs is through the threat of or actual interception of aircraft. Interception involves a series of actions and maneuvers by the intercepting aircraft to track, identify, and communicate with the intercepted aircraft. States also use interceptions to return aircraft to a planned track, direct aircraft beyond the boundaries of a national airspace, guide aircraft away from a prohibited areas or instruct aircraft to effect a landing at a designated aerodrome. Underlying interceptions is the threat of force against non-compliant aircraft.

The United States enforces ADIZs through interceptions subject to transparent procedures and additional protections for civil aircraft consistent with international law. International law distinguishes between civil and state aircraft when determining the protections afforded to the intercepted aircraft. For civil aircraft, interceptions must be conducted according to specific procedures and limitations under the Chicago Convention. The use of weapons against civil aircraft in flight is prohibited, subject to the right of self-defense. Interception of civil aircraft must be a last resort. The Chicago Convention interception standards apply wherever civil aircraft are operating, regardless of jurisdiction. More generally, for state and civil aircraft, any use of force in relation to interceptions to enforce ADIZs must be proportional, necessary, minimize harm to civilians and otherwise be consistent with customary international law.

1. The United States Enforces ADIZs Through Interceptions Subject to Limitations and Procedures, with Additional Protections for Civil Aircraft

The United States enforces ADIZs according to specific interceptions procedures. The FAA and the U.S. military, under the auspices of NORAD, jointly administer the U.S. ADIZs.²⁸⁹ In conjunction with the FAA, NORAD monitors air traffic and can order an intercept in the interest of national security or defense. NORAD states that “any aircraft flying in these zones without authorization may be identified as a threat and treated as an enemy aircraft, potentially leading to interception by fighter aircraft.”²⁹⁰

The threshold for use of force against unauthorized aircraft is dependent on whether the aircraft is military or civil.²⁹¹ According to U.S. policy, an aircraft with military markings may be presumed to be on a military mission unless evidence is produced to the contrary by its state of registry.²⁹² The United States further advises that military aircraft intruding into foreign airspace on a military

²⁸⁹ See NORTH AMERICAN AEROSPACE DEFENSE COMMAND, *NORAD Intercept Procedures, Air Defense Identification Zone & Temporary Flight Restrictions*, 13, <https://www.faa.gov/files/gslac/library/documents/2011/Jan/49877/ADIZ%20TFR%20Intercepts%20w%20answers.pdf>.

²⁹⁰ *Id.* at 16.

²⁹¹ See U.S. Navy Commander’s Handbook, *supra* note 26, ¶ 4.4.2.

²⁹² *Id.*, ¶ 4.4.2.

mission, whether for tactical attack or intelligence-gathering purposes, may constitute a sufficient threat to justify the use of force in self-defense.²⁹³

In contrast to its stance on intercepting military aircraft, the United States recognizes that a state may not use weapons against an aircraft with civil markings except in the exercise of self-defense.²⁹⁴ The United States maintains that customary international law provides that a foreign civil aircraft entering national airspace without permission due to distress or navigational error may be required to comply with orders to turn back or to land.²⁹⁵

The FAA has published specific guidance on the interception process for civil aircraft in the event of a violation of U.S. ADIZ requirements.²⁹⁶ The intercept procedures follow three stages: (1) approach phase; (2) identification phase; and (3) post-intercept phase.²⁹⁷ The purpose of these procedures is to identify, track, inspect, divert, and establish communications with an aircraft.²⁹⁸ “An interceptor may attempt to establish communications via standard ICAO signals,” and “if the intercepted aircraft remains non-compliant to instruction,” “the interceptor pilot may initiate a divert maneuver.”²⁹⁹ Ultimately, failure to comply could lead to the use of force.³⁰⁰

Consistent with the Chicago Convention, the United States “refrains from the use of weapons against civil aircraft” and during the interception of civil aircraft seeks to avoid endangering the safety of the aircraft and the lives onboard.³⁰¹ U.S. interceptor pilots must “use caution to avoid startling the intercepted crew or passengers” and are responsible for maintaining safe separation during all intercept maneuvers.³⁰² “Absent compelling evidence to the contrary from the overflown state, an aircraft with civil markings will be presumed to be engaged in nonmilitary commercial activity.”³⁰³

²⁹³ *Id.*, ¶ 4.4.2.

²⁹⁴ *Id.*, ¶ 4.4.2.

²⁹⁵ *Id.*, ¶ 4.4.2.

²⁹⁶ See FAA Manual, *supra* note 92, ¶ 5-6-2 (Interception Procedures).

²⁹⁷ *Id.*, ¶ 5-6-2 (Interception Procedures).

²⁹⁸ *Id.*, ¶ 5-6-2 (Interception Procedures).

²⁹⁹ See FAA Manual, *supra* note 92, ¶ 5-6-2 (Interception Procedures), § 5-6-2(b)(3).

³⁰⁰ *Id.*, ¶ 5-6-2 (Interception Procedures), § 5-6-2(b)(3).

³⁰¹ See U.S. Navy Commander’s Handbook, *supra* note 26, ¶ 4.4.2.

³⁰² See FAA Manual, *supra* note 92, § 5-6-2.

³⁰³ See U.S. Navy Commander’s Handbook, *supra* note 26, ¶ 4.4.2.

2. Enforcing ADIZs Through Interception of Aircraft is Subject to Differing Limitations and Procedures Based on the Legal Distinction Between Civil and State Aircraft

- a) Interception of civil aircraft to enforce ADIZs is subject to specific procedures and limitations under the Chicago Convention
 - i. Use of weapons against civil aircraft in flight is prohibited

ICAO advises that interception of civil aircraft may take place in the event that “military, customs or police authorities” of a state: (1) “are unable to secure positive identification of an aircraft observed in or entering the sovereign airspace of the State;” (2) “observe that an aircraft without proper authorization is about to enter, or has entered,” sovereign airspace or a restricted or prohibited area, and “fails to comply with instructions to land or to leave the airspace”; (3) observe aircraft entering the sovereign airspace through different positions or routes from those stated in the overflight permission; (4) observe that an aircraft within its airspace deviates from its flight plan for no valid reason; or (5) suspect that an aircraft is engaged in illegal flights inconsistent with the aims of the Chicago Convention and contrary to the laws of said state.³⁰⁴ ICAO’s warning to civil aircraft acknowledges that, when weighing whether to intercept, the offended state may make a subjective determination as to the intent and nature of the flight.

The subjective determination of a flight’s intent and subsequent interception has resulted in substantial controversy in the past. During the Cold War, a dispute over the use of force against identified civil aircraft intruding upon sovereign airspace led to new international standards and guidelines for intercepting civil aircraft.³⁰⁵ On September 1, 1983, a Korean Airlines (KAL) Flight 007, en route from Anchorage, Alaska to Seoul, South Korea, deviated from its planned course and intruded into Soviet airspace over the Kamchatka Peninsula and Sakhalin Island.³⁰⁶ After tracking KAL Flight 007 for a few hours via radar, Soviet military aircraft shot down the scheduled commercial flight and killed the 29 flight crew members and 240 passengers.³⁰⁷

³⁰⁴ ICAO Civil Aircraft Interception Manual, *supra* note 116, at ¶¶ 1.2.1, 1.2.2.

³⁰⁵ See Masahiko Kido, *The Korean Airlines Incident On September 1, 1983, And Some Measures Following It*, 62 J. AIR L. & COM. 1049, 1062 (1997).

³⁰⁶ *Id.* at 1049.

³⁰⁷ Passengers included Americans, Australians, British, Canadians, Japanese, Thais, and South Koreans. See U.N. SCOR, 37th Sess., 2470th mtg. at 2, U.N. Doc. S/PV.2470 (1983). For further details of the debates in the Security Council, See U.N. SCOR, 37th Sess., 2471st mtg. at 1–12, U.N. Doc. S/PV.2471 (1983); U.N. SCOR, 37th Sess., U.N. Docs. S/15947 (letter from the U.S. Permanent Representatives to the U.N. of Sept. 1, 1983), S/15948 (note by the President of the Security Council), S/15949 (note by the President of the Security Council answering the letter of the Permanent Observer of the Republic of Korea to the U.N.), S/15950 (letter from Japan), S/15951 (letter from Australia) (1983), reprinted in 22 I.L.M. 1111-13 (1983).

The incident caused international outrage and provoked a contentious debate at the Security Council³⁰⁸ leading to an investigation by the ICAO Council of KAL Flight 007 and the study of new standards for interception of civil aircraft.³⁰⁹ The Chicago Convention was subsequently amended to include Article 3 *bis*, which expressly prohibits the use of “weapons against civil aircraft in flight,” subject to the inherent right of self-defense under Article 51 of the United Nations Charter.³¹⁰ States are further required to mitigate the endangerment of aircraft and lives of persons on board during interceptions.³¹¹ These principles limit a state’s exercise of exclusive sovereignty rights in national airspace.³¹²

Article 3 *bis* permits States to require an unauthorized civil aircraft flying within national airspace, or authorized aircraft that are reasonably deemed to be contravening the Chicago Convention, to land at a designated airport or give such aircraft any other instructions to put an end to such violations.³¹³ For this purpose, “the contracting states may resort to any appropriate means consistent with relevant rules of international law,” such as the right to self-defense.³¹⁴

In order to inform the international aviation community and prevent miscommunication, each contracting state must publish its interception regulations.³¹⁵ Pilots must comply with orders from intercepting aircraft consistent with the Chicago Convention’s interception guidelines.³¹⁶ Contracting states are obligated to ensure that its registered civil aircraft and national air operators comply with such interception procedures through enforcement of supporting national regulations.³¹⁷

³⁰⁸ U.N. Security Council Consideration, 22 I.L.M. 1109, 1148 (1983).

³⁰⁹ See Kido, *supra* note 305, at 1052–70.

³¹⁰ The ICAO Assembly voted in 1984 to amend the Chicago Convention by adopting Article 3 *bis*, which came into force on October 1, 1998, for ratifying states. Chicago Convention, *supra* note 21, art. 3 *bis* (a) (“This provision shall not be interpreted as modifying in any way the rights and obligations of States set forth in the Charter of the United Nations”).

³¹¹ Chicago Convention, *supra* note 21, art. 3 *bis* (a).

³¹² Article 3 *bis* in effect closed what one commentator observed as the “Soviet exception” for the inviolability of airspace wherein aircraft, civil or military, which intruded into national airspace without authorization, and regardless of intention, would be intercepted and ordered to land. If such aircraft ignored the interception, either intentionally or unintentionally, the aircraft would be shot down regardless of the potential loss of life involved. See Phelps, *supra* note 112, at 296–97.

³¹³ Chicago Convention, *supra* note 21, art. 3 *bis* (b).

³¹⁴ *Id.*, art. 3 *bis* (b) (specifically referencing the provision in Subsection (a) preserving “the rights and obligations of States set forth in the Charter of the United Nations”).

³¹⁵ See Chicago Convention, *supra* note 21, art. 3 *bis* (b); FAA Manual, *supra* note 92, ¶ 5-6-2 (Interception Procedures).

³¹⁶ Chicago Convention, *supra* note 21, art. 3 *bis* (c).

³¹⁷ *Id.*, art. 3 *bis* (c).

- ii. Interception of civil aircraft must be a last resort and follow ICAO standards and procedures

Under Annex 2, States are obligated to exercise due regard for the following principles when implementing interception-related regulations and administrative directives:

(a) interception of civil aircraft will be undertaken only as a last resort; (b) if undertaken, an interception will be limited to determining the identity of the aircraft, unless it is necessary to return the aircraft to its planned track, direct it beyond the boundaries of national airspace, guide it away from a prohibited, restricted or danger area or instruct it to effect a landing at a designated aerodrome; (c) practice interception of civil aircraft will not be undertaken; (d) navigational guidance and related information will be given to an intercepted aircraft by radiotelephony, whenever radio contact can be established; and (e) in the case where an intercepted civil aircraft is required to land in the territory overflowed, the aerodrome designated for the landing is to be suitable for the safe landing of the aircraft type concerned.³¹⁸

Contracting States must further publish the standard interception and aircraft maneuver methods “designed to avoid any hazard for the intercepted aircraft.”³¹⁹

ICAO has also issued special recommendations in Annex 2 in order to further standardize interception practices through the implementation of “appropriate regulatory and administrative action[s]” by contracting states.³²⁰ These recommendations contain detailed procedures for interception – including approach, visual signals and maneuvering, and sample voice transmissions – and corresponding actions to be taken by intercepted aircraft.³²¹ Interception of civil aircraft must “be undertaken only as a last resort;” and “if undertaken, the interception must be limited to determining the identity of the aircraft, unless it is necessary to return the aircraft to its planned track, direct it beyond the boundaries of national airspace, guide it away from a prohibited, restricted or danger area or instruct it to effect a landing at a designated airport.”³²²

³¹⁸ Annex 2, *supra* note 71, appendix 2, ¶ 1.1.

