

A CRITICAL APPRAISAL ON THE LEGALITY OF ADIZ: AN INTERNATIONAL LAW PERSPECTIVE

By
OLAMIDE OYINDAMOLA AKINFOLARIN

Submitted in fulfilment of the requirements for the degree LLM in International Air,
Space and Telecommunications Law
In the FACULTY OF LAW,
UNIVERSITY OF PRETORIA

December 2018

Supervisor: Prof. Dr. Stephan Hobe

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SUMMARY

Air Defence Identification Zones are unilaterally declared designated areas of non-territorial airspace where states impose reporting obligations on civil and military aircraft for the purpose of national security.¹ The purpose for ADIZ is said to be national security; however some argue that ADIZs are used as a ploy by states to extend their territory and in doing so violate international air law by restricting the freedom of overflight in international airspace.² However this cannot be argued at face value, simply because there is no universal procedure for the adoption of ADIZ, leaving the implementation of ADIZ rules open to varied practice by states. The United States and China are used as case studies to show the varied practice of ADIZ by states and the cause of such misconception. One major difference is the threat of the use of force in the East China Sea ADIZ for non-compliance with China's ADIZ rules. This is a clear violation of international law as international airspace is free for all and no state can claim exclusive jurisdiction over it. The legality of ADIZ is the main concern of this thesis and different sources of international law will be discussed with an aim to conclude the legality of ADIZ.

¹ C. K. Lamont, *Conflict in the Skies: The Law of Air Defense Identification Zones*, Air & Space Law, 39(3), 187-202 pg 189 (2014)

² E. Cuadra, *Air Defense Identification Zones: Creeping Jurisdiction in the Airspace*, 18 Virginia Journal of International Law 485, at 489-493 (1977)

DECLARATION OF ORIGINALITY

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SIGNATURE

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Abbreviations

ADIZ	-	Air Defence Identification Zone
ATS	-	Air Traffic Services
ECS	-	East China Sea
EEZ	-	Exclusive Economic Zone
ICAO	-	International Civil Aviation Authority
ICJ	-	International Court of Justice
FIR	-	Flight Information Region
SARPs	-	Standard and Recommended Practices
UN	-	United Nations
UNCLOS	-	United Nations Convention on the Law of the Sea
US	-	United States

CHAPTER ONE

HISTORY AND EVOLUTION OF AIR DEFENCE IDENTIFICATION ZONES

1.1 Introduction

Air Defence Identification Zones (ADIZs) are 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).³ It is a publicly defined area which may extend beyond national territory in which unidentified aircraft are liable to be interrogated and, if necessary, intercepted for identification before they cross into sovereign airspace⁴. Functionally, ADIZs can also be used to help reduce the risk of mid-air collisions and facilitate search and rescue missions.⁵ Many nations have established one or more ADIZs in the interest of national security.⁶ One problem with ADIZs is the absence of any international agreement or consensus regarding the establishment of or the flight operations and air traffic procedures related to such airspace.⁷

From the above the following can be deduced; firstly, ADIZ is either within a state's territory or outside same. However, ADIZ created outside a state's territory is the main concern of this dissertation. ADIZ outside of a state's territory would either be over the Exclusive Economic Zone (EEZ), the high seas or both. Secondly, there is no universal procedure for the adoption of ADIZ neither are there air traffic procedures with regard to such airspace and any state can decide to create and adopt ADIZ adjacent to its territory with no limit as to size or range.⁸ Thirdly, ADIZ can serve as a means of protecting national security and reduce the risk of mid-air collisions.

This Chapter will delve into the history and evolution of ADIZ and attempt to discover the purpose and intention behind the creation of the concept. There will also be a

³ Annex 15 to the International Civil Aviation Organization (ICAO), Convention on Civil Aviation ("Chicago Convention"), 7 December 1944, (1994) 15 U.N.T.S. 295, available at: <http://www.refworld.org/docid/3ddca0dd4.html> [accessed 11 June 2018].

⁴ Welch D.A, *What's an ADIZ? Why the United States, Japan and China get it wrong* <https://www.foreignaffairs.com/articles/east-asia/2013-12-09/whats-adiz> [accessed 9 June 2018] (Hereinafter Welch).

⁵ Ibid Welch.

⁶ Ibid Welch.

⁷ Rinehart I.E Analyst in Asian Affairs, Elias B Specialist in Aviation Policy, *China's Air Defense Identification Zone (ADIZ)* Congressional Research Service pg 5(2015) (Hereinafter Rinehart & Elias).

⁸ This then creates the problem of ADIZ creation over disputed territories as is the case in the East China Sea.

brief look into the practice of ADIZ in the United States (U.S) and China and a more critical view of these will be discussed in chapter four.

1.2 History and Evolution of ADIZ

ADIZ is a concept which was created during the cold war period originally to facilitate the early identification of inbound aircraft and reduce the frequency and inherent risks of airborne interceptions.⁹ The U.S was the first country to adopt an ADIZ in 1950; it then implemented ADIZs in other countries such as Japan, Taiwan, South Korea and Iceland.¹⁰ Other countries adopted their own ADIZs, but some such as Norway's, was dismantled following the cold war.¹¹ Today, the U.S has five zones (East Coast, West Coast, Alaska, Hawaii, and Guam) and operates two more jointly with Canada.¹² The present-day U.S ADIZs, including the contiguous U.S ADIZ (over Atlantic, Pacific, and Gulf of Mexico waters, see **Figure 1.1**), the Alaska ADIZ, the Guam ADIZ, and the Hawaii ADIZ, are codified in Title 14, Part 99, of the *Code of Federal Regulations*, along with the procedural requirements for flights operating in these designated areas.¹³ They are predominantly located over water and typically do not extend to the shore, leaving a narrow strip of sovereign airspace parallel to the coastline that is not within the ADIZ.¹⁴

⁹ Charbonneau J, Heelis K and Piereder J; *Putting Air Defense Identification Zones on the radar*, No.1 Policy brief CIGI graduate fellows series pg 2 (2015). (Hereinafter Charbonneau, Heelis & Piereder).

¹⁰ Ibid Charbonneau, Heelis & Piereder.

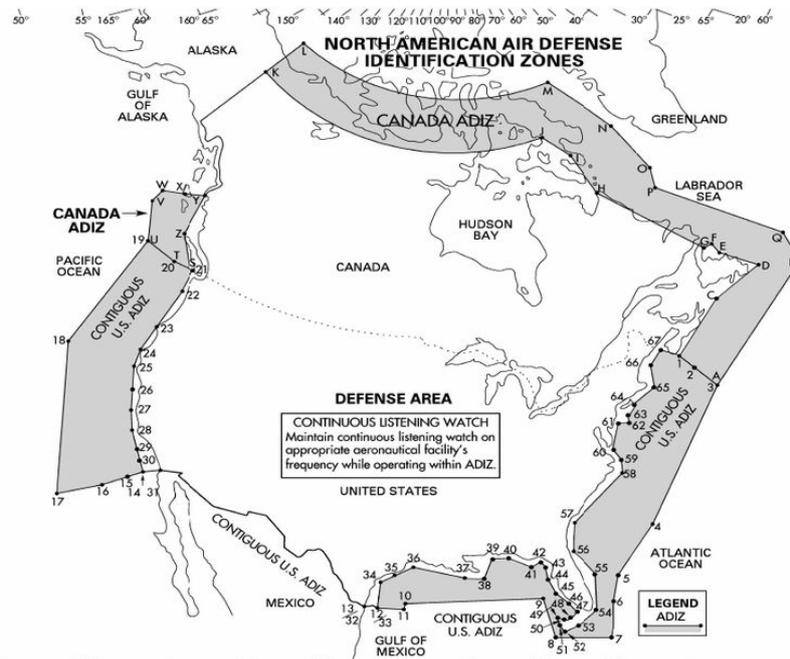
¹¹ Ibid Charbonneau, Heelis & Piereder.

¹² Rinehart & Elias Supra note 5 at 6.

¹³ Ibid Rinehart & Elias.

¹⁴ Ibid Rinehart & Elias.

Figure 1.1 Contiguous U.S. and Canada ADIZ



SOURCE: Ian Rinehart and Bart Elias, “China’s Air Defense Identification Zone,” *Congressional Research Service*, January 30, 2015.

Other countries that maintain ADIZs include China, India, Japan, Pakistan, South Korea, Taiwan, and the United Kingdom.¹⁵ At this point, there are about 20 nations in the world that maintain ADIZs.¹⁶

Day-to-day flight operations in international airspace are managed by the International Civil Aviation Organization (ICAO), a United Nations agency established in 1944 to manage the administration and governance of the Convention on International Civil Aviation, also known as the Chicago Convention.¹⁷ ICAO oversees Flight Information Regions (FIRs), which have existed since the end of World War II and the advent of commercial flight.¹⁸ FIR is a defined airspace assigned to a civil government authority; this authority provides a flight information

¹⁵ Welch supra note 2.

¹⁶ Lai D, *A Few Questions About China’s Air Defense Identification Zone and Its Aftermath*, <http://ssi.armywarcollege.edu/index.cfm/articles/A-Few-Questions-About-Chinas-Air-Defense-Identification-Zone-and-Its-Aftermath/2014/03/21> [accessed 31 May 2018] (Hereinafter Lai).

¹⁷ Burke E.J., Cevallos A.S, *In Line or Out of Order? China’s Approach to ADIZ in Theory and Practice*, Rand Corporation pg 3(2017) (Hereinafter Burke & Cevallos).

¹⁸ Ibid Burke & Cevallos.

service and an alerting service to aircrews in transit.¹⁹ Although the Chicago Convention lays out clear rules for international airspace and FIRs, it does not address ADIZs.²⁰ In fact, there is no established international legal framework governing the establishment or enforcement of ADIZs.²¹ As a result, states differ in their implementation of ADIZ rules.²²

In order to understand the intricate practice of ADIZ, this work will be looking at the practice of ADIZ in the U.S being the pioneer of the concept. ADIZ practice in the U.S will be compared with China to understand why the latter is widely unaccepted.

