

# Air Defense Identification Zone (ADIZ) in the light of Public International Law

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*The Air Defense Identification Zone (ADIZ) is established to serve the national security interests of the state. Maintaining ADIZ becomes fundamentally relevant from the perspective of international law when such a zone extends into airspace suprajacent to international waters. Materially, two considerations are most relevant in terms of ADIZ conforming to international law, both potentially creating a conflict with ADIZ rules: Contracting Parties to the Chicago Convention on International Civil Aviation have delegated rule-making powers to enact rules of the air with a view to safeguarding the safety of air traffic in international airspace to the ICAO Council. Furthermore, in international airspace the state of registry generally enjoys exclusive jurisdiction with respect to the aircraft carrying its national mark. In this paper ADIZ will be deemed as exercising jurisdiction over extraterritorial acts by the state maintaining ADIZ; hence, the prescriptive and enforcement distinction adds an additional layer to the analysis of the international legal context of ADIZ. The response to as to how ADIZ fits in the international legal framework may differ depending on whether one seeks to identify permissive rules of international law related to the maintenance of ADIZ in international airspace or the non-existence of prohibitive rules sufficient to justify conformance with international law.*

*Keywords: ADIZ, air law, law of the sea, Chicago Convention on International Civil Aviation, jurisdiction, use of force, international customary law, civil aircraft, state of registry*

## 1. By way of Introduction

This paper endeavors to highlight some of the manifold international law aspects of the Air Defense Identification Zone (ADIZ), which become increasingly challenging when ADIZ is extended to international airspace falling outside of national sovereignty. The overall objective is to find out where ADIZ fits in the international public law framework. To this end, an attempt is made to identify relevant permissive or prohibitive rules of international law in terms of states' powers to establish ADIZ in international airspace. This paper does not, however, pretend to provide an all-encompassing and comprehensive assessment of international public law in the course of identifying such permissive and prohibitive rules. Such an undertaking would go beyond the scope of the present effort.

The focus of this paper is on the international law framework regulating civil aviation in times of peace – with special emphasis on the rules and regulations pertaining to the airspace over international sea that are not the subject of national sovereignty.

ADIZ will be qualified as exercising state jurisdiction – with respect to which, a distinction will be drawn between prescriptive jurisdiction and jurisdiction to enforce. This paper does not endeavor to comprehensively address jurisdiction, hence only jurisdiction based on the Chicago Convention, namely territorial jurisdiction and quasi-territorial jurisdiction, are assessed. Other international air law instruments containing rules of jurisdiction are not addressed, such as for example criminal jurisdiction over offences committed on board an aircraft or jurisdictional regime of the Montreal Convention for the unification of certain rules for international carriage by air. Other potentially relevant grounds for extraterritorial jurisdiction not closely related to air law – such as the protective or security principle of the state established in international criminal law or the effects doctrine developed in competition law – are not the subject of this paper.

The specific legal regime applicable in times of armed conflict – and the special rules pertaining to state aircraft, including military aircraft – is not addressed. At the outset a short definition to ADIZ is provided, followed by a concise overview of conventional sources of international air law; in addition to law of the sea, as applicable to ADIZ. In the first instance Article 11, Article 12 and Annex 2, Annex 6 and Annex 11 of the Chicago Convention on International Civil Aviation signed in 1944 is the subject of examination, whereas in the second the paper takes a closer look at the status of airspace over the contiguous zone and the exclusive economic zone (EEZ), codified in the United Nations Convention on the Law of the Sea adopted in 1982. The customary international law context and self-defense aspects will also be touched upon. Finally before drawing conclusions a handful of international practices comparable to ADIZ shall be briefly highlighted.

## 2. Definition and Historical Background

### 2.1. Definition

According to Annex 15 to the Convention on International Civil Aviation the definition of ADIZ (Air Defense Identification Zone) reads as follows: “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).”<sup>1</sup>

The definition of ADIZ provided by applicable U.S. regulations specifies the rationale for the adoption of such special rules in the following manner (emphasis added by author): “*Air defense identification zone (ADIZ) means 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.*”<sup>2</sup>

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The views expressed by the author in this paper are personal and do not necessarily reflect the views of his employer.

<sup>1</sup> Annex 15 to the Convention on International Civil Aviation: Aeronautical Information Services Fourteenth Edition July 2013 Contents of Aeronautical Information Publication p. 1-2.

<sup>2</sup> Electronic Code of Federal Regulations Title 14: Aeronautics and Space PART 99 – Security Control of Air Traffic § 99.3.

<http://www.ecfr.gov/cgi-bin/text-idx?SID=47ea22ffe1bbd086f961a0ea69e03aa3&node=sp14.2.99.a&rgn=div6> (last retrieved: 10 September 2015) (Electronic Code of U.S. Federal Regulations 2015).

ADIZ is designated *unilaterally* by a state with the declared purpose of safeguarding national security interests and/or other purposes such as *e.g.* ensuring the establishment of reasonable conditions of entry into territory<sup>3</sup> of the state that established ADIZ. It should be noted that security considerations of a state are distinct from the well-established and longstanding objective of safeguarding the safety of civil aviation. ADIZ is either established in airspace where a state has complete and exclusive sovereignty or *outside of such airspace* where no state has complete and exclusive sovereignty. However, some recent examples also included partially overlapping ADIZs and in some cases ADIZ was established in the airspace over islands, the legal status of which is disputed (see later, East China Sea ADIZ). The latter development led to an interpretation that ADIZ may also be used to substantiate territorial claims over disputed areas.<sup>4</sup> Through ADIZ states impose reporting and other type of obligations on pilots/operators of aircraft entering such zones. Non-conformance with ADIZ rules results in prompt retaliatory action<sup>5</sup>, including the interception or forced landing of an aircraft violating ADIZ rules (by military aircraft of the state declaring the ADIZ).

State practice pertaining to ADIZ is rather mixed. It may be categorized in different ways according to its:

- a) time duration (temporary or permanent);
- b) personal scope (applied solely to civil aircraft or to civil and military aircraft alike);
- c) material scope (covering only “inbound” flights to the state having established ADIZ or all flights entering ADIZ regardless of their final destination);
- d) territorial scope (covering airspace falling under national sovereignty or international airspace).

## 2.2. The U.S. and the East China Sea ADIZ

Given the fact that the practice of the United States and that of China concerning ADIZ have been drawing much international attention, and also considering U.S. ADIZ rules seem to be fairly elaborated and accessible to the public, the two respective state practices are introduced in the following paragraphs in more detail.

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.<sup>6</sup> The U.S. ADIZ solely applies to

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<sup>3</sup> The Commander’s Handbook on the law of naval Operations, NWP 1-14M, Edition July 2007, p. 2-13, *para* 2.7.2.3 [http://permanent.access.gpo.gov/gpo56195/1-14M\\_\(Jul\\_2007\)\\_NWP.pdf](http://permanent.access.gpo.gov/gpo56195/1-14M_(Jul_2007)_NWP.pdf) (last retrieved: 10 September 2015) (Commander’s Handbook). Also other declared objectives of U.S. ADIZ include national defense considerations and stopping the transportation of illegal drugs by aircraft. Federal Register/Vol. 66, No 189/Friday September 28, 2001/Rules and regulations p. 49818 <http://www.gpo.gov/fdsys/pkg/FR-2001-09-28/pdf/FR-2001-09-28.pdf> (last retrieved: 10 September 2015).

<sup>4</sup> Christopher K. Lamont, *Conflict in the Skies: The Law of Air Defence Identification Zones*, Air & Space Law 39, no. 3, 2014, p. 202.

<sup>5</sup> Air Traffic Services Planning Manual ATSPM Doc. 9426 First (Provisional) Edition 1984 *para* 3.3.4 p. I-2-3-4.

<sup>6</sup> Electronic Code of U.S. Federal Regulations 2015 Title 14: Aeronautics and Space PART 99 – Security Control of Air Traffic.

in-bound and out-bound air traffic and air traffic in the U.S.<sup>7</sup> It is composed of the following geographical components: a) Contiguous ADIZ, b) Alaska ADIZ, c) Guam ADIZ, d) Hawaii ADIZ<sup>8</sup> (jointly referred to as: *U.S. ADIZ*). It is noteworthy that U.S. ADIZ rules also apply to all flights (VFR and IFR alike) and to uncontrolled airspace, in addition to controlled airspace.<sup>9</sup> The rules cover all aircraft, both civil and military – although certain obligations solely pertain to civil aircraft.<sup>10</sup> Based on information available on the internet<sup>11</sup>, the East China Sea Air Defense Identification Zone of the People's Republic of China (hereinafter: *East China Sea ADIZ*) established in November 2013 applies to all traffic entering the zone regardless of their destination. In this regard it should be recalled that Canadian ADIZ (CADIZ) also covers all aircraft flying in such zone.<sup>12</sup> Military aircraft are also subject to East China Sea ADIZ rules. In addition to radio, flight plan, and radar requirements the East China Sea ADIZ also prescribes nationality identification requirements.

The East China Sea ADIZ extends to 300 miles beyond territorial waters,<sup>13</sup> whereas in respect of the United States the ADIZs extend seaward of American coastline in the range of 300 to 400 nautical miles.<sup>14</sup> In both cases non-compliance with ADIZ rules and regulations may result in interception of the “violator aircraft”<sup>15</sup>. In the *East China Sea ADIZ* China’s armed forces will adopt “defensive emergency measures” to respond to non-cooperating aircraft.<sup>16</sup>

It is notable that originally ADIZ rules were established by the U.S. Secretary of Commerce in 1950 based on a mandate received from President Truman issued in the form of an executive order.<sup>17</sup> The President

<sup>7</sup> *Ibid* Title 14 Part 99. §99.1 (a).

<sup>8</sup> *Ibid* Title 14. Part 99. §99.41 to §99.49.

<sup>9</sup> *Ibid* Title 14. Part 99.15 (a) (2).

<sup>10</sup> *Ibid* Title 14. Part 99. §99.1 sets out that the subpart prescribes rules for operating *all* aircraft (except for Department of Defense and law enforcement aircraft) in, or into, within, or out of United States through an ADIZ. In 99.9§ radio requirements solely apply to persons operating a civil aircraft into ADIZ.

<sup>11</sup> Announcement of the Aircraft Identification Rules for the East China Sea Air Defense Identification Zone of P.R.C. [http://news.xinhuanet.com/english/china/2013-11/23/c\\_132911634.htm](http://news.xinhuanet.com/english/china/2013-11/23/c_132911634.htm) (last retrieved: 10 September 2015) (East China Sea ADIZ Announcement).

<sup>12</sup> Canadian Aviation Regulations Consolidation, SOR/96-433, 2015, pp. 585-586. <http://laws-lois.justice.gc.ca/PDF/SOR-96-433.pdf> (last retrieved: 10 September 2015).

<sup>13</sup> Lamont 2014, p. 188.