³¹⁹ *Id.*, appendix 2, ¶ 1.2.

³²⁰ *Id.*, attachment A.

³²¹ *Id.*

³²² *Id.*

Aircraft must not be flown “in a prohibited area, or in a restricted area, the particulars of which have been duly published³²³, except in accordance with the conditions of the restrictions or by permission of the State over whose territory the areas are established.”³²⁴ “To eliminate or reduce the need for interception of civil aircraft,” States must make “all possible efforts” “to secure identification of any aircraft which may be a civil aircraft, and to issue any necessary instructions or advice to such aircraft, through the appropriate air traffic services units.”³²⁵ As noted previously, Annex 15 requires states to provide notice of flight prohibitions and restricted areas in the AIP, including “the risk, if any, of interception in the event of penetration of such areas.”³²⁶

- iii. ICAO interception standards apply wherever civil aircraft are operating, regardless of jurisdiction

Even though the Chicago Convention’s interception standards contemplate civil aircraft flying in national airspace, these norms apply wherever civil aircraft are in flight regardless of jurisdiction.³²⁷ The United Nations Security Council affirmed this customary principle in the Brothers to the Rescue incident.³²⁸

On February 24, 1996, the Cuban Air Force shot down two unarmed U.S. civil aircraft operated by Brothers to the Rescue, a Florida-based volunteer organization providing search and rescue support to Cuban refugees attempting to cross the Straits of Florida.³²⁹ As President of the Security Council, the United States issued a statement on behalf of the Security Council deploring the use of force against civil aircraft and requesting that ICAO initiate an investigation.³³⁰ ICAO quickly deplored the Cuban action and launched an investigation with the participation of both the United States and Cuba.³³¹

ICAO found that the interception occurred without any prior attempt to establish radio communications or guide the U.S. civil aircraft away from the proscribed danger areas and national airspace, contrary to established interception procedures³³² and the principle that interception of civil aircraft should be a last

³²³ “The phrase ‘duly published in this context is understood to mean published in accordance with the provisions of Annex 15.’ ICAO Civil Aircraft Interception Manual, *supra* note 116, ¶ 3.2.4.2.

³²⁴ Annex 2, *supra* note 71, ¶ 3.1.10.

³²⁵ *Id.*, attachment A, 2.2.

³²⁶ Annex 2, *supra* note 71, attachment A, 2.2.

³²⁷ *See* Williams, *supra* note 75, at 135.

³²⁸ S.C. Res. 1067, U.N. Doc. S/RES/1067 (Jul. 26, 1996).

³²⁹ Tim Weiner, *Clinton Considers Punishing Cubans for Plane Attack*, N.Y. TIMES, Feb. 26, 1996, at A7.

³³⁰ U.N. SCOR, 51st Sess., 3653th mtg., U.N. Doc. S/PRST/1996/9 (Feb. 27, 1996).

³³¹ ICAO News Release, PIO 3/96 (1996); *See* The Shooting-down of Two U.S.-registered Private Civil Aircraft by Cuban Military Aircraft on 24th February 1996, U.N. Doc. S/1996/509, appendix B, (June 20, 1996) [hereinafter ICAO Cuba Report].

³³² *See* ICAO Civil Aircraft Interception Manual, *supra* note 116. ICAO issued the first version of the manual in 1983 following the deadly interception of KAL 007, as noted above.

resort.³³³ Although Cuba argued that the planes were within its national airspace,³³⁴ ICAO found that the military interception occurred in international airspace – approximately 10 nautical miles outside of Cuban national airspace, as measured from outer limit of the territorial sea.³³⁵

Based on the findings of ICAO, the Security Council adopted a resolution formally condemning the use of weapons against civil aircraft and calling upon Cuban to comply with international law.³³⁶ The Security Council noted that interception “violated the principle that States must refrain from the use of weapons against civil aircraft in flight and that, when intercepting civil aircraft, the lives of persons on board and the safety of the aircraft must not be endangered.”³³⁷ The Security Council further condemned such use as being incompatible with the rules of customary international law contained in Article 3 *bis* and Annexes of the Chicago Convention and with elementary consideration of humanity.³³⁸

- b) Any use of force in relation to the interception of aircraft to enforce ADIZs must be proportional, necessary, minimize harm to civilians, and otherwise be consistent with customary international law

The Brothers to the Rescue incident, discussed above, occurred in the absence of hostilities. During an actual armed conflict or a national emergency, the Chicago Convention principles and interception procedures would not necessarily limit a state’s freedom to use force when intercepting a civil aircraft.³³⁹ With regard to military aircraft, the Chicago Convention’s specific protections aimed at civil aircraft do not apply at all.³⁴⁰ However, use of force during interceptions of both civil and military aircraft remains limited by customary principles from the law of war.³⁴¹

Pursuant to customary international law, in the event of any interception, the use of force must be proportional to the threat and adequate to the situation such that the loss of life to civilians or other protected persons is limited to the

³³³ See ICAO Cuba Report, *supra* note 331, ¶¶ 1.1.25, 1.1.27, 1.1.40, 2.3.3.2.4, 2.3.3.3.4, 2.5.2.6.

³³⁴ Cuba and the United States offered conflicting evidence on the location of the aircraft, forcing ICAO to rely on independent data from a cruise ship in the area. *Id.* ¶¶ 2.3.6.1.4, 2.3.7.5, 2.3.6.2.3, 2.3.7.4.

³³⁵ See ICAO Cuba Report, *supra* note 331, ¶ 3.17.

³³⁶ U.N. SCOR, 51st Sess., 3653th mtg., U.N. Doc. S/PRST/1996/9 (Feb. 27, 1996). Russia and China abstained and protested that Resolution 1067 was not balanced regarding the breach of Cuba’s rights under international law. See Press Release, Security Council, Security Council Condemns Use of Weapons Against Civil Aircraft; Calls on Cuba to Comply with International Law, U.N. Press Release SC/6247 (Jul. 27, 1996).

³³⁷ U.N. SCOR, 51st Sess., 3653th mtg., U.N. Doc. S/PRST/1996/9 (Feb. 27, 1996).

³³⁸ *Id.*

³³⁹ Chicago Convention, *supra* note 21, art. 89.

³⁴⁰ *Id.*, art. 3.

³⁴¹ See Petras, *supra* note 34, at 8.

necessity underlying the interception.³⁴² As a corollary, intercepting aircraft must distinguish military aircraft from civilian aircraft “so as to minimize damage to civilians and civilian objects.”³⁴³

In the event of armed conflict, the law of war provides specific protections to civil aircraft that are similar to those set forth under the Chicago Convention.³⁴⁴ Civil airliners are generally exempt from attack so long as the aircraft are employed in their normal role and do not intentionally hamper the movements of combatants.³⁴⁵ Even if civil airliners breach these conditions, attack is only warranted if:

(a) diversion for landing, visit and search, and possible capture, is not feasible; (b) no other method is available for exercising military control; (c) the circumstances of non-compliance are sufficiently grave that the aircraft has become, or may be reasonably assumed to be, a military objective; and (d) the collateral casualties or damage will not be disproportionate to the military advantage gained or anticipated.³⁴⁶

Even enemy civil aircraft may not be attacked unless such aircraft are making an “effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.”³⁴⁷

“Military aircraft intruding into foreign national airspace on a military mission may constitute a sufficient threat”—due to the carriage of tactical weapons or for intelligence-gathering purposes—“to justify the use of force in self-defense.”³⁴⁸ As compared to civil aircraft, there is a much lower threshold for the use of force without warning against military aircraft intruding into the territory of another State.³⁴⁹ “State practice suggests that an aircraft with military

³⁴² Williams, *supra* note 75, 114–15.

³⁴³ U.S. Navy Commander’s Handbook, *supra* note 26, ¶ 5.3.2.

³⁴⁴ See generally INT’L INSTITUTE OF HUMANITARIAN LAW, SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA (1994), <http://www.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=5B310CC97F166BE3C12563F6005E3E09&action=openDocument>. “The San Remo Manual was prepared during the period 1988-1994 by a group of legal and naval experts participating in their personal capacity in a series of Round Tables convened by the International Institute of Humanitarian Law. The purpose of the Manual is to provide a contemporary restatement of international law applicable to armed conflicts at sea.” *Id.*

³⁴⁵ *Id.* ¶ 53(c).

³⁴⁶ *Id.* ¶ 57.

³⁴⁷ *Id.* ¶ 40. See also *id.* ¶¶ 62, 63.

³⁴⁸ U.S. Navy Commander’s Handbook, *supra* note 26, ¶ 4.4.2; see also Phelps, *supra* note 112, at 292 (noting that technological advancements in weapons systems and intelligence gathering equipment able to be carried by aircraft presents a threat to national security).

³⁴⁹ See Phelps, *supra* note 112, at 291–94.

markings may be presumed to be on a military mission unless evidence is produced to the contrary by its state of registry.”³⁵⁰ State practice further indicates that force may be used without warning against a military aircraft that has intruded into foreign national airspace while conducting a definitive military mission.³⁵¹ For example, the United States did not protest in 1960 when the Soviet Union shot down an American U-2 reconnaissance aircraft in Soviet airspace on an intelligence-gathering mission.³⁵²

However, before using force against military aircraft, normative standards of necessity and proportionality suggest that the state should determine the imminence and gravity of the threat posed by the trespassing aircraft.³⁵³ If a trespassing military aircraft is definitively non-hostile and enters national airspace due to error or *force majeure* – then arguably the aircraft should be given the opportunity to land or change course.³⁵⁴ For example, following the use of force against an unarmed U.S. military cargo aircraft that trespassed Yugoslavia’s national airspace, the Yugoslavian government indicated that in the future it would not use force against a non-hostile military transport aircraft and would provide an opportunity for the aircraft to land and, if refused, then the situation would be handled through diplomatic channels.³⁵⁵

Although the threshold for interception and use of force against military aircraft is lower over a state’s national territory, the threshold is higher in international airspace within an ADIZ. Before using force in international airspace, the intercepting aircraft must determine if the military aircraft is hostile and intends to actually intrude sovereign airspace.³⁵⁶ Military aircraft should also be given the reasonable opportunity to signal its non-hostile intent, respond to communications from the intercepting aircraft or otherwise change course away from national airspace.³⁵⁷

³⁵⁰ See U.S. Navy Commander’s Handbook, *supra* note 26, ¶ 4.4.2.

³⁵¹ See Phelps, *supra* note 112, at 287, 292.

³⁵² See *id.*, at 287. Cf. Petras, *supra* note 34, at 18; Eric Geiser, *The Fog of Peace: The Use of Weapons Against Aircraft in Flight During Peacetime*, 4 J. INT’L LEGAL STUD. 187, 191 (Summer 1998).

³⁵³ See Petras, *supra* note 34, at 22.

³⁵⁴ See Phelps, *supra* note 112, at 294. *But see* Petras, *supra* note 34, at 23–24 (arguing that this norm is not customary given the persistent contrary positions in state practice with regard to military aerial intruders).

³⁵⁵ See Phelps, *supra* note 112, at 275–76.

³⁵⁶ “The United States,” for instance, “does not recognize the right of a coastal state to apply its ADIZ procedures to foreign aircraft not intending to enter national airspace.” U.S. Navy Commander’s Handbook, *supra* note 26, ¶ 2.7.2.3.

³⁵⁷ This would be consistent with the normative standards under the Chicago Convention, as discussed below, applicable to interception of civil aircraft that trespass national airspace due to error, distress, or *force majeure*. See U.S. Navy Commander’s Handbook, *supra* note 26, ¶ 4.4.2. See also Petras, *supra* note 34, at 22.

F. Extensive Temporal and Geographic Scope

ADIZs have extensive temporal and geographic scope. Under U.S. practice, ADIZs form near-permanent buffer zones that stretch hundreds of miles beyond the edge of the territorial sea. International law establishes important limitations on the scope and jurisdiction claimed in conjunction with the zones. In accordance with customary international law, ADIZs must have a scope that is necessary and proportionate to the imminent or actual threat presented. Furthermore, ADIZs must not unduly interfere with high seas freedoms or exceed the limited functional jurisdiction of coastal states in maritime zones under UNCLOS. ADIZs are not a prescriptive means of advancing claims to international airspace or disputed territory.