1.3 Current Practice of ADIZ

1.3.1 Practice of ADIZ in the U.S

As earlier discussed, the U.S was the first to declare an ADIZ in 1950 so as to provide early warning against a feared Soviet strategic air attack.²³ In addition, the 11 September 2001 attacks on Washington D.C. and New York provided ADIZs with a new purpose to guard against hijacked civilian aircraft bound for US territorial airspace.²⁴ The U.S Code of Federal Regulations defines ADIZs as:

*“an area of airspace over land or water in which the ready identification, location, and control of civil aircraft is required in the interest of national security”.*²⁵

These are distinct from Defence Areas, which are restricted to U.S territorial airspace and are defined as,²⁶

*“any airspace of the contiguous United States that is not an ADIZ in which the control of aircraft is required for reasons of national security.”*²⁷

¹⁹ Ibid Burke & Cevallos.

²⁰ Ibid Burke & Cevallos.

²¹ Ibid, Welch supra note 2.

²² Ibid Burke & Cevallos.

²³ Lamont C.K, *Conflict in the Skies: The Law of Air Defense Identification Zones*, Air & Space Law, Vol.39(3), pp.187-202 (2014) p.189 (Hereinafter Lamont).

²⁴ Dutton P.A, *Caelum Liberum: Air Defense Identification Zones Outside of Sovereign Airspace*, Vol. 103(4) The American Journal of International Law 691-709 (2009) p.699 [Hereinafter Dutton]: Lamont supra note 21 at 189.

²⁵ Electronic code of U.S. Federal Regulations (2015) Title 14 Chapter 1, Subchapter F, Part 99 Subpart A §99.3 (Hereinafter U.S. Electronic Code).

²⁶ Lamont supra note 21 at 197.

²⁷ U.S. Electronic Code supra note 23 at § 99.3.

The U.S rules prescribe that a person who operates an aircraft entering an ADIZ and/or the pilot must a) have a functioning two-way radio, with the pilot maintaining continuous auditory watch on the appropriate frequency; b) file a flight plan; c) ensure that the aircraft is equipped with a radar transponder that is operational throughout the flight d) continuously provide their position e) instructions given to the pilot must be observed f) special security instructions must be complied with.²⁸

However, the applicability of the U.S ADIZ is restricted to aircraft inbound, outbound and within the U.S airspace.²⁹ This shows that for the U.S, ADIZs are solely for security measures, and thus do not aim to regulate air traffic within their respective patches of airspace.³⁰ Therefore, the U.S imposes its reporting obligation only upon aircraft en-route to the U.S.³¹ The U.S does not impose reporting obligations on aircraft simply transiting an ADIZ.³² In relation to ADIZs imposed by other nations, the U.S does not recognize the right of states to impose obligations upon aircraft not en-route to the state in question.³³ In fact, U.S military aircraft are instructed not to comply with such reporting requirements imposed by other nations.³⁴

1.3.2 Practice of ADIZ in China

On November 23, 2013, China unilaterally declared the establishment of an Air Defense Identification Zone (ADIZ) over the East China Sea (the “ECS ADIZ”),³⁵ increasing the tension in an already volatile region and raising objections from other

²⁸ Id U.S. Electronic Code at §99.9.

²⁹ Id U.S. Electronic Code at §99.1 (a), Papp Z, *Air Defense Identification Zone (ADIZ) in the light of Public International Law*, Phd Student, Pázmány Péter Catholic University, In-house legal counsel, HungaroControl Pte Ltd. Co. p.30 (Hereinafter Papp).

³⁰ Lamont supra note. 21 at 190.

³¹ Ibid, this also refutes any claim of an extension of sovereign territory as the US, by not imposing reporting obligations on aircraft not entering its territory, doesn't interfere with the freedom of overflight in international airspace.

³² Lamont supra note 21 at 190.

³³ See U.S. Dept. of the Navy, *The Commander's Handbook on the Law of Naval Operations*, 2.8 (2007) at ¶ 1.3. (hereinafter U.S. Navy Commander's Handbook). Lamont supra note. 21 at 198

³⁴ 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. Ibid U.S. Navy Commander's Handbook. Id Lamont at 198, Almond R, *Clearing the Air Above the East China Sea: The Primary Elements of Aircraft Defense Identification Zones*, Vol.7, Harvard National Security Journal 126-198 (2016) p.131 (Hereinafter Almond).

³⁵ 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). Id Almond at 129.

states.³⁶ According to China's Ministry of National Defense, the purpose of the measure is to:

"[protect] state sovereignty and territorial airspace security" in the East China Sea.³⁷



SOURCE: R. Beckman and H.D. Phan, *Air Defense Identification Zones: Implications for Freedom of Overflight and Maritime Disputes*, Centre for International Law National University of Singapore (2014)

The zone extends more than 300 miles from Chinese territory and overlaps with existing ADIZs in the area established by South Korea, Taiwan, and Japan.³⁸ The ECS ADIZ also encompasses contested territory, including the Senkaku/Diaoyu

³⁶ Almond supra note 32 at 129.

³⁷ 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.html. [accessed 16 June 2018]. [hereinafter Defense Ministry Spokesman Responds to ADIZ Questions]: Almond supra note 32 at 129.

³⁸The 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 [accessed 10 June 2018]. [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 [accessed 12 June 2018]. Almond supra note 32 at 129.

Islands³⁹, which are administered by Japan, but claimed by China and Taiwan.⁴⁰ The ECS ADIZ also covers airspace above a submerged rock, leodo⁴¹, which is under South Korean administration and is the site of an ocean research center.⁴² The rules further provided that in the event that aircraft do not cooperate in the identification or refuse to follow the instructions, China's armed forces will adopt 'defensive emergency measures.'⁴³ The rules also require compliance by all aircraft regardless of their destination, this includes all aircraft whether or not they intend on entering Chinese airspace.⁴⁴

The above ADIZ rules will be discussed in detail in the coming chapters making reference to established international concepts, in order to depict the limits of the practice of ADIZ under international law.

1.4 Aim and Objectives

The main aim of this research is to critically appraise the legality of state establishment of ADIZ outside its territory. The specific objectives are:

1. To articulate the basis for the establishment of as well as the content and dimensions of the regime of ADIZs.

³⁹ The Senkaku/Diaoyu Islands are a chain of eight small and uninhabited volcanic islands located in the East China Sea. Although these islands were claimed by Japan since 1895, they were administered by the United States from the end of the Second World War in 1945 until 1972, when the US returned the islands to Japan along with Okinawa and the Ryukyu Islands. They are currently claimed by China, Japan and Taiwan: Lamont supra note. 21 at 188.

⁴⁰ Almond supra note 32 at 129.

⁴¹ The leodo/Suyan reef is described as a 'submerged rock' south of South Korea's southernmost Island, Marado. It falls within China and Korea's overlapping exclusive economic zones and is claimed by both States. For an overview, from a South Korean perspective, see KimYoung-jin, *Why leodo Matters: Reef vital to protecting Korea's economic zone*, Korea Times, (18 Sept. 2012), available at http://www.koreatimes.co.kr/www/news/nation/2012/09/117_120266.html [last accessed 2 May 2014]: Lamont supra note 21 at 188.

⁴² Rinehart & Elias supra note 5.

⁴³ Statement by the Government of the People's Republic of China on Establishing the East China Sea Air Defense Identification Zone Xinhua News Agency, Nov. 23, 2013 http://news.xinhuanet.com/english/china/2013-11/23/c_132911634.html. [accessed 20 June 2018] Beckman R and Phan H.D, *Air Defense Identification Zones: Implications for Freedom of Overflight and Maritime Disputes*, Centre for International Law National University of Singapore (2014) p.8 (Hereinafter Beckman & Phan).

⁴⁴ Statement by the Government of the People's Republic of China on Establishing the East China Sea Air Defense Identification Zone Xinhua News Agency, Nov. 23, 2013 http://news.xinhuanet.com/english/china/2013-11/23/c_132911634.html. [accessed 20 June 2018]. Ibid Beckman & Phan.

2. To explain the right of states to proactive defence measures against aerial intrusion within its territory.
3. To critically analyse the lawfulness of State jurisdiction in ADIZ beyond its territory.
4. To critically analyse the lawfulness of ADIZ under international law with reference to the different sources of international law.

1.5 Research Questions

1. What is the legal basis for the establishment of Air Defence Identification Zones?
2. Does establishment of ADIZs extend a States' sovereignty beyond its territory?
3. Can a state exercise its jurisdiction within ADIZs established by it beyond its territory?
4. What source of international law is the establishment of ADIZ predicated on?
5. What are the consequences associated with the practice of state jurisdiction within ADIZs?
6. Does the establishment of an ADIZ authorize the coastal state to the use of force against incoming airplanes in case of non-obedience to the request for identification?

1.6 Research Methodology

This research will be desk based/doctrinal. Information for the study will be sourced mainly from, both primary and secondary sources of law, in particular treaties, conventions and other international agreements. Relevant literature from books, journals and other international instruments and comments will be relied on to achieve the objectives of this study.

This research will comprise of five chapters;

Chapter one will give a breakdown of the history, intent and evolution of Air Defence Identification Zone. It will also analyse the current practice of ADIZ in America and China and juxtapose them to find similarities and differences in practice.

Chapter two will focus mainly on state aerial sovereignty and jurisdiction making reference to international conventions. It will also discuss the use of self-defence by states as a means of protecting their sovereignty.

Chapter three will discuss International law on territories with specific reference to the Rules of the Air, Exclusive Economic Zone (EEZ), the high seas and the Law of the seas.

Chapter four will analyse the lawfulness of ADIZs under international law. The concept of ADIZ will be tested against the different sources of international law to prove its legal standing or lack thereof.

Chapter five will be the concluding chapter which will give a summary and recommendations as to the legality of State establishment of Air Defence Identification Zones.

1.7 Conclusion

What is the legal basis for the establishment of Air Defence Identification Zones?

From the above it is clear that the concept behind the creation of ADIZ is mainly for national security. However, ADIZs are largely outside state territory and therefore no state can exercise sovereign jurisdiction over it.⁴⁵ There is no explicit provision for the establishment of ADIZ under international law, however, chapter four will discuss the various sources of international law in an attempt to discover the legal basis on which the establishment of ADIZ is predicated on.

Does establishment of ADIZs extend a States' sovereignty beyond its territory?

Going by the practice in the U.S, identification is only required when the aircraft intends to enter U.S territory. This precondition therefore eliminates the question of the extension of U.S territorial airspace into international airspace as no identification is required if the aircraft is simply flying within the international airspace. An opposite practice is observed in China in its ECS ADIZ, which requires identification whether or not the aircraft intends to enter its airspace. The ECS ADIZ also threatens the use

⁴⁵ Art. 89 United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 [Hereinafter UNCLOS].

of force in case of non-compliance, this can clearly be seen as an extension of its territorial aerial jurisdiction and a violation of the freedom of navigation within international airspace guaranteed under international law.