<sup>14</sup> Peter A. Dutton, *Caelum Liberum: Air Defense Identification Zones outside Sovereign Airspace*, American Journal of International Law, 2009, Vol. 103, p. 698.

<sup>15</sup> For US interception procedures see US Federal Aviation Administration (FAA): January 8, 2015 Aeronautical Information Manual (AIM) Chapter 5 section 6: National Security and Interception Procedures It should be noted that the cited AIM document does not expressly state that failure to observe ADIZ rules in international airspace results in interception of aircraft. ADIZ and CADIZ rules used to contain an explicit reference to interception. This is no longer the case. However currently ADIZ rules and interception rules are dealt with under one common section of the (U.S.) AIM. Since interception serves *inter alia* the purpose of identifying an aircraft (AIM p. 5-6-2.), aircraft non-complying with ADIZ rules presumably risk interception. [https://www.faa.gov/air\\_traffic/publications/media/aim\\_w\\_chgs\\_1-2\\_dtd\\_1-8-15.pdf](https://www.faa.gov/air_traffic/publications/media/aim_w_chgs_1-2_dtd_1-8-15.pdf) (last retrieved: 10 September 2015).

<sup>16</sup> East China Sea ADIZ Announcement 2013, point 4.

<sup>17</sup> Elizabeth Cuadra, *Air Defense Identification Zones: Creeping Jurisdiction in the Airspace*, Virginia Journal of International Law, Vol. 18, 1977, pp. 492-493.

used his powers based upon the Civil Aeronautics Act of 1938, as amended in 1950, mandating the President whenever he determines such action to be required in the interest of national security to direct the Secretary of Commerce to exercise powers, duties, and responsibilities granted in the Act to the extent, in the manner and for such periods of time as the President considers necessary.<sup>18</sup> Subsequently in 1958 the title of this statutory provision was renamed “Geographical Extension of Jurisdiction”, while currently it reads “Relationship to other laws”.<sup>19</sup> It would seem that the said provision makes possible under certain conditions the extension of the application of certain sections of the civil aviation code to areas outside the United States. This may imply that the sanctions regime applicable in relation to a violation of ADIZ rules in the airspace over the United States<sup>20</sup> is also enforced in respect of breaches of ADIZ rules occurring abroad. It is of interest in this regard that the ADIZ regulations used to spell out expressly that, in addition to penalties otherwise provided for (in the act), any person violating ADIZ (security) provisions shall be subject to a fine of not exceeding 10,000 USD or to imprisonment not exceeding one year.<sup>21</sup> However, the current ADIZ regulations do not contain such a provision. Publicly available information suggests that violations of special security instructions are solely related to national airspace (D.C. ADIZ).<sup>22</sup> In sum, the U.S. sanctions regime applicable in the case of non-compliance with ADIZ rules pertaining to international airspace is far from being obvious, a further in-depth study would be required to shed light on this matter.

No information was available to the author of this paper on the enforcement regime of the East China Sea ADIZ save interception measures that are initiated against aircraft disregarding ADIZ procedures, as highlighted above in this sub-section.

As regards official justifications for maintaining ADIZ, China argues that the establishment of ADIZ was necessary to protect its state sovereignty and territorial and airspace security,<sup>23</sup> whereas the current official U.S. position seems to underline the idea that ADIZ rules constitute reasonable conditions for entry into territorial airspace.<sup>24</sup>

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<sup>18</sup> Sec 1201 and Sec 1203 of Title XII- Security Provisions <http://www.airgyle.com/wp-content/uploads/64-Stat.-825-Act-of-Sept.-9-1950-S-3995.pdf> (last retrieved: 10 September 2015).

<sup>19</sup> Public Law 85-726 – Aug 23, 1958 Sec 1110. Geographical Extension of Jurisdiction; Current legislation in force 49. U.S. Code § 40120 – Relationship to other laws.

<sup>20</sup> See, e.g. 49 U.S. CODE § 46307: Violation of national defense airspace. Violations of security provisions established pursuant to the said Act (49 U.S. Code) are punishable by payment of fine and/or imprisonment.

<sup>21</sup> John Taylor Murchison, *The Contiguous Airspace Zone in International Law*, Thesis Presented to the Faculty of Graduate Studies McGill University for the Degree of LLM, 1955 Appendix II regulations of the Administrator Part 620 – Effective January 15, 1953 Security of Air Traffic, p.3., para §620.18.; McGill digitool library [http://digitool.library.mcgill.ca/R/?func=dbin-jump-full&object\\_id=110036&local\\_base=GEN01-MCG02](http://digitool.library.mcgill.ca/R/?func=dbin-jump-full&object_id=110036&local_base=GEN01-MCG02) (last retrieved: 10 September 2015).

<sup>22</sup> US Federal Aviation Administration FAA Compliance and Enforcement Program Order 2150.3B CHG, 2015, pp.H-6-H-7. [http://www.faa.gov/documentLibrary/media/Order/2150.3B\\_W-Chg\\_8.pdf](http://www.faa.gov/documentLibrary/media/Order/2150.3B_W-Chg_8.pdf) (last retrieved: 10 September 2015).

<sup>23</sup> Statement by Chinese Defense Ministry spokesman on ADIZ dated December 3, 2013 <http://www.fmprc.gov.cn/ce/cebe/eng/zt/dhfkbsbq13/t1109762.htm> (last retrieved: 10 September 2015) (Statement of Chinese Defense Ministry Spokesman).

<sup>24</sup> Andrew S. Williams, *The Interception of civil Aircraft Over the High Seas in the Global War on Terror*, Air Force Law Review, Vol. 73, 2007 p. 96. and Commander’s Handbook 2007 p. 2-13 para 2.7.2.3.

### 2.3. Historical Background

The United States was the first to adopt ADIZ, extending airspace over high seas in 1950; to be later followed by Canada in 1951 (CADIZ).<sup>25</sup> The ADIZ established by the United States (and Canada) in the 1950s was the forerunner of and model for the spread of ADIZ in the Cold War era. Initially, the bipolar world ADIZ was conceived to protect against (nuclear) attacks carried out by long range enemy bombers.<sup>26</sup> As military technology evolved, the launching of long-range nuclear missiles became feasible from other platforms, hence the originally identified threat from aircraft gradually receded. The tragic events of September 11, 2001 and the emergence of new security threats, however, reinvigorated the said practice in the United States. To date, ADIZ remains a topical and, in some instances, widely discussed issue; as highlighted by the international reaction to the establishment of the East China Sea Air Defense Identification Zone in November 2013. The creation of the latter ADIZ drew criticism due to the fact that it overlaps with the respective ADIZs of Japan and South Korea<sup>27</sup>, in addition to it covering the airspace over the Senkaku/Diaoyu islands – which are claimed by Japan, China, and Taiwan – and the airspace over the Ieodo/Suyan reef – claimed in turn by both South Korea and China.<sup>28</sup>

Canada, India, Japan, Pakistan, Norway, United Kingdom, China, South Korea, Taiwan, and the United States are some examples of countries currently maintaining air defense identification zones.<sup>29</sup>

### 3. Different Approaches in International Law to the Freedom of a State to Exercise Powers Outside its Territory

In the Lotus case presented before the Permanent Court of Justice<sup>30</sup> the adjudication of a case concerned competing criminal jurisdictions of states with respect a ship collision that occurred on the high seas. In its judgment delivered in 1927, the Court made some general remarks on the characteristics of international law, in particular on the limits of states' freedom to exercise their powers abroad. The Court was of the view that in inter-state relations restrictions upon the independence of states cannot be presumed. In the same vein, international law *does not prohibit* a state from exercising (prescriptive) jurisdiction in its own territory *in respect of any case* which relates to acts that have taken place abroad. According to the findings of the Court, the states' corresponding discretion is solely limited by *prohibitive rules* of international law. As regards exercising *enforcement powers*, it cannot be exercised by a state outside its territory except by virtue of a *permissive rule* derived from international custom or from a convention. In short, in the Lotus case the Permanent Court of International Justice affirmed, in effect, the universal scope of territorial

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<sup>25</sup> Cuadra 1977, pp. 492-493.

<sup>26</sup> *Ibid* p. 496.

<sup>27</sup> Lowell Bautista and Julio Amador III, *Complicating the Complex: China's ADIZ*, research online University of Wollongong, 2013, p. 3. <http://ro.uow.edu.au/cgi/viewcontent.cgi?article=2036&context=lhapapers> (last retrieved: 10 September 2015).

<sup>28</sup> Lamont 2014, p. 188.

<sup>29</sup> Bautista-Amador III 2013, p. 2.

<sup>30</sup> *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/pcij/serie\\_A/A\\_10/30\\_Lotus\\_Arret.pdf](http://www.icj-cij.org/pcij/serie_A/A_10/30_Lotus_Arret.pdf) (last retrieved: 10 September 2015).

prescriptive jurisdiction and the overriding character of territorial enforcement jurisdiction.<sup>31</sup> If we accept the above line of reasoning, two relevant conclusions arise from the perspective of ADIZ:

- a) States are free to prescribe ADIZ rules, unless prohibited by international law.
- b) States are free to enforce ADIZ rules in their territory. However, a permissive rule is required if they were to enforce ADIZ rules outside of their territory.

The findings of the Permanent Court of Justice described above are far from being unchallenged due to their philosophical approach in treating states as possessing very wide powers of jurisdiction that can only be limited by the rule of international law prohibiting the action concerned. It was also detailed that the emphasis actually lies the other way round.<sup>32</sup> Thus a different interpretation of states' freedom to exercise their prescriptive powers should also be considered feasible, one that may be described from the perspective of ADIZ as follows:

- a) States are free to prescribe ADIZ if a permissive rule of international law exists to that effect.
- b) With respect to enforcement powers, the assertion is the same as above. Namely, the permissive rule of international law is necessary.

In this paper effort will be made to examine the international legal foundations of ADIZ by relying upon both interpretations described above.

## 4. Aspects of International Air Law (Chicago Convention)

### 4.1. General Remarks

In this chapter the Convention on International Civil Aviation (hereinafter: Chicago Convention) adopted in 1944<sup>33</sup> is analyzed from the perspective of ADIZ. The term "international airspace" or airspace over high seas will be used to describe airspace areas not subject to national sovereignty, while airspace falling under the exclusive and complete sovereignty of a state will be called "national airspace." For the purpose of this paper any reference to high seas and to airspace over the high seas (or to international airspace) is deemed to encompass both the Exclusive Economic Zone and the airspace over the Exclusive Economic Zone. For a more detailed analysis and justification for assimilating EEZ to High Seas in this paper see the section on aspects of the law of the sea.

The Chicago Convention codified customary international law on state sovereignty over airspace.<sup>34</sup> Article 1 of the Convention recognizes that every state (not only contracting states) have complete and exclusive sovereignty over the airspace above its territory. According to Article 2 the territory of the state shall be

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<sup>31</sup> Bin Cheng, *The extraterrestrial application of International Law*, Current Legal Problems, Stevens & Sons, London, 1965, pp. 136-138, p. 140.