1. U.S. ADIZs Form Near-permanent Buffer Zones that Stretch Hundreds of Miles Beyond the Edge of the U.S. Territorial Sea

The United States has designated ADIZs for the contiguous United States, Alaska, Guam, and Hawaii, which extend well beyond the U.S. territorial seas.³⁵⁸ The Contiguous U.S. ADIZ extends more than 300 nautical miles into the Atlantic Ocean and more than 400 miles into the Pacific Ocean.³⁵⁹ These ADIZs are not temporary, but have been in place for more than fifty years.³⁶⁰ The FAA regularly alters the size and shape of ADIZs based on different policy objectives.³⁶¹ In 1982, for instance, the FAA modified the geographic area of exclusion for flight plan requirements involving low-speed aircraft in the ADIZ bordering Florida in order to address the threat of illicit drug trafficking to aerial commerce.³⁶²

The FAA also responds to petitions from the U.S. Military Joint Chiefs of Staff for amendments to the geographic scope of ADIZs. The FAA revised the Alaskan ADIZ to include the Aleutian Islands and establish an inner ADIZ for the defense of the Mariana Islands in response to defense concerns.³⁶³ At the DOD's

³⁵⁸ 14 C.F.R. § 99, subpart B (2015) (listing the geographic coordinates of each ADIZ).

³⁵⁹ See FAA Manual, *supra* note 92, ¶ 5-6-5, Fig. 5-6-3 (ADIZ Boundaries and Designated Mountainous Areas); 14 C.F.R. § 99.43 (2014) (defining boundaries of the Contiguous U.S. ADIZ).

³⁶⁰ The initial ADIZ were established in 1950. 15 Fed. Reg. 9319 (1950).

³⁶¹ In making amendments and adjustments to ADIZ requirements, the FAA often uses notice and comment rulemaking. For example, before enacting new transponder requirements for ADIZ, on October 5, 1988, the FAA issued Notice No. 88-17, Transponder Requirements in an ADIZ (53 Fed. Reg. 39846), received five comments in response and subsequently adopted the rule change. See 55 Fed. Reg. 8390 (Mar. 7, 1990). However, this practice of providing prior notice has not always been consistent. For example, on September 28, 2001, the FAA issued an immediately effective final rule that revised the boundaries of the U.S. ADIZ and strengthened aircraft identification procedures. 66 Fed. Reg. 49818, 49819 (Sept. 28, 2001). The FAA issues immediately effective final rules when the agency determines that it would be impracticable, unnecessary, or contrary to the public interest to conduct traditional notice and comment rulemaking. 14 C.F.R. § 11.11 (2015); 5 U.S.C. § 553(b) (2012).

³⁶² 47 Fed. Reg. 12324 (Mar. 22, 1982).

³⁶³ 53 Fed. Reg. 18216 (May 20, 1988).

request, the FAA also altered the ADIZ in the Gulf of Mexico and off the coast of southern California so that it did not encroach upon the sovereign airspace of Mexico.³⁶⁴ Thus, even while the United States does not expressly seek to extend its sovereignty through ADIZs, the United States has acknowledged that ADIZs can impact the sovereignty of other states. Other states have exercised similar restraint in defining the geographic scope of ADIZ, particularly in relation to disputed territory.³⁶⁵

2. International Law Allows for ADIZs in Adjacent International Airspace, but Subject to Important Limitations on the Scope and Jurisdiction Claimed in Conjunction with the Zones

- a) ADIZs must have a scope that is necessary and proportionate to the imminent or actual threat presented

More than 20 nations have followed the practice of the United States in establishing ADIZs in adjacent international airspace.³⁶⁶ Customary international law also provides that ADIZs, as a form of self-defense, should adhere to the principles of necessity and proportionality.³⁶⁷ In applying these principles to ADIZs, it is useful to examine state practice with regard to other airspace security zones. In 1956 during the Algerian insurgency, for example, France established an ADIZ in international airspace above the Mediterranean Sea in order to regulate air traffic along the Algerian coast.³⁶⁸ The zone ended with the independence of Algeria.³⁶⁹ The United Nations has also established “no-fly zones” in international airspace over high seas, which have been enforced by member states. During the 2011 North Atlantic Treaty Organization (NATO) campaign in Libya, the United States enforced UN Security Council Resolution 1973 authorizing the use of force, including enforcement of a no-fly zone, to protect civilians and civilian areas.³⁷⁰ The zone corresponded with the Tripoli Flight Information Region and extended well-beyond Libya’s territorial waters into the high seas.³⁷¹ These types

³⁶⁴ *Id.*

³⁶⁵ For example, “Japan . . . did not extend its ADIZ to include the airspace over the Kuril Islands, which are claimed by Japan, but have been controlled by Russia since the end of World War II . . . [nor] around Tokdo/Takeshima Island, which is claimed by both Japan and South Korea.” Raul Pedrozo, *The Bull in the China Shop: Raising Tensions in the Asia-Pacific Region*, 90 INT’L L. STUD. 66, 74 n.39 (2014). A unique exception is Taiwan, which has asserted that its ADIZ covers parts of the territory administered by China (on the Chinese mainland) and by Japan (by one degree of longitude over Japan’s Yonaguni Island). CRS ADIZ Report, *supra* note 7, at 4. Taiwan has long standing maritime territorial disputes in East Asia. See generally BEN DOLVEN ET AL., CONG. RESEARCH SERV. R42930, MARITIME TERRITORIAL DISPUTES IN EAST ASIA: ISSUES FOR CONGRESS (2013).

³⁶⁶ See generally Hsu, *supra* note 34.

³⁶⁷ See *Nicaragua* case, *supra* note 45, ¶ 176 (stating that the principles of necessary and proportionality are “well established in customary international law”).

³⁶⁸ See Cuadra, *supra* note 46, at 494.

³⁶⁹ See *id.*, at 495.

³⁷⁰ S.C. Res. 1973, U.N. Doc. S/RES/1973 (Mar. 17, 2011).

³⁷¹ 14 C.F.R. § 91.1603(a) (2011); 76 Fed. Reg. 16236 (Mar. 23, 2011).

of security zones in international airspace are temporary and are enforced in relation to areas of specific hostilities. Security Council-backed no-fly zones also have explicit international legal sanction under Chapter VII of the UN Charter.³⁷²

In contrast to such security zones, the geographic breadth and indeterminate duration of ADIZs must be evaluated in the context of anticipatory self-defense. Recall that this doctrine provides that states should not be forced “to absorb an aggressor’s initial and potentially crippling first strike before taking those military measures necessary to thwart an imminent attack.”³⁷³ Regarding scope, the question is whether the area covered and indefinite duration of ADIZs are necessary and proportional to the imminent or actual threat presented.

Simply put, aviation activities, even commercial flights, in international airspace present a threat to national security.³⁷⁴ The mysterious disappearance of Malaysian Flight 370 on March 8, 2014, for example, raises security concerns and the need to track aircraft in international airspace.³⁷⁵ In practice, states also routinely use flight operations in international airspace beyond the coastal state’s territorial limits for intelligence-gathering purposes.³⁷⁶ Even though the Cold War is long over, states such as Russia continue to use long range bombers and military flights in international airspace to coerce and threaten others.³⁷⁷ The increased risk of terrorism and the devastating quality of weapons of mass destruction provide a legitimate basis for instituting methods to identify, control, and prevent potential the threats from aircraft operating in international airspace.³⁷⁸

³⁷² UN Charter, art. 42. Security Council resolutions under Chapter VII are binding on all member states. *Id.*, art. 25; *see generally* Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16 (June 21).

³⁷³ U.S. Navy Commander’s Handbook, *supra* note 26, ¶ 4.4.3.1.

³⁷⁴ Chicago Convention, *supra* note 21, preamble (noting that the “abuse” of civil aviation can be a “threat to general security”).

³⁷⁵ Press Release, MH370 Flight Incident: Press Briefing by Hishammuddin Hussein, Minister of Defence and Acting Minister of Transport (Mar. 17, 2014), <http://www.eturbonews.com/43727/mh-370-press-statement-ministry-transportation-malaysia>; Scott Neuman, *Search For Flight MH370 Reportedly Largest In History*, NAT’L PUBLIC RADIO (Mar. 17, 2014), <http://www.npr.org/blogs/thetwo-way/2014/03/17/290890377/search-for-flight-mh370-reportedly-largest-in-history>.

³⁷⁶ Interview with Barry Valentine, Former Acting Administrator, U.S. Federal Aviation Administrator (May 22, 2014).

³⁷⁷ David Alexander, *U.S. Chides Russia Over Military Flights in Europe*, REUTERS (Nov. 1, 2014, 3:18 pm), <http://www.reuters.com/article/2014/10/31/us-russia-military-usa-idUSKBN0IK2DR20141031>.

³⁷⁸ *See generally*, John Yoo, *Using Force*, 71 U. CHI. L. REV. 729 (2004); Thomas Anderson, *Legitimizing the New Imminence: Bridging the Gap Between the Just War and the Bush Doctrine*, 8 GEO. J.L. & PUB. POL’Y 261 (2007).

If one accepts that a threat exists and that ADIZs are permissible under customary international law³⁷⁹, it is important to continue to evaluate the defensive rationales underlying their scope and application. Indeed, given their extensive scope, ADIZs may represent a broader jurisdictional claim by coastal states to international airspace.³⁸⁰ Among the most important limitations to such a claim, as repeatedly expressed by maritime states, are the high seas freedoms of navigation and overflight.³⁸¹ Therefore, it is necessary to turn to UNCLOS to further evaluate the lawful exercise of functional jurisdiction by coastal states.³⁸²

- b) ADIZs must not unduly interfere with high seas freedoms or exceed the limited functional jurisdiction of coastal states in maritime zones under UNCLOS
 - i. The high seas freedoms and the principle of due regard restrict the exercise of coastal zone jurisdiction

UNCLOS codified three coastal zones that extend the coastal state's exercise of jurisdiction into international waters: (1) the contiguous zone;³⁸³ (2) the continental shelf;³⁸⁴ (3) and the EEZ.³⁸⁵ The contiguous zone is an area extending contiguous to the territorial sea, measured seaward from the baseline up to 24 nautical miles.³⁸⁶ The continental shelf consists of the seabed and subsoil of the submarine areas that extend beyond its territorial sea to the outer edge of the continental margin or to a distance of 200 nautical miles from the baseline used to measure the territorial sea where the continental margin does not extend to that distance.³⁸⁷ The EEZ is an area beyond and adjacent to the territorial sea that extends no farther than 200 nautical miles from the baseline from which the breadth of the territorial sea is measured.³⁸⁸

The principal limitation on the jurisdiction of coastal states over maritime zones is the freedom of the high seas.³⁸⁹ With regard to the contiguous zone, the continental shelf, and the EEZ, the coastal state may not infringe or unjustifiably

³⁷⁹ Jaemin Lee, *China's Declaration of an Air Defense Identification Zone in the East China Sea: Implications for Public International Law*, ASIL INSIGHT, Vol. 18 Issue 17 (Aug. 19, 2014), <http://www.asil.org/print/1611>.

³⁸⁰ Cuadra, *supra* note 46, at 489, 493.

³⁸¹ Dutton, *supra* note 34, at 697.

³⁸² Hailbronner, *supra* note 73, at 493.

³⁸³ UNCLOS, *supra* note 19, art. 33.

³⁸⁴ *Id.*, art. 76.

³⁸⁵ *Id.*, arts. 55–57.

³⁸⁶ *Id.*, art. 33(2).

³⁸⁷ The continental shelf may not extend beyond 350 nautical miles from the baseline of the territorial sea or 100 nautical miles from the 2,500-meter isobath, whichever is greater. UNCLOS, *supra* note 19, art. 76.

³⁸⁸ UNCLOS, *supra* note 19, arts. 55, 57.