Chapter Two

SOVEREIGNTY AND JURISDICTION

2.1 Introduction

Every state has complete and exclusive sovereignty over its airspace.⁴⁶ It therefore has the right to protect its territory against any form of external intrusion through the use of self-defence⁴⁷. A state's territorial sea extends to a limit not exceeding 12 nautical miles⁴⁸ and its exclusive economic zones extend to a limit not exceeding 200 nautical miles from the baselines from which the breadth of the territorial sea is measured.⁴⁹ The state exercises exclusive sovereignty of the airspace over its territorial sea⁵⁰ but not of the airspace over the high seas, its exclusive economic zone or beyond.⁵¹ Therefore the airspace over the High Seas is not subject to any state's exclusive sovereignty.⁵²

This chapter will attempt to explain the concept of state sovereignty and jurisdiction. It will do this by placing emphasis on the limits state sovereignty and jurisdiction place on ADIZ. The use of force and justification of same by states will also be discussed in an attempt to highlight the international law rule regarding the jurisdiction of a state to exercise sovereignty within its established ADIZ.

2.2 Overview and definition of sovereignty

2.2.1 Concept of State sovereignty

State Sovereignty is a fundamental principle of international law; states are the principle subjects of international law.⁵³ In essence, international law is based on the concept of the state and the state lies upon the foundation of sovereignty, which in turn expresses the internal supremacy of the governmental institutions and the external supremacy of the state as a legal person.⁵⁴ However, sovereignty in itself,

⁴⁶ Chicago Convention supra note 1 art. 1.

⁴⁷ Article 51 Chapter VII of the United Nations Charter (Hereinafter UN Charter).

⁴⁸ UNCLOS supra note 43 at art.3.

⁴⁹ Id at art. 57.

⁵⁰ Id at art. 2(2).

⁵¹ Ibid.

⁵² Id at art. 56.

⁵³ Jennings R and Watts A, *Oppenheim's International Law*, 9th ed. Vol. 1, Chpt. 1, (1996) p.16 (Hereinafter Jennings & Watts).

⁵⁴ Shaw M.N, *International Law*, 6th ed. Chptr 10, (2008) p.487 (Hereinafter Shaw).

with its retinue of legal rights and duties, is founded upon the fact of territory and without territory a legal person cannot be a state.⁵⁵ It is undoubtedly the basic characteristic of a state and the one most widely accepted and understood.⁵⁶

There are currently some 200 distinct territorial units, each one subject to a different territorial sovereignty and jurisdiction.⁵⁷ However, the term is very often used in a political sense, with differing interpretations depending on context and intention.⁵⁸ The notion of sovereignty is dynamic and evolving with the development of the global institutional environment.⁵⁹

2.2.2 State Aerial Sovereignty with respect to ADIZ

In aviation, sovereignty refers to the ownership of airspace, in other words, it is the exclusive competence of a State to exercise its legislative, administrative and judicial powers within its national airspace.⁶⁰ State sovereignty over its territorial airspace is the basic principle underlying the whole system of International Air Law.⁶¹ This exclusive right of a state is strictly limited to the airspace above its land and territorial waters,⁶² this will by implication exclude the airspace over its Exclusive Economic Zones and the High seas.⁶³

2.3 Overview and definition of Jurisdiction

In public international law, the concept of jurisdiction has traditionally had a strong link with the notion of sovereignty.⁶⁴ Jurisdiction allows States to give effect to the sovereign independence which they are endowed with, in a global system of formally equal States through stating what the law is relating to persons or activities in which they have a legal interest.⁶⁵ Sovereignty however not only serves as an enabling concept with respect to the exercise of jurisdiction, but also as a restraining device: it

⁵⁵ Ibid Shaw.

⁵⁶ Ibid Shaw.

⁵⁷ Ibid Shaw.

⁵⁸ Ibid Shaw.

⁵⁹ Ibid Shaw.

⁶⁰ International Civil Aviation Organization “Worldwide Air Transport Conference (ATCONF) Sixth Meeting” Montréal, 18 - 22 March 2013.

⁶¹ Fong T.U.T, Air Law, online: www.dsaj.gov.mo/EventForm/DisplayEvent.aspx?Rec_Id=4947 [accessed 01 June 2018] (Hereinafter Fong).

⁶² This is expressly provided for in the Chicago Convention, Chicago Convention supra note 1 art. 1 & 2.

⁶³ Fong supra note 59.

⁶⁴ Ryngaert C, The Concept of Jurisdiction in International Law, 2nd ed. (2015) p.1 (Hereinafter Ryngaert)

⁶⁵ Ibid Ryngaert.

informs the adoption of international rules restricting the exercise of State jurisdiction.⁶⁶ States may indeed well adopt laws that govern matters that are not exclusively of domestic concern, and thereby impinge on other States' sovereignty.⁶⁷ In essence, the laws of jurisdiction delimit the competences between States, and thus serve as the basic 'traffic rules' of the international legal order.⁶⁸

Jurisdiction concerns the power of the state under international law to regulate or otherwise impact upon people, property and circumstances and reflects the basic principles of state sovereignty, equality of states and non-interference in domestic affairs.⁶⁹ Jurisdiction is a vital and indeed central feature of state sovereignty, for it is an exercise of authority which may alter or create or terminate legal relationships and obligations.⁷⁰ It may be achieved by means of legislative, executive or judicial action.⁷¹

2.3.1 State Aerial Jurisdiction with respect to ADIZ

One of the principles governing air space is sovereignty (*aer clausum*), according to which States have sovereignty over the airspace above their land territory and above the territorial sea adjacent to their coast.⁷² It follows from the nature of the sovereignty of states that while a state is supreme within its own territorial frontiers; it must not intervene in the domestic affairs of another nation.⁷³ This duty of non-intervention within the domestic jurisdiction of states provides for the shielding of certain state activities from the regulation of international law.⁷⁴

State aerial jurisdiction can be deduced from the above as the right of a state to regulate and protect its airspace while exercising its sovereign rights.⁷⁵ This must however be done within its territory and it must refrain from interfering with the airspace outside its territory, this would include international airspace and the

⁶⁶ Id Ryngaert at 2.

⁶⁷ Ibid Ryngaert.

⁶⁸ Ibid Ryngaert.

⁶⁹ Shaw supra note 52 at 645.

⁷⁰ Ibid Shaw.

⁷¹ Ibid Shaw.

⁷² Beckman & Phan supra note 41 at 3.

⁷³ Shaw supra note 52 at 647.

⁷⁴ Ibid Shaw.

⁷⁵ Ibid.

airspace of another sovereign territory.⁷⁶ It follows that, a state lacks jurisdiction to exercise sovereignty over airspace within its ADIZ with particular reference to the use of force.⁷⁷

2.4 Concept of the Use of Force under International Law

There is a general prohibition of the use of armed force⁷⁸ which flows from an international norm; prior to 1928 the use of force was a natural component of the state's sovereignty.⁷⁹ That year, the Kellogg-Briand Pact became the first Convention to establish the nonuse of force as a principle regulating international relations, a rule that became central to the Charter of the United Nations (UN) in its article 2(4)⁸⁰ and has been upheld and reinforced by the International Court of Justice (ICJ).⁸¹ The essence of international relations, concluded by the ICJ in the Nicaragua case,⁸² lies in the respect by independent states of each other's territorial sovereignty.⁸³ Most of the legal theory thus considers the nonuse of weapons a peremptory norm of international law, also called *jus cogens*.⁸⁴ This international law principle has an impact on civil aviation to the extent that a state may not use armed force against a commercial aircraft.⁸⁵

⁷⁶ McDougal M.S., *"The Impact of International Law upon National Law: A Policy-Oriented Perspective"* (Faculty Scholarship Series, Yale Law School) Paper 2614 (1959), online http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=3562&context=fss_papers;The [accessed 21 June 2018] (Hereinafter McDougal).

⁷⁷ Ibid.

⁷⁸ UN Charter supra note 45 art. 2(4).

⁷⁹ Luca M.A.D., *Using the Air Force against Civil Aircraft From Air Terrorism to Self-Defense*, PhD, French Air Force* ASPJ Africa & Francophonie - 3rd Quarter (2012) p.46 (Hereinafter Luca).

⁸⁰ The UN Security Council's Resolution 1067, 26 July 1996, S/RES/1067 (1996) "condemns the use of weapons against civil aircraft in flight as being incompatible with elementary considerations of humanity, the rules of customary international law as codified in [the addendum to] article 3 of the Chicago Convention." UN Charter supra note 43 art. 2(4), Luca supra note 77 at 46.

⁸¹ The ICJ held on 9 April in *United Kingdom v. Albania, Corfu Channel Case*, Reports 1949, 22 that "elementary considerations of humanity, even more exacting in peace than in war," are not simple moral dictates but general principles of international law. Luca supra note 77 at 46.

⁸² See the Nicaragua case, ICJ Reports, 1986, pp. 14, 109–10; 76 ILR, pp. 349, 443–4 (Hereinafter Nicaragua case)

⁸³ Shaw supra note 52 at 1128.

⁸⁴ In its work on the codification of the Law of Treaties, the International Law Commission stated that "the law of the Charter concerning the prohibition of the use of force in itself constitutes a conspicuous example of a rule in international law having the character of *jus cogens*." Par. 1 of the International Law Commission's Commentaries on Art. 50 of its draft "Articles on the Law of Treaties," International Law Commission Yearbook, 1966-II, 270; Luca Supra note 77 at 46.

⁸⁵ Chicago Convention supra note 1 art. 3 bis (a), *ibid* Luca.

2.4.1 The Use of Force under the Chicago Convention

A 1984 protocol to the Chicago Convention [Article 3bis⁸⁶ (a): Non-use of weapons against civil aircraft in flight] *recognizes and sets out as follow*;

“Every State must refrain from resorting to the use of weapons against civil aircraft in flight and that, in case of interception, the lives of persons on board and the safety of aircraft must not be endangered.”

The use of force against a foreign registered civil aircraft is tantamount to the use of force against the State of registration, and therefore a breach of Article 2(4) of the UN Charter and associated customary international law.⁸⁷ Due to the exclusive sovereignty that a state exercises over its territorial airspace and the overarching need to protect its entire territory from any external intrusion,⁸⁸ the drafters of the protocol in a bid to provide protection and safety to the passengers onboard civil aircraft; proceeded to provide alternatives to the immediate use of force by states.