<sup>32</sup> Malcolm. N. SHAW QC, *International Law* Sixth Edition Cambridge University Press 2012, p. 656.

<sup>33</sup> 1944 Convention on International Civil Aviation ICAO Doc 7300/9, Ninth Edition 2006 [http://www.icao.int/publications/Documents/7300\\_cons.pdf](http://www.icao.int/publications/Documents/7300_cons.pdf) (last retrieved: 10 September 2015).

<sup>34</sup> *Case concerning military and paramilitary activities in and against Nicaragua (Nicaragua v. United States of America)* Merits Judgment of 27 June 1986, I.C.J. Reports 1986, p. 14, para 212.

deemed to be the land areas and territorial waters adjacent thereto under the sovereignty, suzerainty, protection or mandate of such a state. The *Chicago Convention* proceeds from *territorial jurisdiction* in national airspace.<sup>35</sup> The territorial jurisdiction principle basically confers powers on the territorial state, which is the state subjacent to airspace, to enact and enforce relevant (national) rules. The former powers are also known as “jurisdiction to prescribe” (*prescriptive jurisdiction* or *jurisdiction*), while the latter “jurisdiction to enforce” (*jurisdiction to enforce* or *jurisdiction*).<sup>36</sup> Of course such prerogatives are to be exercised in compliance with the Chicago Convention to ensure that rules are inter alia globally uniform to the extent possible, and that the principle of non-discrimination is observed. Air law also recognizes the notion of personal jurisdiction as well as a special form of jurisdiction, the so-called *quasi territorial jurisdiction* (comprising *jurisdiction* and *jurisdiction* alike) – which is the sum of the total powers of state, not only in respect of ships and aircraft registered in that state, but also to all persons and things on board aircraft.<sup>37</sup> Prescriptive jurisdiction is concurrent most of the time, as different states may simultaneously enact laws based on different types of state jurisdiction. In the absence of a treaty or other consensual arrangement whenever conflict arises, the territorial jurisdiction to enforce overrules quasi-territorial and personal jurisdiction to enforce; while quasi-territorial jurisdiction overrides personal jurisdiction.<sup>38</sup>

Of particular relevance to our subject matter is that *no state may validly purport to subject* high seas (and suprajacent airspace) *to its sovereignty* nor to its territorial jurisdiction. Nonetheless, quasi-territorial jurisdiction may have relevance in respect of flights carried out in airspace over the high seas in that, in general, the law of the state in which the aircraft is registered will be applicable to such flights.<sup>39</sup> A section on the law of the sea deals with this aspect in more detail. In the airspace over the high seas an aircraft is generally *subject to the exclusive jurisdiction of the state of registry*.<sup>40</sup> The establishment of ADIZ that extends over airspace suprajacent to the high seas, and the interception of foreign aircraft perceived as a threat to national security, raises important legal questions concerning the *freedom of aviation* and the *exclusive jurisdiction of the state of registry*.<sup>41</sup>

## 4.2. Exercise of Jurisdiction

Jurisdiction concerns the power of the state under international law to regulate or otherwise impact upon people, property, and circumstances. It is a central feature of state sovereignty, for it is an exercise of authority that may alter, create or terminate legal relationships and obligations. The recognized authorities of the state, as determined by the legal system of that state, perform certain functions permitted to them which affect the life around them in various ways. While the relative exercise of powers by the legislative, executive, and judicial organs of government is a matter for the municipal legal and political system, the extraterritorial jurisdiction will depend on the rules of international law.<sup>42</sup> If there is a cardinal principle

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<sup>35</sup> I.H.Ph. Diederiks-Verschoor, *An Introduction to Air Law*, Wolters Kluwer, The Netherlands, 2012, p. 14.

<sup>36</sup> Cheng 1965, pp. 136-138.

<sup>37</sup> *Ibid* p. 135.

<sup>38</sup> *Ibid* p. 140.

<sup>39</sup> Diederiks-Verschoor 2012, p. 14.

<sup>40</sup> Nicholas Grief, *Public International Law in the Airspace of the High Seas*, Martinus Nijhoff Publishers Dordrecht/Boston/London, 1994, pp. 77-95.

<sup>41</sup> *Ibid* p.5.

<sup>42</sup> Shaw 2012, pp. 645, 647.

emerging as to the existence of extraterritorial jurisdiction, it is that of a genuine connection between the subject-matter of jurisdiction and the territorial base, or the reasonable interests of the state in question.<sup>43</sup>

### 4.3. ADIZ as Exercise of Prescriptive Jurisdiction (and Possibly of Enforcement Jurisdiction)

The author of this paper submits that ADIZ rules may be deemed an *exercise of prescriptive jurisdiction*, due to the fact that, as highlighted earlier in the introductory section, ADIZ being a set of permanent rules of a binding nature adopted by a state.<sup>44</sup> It is promulgated in national aeronautical publications (AIP) and, in some cases, in national regulations.<sup>45</sup> The state maintaining ADIZ is in a position to control the activities of aircraft in international airspace through prescribing certain procedures. ADIZ rules are binding on all persons operating/piloting an aircraft in a designated area of airspace. In cases of non-conformance, special enforcement measures may be applied, usually in the form of interception. Therefore, ADIZ may also amount to *enforcement jurisdiction*. The executive branch is responsible for prescribing and enforcing ADIZ rules. Usually national defense authorities are appointed to administer the operation of ADIZ.<sup>46</sup> Content-wise ADIZ rules *resemble rules of the air* – the latter being of a binding nature, to guarantee the safety of civil aviation. For more on aspects of the rules of the air see the section in the Annexes of the Chicago Convention. Another specificity of ADIZ is that in the majority of cases such rules may qualify as having an *extra-territorial element*, for they are applicable – and in case of non-compliance also (partly or fully) enforceable – in international airspace.

### 4.4. ADIZ and SARPs (Annexes to the Chicago Convention)

#### 4.4.1. General Observations

If ADIZ is tantamount to the exercise of jurisdiction, the next logical question would be to *classify* ADIZ rules under the Chicago Convention, namely according to International Standards and Recommended Practices (SARPs) adopted in the form of Annexes to the said Convention. In accordance with Article 37 of the Chicago Convention, Contracting Parties undertook to collaborate in securing the *highest practicable degree* of uniformity in regulations, standards, procedures, and organization with respect to International Standards and Recommended Practices. In general, a state has the possibility to file differences to Standards

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<sup>43</sup> James Crawford SC, FBA, *Bornlie's Principles of Public International Law*, Oxford University Press, 2012, p. 457.

<sup>44</sup> Kay Hailbronner, *Freedom of the Air and the Convention on the Law of The Sea*, American Journal of International Law, Vol. 77, 1983, p. 517. Hailbronner writes that enforcement measures and imposition of regulations that provide for flight rules and possible prosecution of pilots amount to an extension of coastal state's jurisdiction. Any claim of control over foreign aircraft on a permanent basis is opposed to the principle according to which no state may validly purport to subject any part of the high seas to its sovereignty. Cuadra refers to ADIZ as unilateral claims of limited sovereignty in the airspace over the high seas. See Cuadra 1977, p. 485.

<sup>45</sup> U.S. ADIZ and CADIZ rules are published as part of (federal) regulations. Examples of AIP publication include Republic of Korea ENR 5.2-5 and ENR 5.2-6. <http://ais.casa.go.kr/AIP.ASP?GUBUNCODE=2&GubunName=ENR> (last retrieved: 10 September 2015).

<sup>46</sup> In the East China Sea ADIZ the Ministry of Defense, whereas in U.S. ADIZ FAA and the Ministry of Defense are the administrative organs.

it considers impractical to comply with. When a state has not filed any differences to a Standard, such Standard must be regarded as binding upon that state.<sup>47</sup> In the same vein, if Differences are filed, the Standard is non-binding upon the said state, inasmuch as the differing state practice was duly notified to ICAO. Recommended practices are of a non-binding nature. It must be recalled that the precise legal status of Annexes remain ambiguous, as they do not necessarily represent “hard law”, nor possess the legal force equal to that of the Chicago Convention. Nonetheless, there exists a powerful motivation for states wishing to fully participate in international air transport to comply with such procedures as closely as possible.<sup>48</sup>

Since ADIZ procedures request operators of aircraft/pilots to comply with certain obligations pertaining to the operation of an aircraft in flight, the Standards and Recommended Practices of the rules of the air (Annex 2) come very close to ADIZ rules. In terms of their substance, overlaps between ADIZ rules and Annex 2 include flight plans, position reports, communications between ATS units and aircraft.<sup>49</sup> Annex 6 on the operation of aircraft is also pertinent to ADIZ, as the said Annex sets out transponder and radio requirements.<sup>50</sup> Annex 11 on Air traffic Services setting out obligations for states with regards to the provision of air traffic services should also be mentioned.<sup>51</sup> Annex 15 on Aeronautical Information Services warrants some comment due to the fact that it provides a definition of ADIZ. In the view of this paper’s author, defining ADIZ in an Annex does not automatically create a basis in international law (*e.g.* a foundation in customary international law) to create ADIZ in international airspace. Rather, the said definition seems to be more a mere recognition by ICAO of existing state practice that may have safety implications for air traffic. Obligations were therefore put in place which ensure that ADIZ procedures be duly published in a standard format available to aircraft operators/pilots for the sake of air traffic safety.<sup>52</sup> Finally, Annex 17 on security should be briefly touched upon. The *special security instruction* issued in the interest of national security<sup>53</sup> in U.S. ADIZ is apparently directly dictated by national security considerations of a State and as such does not seem to fall within the purview of Annex 17 on security, which has a different perspective: that of safeguarding international civil aviation against acts of unlawful interference.

#### 4.4.2. Annex 2, Annex 6, and Annex 11 of the Chicago Convention

The most relevant Annexes mentioned above (*Annex 2, Annex 6, Annex 11*) vary in terms of their application in international airspace. As regards Annex 2, ICAO is the sole legislator and hence states are not permitted to file any differences thereto (see subsection dedicated to Article 12 of the Chicago

<sup>47</sup> Niels van Antwerpen, *Cross-Border Provision of Air Navigation Services with Specific Reference to Europe, Safeguarding Transparent Lines of Responsibility and Liability*, Wolter Kluwer Law & Business, The Netherlands, 2008, p. 31.

<sup>48</sup> Michael Milde, *International air law and ICAO*, Second Edition 2012, Eleven International Publishing, pp. 63, 175.

<sup>49</sup> Annex 2 to the Convention on Civil Aviation Rules of the Air Tenth Edition 2005. pp. 3-7., 3-8, 3-9, 3-11, 3-12.