³⁸⁹ Hailbronner, *supra* note 73, at 493.

interfere with the high seas freedoms of overflight and navigation.³⁹⁰ The freedom of the high seas applies to all maritime vessels and aircraft, military and civil,³⁹¹ and ensures that the high seas are open to all States for “peaceful purposes.”³⁹² Among the freedom of the high seas, the freedom of overflight and navigation are the least disputed.³⁹³

In turn, states must exercise high seas freedoms with due regard for the right and interests of other states under UNCLOS.³⁹⁴ This duty includes practicing specific due regard for the high seas freedoms of navigation and overflight exercised by other states within the EEZ.³⁹⁵ In turn, the principle of due regard extends to exercising the freedom of overflight in the EEZ. All States must act with “due regard to the rights and duties of the coastal state” and must “comply with the laws and regulations adopted by the coastal state” in accordance with UNCLOS and other rules of international law in so far as they are not incompatible with these rules.³⁹⁶ More generally, states must not abuse the rights and freedoms set forth in UNCLOS³⁹⁷ or otherwise use such rights and freedoms as the basis for the threat or use force against the territorial integrity or political independence of other states.³⁹⁸

The limitations on coastal state jurisdiction are especially important to disputed maritime claims. The establishment of an ADIZ coupled with a coastal zone could represent an aggressive claim to title of that airspace and the waters below.³⁹⁹ By monitoring, patrolling, and intercepting aircraft merely crossing an ADIZ, this may represent a coastal state’s attempt to “effectively occupy” international airspace.⁴⁰⁰ Yet international airspace is not subject to acquisition

³⁹⁰ UNCLOS, *supra* note 19, arts. 58(1), 78(2), 86–7.

³⁹¹ *Id.*, art. 87. *Cf.*, Chicago Convention, *supra* note 21, art. 3 (expressly limiting application to civil aircraft).

³⁹² UNCLOS, *supra* note 19, art. 88.

³⁹³ See Michael Milde, *United Nations Convention on the Law of the Sea—Possible Implications for International Air Law*, 8 ANNALS OF AIR & SPACE L. 167, 180 (1983).

³⁹⁴ UNCLOS, *supra* note 19, arts. 1, 87.

³⁹⁵ *Id.*, art. 58(1).

³⁹⁶ *Id.*, art. 58(3).

³⁹⁷ *Id.*, art. 300.

³⁹⁸ *Id.*, art. 301.

³⁹⁹ The five modes of acquiring territory under classic international law are: occupation of *terra nullius*, prescription, cession, accretion, and subjugation. See Daniel-Erasmus Khan, *Territory and Boundaries* in THE OXFORD HANDBOOK OF THE HISTORY INTERNATIONAL LAW 237–239 (Bardo Fassbender et al., eds, 2012). *Terra nullius* refers to regions not subject to the territorial sovereignty of any state. *Id.*

⁴⁰⁰ By comparison, during the height of colonialism, the Western powers used the legal concepts of *terra nullius* and “effective occupation” to justify the expansion of colonial empires into areas, particularly in Africa, inhabited by indigenous peoples but considered not to exhibit signs of effective sovereignty. See General Act of the Conference at Berlin art. 35, Feb. 26, 1885, 165 C.T.S. 485 (1885) (Recognizing that effective territorial occupation requires the “existence of an authority sufficient to cause acquire rights to be respected”). See also Andrew Fitzmaurice, *Discovery, Conquest, and Occupation of Territory*, in THE OXFORD HANDBOOK OF THE HISTORY OF INTERNATIONAL LAW 856–858 (Bardo Fassbender et al., eds, 2012).

through prescriptive title: no state may validly purport to subject any part of the high seas, including the airspace above, to its sovereignty.⁴⁰¹ Protecting and sustaining this principle requires restraint by coastal states and constant vigilance by the international community.⁴⁰²

- ii. The jurisdiction of coastal zones is limited to functional rights that do not include security privileges

UNCLOS prescribes specific rights and duties that grant states *limited* functional jurisdiction: within the contiguous zone, the coastal state may exercise the control necessary to prevent or punish infringement of its customs, fiscal, immigration, and sanitary laws and regulations that occur within its territory or territorial sea,⁴⁰³ but security-related measures are not enforceable in this zone under UNCLOS.⁴⁰⁴ As noted previously, enforcement of such laws is limited to instances where it is “reasonably apparent” that the offending vessel or aircraft is about to enter or exit the territorial sea.⁴⁰⁵

In the continental shelf, the coastal State has jurisdiction over exploitation and exploration of the natural resources on the sea-bed⁴⁰⁶, but no corresponding sovereign rights, such as security privileges, over the subjacent waters or airspace.⁴⁰⁷

In the EEZ, the coastal state has “sovereign rights” for the purpose of exploring, exploiting, conserving, and managing the natural resources of the sea-bed and subsoil and of the superjacent waters, and engaging in other activities for

⁴⁰¹ UNCLOS, *supra* note 19, art. 89. Some commentators have interpreted this principle as being *prima facie* opposed to any claim of control over foreign aircraft on a permanent basis. *See, e.g.*, Hailbronner, *supra* note 73, at 517.

⁴⁰² As weapon, aircraft and aerospace technology increases the ability of states to patrol, monitor, and enforce or deny access to airspace, this limitation on ADIZ for regulating entry into airspace may become increasingly important as a matter of restraining state practice. For example, if capable, states may seek to extend defensive zones and related jurisdictional claims and administrative rights into other common areas such as outer space. Outer space, under current international law, is “not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means.” Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies art. 2, Jan. 27, 1967 (opened for signature Jan. 27, 1967, entered into force October 1967), 610 U.N.T.S. 205.

⁴⁰³ UNCLOS, *supra* note 19, art. 33(1).

⁴⁰⁴ Hailbronner, *supra* note 73, at 518.

⁴⁰⁵ *See* Stephens, *supra* note 139, at 290.

⁴⁰⁶ UNCLOS, *supra* note 19, art. 77. In contrast to the functional jurisdiction in the contiguous zone or EEZ, the rights of the coastal State in the continental shelf are automatic and do not depend on exercise or assertion of authority. *Cf.* Article 77(3) with Articles 3, 33, 47, and 57. RESTATEMENT (3D.) OF FOREIGN RELATIONS LAW §§ 512, 513, Comment d (1987).

⁴⁰⁷ The legal status of the subjacent waters and airspace is unchanged by the rights of coastal states over the continental shelf. UNCLOS, *supra* note 19, art. 78(1).

the economic exploration and exploitation of the zone.⁴⁰⁸ The exercise of delineated sovereign rights in the EEZ does not permit a state to enforce security rights in accordance with territorial jurisdiction.⁴⁰⁹ Such explicit limitations on the type of jurisdiction that states are permitted to exert in coastal zones makes it difficult to use UNCLOS to justify an ADIZ, which is fundamentally linked to security.

- iii. The sovereignty rights of coastal states is further conditioned by the passage regimes

UNCLOS codified passage regimes applicable to key straits and archipelagic waters that would otherwise be subject to the territorial and, thus, restrictive sovereignty of coastal states. The right of transit passage applies to straits that are used for international navigation between one part of the high seas or an EEZ and another part of the high seas or an EEZ.⁴¹⁰ The right of archipelagic sea lanes passage is substantially identical to the right of transit passage.⁴¹¹ The passage regimes balance the sovereignty interests of coastal states against the aims of facilitating international communication and ensuring the peaceful, equitable and efficient use of the seas and oceans.⁴¹²

For example, ships and aircraft, while exercising the right of transit passage, must: (a) proceed without delay through or over the strait; (b) refrain from any threat or use of force against the sovereignty, territorial integrity, or political independence of States bordering the strait (or otherwise violate the principles set forth in the UN Charter); and, (c) refrain from any activities other than those incident to their normal modes of continuous and expeditious transit unless rendered necessary by force majeure or by distress.⁴¹³

Civil aircraft engaging in transit passage must follow ICAO Annex 2 rules and monitor appropriate radio frequencies.⁴¹⁴ All aircraft, whether or civil or state, are restricted to normal or usual cruising altitude and speed for the particular type of aircraft making the passage in a given circumstance.⁴¹⁵ Weapons use, intelligence gathering, or other acts prejudicial to the security of the coastal State are not permitted.⁴¹⁶

⁴⁰⁸ UNCLOS, *supra* note 19, art. 56(1)(a). The coastal state jurisdiction serves a limited and functional purposes: (i) the establishment and use of artificial islands, and of installations and structures for economic purposes; (ii) marine scientific research; and (iii) the protection of the marine environment. UNCLOS, *supra* note 19, arts. 56(1)(b), 60.

⁴⁰⁹ See RESTATEMENT (3D.) OF FOREIGN RELATIONS LAW § 511, Comment b (1987).

⁴¹⁰ UNCLOS, *supra* note 19, art. 37.

⁴¹¹ See U.S. Navy Commander's Handbook, *supra* note 26, ¶ 2.5.4.1.

⁴¹² UNCLOS, *supra* note 19, preamble; see also Hailbronner, *supra* note 73, at 495.

⁴¹³ UNCLOS, *supra* note 19, art. 39.

⁴¹⁴ *Id.*, art. 39.

⁴¹⁵ Petras, *supra* note 34, at 36.

⁴¹⁶ Hailbronner, *supra* note 73, at 496.

The passage regime stems from the *Corfu Channel* case, which involved a series of three transits by British warships through Corfu Channel in 1946 during a period of tensions between Albania and Great Britain.⁴¹⁷ During the first transit, Albania fired upon two passing British warships.⁴¹⁸ During the second transit, the British warships were placed in battle readiness, but were otherwise in normal mode.⁴¹⁹ Two of the four vessels struck mines laid apparently with Albanian knowledge.⁴²⁰ The final transit involved a large contingent of British ships and an extensive mine-sweeping operation.⁴²¹

The Court determined that the third transit was an unlawful intervention sustained by the threat of the use of force.⁴²² However, with respect of the first two transits, the ICJ determined that the British ships were conducting innocent passage and, therefore, were legally justified.⁴²³ This right of innocent passage received preference over the coastal state's assertion of sovereignty to deny passage through the strait, situated off the coast of Albania, but used for international navigation.⁴²⁴ The Court interpreted the second transit as a lawful, even if forcible, affirmation of legal rights of navigation that were unjustly denied.⁴²⁵

Corfu Channel provides a basis for states to take forcible action to affirm the freedoms of navigation and overflight in international airspace within an established ADIZ. In the case of the ECS ADIZ, for example, the United States promptly flew two B-52 bombers through the zone to reinforce the freedoms of navigation and overflight.⁴²⁶ In addition the passage regime, which followed the ICJ's decision, further demonstrates that UNCLOS is designed to mitigate burdens to international transportation presented by a coastal state's exercise of jurisdiction.⁴²⁷ The abuse of ADIZs threatens the treaty's basic aim to facilitate the peaceful, equitable, and efficient use of the international airspace and waters.

IV. Application to the ECS ADIZ

The primary elements of ADIZs are helpful for evaluating the validity of the ECS ADIZ. First, as long as the purpose of the ECS ADIZ is to protect

⁴¹⁷ *Corfu Channel Case*, 1949 I.C.J. ¶ 12–13 (Apr. 9).

⁴¹⁸ *Id.* ¶ 27.

⁴¹⁹ *Id.* ¶ 30.

⁴²⁰ *Id.* ¶¶ 22–23.

⁴²¹ *Id.* ¶¶ 32–35.

⁴²² *Id.* ¶ 35.

⁴²³ *Id.* ¶ 31.

⁴²⁴ *Id.* ¶ 55 (concluding that the second transit was a “mission . . . designed to affirm a right which had been unjustly denied.”); see also D.G. Stephens & M.D. Fitzpatrick, *Legal Aspects of Naval Mine Warfare*, 21 LOY. L.A. INT'L & COMP. L.J. 553, 573 (1999).

⁴²⁵ *Corfu Channel Case*, 1949 I.C.J. 30 (Apr. 9).

⁴²⁶ *US B-52 bombers challenge disputed China air zone*, BBC NEWS, Nov. 26, 2013, <http://www.bbc.com/news/world-asia-25110011>.

⁴²⁷ Hailbronner, *supra* note 73, at 495.

China's national security interests, the zone is consistent with state practice and international law. Extension of the ECS ADIZ to support territorial, economic, or other claims in international airspace or waters would be unwarranted under state practice or international law.

Second, the application of the ECS ADIZ to aircraft not intending or demonstrating an intention to enter Chinese national airspace is inconsistent state practice and international law. The ECS ADIZ should serve as a condition for entry into national airspace and not as a means for regulating air traffic merely traversing international airspace within the zone.

Third, China administers the ECS ADIZ through standard aircraft identification and control procedures, but failed to provide adequate notice and coordination when establishing the security zone. Such prior coordination is critically important to air safety given that the ECS ADIZ covers disputed territory and overlaps existing ADIZ and FIR in the East China Sea.

Fourth, China applies the ECS ADIZ to all aircraft regardless of its civil or state character, which, while consistent with state practice, remains problematic. The legality of China's enforcement of the security zone through interception in international airspace could turn on whether the intercepted aircraft is deemed "state" as opposed to "civil."