Article 3 bis (b) of the Chicago Convention provides as follows:

“Every State, in the exercise of its sovereignty, is entitled to require the landing at some designated airport of a civil aircraft flying above its territory without authority or if there are reasonable grounds to conclude that it is being used for any purpose inconsistent with the aims of this Convention; it may also give such an aircraft any other instructions to put an end to such violations. For this purpose, the contracting States may resort to any appropriate means consistent with relevant rules of international law.”

This provision states that a state may employ other measures against a civil aircraft acting illegally, provided that such action does not endanger the latter’s integrity.⁸⁹ Therefore, it cannot use weapons or open fire to destroy the aircraft, but it may lawfully employ any other measure aimed at stopping the security breach.⁹⁰

⁸⁶ Due to the difficulty in the amendment of the Chicago Convention, Article 3bis doesn’t apply to all parties to the Convention but to only those who consented to it. There are about 152 states to which the article applies.

⁸⁷ Trapp K.N, Uses of force against civil aircraft, Pub June 28, 2011 <https://www.ejiltalk.org/uses-of-force-against-civil-aircraft/> [accessed 12 June 2018] (Hereinafter Trapp).

⁸⁸ Chicago Convention supra note 1 art 1&2.

⁸⁹ Luca supra note 77 at 49.

⁹⁰ Ibid Luca.

Authorized coercive means include surrounding the civil aircraft with interceptors,⁹¹ using tracers as a warning, conducting visual or radio interrogation, restricting flight paths, boarding, and firing warning shots when the aircraft refuses to comply.⁹² The state must always execute these maneuvers without endangering the safety of the passengers and aircraft.⁹³ According to the ICAO Council's special recommendations, interception of a civil aircraft, carried out as a last resort, should be limited to establishing the aircraft's identity and to providing the navigational guidance necessary to ensure the flight's safety.⁹⁴ The ICAO thus encourages states to standardize their interception procedures regarding civil aircraft to improve aviation safety.⁹⁵

Interception may also create a right of hot pursuit when the aircraft that violates overflight rules flees toward international airspace.⁹⁶ Only an aircraft of the state can carry out the pursuit, and the operation must not violate another state's sovereignty over its airspace unless the latter gives its express consent.⁹⁷ In such a case, the intercepting state may act in the contracting state's airspace until boarding the aircraft under pursuit.⁹⁸ Finally, the state must initiate pursuit as soon as the violation occurs and must continue uninterrupted.⁹⁹

The principle of nonuse of armed force against civil aircraft does not mean that the latter cannot be subjected to measures intended to preserve a state's sovereignty over its airspace.¹⁰⁰ This then gives rise to exceptions to the use of force.

⁹¹ Aircraft Interception mostly occurs when a military aircraft is intercepting a civilian aircraft that enters national airspace without a flight plan, entering restricted or prohibited airspace, aircraft having communication failures or aircraft that cannot otherwise be identified. There are standardized procedures for interception provided by ICAO to give a universal code for all states. There might be some minor national differences which would be specified in its AIP (Aeronautical Information Publication). Though interception is also seen as dangerous to the safety of civil aircraft, when properly used it can be an effective alternate to the use of force by states on civil aircraft. Manual concerning Interception of Civil Aircraft (Consolidation of Current ICAO Provisions and Special Recommendations) Chapter 1, 2nd edn 1990 Doc 9433-AN/926.

⁹² Luca supra note 77 at 49.

⁹³ Ibid Luca.

⁹⁴ Chicago Convention supra note 1, Addendum A, Appendix 2. Ibid Luca.

⁹⁵ A25-3, Cooperation among Contracting States for Ensuring the Safety of International Civil Aviation and Advancing the Aims of the Chicago Convention, ICAO Assembly Resolutions, Doc. 9848, I-7. Ibid Luca at 49.

⁹⁶ see Monari L, *Uses and misuses of the international airspace* (doctoral dissertation, McGill University, Montréal, 1996) pp. 40-44 (Hereinafter Monari). Luca supra note 77 at 50.

⁹⁷ Ibid Luca.

⁹⁸ Ibid Luca.

⁹⁹ Ibid Luca.

¹⁰⁰ Luca supra note 77 at 48.

2.4.2 Exceptions to the prohibition against the use of force

Due to the use of civil aircraft as weapons,¹⁰¹ the principle of nonuse of force against civil aircraft cannot remain absolute.¹⁰² This exception can however only be applicable in two scenarios; self-defense and threat against international security and peace.¹⁰³

a. Self-defense

Self-defense according to article 51 of the UN Charter and the addendum to article 3 of the Chicago Convention authorizes a state to use armed force against civil aircraft that are being used for purposes contrary to those allowed for civil aviation¹⁰⁴ within its sovereign territory.¹⁰⁵ The aim of this exception is to prevent civil aircraft from using the prohibition of the use of force as a means to attack¹⁰⁶ any states' sovereign territory.¹⁰⁷

It should be noted that this exception applies to a states' sovereign territory which excludes ADIZ. A State is therefore not authorized to claim self-defense when such force is used with its ADIZ.

i. Justification for the use of self-defense

Article 51 of the UN Charter authorizes the use of self-defense in case of armed attacks with the intension to destroy some of that country's vulnerable points. Therefore there must be an imminent attack and will to do harm¹⁰⁸ and not a presumed or possible attack to justify the use of self-defense. An important condition for the justification of self-defense by a state is the necessity¹⁰⁹ and proportionality¹¹⁰ to the attack suffered.

¹⁰¹ 9/11 attack of the twin towers in the United States.

¹⁰² Luca supra note 77 at 50.

¹⁰³ UN Charter supra note 45 art. 51.

¹⁰⁴ Such as terrorist attacks against the state.

¹⁰⁵ Luca supra note 77 at 51.

¹⁰⁶ attack here means "the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State" General Assembly Resolution 3314, 29th sess., 14 December 1974, Art. 3(g), Luca supra note 77 at 51.

¹⁰⁷ Luca supra note 77 at 51.

¹⁰⁸ This is justified regardless of whether harm was actually done or not. Nicaragua case supra note 80.

¹⁰⁹ Necessity here means the existence of an imminent and inevitable danger or threat to the state.

¹¹⁰ Proportionality here means the action carried out to stop the danger or threat against the state.

Below are cases, where the use of force was used by states within its territory; on intruding commercial airlines.

- a. On 27 July 1955,¹¹¹ an Israeli passenger aircraft on a regular commercial flight between Austria and Israel was shot down by units of the armed forces of Bulgaria after it had intruded without permission into Bulgarian airspace.¹¹² There were no survivors; all attempts by the Israeli government to obtain compensation from Bulgaria were unsuccessful.¹¹³
- b. On 3 July 1988,¹¹⁴ a commercial Iran-Air flight (inbound for Dubai from Bandar Abbas) was shot down in the Strait of Hormuz by the USS Vincennes.¹¹⁵ On 17 May 1989 Iran filed an application before the ICJ after the US had refused to accept responsibility for the downing and had not offered compensation for the losses incurred by Iran.¹¹⁶ The parties finally agreed on ex gratia compensation for the families, but the US refused to pay damages for the airplane.¹¹⁷ The case was discontinued at the joint request of the parties on 22 February 1996.¹¹⁸

There was clearly no justification for the use of self-defense in the above cases. There was no imminent danger, however, due to the hostile international environment; states try to adopt a preventive self-defense doctrine as a means of protecting their sovereign territory.¹¹⁹

b. Threat against international security and peace

The Security Council is empowered by the UN Charter to authorize the use of force where it is in the interest of international security and peace.¹²⁰ This power is however at the discretion of the Security Council.¹²¹

¹¹¹ Case Concerning the Aerial Incident of July 27, 1955 (Israel v. Bulgaria), [1959] I.C.J. Rep. 127.

¹¹² Hailbronner K, Heilmann D *Aerial Incident Cases before International Courts and Tribunals*, Max Planck Encyclopedia of Public International Law, p.4 [last update March 2009] (Hereinafter Hailbronner & Heilmann).

¹¹³ Ibid Hailbronner & Heilmann.

¹¹⁴ Aerial Incident of 3 July 1988 (Iran v. U.S.), 1989 I.C.J. 132 (Order of Dec. 13).

¹¹⁵ Hailbronner & Heilmann supra note 110 at 5.

¹¹⁶ Ibid Hailbronner & Heilmann.

¹¹⁷ Id at 6.

¹¹⁸ Ibid Hailbronner & Heilmann.

¹¹⁹ Luca supra note 77 at 52.

¹²⁰ UN Charter supra note 45 art. 41&42.

¹²¹ Ibid.

2.4.3 The Use of Force within ADIZ

The general prohibition of the use of force has been established above. However, the existence of exceptions and alternatives to the use of force has also been stated. The predominant thread that runs through the entire fabric of this debate on the use of force remains sovereignty. Therefore, for a state to use force or any other alternative techniques against any civil aircraft, the latter must be within the sovereign territory of the state in order for the jurisdiction of such state to exercise its sovereign power to exist.

2.5 Conclusion

From the above it can be seen that every state has complete and exclusive sovereignty and jurisdiction over its territory, territorial sea and airspace. States therefore have a duty to protect their territory, territorial sea and airspace from any form of danger or threat against it. However, this duty is mostly abused, causing unnecessary and excessive force to be used by states in the guise of the protection of its territory as can be seen in the cases discussed above. This is why article 2(4) of the UN Charter and the addendum to article 3 of the Chicago Convention are so important to, if not totally eradicate the premature and unnecessary use of force against civil aircraft, at least mitigate it. States are advised to use alternative measures to expel any danger which a civil aircraft may bring with due regard to the passengers on board, the use of force is left as a means of last resort.

Does the establishment of an ADIZ authorize the coastal state to the use of force against incoming airplanes in case of non-obedience to the request for identification?

The use of force should be a last resort and should only be used within the ambits of self-defence as provided in article 51 of the UN Charter. Justification for the use of force would include necessity and proportionality with regards to the protection of its territory against imminent danger. The point to be noted here is that the danger or threat must be against the state's territory and not beyond. As established in subparagraphs above, a states' aerial jurisdiction and its exercise of aerial sovereignty is strictly restricted to the airspace above its territory,¹²² territorial sea

¹²² McDougal supra note 74.

and nowhere else.¹²³ This would therefore imply that the use of force when justifiable in the protection of a states' territory must be done only within its territory or territorial sea, this would exclude international airspace¹²⁴ and most importantly, airspace within ADIZ.¹²⁵

As discussed in chapter one, ADIZs are mostly established beyond state territory, this would in conclusion exclude a state from using force within ADIZs established outside its territory. The ECS ADIZ rule established by China¹²⁶ as discussed in chapter one can be seen to be in clear contradiction with a well-established principle of international law and any use of force within the zone would be unjustifiable.