<sup>50</sup> Annex 6 to the Convention on Civil Aviation: Operation of Aircraft Part I International Commercial Air Transport-Aeroplanes Ninth Edition, July 2010. See *e.g.* Chapter 7 Aeroplane communication and Navigation Equipment.

<sup>51</sup> Annex 11 to the Convention on Civil Aviation Air Traffic Services Thirteenth edition 2001, p. 2-1 2.1.2.

<sup>52</sup> Annex 15 to the Convention on International Civil Aviation: Aeronautical Information Services Fourteenth Edition, July 2013, Contents of Aeronautical Information Publication ENR 5.2. p. APP 1-27.

<sup>53</sup> Electronic Code of U.S. Federal US regulations 2015, §99.7.

Convention). In respect of Annex 6, the state of registry of the aircraft is primarily authorized to enact the relevant rules and regulations, and accordingly such a State may deviate from ICAO's Standards and Recommended Practices.<sup>54</sup> Annex 11 is a special case because, presumably out of safety considerations, the contracting state accepting responsibility for the provision of air traffic services over high seas may apply the Standards and Recommended Practices in a manner consistent with that adopted for airspace under its jurisdiction.<sup>55</sup> Thus no conflict seems to arise as regards Annex 11, as the state maintaining ADIZ is permitted to apply its relevant rules and regulations to the airspace above the high seas. Nonetheless, in cases of geographically overlapping ADIZs (*e.g.* in East China Sea), the so-called single unit of control principle may be violated.<sup>56</sup> This principle ensures that for the sake of the safety of civil aviation at any given moment the aircraft is under the control of only one single ATS unit giving instructions to the aircraft.

In sum the *question arises* as to whether the adoption of ADIZ procedures are in fact in conformity with the prescriptive *jurisdiction of ICAO Council with regard to Annex 2* on the rules of the air and that of the *state of registry* with regard to Annex 6 on the operation of the aircraft. In the event that, as some scholars suggest<sup>57</sup>, Annex 6 is also deemed to form part of the uniform rules applicable to the airspace over the high seas as adopted by ICAO Council in accordance with Article 12, then it is sufficient to assess whether the ADIZ rules are in conformance with the rule-making powers of the ICAO Council as established under Article 12 of the Chicago Convention. However, before comprehensively analyzing Article 12, another relevant provision of the Chicago Convention, namely Article 11, will be examined.

#### 4.5. Article 11 of the Chicago Convention on the Applicability of Air Regulations

Article 11 of the Chicago Convention deserves our attention, as this provision defines national rule-making powers as to the arrival at, departure from, and transit through the national airspace of civil aircraft. It sets out that subject to the provisions of the Convention, the laws and regulations of a contracting state as to the admission to or departure from its territory of aircraft engaged in international air navigation and/or the operation and navigation of such aircraft while within its territory applies to aircraft of all contracting states *without distinction* of nationality. Article 11 also prescribes that the above national rules shall be complied with by all/any aircraft *upon entering or departing from or while within the territory* of the state having adopted those rules. This Article is all the more pertinent to our subject as the U.S. justification for maintaining ADIZ in international airspace (ADIZ as a condition of entry into the U.S. national airspace) apparently builds on Article 11, which allows contracting states to enact laws and regulations relating to the admission to and departure from their territory.<sup>58</sup> It was also submitted that Article 11 recognizes the national laws and regulations of a contracting state for aircraft entering or leaving national airspace, and that such laws are also to be applied upon entering or departing from national airspace, thus in international

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<sup>54</sup> Hailbronner AJIL 1983, p. 509. Hailbronner mentions by way of example airworthiness, equipment, and training of the crew jointly referred to as operational standards, which are not qualified as the rules of the air and hence fall under the prescriptive jurisprudence of the state of registry. Thus it is safe to conclude that Annex 6 also falls under this category. See also Diederiks-Verschoor 2012, p. 14. Diederiks-Verschoor affirms that in general the law of the state in which the aircraft is registered will be applicable during its flight above the High Seas.

<sup>55</sup> Annex 11 to the Convention on Civil Aviation Air Traffic Services Thirteenth edition 2001. p. 2-1.

<sup>56</sup> Stefan A. Kaiser, *The legal status of Air Defense Identification Zones: Tensions over the East China Sea*, Zeitschrift für Luft- und Weltraumrecht, 4/2014, pp. 536, 543.

<sup>57</sup> Abeyratne, Ruwantissa, *Air Navigation Law*, Springer, 2012, p. 27.

<sup>58</sup> Grief 1994, pp. 150, 154.

airspace. As a consequence Article 11 expressly permits national identification procedures that bind aircraft in international airspace, provided they are entering or departing from national airspace. Article 11 is related to a quasi-contractual condition linked to the intended entry of national airspace.<sup>59</sup>

In the author's view, Article 11 has the following potential implications for ADIZ. Firstly, to make Article 11 applicable, it shall be presumed that ADIZ rules fall under the category of laws and regulations pertaining to the *operation and navigation of aircraft*. If the phrase "subject to provisions of this Convention" as contained Article 11 is read in conjunction with Article 1 confirming national sovereignty in airspace, then the conclusion could be drawn that *the territorial (prescriptive) jurisdiction of contracting states* is proclaimed by the above mentioned Article. In the absence of an explicit prohibitive rule, national rules enacted in accordance with Article 11 (provided they are non-discriminative) *may relate to acts which have taken place abroad*, as the said Article does not prohibit such legislation. Of course the risk is that concurrent or competing prescriptive jurisdiction may arise, as other states may also enact rules over the same airspace. The question as to whether Article 12 is (also) a prohibitive rule overruling Article 11 shall be addressed in the next sub-section. If we work under the assumption that *a permissive rule of international law was necessary to justify* the adoption of any national relating to acts taking place abroad, then the author of this paper believes that *Article 11 does not provide the required permissive rule*. It simply does not prohibit the enactment of national rules in relation to acts taking place abroad, without actually providing explicit legal grounds for regulating acts/events occurring abroad. Therefore, in view of the author of this paper, the said Article is simply neutral as regards the prescriptive jurisdiction of states.

Instead of Article 11 the special legal status of airspace over high seas seems to offer grounds for jurisdiction, albeit limited ones. In the absence of territorial sovereignty in the airspace above the high seas *quasi-territorial jurisdiction* empowers the states to prescribe rules *applicable to aircraft of their national registry*. A broader jurisdiction would require another permissive rule of international law.

The state of play regarding the *jurisdiction to enforce* can be assessed as follows: given the fact that aircraft are called upon under Article 11 to only comply with the national rules *upon entry or departing or while within territory* of a given state this Article contains no specific permissive rule for States *to enforce ADIZ outside* of their national airspace. Nonetheless, it is of relevance that since there is no territorial sovereignty in the airspace over the high seas, the state of ADIZ may exercise *enforcement jurisdiction* in such airspace. In the absence of territorial enforcement powers *quasi-territorial jurisdiction* may be applied, which means that the state maintaining ADIZ may *enforce its national rules against aircraft of its national registry*.

Finally, it is noteworthy to mention that the bilateral (or multiparty) air service agreements granting special permissions for the operation of scheduled international air service pursuant to Article 6 of the Chicago Convention usually contain an article similar to that of Article 11 of the Chicago Convention.<sup>60</sup> The agreements this author is aware of do not, however, go beyond Article 11, implying that states were not prepared to create an international basis of law for ADIZ on a bilateral basis in their bilateral (or multilateral) air service agreements.

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<sup>59</sup> Kaiser 2014, pp. 530, 535.

<sup>60</sup> See, e.g. Article 7 of EU-US Air Transport Agreement signed on 25 and 30 April 2007 OJ 2007 L134, Vol. 50, 25 May 2007, p.4.

In sum, Article 11 does not prohibit the exercise of prescriptive jurisdiction of a state to enact ADIZ rules applicable to international airspace. If, however, we wanted to identify permissive rules for maintaining ADIZ Article 11 does not qualify as such rule. The *quasi-territorial* prescriptive and *quasi-territorial enforcement jurisdiction*, nonetheless, provides a limited set of powers for the State maintaining ADIZ.

In the next section an attempt is made to find out whether other provision(s) of the Chicago Convention, in particular Article 12, prohibits the enactment and/or enforcement of ADIZ rules.

#### 4.6. Article 12 of the Chicago Convention: on the Rules of the Air Constituting Prohibitive Rules?

In accordance with Article 12, contracting states are obliged to keep their own national regulations uniform, to the greatest extent possible, with the Annexes established from time-to-time under the Convention. In addition, contracting states are also expected to implement and enforce (*jurisdiction*) Standards and Recommended Practices contained in the Annexes, and to ensure in this connection prosecution of violations of applicable regulations and the control and supervision (safety oversight)<sup>61</sup> of aviation activities carried out in their territory or carried out by aircraft flying their nationality mark.

With regard to ADIZ, of particular interest is that Article 12 also prescribes that rules in force over the high seas with respect to the flight and maneuver of aircraft shall be established under the Chicago Convention, implying that such rules are to be adopted jointly by states under the auspices of the Chicago Convention. Each contracting state shall ensure that all persons violating these rules shall be prosecuted. This means in practice that the ICAO Council is the sole quasi-legislator in respect of rules of the air over the high seas. It is a unique feature in international law-making that an executive body of an international organization can legislate by a two-thirds majority vote for all contracting states.<sup>62</sup> Annex 2 in force constitutes rules pertaining to the flight and maneuver of aircraft over high seas within the meaning of Article 12 of the Convention.<sup>63</sup> Annex 2 contains only Standards (no Recommendations) with respect to airspace above the high seas and states shall not file any differences from such rules with reference to Article 38 of the Chicago Convention. These rules and traffic control measures, which in effect represent restrictions on the absolute freedom of flight, are designed to insure the safety of all aircraft over the high seas. They are applied without any difficulty by all the states parties to the Chicago Convention.<sup>64</sup> In comparison, ADIZ procedures are in fact designed to serve national security interests of individual states.

The question may arise as to what extent rule-making prerogatives (prescriptive jurisdiction) of a state are compatible with the above described legislative powers of the ICAO Council. In other words, is Article 12

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<sup>61</sup> ICAO Doc 9734 AN/959 Safety Oversight Manual Second Edition, 2006, pp. 1-1, 2-1, 2-2.

<sup>62</sup> Michael Milde, *Interception of Civil Aircraft vs. Misuse of Civil Aviation (Background of Amendment 27 to Annex 2)*, *Annals of Air and Space Law*, 1986, p. 106.

<sup>63</sup> Annex 2 to the Convention on Civil Aviation Rules of the Air, Tenth Edition, 2005, Applicability pp. (v) and 2-1.