Fifth, China is enforcing the ECS ADIZ through interceptions like other states, but China has not publically affirmed that civil aircraft will be afforded protections afforded under international law or provided clear guidelines on the rules of engagement. Instead, China's military has threatened to take "defensive emergency measures" to enforce the ECS ADIZ. The lack of clarity on enforcement procedures creates a threat to the safety of all aircraft operating in the region.

Sixth, the scope of the ECS ADIZ presents legal and security concerns due to overlapping ADIZs, territorial disputes, and past jurisdictional claims in the EEZ. During the EP-3 incident, China sought to limit the freedoms of navigation and overflight in the EEZ for security purposes that are distinct from the functional jurisdiction set forth in the UNCLOS. As in the EP-3 incident, and in accordance with its Freedom of Navigation (FON) Program, the United States has already challenged China's extraterritorial claims with military flight operations through the ECS ADIZ. Any attempt by China to use ADIZs to administer and effectively occupying disputed territory would exceed the legal scope and accepted defensive rationale for the zones.

A. Limited Purpose to Protecting China's National Security Interests

The ECS ADIZ shares similar national security goals of U.S. ADIZs as recognized under the right of self-defense under international law. China's

Ministry of National Defense, the administrative organ of the ECS ADIZ,⁴²⁸ explained that the ECS ADIZ was established to “guard against potential air threats” and demarcated outside the territorial airspace in order to allow the identification, monitoring, control and disposal of entering aircraft.⁴²⁹ The ECS ADIZ is thus designed to provide for early warning and to bolster defense of the country’s airspace.⁴³⁰

The objective of the U.S. ADIZs is also to improve surveillance and tracking of aircraft for national security purposes consistent with the mandate set forth in the Federal Aviation Act⁴³¹ and implementing regulations.⁴³² China likewise cites stipulations on protecting territorial and airspace security set forth in domestic laws and regulations to support the ECS ADIZ, including the Law on National Defense, the Law on Civil Aviation and the Basic Rules on Flight.⁴³³

The ECS ADIZ’s purpose of protecting national security is consistent with the right of states to self-defense under international law,⁴³⁴ which allows for anticipatory measures.⁴³⁵ The enforcement and scope of ADIZs must be consistent with principles of necessity and proportionality.⁴³⁶ Furthermore, the stated purpose of the ECS ADIZ is consistent with the rights and norms established by both international aviation and maritime regimes that recognize the risk posed by activities in international airspace and waters.⁴³⁷

However, extension of the purpose of the ECS ADIZ beyond national security, such as for furthering disputed maritime claims,⁴³⁸ would deviate from state practice and encroach upon the rights and obligations of other states in international airspace and waters. Since the establishment of the ECS ADIZ, China appears to have increased its military and state aircraft operations above disputed areas of the East China Sea.⁴³⁹ Such use of an ADIZ reverses the rationale of the zones from defensive to offensive, from the protection of national sovereignty to the coercive extension of sovereignty beyond territorial limits.

⁴²⁸ See *Announcement of the Aircraft Identification Rules for the ECS ADIZ*, *supra* note 2.

⁴²⁹ See *Defense Ministry Spokesman Responds to ADIZ Questions*, *supra* note 3.

⁴³⁰ *Id.*

⁴³¹ In support of Part 99, FAA cites the following provisions of the Federal Aviation Act: 49 U.S.C. § 106(g), 40101, 40103, 40106, 40133, 40120, 44502, 44721.

⁴³² The basis for an ADIZ is to meet the “interest of national security.” 14 C.F.R. § 99.3 (2015) (defining ADIZ). See also FAA Manual, *supra* note 92, § 5-6-1.

⁴³³ See *Defense Ministry Spokesman Responds to ADIZ Questions*, *supra* note 3.

⁴³⁴ U.N. CHARTER art. 51, ¶1.

⁴³⁵ R.Y. Jennings, *The Caroline and McLeod Cases*, 32 AM. J. INT’L L. 82, 89 (1938) (emphasis added).

⁴³⁶ See *Nicaragua case*, *supra* note 45, at ¶ 176.

⁴³⁷ Chicago Convention, *supra* note 21, arts. 3 *bis* (a), 89; UNCLOS, *supra* note 19, preamble (affirming that “matters not regulated by this Convention continue to be governed by the rules and principles of general international law”).

⁴³⁸ USCC 2014 Report, *supra* note 43, at 242.

⁴³⁹ USCC 2014 Report, *supra* note 43, at 242–3.

B. *Limiting ADIZ to Exclude Aircraft Not Intending or Demonstrating an Intention to Enter Chinese National Airspace*

The ECS ADIZ rules state that “aircraft flying in the East China Sea Air Defense Identification Zone must abide by these rules.”⁴⁴⁰ China does not explicitly differentiate between aircraft that are intending to enter Chinese territory and those that are simply traversing international airspace covered by the ECS ADIZ. In fact, China has indicated that the ECS ADIZ will apply to foreign aircraft transiting or operating in the ADIZ even if the aircraft do not intend to enter Chinese sovereign airspace.⁴⁴¹ There is no express limitation on the application of the ECS ADIZ as a condition for entry.

Because the ECS ADIZ purports to regulate aircraft not intending to enter into national airspace, it is inconsistent with state practice and international law. China’s Ministry of National Defense has explained that the ECS ADIZ was established in relation to “entering aircraft” with the aim of protecting its “state sovereignty and territorial and airspace security, and maintaining flying orders.”⁴⁴² However, the Ministry’s statement fails to make clear if the ECS ADIZ will only be applied to aircraft entering territorial airspace, as opposed to the zone itself – which includes international airspace. Applying the ECS ADIZ to aircraft merely traversing international airspace violates the freedom of overflight under UNCLOS.⁴⁴³ Furthermore, China would be violating the principle that no state may validly purport to subject any part of the high seas to its sovereignty.⁴⁴⁴

Perhaps in recognition of these limitations, China exercised initial restraint following establishment of the ECS ADAIZ. Like the United States, in November 2013, Japan and South Korea protested the ECS ADIZ by operating military aircraft through the ECS ADIZ without adhering to its requirements and China did not respond to enforce the zone.⁴⁴⁵ Subsequently, in May and June 2014, in order to enforce the ECS ADIZ, Chinese military aircraft engaged in an interception of Japanese reconnaissance aircraft operating in an area overlapping with the Japanese ADIZ.⁴⁴⁶ Japan criticized these interceptions, which involved close aircraft maneuvers, as being “extremely dangerous.”⁴⁴⁷ In the case of civil aircraft, such an interception would not be consistent with Chicago Convention standards regarding entry and departure of aircraft from the national airspace⁴⁴⁸

⁴⁴⁰ See *Announcement of the Aircraft Identification Rules for the ECS ADIZ*, *supra* note 2.

⁴⁴¹ USCC Report, *supra* note 43, at 240.

⁴⁴² See *Defense Ministry Spokesman Responds to ADIZ Questions*, *supra* note 3.

⁴⁴³ UNCLOS, *supra* note 19, art. 87.

⁴⁴⁴ *Id.*, art. 89. Some commentators have interpreted this principle as being *prima facie* opposed to any claim of control over foreign aircraft on a permanent basis. See, e.g., Hailbronner, *supra* note 73, at 517.

⁴⁴⁵ CRS ADIZ Report, *supra* note 7, at 11.

⁴⁴⁶ *Id.*, at 12–13.

⁴⁴⁷ *Id.*, at 12–13.

⁴⁴⁸ See, e.g., Chicago Convention, *supra* note 21, art. 11.

and would likely violate protections afforded to operations in international airspace.⁴⁴⁹

C. *Standard Administration, But Inadequate Notice and Coordinate Notification*

In administering the ECS ADIZ, China is requiring five aircraft identification procedures. First, aircraft must report flight plans to the Ministry of Foreign Affairs or the Civil Aviation Administration of China.⁴⁵⁰ Second, aircraft must maintain “two-way radio communications, and respond in a timely and accurate manner to identification inquiries” from the Chinese Defense Ministry.⁴⁵¹ Third, aircraft, if equipped with a secondary radar transponder, must keep the transponder working throughout the entire course.⁴⁵² Fourth, aircraft must “clearly mark their nationalities and the logo of their registration identification in accordance with related international treaties.”⁴⁵³ Finally, the aircraft must follow all instructions of the administrative agency, the Chinese Defense Ministry.⁴⁵⁴

The U.S. ADIZs also utilize similar procedures to ensure the ready identification, location and control of civil aircraft, including flight plans⁴⁵⁵, timely position reports,⁴⁵⁶ transponder requirements,⁴⁵⁷ use of two-way radios⁴⁵⁸, and special security instructions.⁴⁵⁹ The ECS ADIZ rules also share elements with ICAO “Rules of the Air”⁴⁶⁰ that civil aircraft engaged in international operations must adhere to, such as the filing of flight plans with the responsible air traffic service authority.⁴⁶¹

The ECS ADIZ is comparable to areas where, pursuant to ICAO standards, a state has accepted responsibility for air traffic authority in a FIR above the high seas or in airspace of undetermined sovereignty.⁴⁶² Even though FIR responsibility is not directly linked with security interests, within the FIR, the responsible state may mandate civil aircraft traversing certain areas use identification procedures, which involve flight plans, two-way communications

⁴⁴⁹ See Chicago Convention, *supra* note 21, art. 3 *bis*. Protections afforded to civil aircraft during enforcement of ADIZ are discussed in Section II(E).

⁴⁵⁰ See *Announcement of the Aircraft Identification Rules for the ECS ADIZ*, *supra* note 2.

⁴⁵¹ *Id.*

⁴⁵² *Id.*

⁴⁵³ *Id.*

⁴⁵⁴ *Id.*

⁴⁵⁵ 14 C.F.R. § 99.11 (2015).

⁴⁵⁶ *Id.* § 99.15.

⁴⁵⁷ *Id.* § 99.13(b)–(c). Balloons, gliders, and aircraft not equipped with an engine-driven electrical system are excepted from this requirement. *Id.* § 99.13(d).

⁴⁵⁸ *Id.* § 99.9.

⁴⁵⁹ *Id.* § 99.7.

⁴⁶⁰ Annex 2, *supra* note 71.

⁴⁶¹ *Id.*, Std. 3.3.1.2.

⁴⁶² *Id.*, Std. 2.1.2.

using transponders and radios, and timely position reporting.⁴⁶³ Coordination for FIR responsibility in international airspace is ensured through a regional air navigation agreement with ICAO.⁴⁶⁴ In order to reduce the need for interception, national air traffic services units in charge of adjacent FIR must share flight plan and flight progress information for flights along specified routes or portions of routes in close proximity to FIR boundaries.⁴⁶⁵

States have recognized the standard identification and control procedures of the ECS ADIZ, which China later transmitted via NOTAMs. The United States, for example, instructed its commercial carriers operating internationally to follow Chinese NOTAMs related to the ECS ADIZ for the safety and security of passengers⁴⁶⁶, but noted that this action does not indicate the U.S. government's acceptance of the ECS ADIZ.⁴⁶⁷ In contrast, Japan has instructed its airlines to defy the ECS ADIZ requirements.⁴⁶⁸

Where the ECS ADIZ clearly diverges from international norms is China's failure to provide adequate notice and coordination prior to establishing the security zone. China unilaterally established the ECS ADIZ with a public announcement on November 23, 2013⁴⁶⁹ without any prior notice to the international community.⁴⁷⁰ This is not consistent with ICAO standards which require prior notice and coordination with the appropriate air traffic services authorities in the region to avoid dangers to civil aviation operations over the high seas.⁴⁷¹ Furthermore, ICAO requires close cooperation between air traffic authorities and military authorities in order to address security concerns and avoid the need for interceptions.⁴⁷² International cooperation is effectuated through

⁴⁶³ *Id.*, Std. 2.17.3.1.

⁴⁶⁴ *Id.*, Std. 2.1.2.

⁴⁶⁵ ICAO Civil Aircraft Interception Manual, *supra* note 116, at 3.1.4.4 (Citing ICAO Doc. 4444, PANS-RAC, Part VII, 1.4).

⁴⁶⁶ NBAA Advising Members to Check China ADIZ Flight-Planning Requirements (Dec. 5, 2013), <https://www.nbaa.org/ops/intl/mid/20131205-nbaa-advising-members-to-check-china-adiz-flight-planning-requirements.php> (describing Chinese NOTAMs: NOTAMR A1886/13 and NOTAM A1916/13); *see also* CRS Report, *supra* note 7, at 16 Fn. 72 (noting China later published the NOTAMs related to the ECS ADIZ in its permanent Aeronautical Information Publication (AIP)).