¹²³ Fong supra note 59.

¹²⁴ Airspace over the High seas and Exclusive Economic Zones.

¹²⁵ Fong supra note 59.

¹²⁶ Which states that China will undertake 'defensive emergency measures' against aircraft that violate its ADIZ rules.

Chapter Three

INTERNATIONAL LAW ON TERRITORIES

3.1 Introduction

All states whether coastal or land-locked have freedom of use of the high seas for navigation; overflight; laying of submarine cables and pipelines; construction of artificial islands, fishing and scientific research.¹²⁷ The freedoms of navigation, overflight and laying of submarine cables and pipelines to all states also apply in the exclusive economic zone.¹²⁸

This chapter intends to look into the international law on territories in relation with ADIZs. It will begin by assessing the view of ADIZ under the Chicago Convention. It will thereafter, with a critical look into the Law of the sea Convention, define the boundary limitations placed on states to exercise rights within established ADIZ outside state territory. This will be achieved by analysing ADIZ with respect to the High seas and EEZ. In conclusion, this chapter will state the international law position of state action within its established ADIZ beyond its territory.

3.2 Chicago Convention

International civil aviation matters are generally encompassed in the Convention on International Civil Aviation, commonly known as the Chicago Convention, which was fully ratified in 1947.¹²⁹ There are currently 195 States in the world¹³⁰ and 192 of those States are party to the Chicago Convention,¹³¹ this makes the Chicago Convention the foremost authority on international civil aviation matters. While ADIZ is not referred to or regulated in the Chicago Convention,¹³² the Chicago Convention includes rules relevant to ADIZs,¹³³ including the use of international airspace and sets forth norms that condition the application of ADIZs. The treaty is administered

¹²⁷ UNCLOS supra note 43 art. 87(1).

¹²⁸ UNCLOS id art. 58(1).

¹²⁹ Ibid UNCLOS.

¹³⁰ <http://www.worldometers.info/geography/how-many-countries-are-there-in-the-world/> [accessed 5 June 2018].

¹³¹ <https://www.icao.int/about-icao/Pages/member-states.aspx> [accessed 5 June 2018].

¹³² Pillay S, *The legal requirements for the proclamation of Air Defense Identification Zones (ADIZs): an examination with specific reference to the ADIZ of the People's Republic of China*, (Masters dissertation, University of Pretoria, 2015) p.18 (Hereinafter Pillay).

¹³³ Chicago Convention, supra note 1, art. 12 (“Over the high seas, the rules in force shall be those established under this Convention”), Almond supra note 32 at 137.

by ICAO is a United Nations specialized agency based in Montreal.¹³⁴ The amendment of the Convention requires the consent of all state parties, which makes it difficult and near impossible to achieve. Therefore the council which is elected by the Assembly¹³⁵ is responsible for the adoption of Standards and Recommended Practices (SARPs),¹³⁶ which serve as Annexes to the Chicago Convention, which are easier to amend unlike the Convention itself.¹³⁷ Both the United States and China are ICAO-contracting states and members of the Council.¹³⁸ All contracting states are under a legal obligation to implement standards established by ICAO.¹³⁹ There are no express articles precluding the establishment of ADIZ in the airspace over the high seas in the Chicago Convention and according to the PICJ in the lotus case what is not expressly prohibited is allowed.¹⁴⁰ This omission of a proper legal framework for the establishment of ADIZ leaves it open to abuse.¹⁴¹

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 jurisdictional claims of coastal states to airspace above subjacent waters.¹⁴² Therefore the examination of international maritime law, as codified in UNCLOS, is pertinent.¹⁴³

3.3 The Law of the Sea

The 1982 United Nations Convention on Law of the Sea (UNCLOS) informs present day International policy discussion regarding territorial waters and, consequently,

¹³⁴ Chicago Convention, supra note 1, arts. 43–66.

¹³⁵ Id art. 50.

¹³⁶ Id arts. 37, 54(I).

¹³⁷ Id art. 90, Almond supra note 32 at 137.

¹³⁸ Member States, INT'L CIVIL AVIATION ORG. (Nov. 18, 2017), <http://www.icao.int/MemberStates/Member%20States.English.pdf> [accessed 25 May 2018] Almond supra note 32 at 137.

¹³⁹ Chicago Convention supra note 1 annex 2 (Rules of the Air). 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 1, art. 38.

¹⁴⁰ Affaire du «Lotus», Recueil des arrêts, publications de la cour permanente de justice internationale Série A – No

10, Le 7 septembre 1927, pp. 18-20. http://www.icj-cij.org/files/permanent-court-of-international-justice/serie_A/A_10/30_Lotus_Arret.pdf [accessed 21 June 2018].

¹⁴¹ Pillay supra note 130 at 12.

¹⁴² Cuadra E, *Air Defense Identification Zones: Creeping Jurisdiction in the Airspace*, Vol. 18 pp. 485-494, Virginia Journal of International Law, (1977) pp. 489-493 (Hereinafter Cuadra).

¹⁴³ Hailbronner K, *Freedom of the Air and the Convention on the Law of the Sea*, Vol. 77(3) pp. 490-520, The American Journal of International Law, (1983) p.493 (Hereinafter Hailbronner). Almond supra 32 at 138.

matters of airspace sovereignty beyond land borders.¹⁴⁴ In general, UNCLOS provides that nations maintain exclusive sovereignty within territorial seas, extending 12 nautical miles (roughly 14 statute miles) offshore.¹⁴⁵ Additionally, UNCLOS defines “contiguous zones” as additional outer bands extending to 24 nautical miles (roughly 27.5 statute miles) from shore, in which a nation may exercise certain controls and enforcement actions to protect itself from infringement of its customs, fiscal, immigration, or sanitary laws and regulations.¹⁴⁶ Further, UNCLOS allows nations to establish exclusive economic zones (EEZs), extending as far as 200 nautical miles (roughly 230 statute miles) offshore, in which a nation can exert control over activities impacting economic resources including fishing, mining, oil exploration, and pollution.¹⁴⁷ UNCLOS maintains that all nations may enjoy the freedoms of navigation and overflight within these zones, as well as other internationally lawful uses, which in general may include military exercises, reconnaissance, and other civilian and military use.¹⁴⁸

Today UNCLOS is generally considered by the international community as the accepted legal norm for maritime conduct, a “constitution for the oceans” governing all ocean uses, exploitation of ocean resources and the protection of the marine environment.¹⁴⁹ The “Constitution of the Oceans” enjoys almost universal ratification, with 168 parties to it, making it the single legal framework for ocean governance.¹⁵⁰

UNCLOS entered into force in 1994 and has been ratified by 166 states,¹⁵¹ including all major maritime powers except for the United States (which nevertheless recognizes many of the customary norms set forth in the treaty).¹⁵² Of relevance to ADIZs, the treaty codified the aforementioned customary high seas freedoms, with

¹⁴⁴ Lovelace D.C. Jr. *Terrorism commentary on security documents*, Rise of China Vol .139 (2015) p. 154 (Hereinafter Lovelace), id Hailbronner at 493.

¹⁴⁵ Ibid Lovelace.

¹⁴⁶ Ibid Lovelace.

¹⁴⁷ Ibid Lovelace.

¹⁴⁸ Hailbronner supra note at 141 at 493.

¹⁴⁹ United Nations Publications prepared by the Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs [last update August 1, 2012].

¹⁵⁰ Update: as of April 3, 2018, there are currently 168 State parties to the 1982 Convention.

http://www.un.org/depts/los/reference_files/chronological_lists_of_ratifications.htm [accessed 11 June 2018]

¹⁵¹ United Nations, UNCLOS, Status (As of Oct. 10, 2014).

http://www.un.org/Depts/los/reference_files/status2010.pdf [accessed 10 June 2018] Almond supra note 32 at 138.

¹⁵² Williams A.S, *The Interception of Civil Aircraft Over the High Seas in the Global War on Terror*, Vol. 59, 73 - 151, *Air Force Law Review*, (2007) 92 – 93. Almond supra note 32 at 138.

the principal freedoms being overflight and navigation.¹⁵³ 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.¹⁵⁴ 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.¹⁵⁵

3.4 The High seas and ADIZ

A well-known principle governing air space is freedom of overflight (*caelum liberam*). Freedom of overflight is a freedom of the high seas.¹⁵⁶ This affords all states the freedom to fly over the high seas.¹⁵⁷ It is important to note that the Chicago Convention contains no explicit provision confirming the freedom of overflight over the high seas.¹⁵⁸ This was probably not deemed necessary in the light of the provisions clearly defining which airspace falls under the complete and exclusive jurisdiction of a state. The freedom of overflight over high seas, a principle of customary international law, was first codified by the Convention on High Seas, adopted in 1958.¹⁵⁹ The very same Convention also declared the invalidity of sovereignty over the high seas.¹⁶⁰ It follows from the latter principle that the high seas and airspace there above are beyond the jurisdiction of any state.¹⁶¹ The above mentioned principles are also enshrined in UNCLOS, in Article 87 and 89 respectively.¹⁶² In conclusion ADIZ established by states over the high seas are

¹⁵³ UNCLOS, supra note 43, 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> [accessed 14 June 2018] (hereinafter U.S. Oceans Policy Statement) Almond supra note 32 at 138.

¹⁵⁴ See U.S. Navy Commander's Handbook, supra note 31, ¶ 1.3. Almond supra note 32 at 138.

¹⁵⁵ Almond supra note 32 at 138.

¹⁵⁶ Beckman & Phan supra note 41 at 3.

¹⁵⁷ Art 2 Convention on the High Seas, adopted 29 April 1958, 450 UNTS 11 (entered into force 30 September 1962), (Hereinafter High Seas Convention).

¹⁵⁸ Beckman & Phan supra note 41 at 5.

¹⁵⁹ ILC Law of Air and Draft Articles concerning Law of the Sea 1958, p. 67., ¶ 25-26. Papp supra note 27 at 42.

¹⁶⁰ Ibid Papp.

¹⁶¹ ICAO Study on Chicago Convention and UNCLOS 1987, p. 257 (Hereinafter ICAO study). Papp supra note 27 at 42.