<sup>64</sup> United Nations Conference on the Law of the Sea, Geneva Switzerland 24 February to 27 April 1958, *The Law of the Air and the Draft Articles Concerning the Law of the Sea Adopted by the International Law Commission at its Eighth Session*, A6CONF.13/4 38, 1958, p. 69. [http://legal.un.org/diplomaticconferences/lawofthesea-1958/docs/english/vol\\_I/7\\_A-CONF-13-4\\_PrepDocs\\_vol\\_I\\_e.pdf](http://legal.un.org/diplomaticconferences/lawofthesea-1958/docs/english/vol_I/7_A-CONF-13-4_PrepDocs_vol_I_e.pdf) (last retrieved: 10 September 2015) (ILC Law of Air and Draft Articles concerning Law of the Sea).

a prohibitive rule of international law barring contracting parties from prescribing (and enforcing) ADIZ rules with respect to the airspace above the high seas?

If Article 12 is interpreted strictly, text based, and exclusively – in the sense that no entity other than ICAO Council is entitled to enact rules of the air to the airspace above high seas – then the mere fact that ADIZ procedures are established on a national basis may be questionable, regardless of their actual purpose and/or content.<sup>65</sup> In the same vein, the last sentence of Article 12 laying down an obligation for states “to insure the prosecution of all persons violating the regulations applicable” could be interpreted to the effect that states are to enforce the uniform rules of the air as adopted by the ICAO Council. This could mean that both prescriptive and enforcement jurisdiction relating to ADIZ in airspace over high seas runs contrary to international public law. If, however, we assume that contracting states of the Convention may adopt rules over the high seas for purposes other than safety (*e.g.* national security), then ADIZ rules are lawful inasmuch as they are not at variance content-wise with the uniform rules adopted by ICAO Council in accordance with Article 12 of the Chicago Convention.<sup>66</sup>

## 5. The Law of the Sea Perspective on ADIZ

### 5.1. General observations

ADIZs are usually established in airspace suprajacent to vast areas of the sea. Therefore, the United Nations Convention on the Law of the Sea adopted in 1982 (hereinafter: UNCLOS),<sup>67</sup> which enjoys almost universal acceptance<sup>68</sup>, should be the starting point for any legal analyses of this matter. UNCLOS aimed not only at codifying customary law but also contributed to the progressive development of the relevant field of law.<sup>69</sup> It should be noted at the outset that UNCLOS – which entered into force in 1994, that is almost fifty years after the Chicago Convention came into effect – also *codified certain rules relating to aircraft and air traffic*. The Preamble of UNCLOS affirms that matters not regulated by the said Convention continue to be governed by the rules and principles of general international law, which includes international air law.<sup>70</sup> UNCLOS also declares that [see Article 311 (2)] it shall not alter rights and obligations of states parties which arise from other agreements *compatible* with UNCLOS and which do not affect the enjoyment by

<sup>65</sup> Ivan L. Head, *ADIZ, International Law, and Contiguous Airspace*, Alberta Law Review, 1964, pp. 185-186. Head opines that one state does not have the power within itself to enact regulations effective over the high seas. This in itself appears to be the answer to any question concerning the legality of ADIZ or CADIZ, unless these zones are confined to the space over territorial waters.

<sup>66</sup> G. Nathan Calkins Jr., *The Contiguous Air Space Zone in international law by John Taylor Murchison Book review*, Journal of Air Law & Commerce, Vol. 24, 1957, p. 373. Calkins argues that security rules would be compatible with obligations under the Chicago Convention, so long as the rules for the security control of air traffic do not conflict with the international rules of the road (rules of the air) laid down in the Convention.

<sup>67</sup> 1982 Multilateral Convention on the Law of the Sea No. 31363 UN Treaty Series Volume 1833 I-31363 (UNCLOS 1982).

<sup>68</sup> As of January 2015 the number of ratifications stood at 167. [http://www.un.org/depts/los/reference\\_files/chronological\\_lists\\_of\\_ratifications.htm](http://www.un.org/depts/los/reference_files/chronological_lists_of_ratifications.htm) (last retrieved: 10 September 2015).

<sup>69</sup> UNCLOS 1982, Preamble no. 7.

<sup>70</sup> Michael Milde, *United Nations Convention on the Law of the Sea – Possible Implications for International Air Law*, Annals of Air & Space Law, Vol. VIII, 1983, p. 181.

other states parties of their rights or performance of their obligations under UNCLOS. Since the Chicago Convention has not been amended in the light of UNCLOS, different interpretation of certain provisions of the former convention being the sole action deemed necessary,<sup>71</sup> it may be concluded that the Chicago Convention is compatible with UNCLOS. After having examined the Chicago Convention in the previous section of this paper, the question may arise whether UNCLOS contains permissive or prohibitive rules which may be directly applicable or analogously applied to air law, and in particular to ADIZ.

The notion of *contiguous zone* and that of *exclusive economic zone (EEZ)* will be examined in more detail for they are not only adjacent to territorial sea, but also ADIZs are usually geographically located above such a sea area and, last but not least, in both instances the coastal state enjoys certain prerogatives under the law of the sea. Continental shelf was excluded from the above list as UNCLOS clearly prescribes that the rights of the coastal state over the continental shelf do not affect the legal status of the superjacent waters or of the air space above those waters.<sup>72</sup>

The status of airspace over high seas is only assessed very briefly, as the relevant rules are fairly well established. First, it is worthwhile recalling that the Chicago Convention contains no explicit provision confirming the freedom of overflight over the high seas. 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.<sup>73</sup> The very same Convention also declared the invalidity of sovereignty over the high seas. It follows from the latter principle that the high seas and airspace there above are beyond the jurisdiction of any state.<sup>74</sup> The above mentioned principles are also enshrined in UNCLOS, in Article 87 and 89 respectively.

## 5.2. Legal Status of the Contiguous Zone

According to UNCLOS, the contiguous zone may extend to a maximum of 24 nautical miles from the baselines from which territorial sea is measured. Territorial sea extends to 12 nautical miles from baseline. In the contiguous zone the coastal state may exercise control which is necessary to prevent and punish infringement of its *customs, fiscal, immigration or sanitary laws* (committed) *within its territory*. This seemingly exhaustive list *does not* contain *security* or national security laws (UNCLOS Article 33). It may be argued that immigration is closely connected to national security. However, a possible counter argument is that position reporting and other obligations imposed on operators of aircraft/pilots do not substitute for

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<sup>71</sup> *Ibid* p. 200 and ICAO Secretariat Study on United Nations Convention Law of the Sea - implications, if any for the Chicago Convention Doc. no LC/26-WP/5-1, *para* 19.6. on p.260 (ICAO Study on Chicago Convention and UNCLOS)

[https://books.google.hu/books?id=SF623exBCNAC&pg=PA243&lpg=PA243&dq=ICAO+doc+LC/26-WP/5-1+United+nations+Convention+on+the+law+of+the+sea+implications+if+any&source=bl&ots=LeZJ27CoU\\_&sig=0fgsXmtkEFvjZUvEG6OCo3ImFg&hl=hu&sa=X&ei=42AJVbreDIXfaNz\\_gpAJ&ved=0CDsQ6AEwBg#v=onepage&q=ICAO%20doc%20LC%2F26-WP%2F5-1%20United%20nations%20Convention%20on%20the%20law%20of%20the%20sea%20implications%20if%20any&f=false](https://books.google.hu/books?id=SF623exBCNAC&pg=PA243&lpg=PA243&dq=ICAO+doc+LC/26-WP/5-1+United+nations+Convention+on+the+law+of+the+sea+implications+if+any&source=bl&ots=LeZJ27CoU_&sig=0fgsXmtkEFvjZUvEG6OCo3ImFg&hl=hu&sa=X&ei=42AJVbreDIXfaNz_gpAJ&ved=0CDsQ6AEwBg#v=onepage&q=ICAO%20doc%20LC%2F26-WP%2F5-1%20United%20nations%20Convention%20on%20the%20law%20of%20the%20sea%20implications%20if%20any&f=false) (last retrieved: 10 September 2015).

<sup>72</sup> UNCLOS 1982, Article 78.1.

<sup>73</sup> ILC Law of Air and Draft Articles concerning Law of the Sea 1958, p. 67., *paras* 25-26.

<sup>74</sup> ICAO Study on Chicago Convention and UNCLOS 1987, p. 257.

immigration legislation that applies to air passengers. The so-called passenger name record (PNR) program is addressed in this paper in the section introducing comparable international practices. The International Law Commission (ILC) submitted arguments as to why *no special security/defense related rights* were enshrined in respect of the contiguous zone in the Convention on the Territorial Sea and Contiguous Zone adopted in 1958. The arguments in question – which remain valid as of today, as UNCLOS strongly builds on the language of the relevant provision of the Convention on the Territorial Sea and Contiguous Zone (1958) – are as follows: firstly, it would have permitted abuses (of such right); secondly, it was not necessary in light of the right to self-defense. It was clear that a state had an *inherent right* to take certain *protective measures* against *imminent* and *direct threat* to its security both within the contiguous zone and (even) outside it. In this regard the International Law Commission referred to the general principles of international law and the Charter of the United Nations.<sup>75</sup>

### 5.3. The Exclusive Economic Zone

#### 5.3.1. Definition and Description of the Relevant Legal Regime

The Exclusive Economic Zone (EEZ) is one of the significant innovations of UNCLOS, a tangible result of the progressive development of international law and, last but not least, it is qualified as a *sui generis* legal regime.<sup>76</sup> EEZ tried to strike a balance between coastal states' claims for sovereignty on the one hand and interests of other states, principally that of maritime powers, on the other – the latter seeking to preserve former high seas freedoms in the new EEZ as well. No doubt that this balancing act partly explains why as of today diverging interpretations still emerge in respect of EEZ.<sup>77</sup>

The EEZ is adjacent to territorial sea and shall not extend beyond 200 nautical miles from the baselines from which the breadth of territorial sea is measured. Article 56 in Part V of UNCLOS sets out the special rights of the coastal state in the exclusive economic zone, which can be 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*

<sup>75</sup> The Continental Shelf and related subjects by Mr. J.P.A François Special Rapporteur Doc. A/CN.4/60 (French only), Extract from the Yearbook of the International Law Commission, 1953 Vol II, pp. 35, 45. [http://legal.un.org/docs/?path=/ilc/publications/yearbooks/english/ilc\\_1953\\_v2.pdf&lang=E](http://legal.un.org/docs/?path=/ilc/publications/yearbooks/english/ilc_1953_v2.pdf&lang=E) (last retrieved: 10 September 2015).

Law of the Sea – Regime of the High Seas A/CN.4/97 Corr.1 Add 1-3. Extract from the Yearbook of the International Law Commission Vol II., 1956, pp. 5-6. [http://legal.un.org/ilc/publications/yearbooks/english/ilc\\_1956\\_v2.pdf](http://legal.un.org/ilc/publications/yearbooks/english/ilc_1956_v2.pdf) (last retrieved: 15 September 2015).