⁴⁶⁷ U.S. State Dept., *China's Declared ADIZ – Guidance for U.S. Air Carriers* (Nov. 29, 2013), <http://www.state.gov/r/pa/prs/ps/2013/11/218139.htm>.

⁴⁶⁸ Pedrozo, *supra* note 49, at 77 (criticizing the United States for undermining Japan's and South Korea's efforts to defy the ECS ADIZ). South Korea initially ordered its air carriers to defy the ECS ADIZ, but later permitted its air carriers to decide whether to comply with the ECS ADIZ rules. Jeyup S. Kwaak, *Seoul to Allow South Korean Airlines to Recognize New China Defense Zone*, WALL STREET JOURNAL (Dec. 12, 2013), <http://www.wsj.com/news/articles/SB10001424052702304202204579253272114964690>.

⁴⁶⁹ *See Announcement of the Aircraft Identification Rules for the ECS ADIZ*, *supra* note 2.

⁴⁷⁰ USCC 2014 Report, *supra* note 43, at 243.

⁴⁷¹ Annex 11, *supra* note 31, Std. 2.16.1.

⁴⁷² *Id.*, Std. 2.17.1.

timely promulgation of information regarding activities potentially hazardous to civil aircraft.⁴⁷³

For example, following establishment of the ECS ADIZ, South Korea extended the KADIZ by 186 miles to correspond with the boundaries of the pre-existing South Korean FIR.⁴⁷⁴ In contrast to Beijing's actions, Seoul engaged neighboring countries and the United States prior to amending the parameters of the security zone. The United States expressed appreciation for the "prior consultations" regarding the KADIZ adjustment and noted that such actions were "consistent with international practice and respect for the freedom of overflight and other internationally lawful uses of international airspace."⁴⁷⁵

China should have engaged the international community and provided notice before establishing the ECS ADIZ, especially because the zone covers disputed territory and overlaps with existing ADIZ and FIR in the East China Sea. Moreover, in establishing the zone, China also threatened the use of force against non-compliant aircraft through military interceptions. Such actions pose an undue threat to international aviation and an abdication of China's international legal responsibilities to provide prior notice and consultation. As highlighted by the official investigation of the MH17 crash, China had a heightened responsibility to provide information on the ECS ADIZ in a structured and timely manner given that Beijing had sole access to its plans to establish the security zone in an area of dispute and conflict.⁴⁷⁶

Unsurprisingly, the international response to China's abrupt action was sharp and critical. Japan rejected the ECS ADIZ and protested China's "unilateral" establishment of the zone, labelling the action as "extremely dangerous" because it could "lead to an unexpected occurrence of accidents in the airspace."⁴⁷⁷ South Korea expressed concern that the ECS ADIZ was "deepening" competition and conflict in the region and requested the zone's rescission in areas overlapping the KADIZ.⁴⁷⁸ Taiwan was "deeply concerned" with China's actions and vowed, in contrast, to remain in close contact with all sides to maintain peace

⁴⁷³ *Id.*, Std. 2.18.1.

⁴⁷⁴ Choe Sang-Hun, *South Korea Announces Expansion of its Air Defense Zone*, N.Y. TIMES (Dec. 8, 2013), http://www.nytimes.com/2013/12/09/world/asia/east-china-sea-air-defense-zone.html?_r=0.

⁴⁷⁵ Jen Psaki, Spokesperson, *Daily Press Briefing*, U.S. DEP'T OF STATE (Dec. 9, 2013), <http://www.state.gov/r/pa/prs/dpb/2013/12/218531.htm#CHINA>.

⁴⁷⁶ MH17 Report, *supra* note 227, at 265.

⁴⁷⁷ Protest by Mr. Junichi Ihara, Director-General of the Asian and Oceanian Affairs Bureau, Min. of Foreign Affairs, to Mr. Han Zhingiang, Minister of the Chinese Embassy in Japan, China's Establishment of an Air Defense Identification Zone in the East China Sea (Nov. 23, 2013), http://www.mofa.go.jp/press/release/press4e_000100.html.

⁴⁷⁸ CRS ADIZ Report, *supra* note 7, at 21.

and stability.⁴⁷⁹ The United States noted that China’s “unilateral action” was “destabilizing” and “increase[d] the risk of misunderstanding and miscalculation.”⁴⁸⁰

In sum, China’s failure to provide prior notice and coordination when announcing the ECS ADIZ represents a deviation from accepted international practice that created an undue risk for civil aviation and unnecessarily escalated tensions in East Asia.

D. *Problematic Application of ADIZ to Both Civil and State Aircraft*

China is requiring that any aircraft flying in the ECS ADIZ follow procedures allowing for identification, monitoring and interception.⁴⁸¹ The United States also applies ADIZ rules to all aircraft – except specifically delineated state aircraft (U.S. Department of Defense and law enforcement aircraft).⁴⁸²

As noted, there are no generally accepted international rules, whether conventional or customary, as to what constitutes “state aircraft” and what constitute “civil aircraft.”⁴⁸³ This ambiguity has led to international disputes with regard to interception of aircraft, the chief means of enforcing ADIZ. State practice suggests that state aircraft may be more susceptible to interception in international airspace due to the greater protections afforded to civil aircraft under the Chicago Convention.

Thus, even if China purports to legitimately apply the ECS ADIZ to both civil and state aircraft, the legality of enforcing the security zone through interception in international airspace could turn on whether the aircraft is deemed “state” as opposed to “civil.” Beijing is likely aware of the risk of international legal censure should an interception of civil aircraft occur within the zone. Following establishment of the ECS ADIZ, China sought to “assure[] commercial airlines that normal flights of foreign airlines would not be [disrupted], despite the broad [scope of] the ECS ADIZ rules.”⁴⁸⁴ Beijing has shown a reluctance to enforce the ECS ADIZ against civil aircraft even when the flight has disregarded

⁴⁷⁹ Executive Yuan, Office of Information Services, “Executive Yuan Responds Firmly to Mainland China’s East China Sea ADIZ Declaration,” (Nov. 29, 2013), http://www.ey.gov.tw/en/News_Content2.aspx?n=1C6028CA080A27B3&s=88C061B0B11D4AC8.

⁴⁸⁰ Chuck Hagel, Secretary of Defense, Statement on the East China Sea air Defense Identification Zone (Nov. 23, 2013), <http://archive.defense.gov/Releases/Release.aspx?ReleaseID=16392>.

⁴⁸¹ The rules demand that any aircraft flying in the ADIZ must: report a flight plan, maintain radio communication and respond to identification inquiries, maintain radar transponder function, and exhibit clear nationality and logo markings. *See Announcement of the Aircraft Identification Rules for the ECS ADIZ*, *supra* note 2.

⁴⁸² 14 C.F.R. § 99.1 (2015).

⁴⁸³ *See Study on Civil/State Aircraft*, *supra* note 269, ¶ 1.1.

⁴⁸⁴ CRS ADIZ Report, *supra* note 7, at 11.

the security zone's rules.⁴⁸⁵ In comparison, China has sought to enforce the ECS ADIZ against Japanese state aircraft crossing the zone.⁴⁸⁶

E. Enforcement and Protections Required for Civil Aircraft

China is enforcing the ECS ADIZ through military interception and the threat thereof. Aircraft flying in the ECS ADIZ must follow the instructions of the Ministry of National Defense or China's armed forces will adopt "defensive emergency measures to respond to aircraft that do not cooperate in the identification or refuse to follow the instructions."⁴⁸⁷ Some observers have determined China's military enforcement posture to be a shift away from standard international practice with regard to ADIZs.⁴⁸⁸

The U.S. military likewise warns that any aircraft flying within U.S. ADIZs without authorization may be identified as a threat and treated as an enemy aircraft, potentially leading to interception by fighter aircraft.⁴⁸⁹ However, unlike China, the United States, through the FAA, has published specific guidance on the interception process for civil aircraft in the event of a violation of U.S. ADIZ requirements.⁴⁹⁰ The U.S. military has also published standard rules of engagement for interception of foreign state aircraft.⁴⁹¹

China's failure to publish interception and rules of engagement in relation to the ECS ADIZ increases "the risk of operational miscalculation or accidents among civilian and military aircraft" flying in the region.⁴⁹² As noted, China has sought to reassure foreign airlines operating in the ECS ADIZ that normal flights

⁴⁸⁵ An example of this restraint is found in the case of Lao Airlines Flight QV916. On July 25, 2015, China instructed Lao Airlines Flight QV916 to turn back after the flight entered the ECS ADIZ, but prior to the flight entering Chinese national airspace. China alleged that Flight QV916 failed to file a complete flight plan and was unresponsive to communications, actions which violate the ECS ADIZ rules. Beijing, however, expressly disavowed any involvement of the ECS ADIZ. Instead, to support its actions, China cited its responsibility, assigned under the Chicago Convention, for providing air traffic services within Shanghai FIR (ZSHA), an area that includes airspace above the high seas. See Roncevert Almond, *China's Air Defense Identification Zone and Lao Airlines Flight QV916*, THE DIPLOMAT (Dec. 15, 2015), <http://thediplomat.com/2015/12/chinas-air-defense-identification-zone-and-lao-airlines-flight-qv916/>.

⁴⁸⁶ *Id.*, at 14 (noting that the ECS ADIZ has targeted Japanese military aircraft in particular).

⁴⁸⁷ See *Announcement of the Aircraft Identification Rules for the ECS ADIZ*, *supra* note 2.

⁴⁸⁸ See Lee, *supra* note 379.

⁴⁸⁹ *NORAD Intercept Procedures, Air Defense Identification Zone & Temporary Flight Restrictions*, NORTH AMERICAN AEROSPACE DEFENSE COMMAND at 16, <https://www.faa.gov/files/gslac/library/documents/2011/Jan/49877/ADIZ%20TFR%20Intercepts%20w%20answers.pdf>.

⁴⁹⁰ See FAA Manual, *supra* note 92, § 5-6-2 (Interception Procedures).

⁴⁹¹ See U.S. Navy Commander's Handbook, *supra* note 26, ¶ 4.4.2.

⁴⁹² USCC 2014 Report, *supra* note 43, at 243. See also *Troubled Skies*, *supra* note 36; Pedrozo *supra* note 49, at 93-94 (observing that China has failed to publish interception procedures in connection with the ECS ADIZ in contrast to state practice and ICAO standards).

would not be disrupted. Despite these assurances, foreign civil and military aircraft still face the threat of Chinese interception and potential use of force. Since declaration of the ECS ADIZ, China has conducted surveillance and patrol operations to monitor flights within the zone.⁴⁹³ On at least two occasions in 2014, Chinese interceptor aircraft have come within 200 feet of Japanese military reconnaissance aircraft in the ECS ADIZ – encounters that threatened the safety and security of the aircraft and crew.⁴⁹⁴ In November 2014, the United States and China announced a Memorandum of Understanding On the Rules of Behavior for the Safety of Air and Maritime Encounters, which represents a step forward in addressing this issue.⁴⁹⁵ However, the document is neither legally binding nor applicable to third parties, and remains incomplete regarding aerial encounters.⁴⁹⁶

Any Chinese interception of civil aircraft within the ECS ADIZ must comply with the Chicago Convention's interception standards as they apply wherever civil aircraft are in flight regardless of jurisdiction.⁴⁹⁷ Interception should be undertaken only as a last resort; if undertaken, an interception will be limited to determining the identity of the civil aircraft, unless it is necessary to return the aircraft to its planned track, direct it beyond the boundaries of Chinese national airspace, guide it away from a prohibited, restricted or danger area or instruct it to effect a landing at a designated airport.⁴⁹⁸

Although different standards apply to the interception and use of force against state or military aircraft, there are still limitations on Chinese enforcement of the ECS ADIZ. China must determine the imminence and gravity of the threat posed by the military aircraft flying in the ECS ADIZ.⁴⁹⁹ While “aircraft with military markings may be presumed to be on a military mission unless evidence is produced to the contrary by its state of registry,”⁵⁰⁰ the intercepting aircraft must first determine if the military aircraft is hostile and intends to actually intrude sovereign airspace.⁵⁰¹ Military aircraft should also be given the reasonable opportunity to signal its non-hostile intent, respond to communications from the

⁴⁹³ USCC 2014 Report, *supra* note 43, at 242–243.

⁴⁹⁴ *Id.*

⁴⁹⁵ Mark J. Valencia, *The U.S.-China MOU on Air and Maritime Encounters*, THE DIPLOMAT (Nov. 17, 2014), <http://thediplomat.com/2014/11/the-us-china-mou-on-air-and-maritime-encounters/>.