¹⁶² Papp supra note 27 at 42.

beyond their jurisdiction and can therefore not legally regulate aircraft within that airspace.

3.5 Exclusive Economic Zones and ADIZ

The Exclusive Economic Zone (EEZ) is one of the significant innovations of UNCLOS, a tangible result of the progressive development of international law and it is qualified as a sui generis legal regime.¹⁶³ The exclusive economic zone (EEZ) is defined by the Convention as

“an area beyond and adjacent to the territorial sea, subject to the specific legal regime established in this Part, under which the rights and jurisdictions of the coastal State and the rights and freedoms of other States are governed by the relevant provisions of this Convention.”¹⁶⁴

Article 56 of the Convention¹⁶⁵ sets out special rights, jurisdiction and duties of the coastal states within their EEZs. These rights are divided into three main categories:

“a) sovereign rights with respect to exploiting, conserving, and managing natural resources of the waters subjacent to seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation of and exploration of the zone;

b) jurisdiction with regard to establishment and use of artificial islands, installations and structures; with regard to marine scientific research; in respect of protection of maritime environment; and,

c) other rights (and duties) provided for in UNCLOS (e.g. hot pursuit). The coastal state shall exercise its rights and perform its duties by having due regard for the rights and duties of other states and shall act in a manner compatible with the provisions of UNCLOS.”¹⁶⁶

Article 60 also gives the coastal states exclusive right to construct, authorize and regulate the construction, operation and use of:

¹⁶³ Beckman R and Davenport T, *The EEZ Regime: Reflections after 30 years*, LOSI Conference papers (2012) p.6 <https://www.law.berkeley.edu/files/Beckman-Davenport-final.pdf> [accessed 14 June 2018] (Hereinafter Beckman & Davenport).

¹⁶⁴ UNCLOS supra note 43 art. 55.

¹⁶⁵ UNCLOS.

¹⁶⁶ Id art 56.

- “(a) Artificial islands;
- (b) Installations and structures for the purposes provided for in article 56 and other economic purposes;
- (c) Installations and structures which may interfere with the exercise of the rights of the coastal State in the zone.”¹⁶⁷

The exclusive rights and jurisdiction of coastal states are confined to the above articles and nowhere in article 56 or 60 is aircraft and air traffic mentioned, nor does the word security or (national) security appear.¹⁶⁸ ADIZ rules also do not fall under any of the above mentioned categories.¹⁶⁹

Article 58 goes further to state the rights of all states over EEZs; paragraph I of Article 58 provides that in the EEZ all states;¹⁷⁰

“enjoy, subject to the relevant provisions of this Convention, the freedoms referred to in article 87 of navigation and overflight . . . and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships [and] aircraft . . . and compatible with the other provisions of this Convention.”

This provision sets out the privileges afforded to all states as regards an EEZ.¹⁷¹ It indirectly, through article 87, creates a linkage between the high seas with the EEZs.¹⁷² This is done by making available to all states, the freedom of overflight and navigation over these areas (high seas and EEZs).¹⁷³ Article 87 states the basic principle of the law as regards the high seas, which confirms that the high seas are open to all states.¹⁷⁴ This freedom of overflight and navigation guaranteed in article 87 would by way of reference also include the EEZ.¹⁷⁵

It can therefore be concluded that coastal states may only utilize their EEZs in accordance with the rights and jurisdiction provided in article 56 and 60.¹⁷⁶

¹⁶⁷ UNCLOS supra note 43 art 60.

¹⁶⁸ Papp supra note 27 at 44.

¹⁶⁹ Ibid Papp.

¹⁷⁰ Ibid Papp.

¹⁷¹ Ibid Papp.

¹⁷² Ibid Papp.

¹⁷³ Ibid Papp.

¹⁷⁴ Papp supra note 27 at 44.

¹⁷⁵ Ibid Papp.

¹⁷⁶ Ibid Papp.

Therefore, confirming that the freedom of overflight and navigation within EEZs is open to all states as guaranteed in article 58 in conjunction with article 87 of the UNCLOS.¹⁷⁷

The coastal state's jurisdiction does not extend to operational rules (such as, e.g. airworthiness, equipment, training of crew etc.) in the airspace over EEZ, as they are not connected with the coastal state's economic rights.¹⁷⁸ The operational rules as adopted by the state of registry of the aircraft are applicable to such aircraft flying over the EEZ; similarly to flights above the high seas (quasiterritorial jurisdiction).¹⁷⁹ It should be noted that proposals were made to the effect that, for the sake of greater certainty in air law, EEZ should be deemed to have the same legal status as the high seas and any reference to high seas in international air law instruments should also be deemed to encompass EEZ.¹⁸⁰

Accordingly, the Rules of the Air as adopted by the ICAO Council in accordance with Article 12 of the Chicago Convention are also applicable to the airspace over EEZ.¹⁸¹ Gbenga Oduntan in a more recently published book confirmed that the EEZ concept continues to encompass the rights and freedoms traditionally exercised by states in the airspace over high seas; such as, the freedom of overflight.¹⁸² For the aforementioned reasons, for the purpose of this dissertation, all reference to international airspace covers airspace over the high seas, EEZs and the superjacent airspace.¹⁸³

3.6 Conclusion

Can a state exercise its jurisdiction within ADIZs established by it beyond its territory?

Articles 58 and 87 of UNCLOS which confirm the freedom of overflight in EEZ and high seas are highly relevant to ADIZ, as in most of the cases the application of ADIZ rules is extended to aircraft in flight over high seas and EEZ. Noting the latter point,

¹⁷⁷ Ibid Papp.

¹⁷⁸ Ibid Papp, Hailbronner supra note 141 at 36.

¹⁷⁹ Papp supra note 27 at 44.

¹⁸⁰ Ibid Papp.

¹⁸¹ Ibid Papp.

¹⁸² Oduntan G, *Sovereignty and Jurisdiction in the Airspace and Outer Space Criteria for Spatial Delimitation*, Routledge Research in International Law (2012) p.137. Papp supra note 27 at 45.

¹⁸³ Ibid Papp.

since ADIZ rules are generally for national security, it is important to clarify that states are not authorized to adopt laws and regulations restricting the freedom of overflight of aircraft as that would be a clear violation of international law.¹⁸⁴ It therefore follows that ADIZs which exist in international airspace do not grant the declaring state sovereignty or jurisdiction over that airspace, which is governed by international law.¹⁸⁵ This means further that aircraft within an ADIZ in international airspace are not obliged to adhere to identification requirements of the state which created such ADIZ due to the state's lack of sovereignty over that area.

The coastal states are not granted by UNCLOS any right or jurisdiction over the airspace above the EEZ in respect of the freedom of overflight and enjoy no regulatory power with respect to flights over EEZs.¹⁸⁶ This therefore limits the legality of ADIZ rules under public international air law as states have no right to implement their ADIZ rules over such areas.¹⁸⁷

However, the practice of ADIZ rules in the U.S which applies only to aircraft en route, within or leaving U.S airspace can be argued to make sense of an otherwise senseless concept. The writer is of the view that with this important applicability factor, the U.S will have ample time to prepare for necessary action where there is a violation of its ADIZ rule upon the aircraft's entry into its airspace and completely disregard if there's no intention of the violating aircraft to enter its airspace. Thereby, in doing so, the U.S practices remains within the confines of international law as regards the freedom of overflight in international airspace.

¹⁸⁴ UNCLOS supra note 43 art 87.

¹⁸⁵ Ibid UNCLOS.

¹⁸⁶ UNCLOS supra note 43 art. 60.

¹⁸⁷ ICAO Study supra note 159 at 255-256, ¶ 11.8 and 11.12. Papp supra note 27 at 45.

Chapter Four

LEGALITY OF ADIZ UNDER INTERNATIONAL LAW

4.1 Introduction

As has been emphasised in previous chapters, ADIZs are mostly not within any state territory and therefore no state can exercise sovereignty or jurisdiction over it.¹⁸⁸ As mentioned in chapter one, there are no rules or laws governing the establishment of ADIZ.¹⁸⁹ A key problem relates to the legal basis and legality establishing ADIZ.¹⁹⁰ This problem is particularly acute since states do not have sovereignty or jurisdiction of the airspace over waters beyond its territorial sea such as the high seas and the EEZ.¹⁹¹ The consequent absence of powers to exercise state jurisdiction in the airspace over the high seas in case of aerial intrusion could create a great problem and conflicts between states. This is because aircraft within ADIZs are not obliged to comply with any state jurisdiction and states are powerless due to lack of jurisdiction, thereby making the creation of such ADIZs inevitably ambiguous.

This chapter seeks to discover the source and legality of ADIZ rules under international law. It has been established that ADIZ has no universal procedure for its establishment,¹⁹² which inevitably leads to varying practices by states. In an attempt to unpack this principle for better understanding, this chapter will start by analysing the ADIZ practice in the U.S and China; juxtaposing both practices, with the aim of better understanding the different practices of the same principle. Thereafter, the sources of international law will be discussed with the sole purpose of pinpointing the legal foundation upon which ADIZ rests.

4.2 The status of ADIZ

4.2.1 ADIZ and International Law

ADIZs are unilaterally declared designated areas of non-territorial airspace where states impose reporting obligations on civil and military aircraft for the purpose of

¹⁸⁸ UNCLOS supra note 43 art. 89.

¹⁸⁹ Rinehart & Elias supra note 5 at 5.

¹⁹⁰ Ibid Rinehart & Elias.

¹⁹¹ As has been established in chapter 3.

¹⁹² Rinehart & Elias supra note 5 at 5.

national security.¹⁹³ Since ADIZs are largely created beyond states' land and sea borders, their treatment in international law and international policy debates has remained complex and contentious.¹⁹⁴ There are various schools of thought as to whether ADIZ violates international law or not.¹⁹⁵ Cuadra is of the view that ADIZ can conflict with the freedom of air navigation in international airspace, which is one of the core principles of public international air law, Dutton, on the other hand, relies on American ADIZ practices to argue that the simple requirement to report is not a violation of international law.¹⁹⁶

4.2.2 An analysis of ADIZ rules in relation to the violation of international law principles (focus on U.S and Chinese ADIZ rules)

Whether or not ADIZ rules violate international law principles cannot be given a simplistic answer, simply because there is no uniform practice of ADIZ and each state understands and implements its rules differently. Below is an analysis of the different practices of ADIZ in the U.S and China.

a. U.S ADIZ Rules

The U.S. ADIZ rules in accordance with Title 14 Chapter I Subchapter F Part 99 Subpart A Section 99.9 prescribes as follows:

“(a) A person who operates a civil aircraft into an ADIZ must have a functioning two-way radio, and the pilot must maintain a continuous listening watch on the appropriate aeronautical facility's frequency.