Articles Concerning the law of the Sea with commentaries International Law Commission, 1956, p. 295. [http://legal.un.org/ilc/texts/instruments/english/commentaries/8\\_1\\_8\\_2\\_1956.pdf](http://legal.un.org/ilc/texts/instruments/english/commentaries/8_1_8_2_1956.pdf) (last retrieved: 15 September 2015).

<sup>76</sup> Robert Beckman and Tara Davenport, *The EEZ Regime: Reflections after 30 years*, LOSI Conference papers 2012, p. 6. <http://www.law.berkeley.edu/files/Beckman-Davenport-final.pdf> (last retrieved: 10 September 2015).

<sup>77</sup> One contentious issue regarding airspace over EEZ is the permissibility of military activities in such zones (*e.g.* military exercises). The long-standing US position has been that freedoms of high seas, including carrying out military activities apply in their entirety in EEZ and in the superjacent airspace. According to the opposing Chinese interpretation the EEZ regime is more restrictive, meaning that military activities in EEZ may be prohibited by the coastal state. US position: Commander's Handbook 2007, pp 2-9. 2-10. Chinese position: Dr. Ren Xiaofeng, Senior Colonel Cheng Xizhong, *A Chinese Perspective*, Marine Policy, Vol. 29, 2005, p. 142.

*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. Aircraft and air traffic are not mentioned in Article 56, nor does the word security or (national) security appear in the text of Article 56. Due to the fact that this Article defines the most prominent rights of a coastal state that shall be respected by non-coastal states, it should not be interpreted in an open-ended manner, but rather narrowly. Therefore, in cases where the coastal state was to exercise any jurisdiction in the airspace over EEZ, such jurisdiction shall be based on the activities enlisted in Article 56. Such activities comprise the economic exploitation of the zone in question or the establishment and use of artificial islands and structures in such a zone, or research and environmental protection of the zone. ADIZ rules do not fall into any of these categories.*

Another key Article is Article 58. In fact, Article 58 sets out rights and duties of states other than the coastal state in EEZ declares that in the EEZ all states enjoy the freedom of high seas enshrined in Article 87; comprising freedom of overflight and other internationally lawful uses of the sea related to the former freedom. Article 58 also declares that states shall have due regard for the rights and obligations of the coastal state when exercising their rights and performing their duties under UNCLOS in the EEZ; and shall comply with the laws and regulations of the coastal state adopted in accordance with UNCLOS and other rules of international law, in so far as they are not incompatible with Part V (EEZ) of the Convention.

Furthermore, of interest is Article 59, as it creates a legal basis for the resolution of conflicts between a coastal state and other states regarding the attribution of (additional) rights and jurisdiction in the EEZ. In the light of the complexity and inherent sensitivity of the matter at hand, it is questionable, however, whether such a special mechanism is the most appropriate and acceptable procedure to extend to the coastal states' prescriptive and enforcement jurisdiction to prevent a breach of, or punish an infringement of, its national security laws.

The confirmation in Article 58 of UNCLOS of the freedom of overflight in EEZ is highly relevant to ADIZ, as in most of the cases the application of ADIZ rules is extended to aircraft in overflight over high seas and EEZ. The coastal state is not authorized to adopt laws and regulations restricting the freedom of overflight of the aircraft of other states. The coastal state is not granted by UNCLOS any right or jurisdiction over the airspace above the EEZ in respect of the freedom of overflight and enjoys no regulatory power with respect to flights over EEZ.<sup>78</sup> 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.<sup>79</sup> 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 (*quasi-territorial jurisdiction*). 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.<sup>80</sup> Accordingly,

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<sup>78</sup> ICAO Study on Chicago Convention and UNCLOS 1987, pp. 255-256, paras 11.8 and 11.12.

<sup>79</sup> Kay Hailbronner, *The legal regime of the airspace above the exclusive economic zone*; Air and Space Law Vol. VIII, number 1, 1983, p. 36.

<sup>80</sup> Milde 1983, p. 200.

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. It is important to note that in a more recently published book the author 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.<sup>81</sup> For these reasons, for the purpose of this paper, any reference to the high seas and the suprajacent airspace also covers EEZ and the suprajacent airspace.

### 5.3.2. Conclusions regarding EEZ and Contiguous Zone

Notwithstanding the fact that the coastal state enjoys a broader set of rights in EEZ as compared to the high seas, UNCLOS apparently do not recognize – neither in the contiguous zone, nor in EEZ the security interests of coastal state – as either a sovereign right(s) or as grounds for (prescriptive and/or enforcement) jurisdiction. It would seem that instead, the general rules of international law pertaining to the use of force and/or self-defense are supposed to cater for national security needs of states parties.

If we work under the assumption that the ADIZ rules are tantamount to exercising prescriptive jurisdiction, then neither the contiguous zone nor the special legal regime of EEZ provide a permissive rule substantiating the maintenance of an ADIZ. However, from a different perspective, it is recurrently argued that ADIZ do not infringe upon the freedom of overflight according to international law.<sup>82</sup> The latter claim presumably serves to demonstrate that international law of the sea does not prohibit the establishment of ADIZ. In other words, according to this argumentation, ADIZ was lawful in the absence of a prohibitive rule of international law.

## 6. Self-defense

### 6.1. The Relevance of Self-defense

In the nineteen-fifties ADIZ was justified among others under the principle of necessity and so-called self-preservation.<sup>83</sup> The former argument was meant to describe the set of circumstances compelling a state to commit an “unusual” act, falling outside international law, but which could nevertheless be excused by virtue of such exceptional circumstances. The latter concept involved taking preventive measures to preserve the nation against ever increasing threats stemming from technical advances in the military field. These included building up a set of circumstances that would make an attack impossible. Taking such measures would not require the imminence of danger, since they were taken prior to the point in time when an attack would have occurred or become imminent. In addition, the prerogatives enjoyed by the coastal state in a contiguous zone under the law of the sea were to be adapted to address challenges originating from aviation, a new medium of transport.<sup>84</sup> In the wake of the September 11 2001 attacks, the above reasoning regained prominence as demonstrated by inter alia the reinvigoration of ADIZ procedures in the

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<sup>81</sup> Gbenga Oduntan, *Sovereignty and Jurisdiction in the Airspace and Outer Space Criteria for Spatial Delimitation*, Routledge 2012. p. 137.

<sup>82</sup> Statement of Chinese Defense Ministry Spokesman 2013.

<sup>83</sup> Murchison 1958, pp. 84-97.

<sup>84</sup> MURCHISON, 1958. pp. 73-75. 78- 85, pp.107-108, pp. 115-116.

U.S.<sup>85</sup> The general right of self-defense also emerged more recently in the literature as a possible legal basis for ADIZ,<sup>86</sup> and the principle of anticipatory self-defense was invoked to that effect.<sup>87</sup>

For the purpose of this paper, it is sufficient to state that self-defense serves to legitimize use of force by a state to repel an armed attack by another state. It follows that in the context of ADIZ some questions may arise as to whether non-compliance with ADIZ in international airspace creates/constitutes (per se) an actual armed attack against the state maintaining ADIZ. If so, does the said armed attack justify the use of force by the state maintaining ADIZ for the purposes of self-defense?<sup>88</sup> In the author's view, the unilaterally declared ADIZ rules do not overrule the rules of international law pertaining to the use of force. In spite of its possible imperfections Article 3bis of the Chicago Convention remains an important achievement in terms of regulating the use of force against civil aircraft in flight. The said Article prohibits resorting to the use of weapons against civilian aircraft, which is considered declaratory of customary law.<sup>89</sup> In accordance with the last sentence of the above Article of the Chicago Convention, however, the prohibition on the use of force should be read in conjunction with Article 51 of the UN Charter codifying the inherent right of individual and the collective self-defense of states. In addition, presumably the customary law existing alongside Article 51 of UN Charter should be taken into consideration; in particular, the principles of necessity and proportionality. Thus, the international law pertaining to the use of force in self-defense is fully applicable in the event that ADIZ rules are violated by civil aircraft.

## 6.2. State of Necessity

And finally the concept of necessity should be addressed briefly. A plea of necessity as embodied in Article 25 of the Draft Articles on the Responsibility of states for Internationally Wrongful Acts is a ground to preclude wrongfulness of an act by a state. It is, however, not intended to cover conduct which is in principle regulated by a primary obligation of the state.<sup>90</sup> This is of a particular importance inter alia in relation to the rules relating to the use of force in international relations that are deemed as primary obligations. In this connection, the consideration of necessity may only be taken into consideration in the context of the

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<sup>85</sup> Stephen M. Maj. Shrewsbury, *September 11<sup>th</sup> and the Single European Sky – Developing Concepts of Airspace Sovereignty*, the Department of the Air Force, 14. Aug 2002. <http://www.google.hu/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CB8QFjAA&url=http%3A%2F%2Fwww.dtic.mil%2Fcgi-bin%2FGetTRDoc%3FAD%3DADA405091&ei=ISclVd6oFoSsPZergIgb&usq=AFQjCNEV2QlhgpRAPX4OLFzzVaBKlyFqcg> (last retrieved 10 September 2015) p. 47.

<sup>86</sup> P.P.C Haanappel, *The Law and Policy of Air Space and Outer Space*, Kluwer Law International, The Hague/London/New York, 2003, p. 19.

<sup>87</sup> Jae Woon Lee, *Tension on the Air: The Air Defense identification Zones on the East China Sea*, *Journal of East Asia and International Law*, Vol 7. Issue 1, 2014, p. 278.

<sup>88</sup> Shrewsbury 2002, p. 34. "The more important issue is whether the United States has a right to destroy a civil aircraft that ignores ADIZ requirements and eventually enters US airspace. It is difficult to imagine any circumstance that would warrant the destruction of a foreign aircraft on a US ADIZ outside of U.S. national airspace." Related footnote in the text reads: "Use of force against an aircraft carrying a known weapon of mass destruction may be such a case under the doctrine of anticipatory self-defense." p. 34, n. 138.

<sup>89</sup> Milde1986, pp. 125-126.

<sup>90</sup> Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries 2001. pp. 31 and 84 *para* 4(a) and *para* (21). [http://legal.un.org/ilc/texts/instruments/english/commentaries/9\\_6\\_2001.pdf](http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf) (last retrieved: 10 September 2015).

formulation and interpretation of the primary obligation, such as the conventional and customary rules on use of force and/or self-defense.

### 6.3. Concluding Remarks regarding Self-defense

Apparently, ADIZ rules do not have primacy over the rules of international law on the use of force by a state. The relationship between the two set of norms is rather the inverse, in that the use of force against an aircraft violating ADIZ rules shall comply with the relevant rules of international law.