⁴⁹⁶ *Id.*

⁴⁹⁷ Security Council Resolution, S/RES/1067 (Jul 26, 1996), <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N96/190/72/PDF/N9619072.pdf?OpenElement>.

⁴⁹⁸ *Id.*

⁴⁹⁹ Petras, *supra* note 34, at 8.

⁵⁰⁰ U.S. Navy Commander's Handbook, *supra* note 26, ¶ 4.4.2.

⁵⁰¹ The United States, for instance, “does not recognize the right of a coastal state to apply its ADIZ procedures to foreign aircraft not intending to enter . . . U.S. airspace.” U.S. Navy Commander's Handbook, *supra* note 26, ¶ 2.7.2.3.

intercepting aircraft, or otherwise change course away from Chinese national airspace.⁵⁰²

F. ECS ADIZ Legal and Security Concerns

Objections to China's actions are not necessarily with the right to declare an ADIZ, but rather relate to the broad temporal and geographic scope of the ECS ADIZ.⁵⁰³ According to China's Defense Ministry, the specific dimensions of the ECS ADIZ are based on the needs of China's national air defense and maintaining flying orders,⁵⁰⁴ and also to respond to the threat of foreign combat aircraft that can reach China's national airspace within a short time.⁵⁰⁵ The Chinese Ministry of National Defense further explained that "a relevant country" – presumably Japan – established its ADIZ as early as 1969, which is also about 130 kilometers from the Chinese mainland at its closest distance.⁵⁰⁶

By comparison, the Contiguous U.S. ADIZ extend more than 300 nautical miles into the Atlantic Ocean and more than 400 miles into the Pacific Ocean⁵⁰⁷, and has been in place for more than fifty years.⁵⁰⁸ However, none of the U.S. ADIZs overlap with contested territory. In fact, as noted, the United States and other states have exercised restraint in the parameters of their ADIZs to account for the sovereign airspace of other countries.⁵⁰⁹

The ECS ADIZ encompasses the Senkaku Islands, which are administered by Japan, but claimed by China and Taiwan.⁵¹⁰ It also overlaps with existing Japanese, South Korean and Taiwanese ADIZs in the East China Sea.⁵¹¹ South

⁵⁰² This would be consistent with the normative standards under the Chicago Convention, as discussed below, applicable to interception of civil aircraft that trespass national airspace due to error, distress, or *force majeure*. See U.S. Navy Commander's Handbook, *supra* note 26, ¶ 4.4.2. See also Petras, *supra* note 34, at 8.

⁵⁰³ See, e.g., Marie Harf, *Daily Press Briefing*, U.S. DEP'T OF STATE (Dec. 6, 2013), <http://www.state.gov/r/pa/prs/dpb/2013/12/218491.htm> ("China's new ADIZ purportedly applies to all aircraft, including those not intending to enter, depart, or transit China's national air space."); see also Kerry Statement, *supra* note 24.

⁵⁰⁴ See *Defense Ministry Spokesman Responds to ADIZ Questions*, *supra* note 3.

⁵⁰⁵ *Id.*

⁵⁰⁶ *Id.*

⁵⁰⁷ 14 C.F.R. § 99.43 (2015) (defining boundaries of the Contiguous U.S. ADIZ).

⁵⁰⁸ The initial ADIZs were established in 1950. 15 Fed. Reg. 9319 (1950).

⁵⁰⁹ Pedrozo, *supra* note 49, at 74.

⁵¹⁰ The Senkaku Islands are referred to as the Diaoyu Islands in China and Taiwan. See *Who really owns the Senkaku Islands?*, THE ECONOMIST (Dec. 3, 2013), <http://www.economist.com/blogs/economist-explains/2013/12/economist-explains-1>.

⁵¹¹ See IATA Operational Bulletin, *supra* note 5; MINISTRY OF DEFENSE, REPUBLIC OF KOREA (Dec. 4, 2013), http://www.mnd.go.kr/user/boardList.action?command=view&page=3&boardId=O_47261&boardSeq=O_56323&titleId=null&id=mnd_eng_030100000000; Tsai Der-sheng: Taiwan will use force if needed to protect ADIZ, TAIWAN NEWS (Dec. 4, 2013), http://www.taiwannews.com.tw/etn/news_content.php?id=2359759.

Korea asked that China rescind portions of the ECS ADIZ that overlap with the KADIZ, but China rejected this request.⁵¹² The ECS ADIZ also aligns with a significant portion of China's declared EEZ.⁵¹³ As a result, the ECS ADIZ has been viewed as a means to exercise dominion and legitimate sovereignty claims in the East China Sea – beyond China's national territory and airspace.⁵¹⁴ The United States has criticized the ECS ADIZ as demonstrating Beijing's willingness to advance parochial interests in the East China Sea in contravention to international norms safeguarding the use of international airspace and waters.⁵¹⁵

UNCLOS, which China has ratified, does extend China's limited functional jurisdiction into international waters through the three coastal zones. However, under UNCLOS China may not infringe or unjustifiably interfere with the high seas freedoms of overflight and navigation.⁵¹⁶ China must exercise due regard for the rights and freedoms of other states in international airspace and waters.⁵¹⁷ The ECS ADIZ cannot be a means for acquiring international airspace by prescriptive title. Any attempt to subject parts of the high seas to China's sovereignty is invalid.⁵¹⁸

When explaining the ECS ADIZ, China's Ministry of National Defense attempted to assuage concerns that China was impermissibly extending its sovereignty into international territory.⁵¹⁹ However, China has a history of attempting to limit the freedoms of navigation and overflight in the EEZ for security reasons that are unrelated to the economic or efficiency rationales underlying the functional jurisdiction set forth in international maritime law.

An example of China's broad assertions of jurisdiction over the EEZ is the incident of April 1, 2001, where a Chinese F-8 military aircraft intercepted and collided with a U.S. EP-3 military reconnaissance aircraft conducting routine operations above the Chinese EEZ in the South China Sea.⁵²⁰ The impact caused the F-8 fighter to crash into the ocean and led to the pilot's death. The U.S. aircraft made an emergency landing on Hainan Island, entering Chinese airspace

⁵¹² CRS ADIZ Report, *supra* note 7, at 21.

⁵¹³ See James Manicom, *Viewpoints: China air zone tensions*, BBC NEWS (Nov. 28, 2013), <http://www.bbc.com/news/world-asia-25116119>.

⁵¹⁴ See Hsu, *supra* note 34; see also USCC Report, *supra* note 43, at 242 (noting that the ECS ADIZ "provides China the opportunity to augment its growing collection of maps and legal documents that attempt to justify its maritime territorial claims").

⁵¹⁵ USCC 2014 Report, *supra* note 43, at 243.

⁵¹⁶ UNCLOS, *supra* note 19, arts. 58(1), 78(2), 86–87.

⁵¹⁷ See, e.g., *id.*, arts. 56(2), 87.

⁵¹⁸ *Id.*, art 89.

⁵¹⁹ See *Defense Ministry Spokesman Responds to ADIZ Questions*, *supra* note 3.

⁵²⁰ SHIRLEY KAN ET AL., CONG. RESEARCH SERV. RL30946, CHINA-U.S. AIRCRAFT COLLISION INCIDENT OF APRIL 2001: ASSESSMENTS AND POLICY IMPLICATIONS 1–6 (2001), <http://www.fas.org/sgp/crs/row/RL30946.pdf>.

without authorization.⁵²¹ The Chinese subsequently seized the aircraft and took the U.S. crewmembers into custody.⁵²²

The Chinese government blamed the United States for the incident, requested an apology, and demanded an end of such operations over the EEZ as a threat to national security.⁵²³ The Chinese asserted that the U.S. surveillance flight over the EEZ abused the freedom of overflight and failed to demonstrate due regard for the rights of China within in this zone.⁵²⁴ The Chinese claimed that a military reconnaissance flight by itself presented a security threat within the EEZ that could be lawfully prevented.⁵²⁵ One theory is that China attempted to articulate a *sui generis* status of the EEZ, wherein the freedoms of navigation and overflight are not similarly applied as within the high seas.⁵²⁶ According to this concept, UNCLOS established a specific legal regime for the EEZ⁵²⁷ under which the scope of freedoms enjoyed by other states are not equivalent in scope to the traditional high seas freedoms as a result of the due regard that must be shown to coastal state's rights within the EEZ.⁵²⁸

In contrast, the United States steadfastly maintained a complete high seas freedom of overflight in international airspace, including for reconnaissance flights, above the EEZ.⁵²⁹ This claim rests on the presumption that the EEZ regime fully preserved the high seas freedoms of navigation and overflight.⁵³⁰ Judge Laing of International Tribunal for the Law of the Sea has concluded that the EEZ regime "has not diminished the well-established freedom of navigation."⁵³¹ Additionally, due regard shown to the rights of coastal states in the

⁵²¹ *Id.*

⁵²² *Id.*

⁵²³ *Spokesman Zhu Bangzao Gives Full Account of the Collision Between US and Chinese Military Planes*, Ministry of Foreign Affairs of the P.R.C. (Apr. 4, 2001), <http://news.xinhuanet.com/english/20010404/393124A.htm>.

⁵²⁴ *Id.*

⁵²⁵ *Id.*

⁵²⁶ Petras, *supra* note 34, at 52; Hailbronner, *supra* note 73, at 504.

⁵²⁷ UNCLOS, *supra* note 19, art. 55 (specific legal regime of the exclusive economic zone).

⁵²⁸ The *sui generis* concept relies on the language of Article 58(3) which qualifies the freedoms of navigation and overflight: "In exercising their rights . . . in the exclusive economic zone, States shall have due regard to the rights and duties of the coastal State and shall comply with the laws and regulations adopted by the coastal State in accordance with the provisions of this Convention and other rules of international law in so far as they are not incompatible with this Part." UNCLOS, *supra* note 19, art. 58(3).

⁵²⁹ See KAN ET AL., *supra* note 520, at 7 (citing comments of the U.S. Deputy Secretary of State that maintaining such freedom of overflight is the first priority of the U.S.).

⁵³⁰ See, e.g., U.S. Navy Commander's Handbook, *supra* note 26, ¶ 1.6.2; see also Petras, *supra* note 34, at 51–52; Hailbronner, *supra* note 73, at 504 (observing that the negotiation history makes clear that the freedoms of navigation and overflight under the EEZ regime were "quantitatively" the same as the freedoms exercised in the high seas).

⁵³¹ Margaret Lewis, *An Analysis of State Responsibility for the Chinese-American Airplane Collision Incident*, 77 N.Y.U.L. REV. 1404, 1421–22 (2002) (citing the separate opinion of Judge Laing in *M/V "SAIGA" (No. 2) (St. Vincent v. Guinea)* Int'l Trib. for the Law of the Sea, para. 53 (July 1, 1999)).

EEZ must be reciprocated by the coastal State for the rights of other states, including the freedoms of overflight and navigation.⁵³² This position is consistent with the ICJ's holding in *Nicaragua* that U.S. naval maneuvers in the immediate vicinity, but beyond the Nicaraguan territorial sea did not constitute a threat to use force.⁵³³

The United States further blamed China for violating standard interception procedures under international law and the principle that responsibility for avoiding collisions lies with the more maneuverable intercepting aircraft.⁵³⁴ Additionally, even though the EP-3 intruded into Chinese sovereign airspace, the aircraft was in distress and thus permitted to take emergency action (i.e. an emergency landing) under customary international law.⁵³⁵ Nevertheless, the United States eventually issued a statement regretting the death of the Chinese pilot and violation of Chinese national airspace due the emergency landing, but otherwise refused to accept responsibility or apologize for the routine mission in international airspace.⁵³⁶

The EP-3 incident prominently raised the impact of linking a coastal State's security rights with EEZ's functional jurisdiction. During the incident, no other governments in the region expressed support for the Chinese position.⁵³⁷ Moreover, long-standing state practice, including by China, evidences the right of overflight, including for surveillance purposes, above the EEZ.⁵³⁸ International law in this area represents a struggle to balance the freedoms of navigation and overflight against the coastal state's right to self-defense from threats originating in or above the high seas.⁵³⁹

⁵³² The reciprocal obligation is set forth in Article 56(2). *See id.* at 1422.

⁵³³ *Nicaragua* case, *supra* note 45, at ¶ 227.

⁵³⁴ *See* KAN ET AL., *supra* note 520, at 18.