(b) No person may operate an aircraft into, within, or whose departure point is within an ADIZ unless -

(1) The person files a DVFR flight plan containing the time and point of ADIZ penetration, and

(2) The aircraft departs within five minutes of the estimated departure time contained in the flight plan.

¹⁹³ Lamont supra note 21 at 192.

¹⁹⁴ Lamont supra note 21 at 192.

¹⁹⁵ Ibid Lamont.

¹⁹⁶ For a skeptical view on ADIZ's compliance with international law see Cuadra supra note 140. For ADIZs as compliant with international law see Dutton, supra note 22.

(c) If the pilot operating an aircraft under DVFR in an ADIZ cannot maintain two-way radio communications, the pilot may proceed, in accordance with original DVFR flight plan, or land as soon as practicable. The pilot must report the radio failure to an appropriate aeronautical facility as soon as possible.

(d) If a pilot operating an aircraft under IFR in an ADIZ cannot maintain two-way radio communications, the pilot must proceed in accordance with § 91.185 of this chapter.”¹⁹⁷

Section 99.1 prescribes as follows;

“This subpart prescribes rules for operating all aircraft (except for Department of Defence and law enforcement aircraft) in a defence area, or into, within, or out of the United States through an Air Defence Identification Zone (ADIZ) designated in subpart B.”¹⁹⁸

i. Important things to note from the above sections;

1. The rules only apply to aircraft entering, within or leaving U.S airspace, this simply means that aircraft simply flying in international airspace with no intention of entering the U.S are excluded from following U.S ADIZ rules.¹⁹⁹ This shows in the writer’s opinion that ADIZ established by the U.S is strictly for security reasons and nothing more and consequently refutes accusations that it might serve a purpose of extending territory, as no concern is had to aircraft simply transiting through international airspace.²⁰⁰
2. There is no mention of the use of force in case of non-compliance within ADIZ outside the territory of the U.S, this in the writers view is simply so because the U.S acknowledges that it has no right to the use of force within international airspace and force can only be used once the aircraft has entered its airspace and poses an imminent threat.²⁰¹

¹⁹⁷ U.S. Electronic Code supra note 23 §99.9.

¹⁹⁸ Id U.S. Electronic Code at §99.1.

¹⁹⁹ Lamont supra 21 at 190.

²⁰⁰ Ibid Lamont.

²⁰¹ “All aircraft operating in US national airspace are highly encouraged to maintain a listening watch on VHF/UHF guard frequencies (121.5 or 243.0 MHz). If subjected to a military intercept, it is incumbent on civilian aviators to understand their responsibilities and to comply with ICAO standard signals relayed from the intercepting aircraft. Specifically, aviators are expected to contact air traffic control without delay (if able) on the local operating frequency or on VHF/UHF guard. Noncompliance may result in the use of force.” Federal Aviation Authority, Us Department of Transportation, Aeronautical Information Manual, Official Guide to Basic Flight Information and ATC Procedures Chapter 5-6-13 a.3 (2017) p.402.

b. China's ADIZ rules

China's ADIZ rules as in contrast with U.S ADIZ rules are as follows;

- a. Compliance is required by all aircraft within the zone regardless of their destination.²⁰²
- b. The implementation of 'defensive emergency measures' in case of non-compliance to its ADIZ rules.²⁰³

i. Reactions to China's ADIZ from the international community

1. Compliance is required by all aircraft within the zone regardless of their destination.²⁰⁴ This would imply the unlawful exercise of sovereign jurisdiction over international airspace by China.²⁰⁵ This negates the guaranteed freedom of overflight in international airspace.²⁰⁶
2. The established ADIZ extends onto disputed areas and could be seen as an attempt by China to extend its territory and lay claim to disputed territory.²⁰⁷ The argument is that, by declaring an ADIZ that included the Senkaku/Diaoyu islands and Socotra Rock, China was attempting to enhance its sovereignty/maritime claims over the Senkaku/Diaoyu Islands and Socotra Rock.²⁰⁸

²⁰² Beckman & Phan supra note 41 at 9.

²⁰³ Id Beckman & Phan at 11.

²⁰⁴ Beckman & Phan supra note 41 at 9.

²⁰⁵ Ibid Beckman & Phan.

²⁰⁶ UNCLOS supra note 43 art. 87.

²⁰⁷ See M. Park, 'Why China's New Air Zone Incensed Japan, US', CNN (updated 2:15 AM EST, Wed November 27, 2013), online: <http://edition.cnn.com/2013/11/25/world/asia/china-japan-island-explainer/> [accessed 14 June 2018]. Beckman & Phan supra note 41 at 10.

²⁰⁸ Ibid Beckman & Phan.



SOURCE: R. Beckman and H.D. Phan, *Air Defense Identification Zones: Implications for Freedom of Overflight and Maritime Disputes*, Centre for International Law National University of Singapore (2014)

3. The implementation of 'defensive emergency measures' in case of non-compliance to its ADIZ rules.²⁰⁹ This goes against general international principles of the use of force,²¹⁰ not to forget that such use of force would be in international airspace which is a violation of the freedom of overflight in international airspace.²¹¹ Some commentators have opined that one reason that China may have declared the ADIZ in this manner was to counter the fact that Japan was intercepting Chinese aircraft in its ADIZ near the equidistance line between the two States, many miles from the Japanese coast.²¹² After declaring an ADIZ in the same area, China could argue that Japan is under a corresponding obligation to give China notice if its aircraft enter China's ADIZ.²¹³

²⁰⁹ Beckman & Phan supra note 41 at 11.

²¹⁰ UN Charter supra note 45 art 2(4).

²¹¹ UNCLOS supra note 43 art 87.

²¹² See Heginbotham E, 'The Foreign Policy Essay: China's ADIZ in the East China Sea', Lawfare Blog (24 August 2014), online:

<https://www.lawfareblog.com/search/node/The%20Foreign%20Policy%20Essay%3A%20China%27s%20ADIZ%20in%20the%20East%20China%20Sea%E2%80%99>. [accessed 14 June 2018]. Beckman & Phan supra note 41 at 10.

²¹³ Ibid Beckman & Phan.

In addition, failure of China to consult its neighbours before declaring its ADIZ was also a concern to the international community.²¹⁴ Consultation may be considered an exercise of due regard.²¹⁵ It may be a practice that States should consider before declaring ADIZs over areas of maritime dispute.²¹⁶ In the case of China's ADIZ, tensions could have been mitigated if China had engaged in any form of consultation with Japan, South Korea and the United States.²¹⁷

However, there is no clear and consistent practice that States declaring an ADIZ must first consult neighbouring States or States where an overlapping ADIZ would result.²¹⁸ It seems highly unlikely that the United States would have consulted China and Russia before establishing ADIZs off the coasts of Japan and Korea.²¹⁹ It appears that Japan did consult Taiwan before extending its ADIZ in 2010.²²⁰ However, it should be noted that consultation means prior notification not request for consent.²²¹

From the practice of ADIZ in China, it is easy to see how Cuadra could have reached the conclusion that ADIZ violates international air law. ECS gravely violates international law principles of the use of force, extension of territory and jurisdiction into international airspace.

However, the writer, relying on the U.S practice (the pioneers of the concept) is inclined to agree with Dutton's argument that ADIZ does not violate international air law because the foundation of its creation is based on securing U.S territory and not extending it.²²²

²¹⁴ Beckman & Phan supra note 41 at 10.

²¹⁵ Ibid Beckman & Phan.

²¹⁶ Ibid Beckman & Phan.

²¹⁷ Lee J.W, 'Tension on the Air: The Air Defense Identification Zones on the East China Sea', (2014) 7 Journal of East Asia International Law 274, at 279. Beckman & Phan supra note 41 at 10.

²¹⁸ Ibid Beckman & Phan.

²¹⁹ Ibid Beckman & Phan.

²²⁰ Beckman & Phan supra note 41 at 10.

²²¹ Despite the fact that Taiwan registered an objection after being consulted, Japan proceeded to amend its ADIZ. Ministry for Foreign Affairs of Japan, Press Conference, Revision to Air Defense Identification Zone (ADIZ) Line (Jun. 25, 2010), online: http://www.mofa.go.jp/announce/fm_press/2010/6/0625_01.html. [accessed 15 June 2018]. Beckman & Phan supra note 41 at 10.

²²² Dutton supra note 24.

4.3 International Law Sources of ADIZ

4.3.1 Treaty Law

There is currently no treaty law expressly permitting or prohibiting the establishment of ADIZ by states over the high seas and EEZ.²²³ The Chicago Convention as well as the UNCLOS is silent as to the establishment of ADIZ by states over the high seas and EEZ.²²⁴ However the UNCLOS expressly states the freedom of overflight in the EEZ and high seas.²²⁵ The rights granted by the UNCLOS, to coastal states over the EEZ, exclude security.²²⁶ Given these restrictions, some writers are of the opinion that states establish ADIZ as a ploy to extend their sovereign territory and violate the freedom of overflight, guaranteed by the UNCLOS.²²⁷ While others maintain that, notwithstanding the absence of a treaty, the legal basis of ADIZ can be found in customary international law, given few objections of state practice since the 1950s.²²⁸

4.3.2 Customary International law

The Statute of the International Court of Justice (ICJ) describes international custom as 'general practice accepted as law'.²²⁹ It was established by the ICJ in the North Sea Continental Shelf Case,²³⁰ that for a customary rule to emerge it needs the objective element or State practice i.e. very widespread and uniform practice which would include States whose interests were specially affected (the state practice must support the custom) and a subjective element, that is, a general recognition of the rule of law or legal obligation (this simply requires that States when performing a custom must do so with the belief that they are legally bound to perform the custom), this concept is called *opinio juris*.²³¹ Both elements are co-dependent and must

²²³ Id Beckman & Phan at 5.

²²⁴ Beckman & Phan supra note 41 at 5.

²²⁵ UNCLOS supra note 43 arts. 58 & 87.

²²⁶ Id art. 56.

²²⁷ Beckman & Phan supra note 41 at 5.

²²⁸ Ibid Beckman & Phan.