## 7. Customary International Law

### 7.1. State Practice Concerning ADIZ

While some four decades ago it was predominantly argued that ADIZ had not yet constituted customary international law,<sup>91</sup> nowadays *some scholars* not only take note of the existence of relevant state practice, but also *recognize* the right to declare ADIZ as presumably *a norm of customary international law* or at least a concept legitimized by state practice.<sup>92</sup> This is naturally not to suggest that the existence of a (customary) basis in international law for ADIZ is currently accepted unanimously.<sup>93</sup> According to one author the presumed emergence of customary law regarding ADIZ is based on state's practice not objecting to such unilateral claims.<sup>94</sup> In this regard, it should be noted that persistent objections have been made by the United States in respect of ADIZ procedures applied to foreign aircraft not intending to enter national

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<sup>91</sup> Cuadra 1977, pp. 485, 505,507 Cuadra argues that the global spread of ADIZ appeared to be „customary international law in the making.” Hailbronner AJIL 1983 pp 518-519. According to Hailbronner it is very doubtful whether claims to extended jurisdiction for security purposes have been approved by a considerable number of states. On the other hand a prominent example of expressing supporting for ADIZ in the 1950's is Murchison 1958.

<sup>92</sup> J Ashley Roach, *Air Defence Identification Zones*, Max Planck Encyclopedia of Public International Law [MPEPIL], 2012, p. 3, para 5C., Dutton by citing Leslie C. Green, *The Contemporary Law of Armed Conflict*, Manchester University Press, 1993 p. 175. Dutton 2009, p. 707., n. 105., Commander's Handbook 2007, p. 2-13, para 2.7.2.3., Michel Bourbonniere and Louis Haeck, *Military Aircraft and international law: Chicago opus 3*, Journal of Air Law and Commerce, 2001. p. 954. According to Bourbonniere and Haeck ADIZ is necessary to the proper defence of states, and such zones have been legitimized by state practice.

Abeyratne holds that despite the fact that there is no overwhelming evidence from either scholastic or legislative perspective that lends legal legitimacy to ADIZs, such a concept has never been challenged as being inconsistent with existing law. According to him the justification for ADIZ lied theoretically speaking in the precautionary principle which asserts that the absence of empirical or scientific evidence should not preclude states from taking action to prevent a harm before it occurs. Abeyratne 2012, pp 12, 18.

<sup>93</sup> 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. Oduntan 2012, pp. 144, 147.

Jae Woon Lee asserts that it was premature to regard ADIZ as customary law yet, since the scope of ADIZ's differ from state to state, and the number of states that have established them is small. He notes, however, that ADIZ can be said to be in the process of “consolidation” as a customary international law. Lee 2014, p. 278.

Kaiser writes that ADIZ practice is not consistent. There is neither consistent state practice, nor a clear opinion *iuris*. Kaiser 2014, p. 537.

<sup>94</sup> Roach 2012, p. 3 *para* 5.

airspace. In this vein, the U.S. protested against the proclamation in November 2013 of the East China Sea ADIZ. Also Asian states, including Japan and South Korea, expressed objections.<sup>95</sup> This wave of condemnation was probably due to the fact that airspace over disputed maritime territories was included within the above ADIZ. In the Cold War era instances of protest was made by states, including the Soviet Union, against ADIZ established by France in the 1950s in the high seas off the coast of Algeria.<sup>96</sup> States other than the state maintaining ADIZ would probably be faced with a difficult situation testing their “limits”, if and when ADIZ procedures were actually enforced by foreign military aircraft against their nationally registered civil aircraft flying in international airspace.

## 7.2. Proposal to Make a Study Assessing Relevant State Practice

The author of this paper is of the view that in light of the widely diverging positions as to the customary law character of ADIZ it would be desirable to *conduct* a comprehensive and impartial *study* to assess whether relevant state practice was indeed extensive and uniform, as well as to examine the existence of the subjective element of such practice (*opinion juris*). ICAO would be well placed to conduct such a study. To achieve a higher level of legal certainty, a more ambitious option than a study would be to seek the codification of ADIZ rules, or at least that of the basic criteria that should be met in terms of its establishment and operation.

The International Law Commission (ILC) has alluded to the possibility that the emergence of a new rule of customary law may modify a treaty, depending on the particular circumstances and the intentions of the parties to the treaty.<sup>97</sup> ILC also recognized that a treaty may codify rules of customary international law. Thus ILC has often referred to treaties as possible evidence of the existence of a customary rule.<sup>98</sup> The International Court of Justice in the *North Sea Continental Shelf* case recognized that treaty rules may be regarded as reflecting, or as crystallizing, received (or at least emergent) rules of customary international law.<sup>99</sup> It follows from the above that the codification of a minimum set of “core” ADIZ rules would not only create treaty rules, but may well reflect or crystallize received or at least emergent rules of customary international law.

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<sup>95</sup> Commander’s Handbook 2007, 2.7.2.3 on p. 2-13. (US position). For US and regional reactions to South China Sea ADIZ see Lamont 2014, p. 188.

<sup>96</sup> Dutton 2009, p. 700. It is to note that a Soviet airplane carrying then president Brezhnev was forced to comply with ADIZ procedures, which prompted Soviet protest.

<sup>97</sup> Formation and evidence of customary international law. Elements in the previous work of the International Law Commission that could be particularly relevant to the topic: Memorandum of the Secretariat A/CN.4/659. International Law Commission, Sixty-fifth Session, Geneva 5 May – 7 June and 8 July – 9 August 2013, p. 34, Observation 27. <http://legal.un.org/docs/?symbol=A/CN.4/659> (last retrieved: 10 September 2015).

<sup>98</sup> *Ibid*, p. 33.

<sup>99</sup> *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)* ICJ Judgment of 20 February 1969, *North Sea Continental Shelf, Judgment*, I.C.J. Reports 1969, p.3, para 63.

### 7.3. Concluding Remarks on State Practice Regarding ADIZ

In sum, in the absence of the permissive conventional rule of international law concerning the creation and maintenance of ADIZ, customary international law may provide such a permissive legal basis if the relevant conduct of states leads to the formation of a new rule of customary law.

## 8. Some International Practices Comparable to ADIZ

### 8.1. General Observations

Before drawing conclusions some comparable examples to ADIZ having extraterritorial elements will be examined in this section. The international treaty's legal basis, the dependence on voluntary co-operation, and its limited time duration are the most prominent characteristics which distinguish the practices below enumerated from ADIZ.

### 8.2. Prohibited, Restricted, and Danger Areas in International Airspace

States cannot restrict or prohibit access to areas over the high seas. On the other hand, the establishment of *danger areas* is not strictly limited to airspace over national territory and might in principle take place over the high seas within the Flight Information Region (FIR) for which the Contracting Party of the Chicago Convention is responsible for the provision of air traffic services. It needs to be ensured, however, that such areas be of a reasonable dimension and *not be permanent* so as not to interfere with the freedom of overflight.<sup>100</sup> Apparently, the time factor (limited duration) constitutes a key aspect of acceptability of the establishment of danger zones in airspace over high seas. It is to note that, save for very few exceptions, ADIZ procedures are of an unlimited duration.

### 8.3. Provision of Air Traffic Services over the High Seas or Other Areas where no Sovereign Rights are Exercised

The Air Traffic Services Planning Manual of ICAO<sup>101</sup> recalls that the provision of (air traffic) services over the high seas are established in accordance with regional air navigation agreements, whereby the totality of interested states entrust a state or states with the provision of air navigation services and other services in a specified portion of such airspace. The assumption of such delegated authority does not imply that this state is then entitled to impose its specific rules and provisions in such airspace at its own discretion. In fact conditions therein are governed by applicable ICAO provisions and *specific national provisions may only be applied* to the extent that these are *essential to permit* the state the efficient *discharge of the*

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<sup>100</sup> European Air Navigation Planning Group (EANPG) Flexible use of airspace (FUA) Task force Third Meeting Paris, 10 to 11 February 2009) FUA TF/3 – IP/03 16 January 2009, p.2., *para* 2.3.  
<http://www.icao.int/EURNAT/Other%20Meetings%20Seminars%20and%20Workshops/FUA%20Task%20Force/FUA%20TF%203/FUA-TF3%20IP03%20-%20UN%20and%20ICAO.pdf> (last retrieved: 10 September 2015).

<sup>101</sup> Air Traffic Services Planning Manual ATSPM Doc. 9426 First (Provisional) Edition, 1984, pp. I-2-1-2. and I-2-I-3, *para* 1.3.3.

*responsibilities* it has assumed under the terms of the regional air navigation agreement. The applicability of “national” Annex 11 may be extended to such airspace as described in the section on the Annexes of the Chicago Convention. The question arises whether ADIZ rules are in fact essential for discharging air traffic services in the airspace over the high seas. This question is even more pertinent if the state maintaining ADIZ does not provide ATS services in the airspace where ADIZ is applicable (*e.g.*, overlapping ADIZs over the East China Sea).

#### 8.4. The Extension of the EU Emissions Trading Scheme to Aviation

Of interest is the judgment of the Court of Justice of the European Union in case C-366/10 concerning the validity of EU Directive 2008/101/EC adopted in the framework of *EU Emissions Trading Scheme (ETS)*. The said Directive extended the applicability of EU ETS rules to flights performed outside the national airspace of EU member states, provided that the flight arrived to or departed from airports in EU member states.<sup>102</sup> In the above judgment the ECJ argued that the EU regulation was *not* in violation of international law (*e.g.* freedom of overflight over high seas), because the provisions thereof were *solely* applied to operators of aircraft *when their aircraft was physically in the territory of an EU member state*.<sup>103</sup> The requirement foreseeing that portions of flights in international airspace and in territorial airspace of third states were taken into consideration for the calculation of allowances to be surrendered by operators of aircraft was deemed to fall *within the territorial jurisdiction* of the EU. The ECJ upheld the validity of the above EU directive implying the exercise of EU jurisdiction of an extraterritorial character, which prompted international opposition.<sup>104</sup>

The rationale of the ETS scheme is different from that of ADIZ, as the former serves the purposes of global environmental protection, while the latter is a security measure. The EU legislation covered activities performed in international airspace and in airspace of third states, but was supposed to be enforced exclusively in respect of aircraft which actually landed at or departed from the airport of an EU member state. In contrast, ADIZ procedures do not apply to activities in the airspace of a third state and they may be enforced at an earlier stage than ETS; namely, already against aircraft flying in international airspace. Finally, notwithstanding the fact that the ECJ upheld the validity of the above Directive, the Commission decided to submit an amended version for approval by the Council and European Parliament. Thus the legislation currently in force solely applies to flights performed between aerodromes in the European Economic Area.<sup>105</sup> In sum, ADIZ seem to go beyond the scope of application of the above EU Directive,

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<sup>102</sup> Case 366/10 Air Transport Association of America and others vs. Secretary of State for Energy and Climate Change Judgment of the Court of Justice of the European Union of 21 December 2011 [2011] ECR I-13755 *paras.* 124-129.

<sup>103</sup> *Ibid*, *paras.* 125-126.