⁵³⁵ *See* Bourbonniere & Haeck, *supra* note 271, at 948 (upholding the right based on elementary considerations of humanity); *see also* Lewis, *supra* note 531, at 1421–22 (finding that customary international law supports right of aircraft to land on foreign soil when necessitated by distress); *see* KAN ET AL., *supra* note 520, at 7 (finding a right under international law based on analogy to the right of ship in distress to enter national waters); *compare* Michael Schmitt, *Clipped Wings: Effective and Legal No-Fly Zone Rules of Engagement*, 20 LOY. L.A. INT'L & COMP. L.J. 727, 785 (1998) (concluding that the right of military aircraft to claim force majeure is unsettled under international law).

⁵³⁶ *See* KAN ET AL., *supra* note 520, 1–6 (citing White House, Remarks by the President in Photo Opportunity with the Cabinet, April 9, 2001).

⁵³⁷ Dutton, *supra* note 34, at 703–705.

⁵³⁸ The United States noted that at the time of the incident, six other countries in Asia, including China, flew reconnaissance flights in international airspace. The United States had been flying such operations in international airspace for more than five decades. *See* KAN ET AL., *supra* note 520, at 6, 26–28.

⁵³⁹ In the *Nicaragua* case, the ICJ determined that aggressive U.S. naval maneuvers, beyond the territorial sea, did not violate the prohibition on the use of force against *Nicaragua's* territorial integrity or political independence. *Nicaragua* case, *supra* note 45, at ¶ 227.

Following the EP-3 incident, some Chinese commentators advocated the establishment of an ADIZ above the EEZ in the South China Sea in order to deter or restrict foreign military operations.⁵⁴⁰ If China established the ECS ADIZ pursuant to this logic, then the zone itself would upset the delicate balance set forth in UNCLOS between protecting the sovereignty interests of coastal states and facilitating the peaceful, equitable, and efficient use of the international airspace and waters. Indeed, any conflicts regarding EEZ functional jurisdiction should be resolved on the “basis of equity” and in light of “all the relevant circumstances, taking into account the respective importance of the interests involves to the parties as well as to the international community as a whole,” as set forth in UNCLOS.⁵⁴¹ Observers have noted that the evaluative nature of this provision – the so-called “Castaneda formula” – suggests that UNCLOS did not fully resolve all issues of rights and jurisdiction of coastal states and other states within the EEZ.⁵⁴²

The ECS ADIZ may also represent Beijing’s first proposal to establish a new state practice where ADIZs are used for a prescriptive purpose: for the administration and effective occupation of disputed territory.⁵⁴³ Indeed, the United States has interpreted the ECS ADIZ as demonstrating an intent by China to advance its disputed territorial claims in the East China Sea.⁵⁴⁴ China recently threatened to establish a new ADIZ above the South China Sea, where China has asserted “undisputed sovereignty” and “related rights and jurisdiction.”⁵⁴⁵ Beijing’s territorial claim is based on a “nine-dash” map encircling the South China Sea, an area equal to about 22 percent of China’s existing land territory and the vast majority of airspace in the South China Sea.⁵⁴⁶ Beijing may feel compelled to align an ADIZ with the dashed-line map in order to preserve, or at least not undermine, its disputed claims in the South China Sea. China is developing a series of landing strips on reclaimed islands in the contested Spratly archipelago that could be used to enforce the ADIZ far from the Chinese

⁵⁴⁰ Dutton, *supra* note 34, at n. 100.

⁵⁴¹ UNCLOS, *supra* note 19, art. 59.

⁵⁴² Hailbronner, *supra* note 73, at 505 (noting that the concept of the EEZ is still evolving).

⁵⁴³ See Roncevert Almond, *Mandate of Heaven: An ADIZ in the South China Sea*, THE DIPLOMAT (Jul.

25, 2015), <http://thediplomat.com/2015/07/mandate-of-heaven-an-adiz-in-the-south-china-sea/>.

⁵⁴⁴ U.S. Dept. of Defense, Annual Report to Congress: Military and Security Developments Involving the

People’s Republic of China 2015, 3 (2015), http://www.defense.gov/Portals/1/Documents/pubs/2015_China_Military_Power_Report.pdf.

⁵⁴⁵ Permanent Mission of the People’s Republic of China, Note Verbale CML/8/2011, April 14, 2011,

http://www.un.org/Depts/los/clcs_new/submissions_files/mysvnm33_09/chn_2011_re_phl_e.pdf.

⁵⁴⁶ Permanent Mission of the People’s Republic of China, Notes Verbales CML/17/2009, CML/18/2009, May 7, 2009,

http://www.un.org/Depts/los/clcs_new/submissions_files/mysvnm33_09/chn_2009re_mys_vnm_e.pdf and

http://www.un.org/Depts/los/clcs_new/submissions_files/vnm37_09/chn_2009re_vnm.pdf.

mainland.⁵⁴⁷ In response, the United States issued a warning to China that any new ADIZ over the South China Sea would be a “provocative and unilateral act that would raise tensions and call into serious question China’s commitment to diplomatically managing territorial disputes in the South China Sea.”⁵⁴⁸ Raising the stakes, the United States has also increased naval patrols in the South China Sea in order to rebut any unlawful territorial claims⁵⁴⁹ arising from China’s land-reclamation projects.⁵⁵⁰

Given the legal ambiguities, competing jurisdictional claims, and existing tensions in the Asia-Pacific region, the ECS ADIZ may unfortunately result in an incident⁵⁵¹, such as Chinese interception of a traversing foreign aircraft, which may force clarification of the legal force and scope of ADIZs. If this were to occur, the six primary elements of ADIZ, as derived from state practice and principles of international law, will be useful in evaluating the merit of competing claims.

IV. Conclusion

The ECS ADIZ presents complex legal issues and geopolitical risks due to the lack of an express foundation under international law. ADIZs serve as defensive measures developed under customary international law, subject to variances and objections through countervailing state action. To achieve greater clarity, this article has identified six primary elements of ADIZs: (1) protecting national security; (2) regulating entry into national airspace; (3) administration through aircraft identification and control procedures; (4) application to all aircraft regardless of civil or state character; (5) enforcement through interception; and (6) extensive temporal and geographic scope. These elements are defined using the state practice of the United States, the lead actor in developing ADIZs, and then further measured under principles of international law.

The primary elements of ADIZs are distinct, but interdependent. For example, as a condition for entry into the national airspace and through the identification and control of incoming aircraft, ADIZs serve to maintain the national security of states consistent with the right of self-defense and principle of exclusive sovereignty. The application of ADIZ rules to all aircraft, civil and

⁵⁴⁷ Greg Torode, *China's Island Airstrips to Heighten South China Sea Underwater Rivalry*, REUTERS (Sept.17, 2015).

⁵⁴⁸ Marie Harf, *Daily Press Briefing*, U.S. DEP’T OF STATE (Jan. 31, 2014), <http://www.state.gov/r/pa/prs/dpb/2014/01/221118.htm#CHINA>.

⁵⁴⁹ Article 60 of UNCLOS states that artificial islands, installations, and structures are not islands and do not generate any territorial sea or other maritime zones. UNCLOS, *supra* note 19, art. 60.

⁵⁵⁰ Torode, *supra* note 547.

⁵⁵¹ A white paper released by the Japanese Ministry of defense in early August noted that China’s creation of the ECS ADIZ was a “profoundly dangerous act” that could lead to “unintended consequences in the East China Sea.” See *Defense of Japan 2014*, MINISTRY OF DEFENSE OF JAPAN 42 (2014), http://www.mod.go.jp/e/publ/w_paper/pdf/2014/DOJ2014_1-1-3_web_1031.pdf.

state, becomes significant and problematic when states enforce ADIZs through interceptions. Interception as an enforcement action raises jurisdictional concerns given the extensive temporal and geographic scope of ADIZs. In turn, the scope of ADIZs must be continuously measured against the limitations of the right to self-defense and territorial nexus underlying the national security objective and the condition for entry. The protection of exclusive sovereignty through ADIZs should not lead to a right to exclude others from spaces in or above the high seas.

China's establishment of the ECS ADIZ highlights the critical importance of resolving the legal ambiguities associated with ADIZs. As a result of China's actions, the potential for miscommunication, miscalculation, and armed conflict in the region has increased. The opportunity is ripe to mitigate this risk through the standardization of ADIZs through a clear articulation of the primary elements of ADIZ in an appropriate international law-making forum. On March 11, 2014, the United States and Japan submitted a letter to ICAO challenging the ECS ADIZ as violating the Chicago Convention.⁵⁵² To date, ICAO has not acted to resolve the dispute.

The ICAO Council, the governing body of the treaty-regime, is a proper forum to begin review of the ECS ADIZ question.⁵⁵³ The ICAO Council may settle disputes regarding the interpretation and application of the Chicago Convention.⁵⁵⁴ There is no compulsory requirement that all parties to the dispute must agree upon an application to the Council or appear before the Council.⁵⁵⁵ Therefore, China or another state would not have a procedural veto power to prevent the proceedings.⁵⁵⁶ The Council's decision could be appealed to the ICJ or to an ad hoc arbitral tribunal.⁵⁵⁷

In the past, the ICAO Council has formally adjudicated disputes between contracting states⁵⁵⁸ such as clashes over traffic rights between states with rival

⁵⁵² East-Asia-Intel.com, Joint U.S.-Japan letter to UN civil aviation agency challenging China's ADIZ gets positive response, <http://eastasiaintel.com/joint-u-s-japan-letter-to-un-civil-aviation-agency-challenging-chinas-adiz-gets-positive-response/>.

⁵⁵³ The ICAO Council represents 36 contracting states elected by the Assembly for three year terms. Chicago Convention, *supra* note 21, art. 50.

⁵⁵⁴ Under the Chicago Convention, a dispute between ICAO Member States "relating the interpretation or application of the Convention" can be heard by the ICAO Council by application of "any State concerned in the disagreement." *Id.*, art. 84.

⁵⁵⁵ *Id.*, art. 84.

⁵⁵⁶ If China were a party to the proceeding, as a Council member, China could not exercise a vote given the conflict of interest rules set forth in the Chicago Convention. *Id.*, art. 84 ("No member of the Council shall vote in the consideration by the Council of any dispute to which it is a party").

⁵⁵⁷ *Id.*, arts. 84–85. Decisions of the Council are, if appealed from, suspended until the appeal is decided. The decisions of the ICJ and of an arbitral tribunal are final and binding. *Id.*, art. 86.

⁵⁵⁸ For a review of adjudications before the ICAO Council see Paul S. Dempsey, *Flights of Fancy and Fights of Fury: Arbitration and Adjudication of Commercial and Political Disputes in International Aviation*, 32 GA. J. INT'L & COMP. L. 231 (2004).

territorial claims (India v. Pakistan)⁵⁵⁹ and noise emissions involving major aviation powers (EU v. U.S.).⁵⁶⁰ The ICAO Council has also been repeatedly called upon by the UN Security Council to investigate complex issues of international law and provide technical findings on interceptions in international airspace, the chief method of enforcing ADIZ. A state party to the Chicago Convention could resort to this forum in the event that its civil aircraft was intercepted by China when such aircraft was merely traversing the ECS ADIZ. Such action by China could be interpreted to be a violation of Article 3 *bis*, which was established to protect civil aircraft from the use of force.⁵⁶¹

However, waiting to adjudicate a disputed interception or aircraft incident in the ECS ADIZ is simply irresponsible, especially in light of the clear threat to civil aviation, the heightened tensions in the region, and the greater risk to international peace and security. Immediate action is required to resolve the legal uncertainties regarding ADIZs. Given that ADIZs are a product of custom, the responsibility for clarifying ADIZ rules and developing a consensus lies primarily with states with or seeking to establish ADIZs. In particular, the states of the Asia-Pacific possess the historic role, the current opportunity and the pressing interest to lead the development of international law in this area. The principle characteristics of ADIZs set forth in this article will prove useful for such an endeavor. Indeed, by defining and applying the primary elements of ADIZ, as derived from state practice and principles of international law, the objective of this article has been to standardize the practice of states, reduce the threat to civil aircraft in disputed airspace, preserve the freedoms associated with international airspace, and mitigate the risk of great power conflict in East Asia.

⁵⁵⁹ The India-Pakistan dispute in 1952 involved the first complaint submitted to the ICAO Council for adjudication. *Id.* at 271.

⁵⁶⁰ *Id.* at 278–286 (providing a case study of the Hushkits dispute); *see generally*, Sean Murphy, *Contemporary Practice of the United States Relating to International Law: Admissibility of US-EU “Hushkits” Dispute before the ICAO*, 95 AM. J. INT’L L. 387 (2001).

⁵⁶¹ Chicago Convention, *supra* note 21, art. 3 *bis*.