²²⁹ Article 38(b) Statute of the International Court of Justice, adopted 26 June 1945, 33 UNTS 993, Art 38(1)(a) (entered into force 24 October 1945) (Hereinafter ICJ Statute); Beckman & Phan supra note 41 at 5.

²³⁰ North Sea Continental Shelf, Germany v Denmark, Merits, Judgment, (1969) ICJ Rep 3, ICGJ 150 (ICJ 1969), 20th February 1969, International Court of Justice [ICJ] (Hereinafter North sea shelf cases).

²³¹ Customary International Law as a Source of Law,

<https://ruwanthikagunaratne.wordpress.com/2011/04/21/lesson-2-2-customary-international-law-as-a->

jointly exist to constitute customary international law.²³² Also in the Nicaragua case, the ICJ stated that

“For a new customary rule to be formed, not only must the acts concerned ‘amount to a settled practice’, but they must be accompanied by *opinio juris sive necessitatis*.²³³ Either the States taking such action or other States in a position to react to it, must have behaved so that their conduct is evidence of a belief that the practice is rendered obligatory by the existence of a rule of law requiring it.”²³⁴

Therefore to ascertain whether or not the legality of ADIZs is settled under customary international law, one has to prove that the norm has met the threshold as determined by the ICJ.²³⁵

In the past it was argued that ADIZ had not yet constituted customary international law.²³⁶ However, in recent times, some scholars are taking notice of state practice and declaring ADIZ as presumably a norm of customary international law or at least a concept legitimized by state practice.²³⁷ The acceptance of ADIZ as constituting customary international law is however not currently unanimous, it remains contentious and disputed in the international community.²³⁸

But regardless of whether or not ADIZ has become a customary rule, it is still a fact that many states have established and enforced their ADIZs with relatively few objections.²³⁹ It is also true that international law does not prohibit the establishment of ADIZs.²⁴⁰ On the other hand, it can be argued that an ADIZ does not prohibit or

[source-of-law/](#) [accessed 17 June 2018] (Hereinafter CIL), O.O. Akinfolarin, *Advanced International Law exam* (Faculty of Law, University of Pretoria) pg. 9, 2018 (Hereinafter Akinfolarin).

²³² Ibid CIL, Akinfolarin.

²³³ Beckman & Phan supra note 41 at 6.

²³⁴ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*, Judgment, (1986) ICJ Reports 14, at 44; Beckman & Phan supra note 41 at 6.

²³⁵ *ibid* Beckman & Phan.

²³⁶ Cuadra supra note 140 at 485, 505,507 According to Cuadra the global spread of ADIZ appeared to be “customary international law in the making.” Hailbronner supra note 141 at 518-519. Hailbronner argues that the claims to extend jurisdiction for security purposes have not been approved by a considerable number of states. Papp supra note 27 at 47.

²³⁷ Roach J.A, *Air Defence Identification Zones*, Max Planck Encyclopedia of Public International Law Max Plank Encyclopedia of Public International Law, (last update 2012) p. 3, ¶15c.

²³⁸ Oduntan supra note 180 at 144,147 Oduntan argues that ADIZ constitute a limitation on the rights of other sovereign states to common and equal use of airspace over the high seas. The fact that there have been heavy protests against these formulations is good enough reason to hold that the institution of such zones cannot be successfully justified as arising from customary international law. Papp supra note 27 at 20.

²³⁹ *Ibid* Papp.

²⁴⁰ *Ibid* Papp.

limit the freedom of overflight.²⁴¹ It is not a “no-fly zone”.²⁴² It merely requires that a foreign aircraft exercising the freedom of overflight identify itself so as to protect the security interests of the coastal State.²⁴³ Despite the fact that the legality of ADIZs under international law is unclear, most States comply in an effort to enhance security and safety near territorial airspace.²⁴⁴

4.4 Conclusion

What source of international law is the establishment of ADIZ predicated on?

The legal basis which ADIZ rests upon is clearly not treaty law as there are no treaties that provide for the establishment of ADIZ.²⁴⁵ However, deciding whether ADIZ has become a rule of customary international law is less explicit and straight forward.²⁴⁶ Going by the ICJ’s decisions on what constitutes a rule of customary international law, it is the opinion of the writer that ADIZ does not meet the criteria.²⁴⁷ ADIZ rules are clearly not uniform as can be seen from the varying practices in the U.S and China and there’s also an absence of *opinio juris*.²⁴⁸ There’s no legal obligation on states to establish ADIZ, in fact the establishment of same is seen as a violation of international air law.²⁴⁹ However, given the absence of an established rule of international law concerning the establishment and maintenance of ADIZ, customary international law may very well provide a legal basis for the establishment of ADIZ if state practice leads to the formation of a new rule of customary law.²⁵⁰

²⁴¹ Ibid Papp; this is Duttons view: Dutton supra note 22 at 699.

²⁴² Beckman & Phan supra note 41 at 6.

²⁴³ Ibid Beckman & Phan.

²⁴⁴ Ibid Beckman & Phan.

²⁴⁵ Rinehart & Elias supra note 5 at 5.

²⁴⁶ Lamont supra note 21 at 192.

²⁴⁷ ICJ Statute supra note 249, North sea shelf cases supra note 227.

²⁴⁸ Beckman & Phan supra note 41 at 6-12.

²⁴⁹ Cuadra supra note 140 at 489-493.

²⁵⁰ Papp supra note 27 at 49.

Chapter Five

SUMMARY, RECOMMENDATION AND CONCLUSION

5.1 Introduction

The aim of this dissertation has been to consider the legal basis for the establishment of ADIZ by states. The summary below highlights the basic conclusions reached in the chapters above, from which recommendations will be made below.²⁵¹

5.2 Summary

1. ADIZ is either within a state's territory or outside same, ADIZ created outside a state's territory has been the main concern of this work. ADIZ outside of a state's territory would either be over the Exclusive Economic Zone (EEZ), the high seas or both. There is no universal procedure for the adoption or establishment of ADIZ neither are there air traffic procedures with regard to such airspace, states individually decide to create and adopt ADIZ adjacent to its territory with no limit as to size or range.²⁵² The underlining purpose for its creation is the protection of national security and the possible reduction of the risk of mid-air collisions.²⁵³

2. All states have exclusive sovereignty and jurisdiction of the airspace over their territory and territorial sea. The use of force by a state, within its territory, against a civil aircraft is prohibited except in cases of self-defence (in which case the attack from the aircraft must be imminent and not probable. The force used must be necessary and proportional i.e required to expel the attack from its territory). A further requirement may be an authorization from the Security Council of the United Nations in the interest of peace and security.

3. No state coastal or landlocked has exclusive jurisdiction of the airspace over the high seas or EEZ. The freedom of overflight in those areas is guaranteed in both treaty and customary international law.²⁵⁴ States do not have the authority to exercise the use of force within the high seas and the EEZ.

²⁵¹ This then creates the problem of ADIZ creation over disputed territories as is the case in the East China Sea.

²⁵² Rinehart & Elias supra note 5 at 5.

²⁵³ Welch supra note 2.

²⁵⁴ UNCLOS supra note 43 art. 83.

4. The source of ADIZ under international law is still disputed.²⁵⁵ There is no treaty approving or prohibiting the establishment of ADIZ by states.²⁵⁶ The only possible source would be customary international law, as a result of prolonged state practice,²⁵⁷ with few objections.²⁵⁸ However this alone does not meet the criteria set by the ICJ²⁵⁹ to constitute a rule of customary international law. At best it can be said that the concept of ADIZ is an emerging state practice.²⁶⁰

5.3 Recommendation

This dissertation has considered the essence and legality of ADIZ under international law. From the above chapters and summary it is clear that ADIZ though widely practiced and obeyed is far from having a uniform legal framework.²⁶¹ This is mostly hinged on the fact that with no written or customary standard every state understands and implements its own ADIZ differently.²⁶² As long as such state practice has not evolved into a rule of customary law, there will continue to be unilateral establishments of ADIZ with more or less blatant violations of international law.²⁶³ It is in the opinion of the writer, in agreement with Papp,²⁶⁴ that the international civil aviation authority (ICAO) which is vested with the power to regulate civil aviation matters, should take up the responsibility to establish a standard legal framework for the establishment of ADIZ. In doing so, it should set out the following;

1. Acceptable boundaries and limitation which states must abide by in establishing ADIZs.
2. Unified and codified rules which will apply within ADIZs
3. Actions that may be taken in case of non-compliance by aircraft
4. The extent of state power within its ADIZ.

Also there should be a reemphasis on the freedom of overflight within international airspace and the absolute prohibition of the use of force by any state within that

²⁵⁵ Papp supra note 27 at 20.

²⁵⁶ Ibid Papp.

²⁵⁷ ADIZ has been in practice since the 1950s.

²⁵⁸ The most objections have been directed to China's ADIZ established over the ECS.

²⁵⁹ Widespread practice and opinion juris; North sea shelf cases supra note 227.

²⁶⁰ Papp supra note 27 at 20.

²⁶¹ Rinehart & Elias supra note 5 at 5.

²⁶² This can be clearly seen from the varying ADIZ practice in the U.S and China.

²⁶³ Such violations specifically those practiced by China within the ECS ADIZ have been discussed in chapter 4.

²⁶⁴ Papp supra note 27 at 20.

area. These rules should be added to the Standard and Recommend Practices (SARPs) of the Chicago Convention which provides the current annexes to the Convention. The reason for this, as has been noted in chapter 3, is because an amendment of the entire Convention is almost impossible due to the requirement of the consent of all parties to the Convention. Therefore to avoid a part application of ADIZ rules²⁶⁵ which it may adopt, it will be safer to do so through the SARPs. ADIZ, though not a new concept, needs a legal framework and ICAO, in the writer's opinion is in the best position to make it happen.

5.4 Conclusion

As an international concept ADIZ is complex due to its varied interpretation and practice, however this can be resolved with a specified legal framework as stated above. It is clear from this dissertation that ADIZ was created and is tolerated for national security objectives. Any deviation from this legitimate objective of ADIZ will result in an unlawful extension of territorial sovereignty as can be seen in the case of China's ADIZ in the ECS,²⁶⁶ resulting in a violation of international law.

²⁶⁵ As can be seen with Article 3bis of the Chicago Convention.

²⁶⁶ Almond R.G, South China Sea: The Case against an ADIZ, <https://thediplomat.com/2016/09/south-china-sea-the-case-against-an-adiz/> [accessed 12 June 2018].

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