<sup>104</sup> Commission Staff Working Document 16.10.2013 SWD (2013) 430 Final Impact assessment accompanying the document Proposal for a Directive of the European Parliament and of the Council amending directive 2003/87/EC establishing a scheme for greenhouse gas emission allowances trading within the Community, in view of the implementation by 2020 of an international agreement applying a single global market-based measure to international aviation emissions. p.4.  
[http://ec.europa.eu/clima/policies/transport/aviation/docs/swd\\_2013\\_430\\_en.pdf](http://ec.europa.eu/clima/policies/transport/aviation/docs/swd_2013_430_en.pdf) (last retrieved 10 September 2015).

<sup>105</sup> European Parliament and Council Regulation 421/2014 OJ L 129 amending Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading within the Community, in view of the implementation by 2020 of an international agreement applying a single global market-based measure to international aviation emissions.

because ADIZ rules are, additionally, enforceable in international airspace. Were ADIZ rules only applicable to aircraft upon or after entering territorial airspace, concerns similar to the ones expressed concerning the legality of above EU Directive may arise.

## 8.5. The Proliferation Security Initiative (PSI)

*The Proliferation Security Initiative* is a multinational response to challenges posed by the threat of proliferation of weapons of mass destruction (WMD).<sup>106</sup> The participants of this voluntary initiative have committed themselves to the so-called Interdiction Principles. In comparing PSI to ADIZ two observations can be made. Firstly, principle (5) of the Interdiction Principles related to aircraft stop short of introducing special measures against aircraft flying in international airspace. Secondly, PSI heavily builds on the voluntary co-operation with the state of nationality of aircraft and that of ships,<sup>107</sup> whereas ADIZ is a unilaterally declared set of binding procedures applicable to all aircraft entering a designated zone, regardless of their national registration mark.

## 8.6. U.S. Passenger Name Record Program and Customs and Border Protection (CBP) Preclearance Process

*Passenger Name Record (PNR)* is information provided by passengers during the reservation and booking of tickets and when checking in on flights.<sup>108</sup> The EU has signed *bilateral agreements* with the United States, Canada, and Australia to enable and facilitate the exchange of information. The purposes for which related data may be sent to the U.S. Department of U.S. Homeland Security are prevention, detection, investigation, and prosecution of terrorist offences and related crimes and other transnational crimes. As regards the legal basis of PNR, it is worth pointing out that relevant data is provided *in accordance with an international agreement* that is reviewed periodically. For the sake of comparison, *no* conventional international law basis exists for ADIZ.

*Customs and Border Protection (CBP) Preclearance Process* provides for the U.S. border inspection and clearance of commercial air passengers and their goods at locations in foreign countries.<sup>109</sup> Through preclearance, the same immigration, customs, and agriculture inspections of international air passengers performed on arrival in the United States can instead be completed before departure at foreign airports. The United States and the host Government are *concluding an agreement* to establish preclearance operations that also seems to imply that the express consent of the respective host government was a precondition for Preclearance Process. Apparently, notwithstanding the fact that both above mentioned procedures (PNR and CBP) constitute a condition of entry into the United States, the procedures in question nonetheless rests on the basis of conventional international law.

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<sup>106</sup> Statement of Interdiction Principles (5) <http://www.psi-online.info/> (last retrieved: 10 September 2015).

<sup>107</sup> Williams 2007, pp. 87-89.

<sup>108</sup> [http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/police-cooperation/passenger-name-record/index\\_en.htm](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/police-cooperation/passenger-name-record/index_en.htm) (last retrieved: 10 September 2015).

<sup>109</sup> [https://help.cbp.gov/app/answers/detail/a\\_id/1640/~/cbp-precleanance](https://help.cbp.gov/app/answers/detail/a_id/1640/~/cbp-precleanance) and [http://www.cbp.gov/sites/default/files/documents/Final%20Preclearance%20Guidance\\_092014.pdf](http://www.cbp.gov/sites/default/files/documents/Final%20Preclearance%20Guidance_092014.pdf) p. 2. (last retrieved: 10 September 2015).

## 8.7. U.S. Container Security Initiative (CSI), Customs-Trade Partnership against Terrorism (C-TPAT), 24-hour Advance Vessel Manifest Rule

CSI addresses the threat to border security and global trade posed by the potential terrorist use of a maritime container by deploying multidisciplinary (U.S.) teams to foreign seaports.<sup>110</sup> Under the legislation in force, the Secretary of Homeland Security is mandated to enter into negotiations with the government of each foreign nation in which a seaport is designated under the Container Security Initiative to ensure full compliance with the requirements under the Container Security Initiative.<sup>111</sup> The C-TPAT is a voluntary government-business initiative to build cooperative relationships that strengthen and improve overall international supply chain and U.S. border security.<sup>112</sup>

In accordance with the 24-hour advance vessel manifest rule, the U.S. Customs and Border Protection (CBP) must receive an electronic cargo declaration from any vessel wishing to enter the United States 24 hours before the actual cargo is laden aboard a vessel at a foreign port. Any master of vessel who fails to provide manifest information risks civil penalties and liquidated damages.<sup>113</sup> The EU maintains a similar pre-notification customs procedure.<sup>114</sup> By way of comparison it is noteworthy that the 24-hour rule is limited to advance information notification. It is comparable by and large to the requirement to submit a flight plan prior to departure of an international flight indicating the aircraft's planned route. ADIZ goes beyond simple advance notification by prescribing and enforcing rules for operating an aircraft in a pre-designated international airspace zone where the rules of the air adopted by the ICAO Council in accordance with Article 12 of the Chicago Convention are applicable.<sup>115</sup>

## 9. Conclusions

Apparently, ADIZ is a form of state jurisdiction exercised over extraterritorial acts, a set of rules applicable to operators and/or pilots of aircraft flying in national, as well as international, airspace. Content-wise, it has a lot in common with the binding (ICAO) rules of the air established for safeguarding the safety of international civil aviation (Annex 2 to the Chicago Convention on the rules of the air). ADIZ is not "above" international law, in that it does not substitute or overrule international law, be it the law of the air, the law of the sea or rules related to the use of force. Thus ADIZ extending to international airspace has to be interpreted in the light of international law.

This paper argues that Article 11 of the Chicago Convention on the applicability of air regulations does not prohibit the exercise of prescriptive jurisdiction of a state to enact ADIZ rules applicable to international

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<sup>110</sup> [http://www.cbp.gov/sites/default/files/documents/csi\\_brochure\\_2011\\_3.pdf](http://www.cbp.gov/sites/default/files/documents/csi_brochure_2011_3.pdf) (last retrieved: 10 September 2015).

<sup>111</sup> 6. U.S. Code § 945 (d) negotiations <https://www.law.cornell.edu/uscode/text/6/945> (last retrieved: 10 September 2015).

<sup>112</sup> <http://www.cbp.gov/sites/default/files/documents/Glossary%20of%20Terms.pdf> (last retrieved: 10 September 2015).

<sup>113</sup> 19 CFR 4.7 Inward foreign manifest; production on demand; contents and form; advance filing of cargo declaration. <https://www.law.cornell.edu/cfr/text/19/4.7> (last retrieved: 10 September 2015).

<sup>114</sup> Entry Summary Declaration (ENS) For more information see [http://ec.europa.eu/ecip/help/faq/ens1\\_en.htm](http://ec.europa.eu/ecip/help/faq/ens1_en.htm) (last retrieved: 10 September 2015).

<sup>115</sup> Kaiser 2014, p. 530. Kaiser asks why states designate an airspace zone rather than solely fixing reporting points. pp. 530, 542.

airspace. If, however, we wanted to identify permissive rules for maintaining ADIZ Article 11 does not qualify as such rule. The assessment of the legal status of airspace over contiguous zone and the exclusive economic zone yields the conclusion that neither of the two constructs provides a permissive rule substantiating the maintenance of an ADIZ. It is, however, recurrently argued that ADIZ is lawful since it does not infringe upon the freedom of overflight, and the law of the sea does not prohibit the establishment of ADIZ. It is shown in the paper that ADIZ rules do not have primacy over the rules of international law on the use of force by a state.

As contracting states to the Chicago Convention delegated to the ICAO Council the adoption of uniform rules of the air (Annex 2) with respect to the airspace over the high seas, Article 12 of the Convention is of special interest. As regards prescriptive jurisdiction, the fact of maintaining ADIZ rules may be at variance with Article 12 of the Chicago Convention if the said Article is interpreted to the effect that the ICAO Council has an exclusive mandate to adopt rules of air over the high seas for the sole purpose of safeguarding the safety of civil aviation. ADIZ rules in force in the airspace extending above high seas may also compete with the jurisdiction of a foreign state of registry relating to the operation of the aircraft (Annex 6) carrying the latter's national mark. If concerns regarding Article 12 (Annex 2) and Annex 6 are not deemed well founded, and the relevant findings of Lotus judgment are accepted (in that, in the absence of prohibitive rules, states are free to prescribe rules on events taking place abroad), then ADIZ created in international airspace is permitted under international law. If issues related to Article 12 and Annex 6 can be put aside and permissive rules of international law need to be identified to render ADIZ consistent with international law, then – in view of the author of this paper – currently quasi-territorial jurisdiction seems to provide the legal basis for prescriptive and enforcement powers. This jurisdiction is, in fact, limited to civil aircraft carrying the national mark of the state maintaining ADIZ.

The comparison of ADIZ with relevant international mechanisms and/or programs reveals some elements that weakens the case for ADIZ: a) ADIZ lacks a specific conventional international law basis b) ADIZ is a unilateral measure, not a voluntary co-operation program c) normally ADIZ is of an indefinite duration d) ADIZ is more than a simple advance notification procedure.

Yet, it would be difficult to ignore the continued existence of state practice, albeit not consistently related to ADIZ. State practice, if considered to be customary international law, may provide a permissive rule of international law, both for prescriptive, as well as enforcement jurisdiction on ADIZ. The customary international law justification of ADIZ is not accepted universally as of today. Some scholars argue, however, that such state practice may signal the possible emergence of a rule of customary law legitimizing ADIZ as applied to in-bound civil aircraft intending to enter national airspace of the state maintaining ADIZ.<sup>116</sup> Whilst recognizing the challenges in setting overambitious objectives, the codification of a set of minimum core ADIZ rules with which all stakeholders can live would promise manifold advantages. Such codification would not only enhance legal clarity through creating conventional law (treaty norms), but may well also serve to reflect or crystallize existing or emergent rules of customary international law relative to ADIZ.<sup>117</sup> Alternatively, a less ambitious goal would be to conduct a comprehensive study under

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<sup>116</sup> Roach 2012, p. 3, para 5.

<sup>117</sup> Cuadra 1977, p. 486. Cuadra advocated codification for different reasons. Notably she pointed out that it was preferred that such results are achieved by the deliberation of the community of nations, instead of occurring due to collective neglect or inattention.

the auspices of ICAO to describe and assess the current state of play regarding state practice pertaining to ADIZ.