

WHOSE AIRSPACE IS IT ANYWAY: DECODING THE ADIZ ENIGMA[†]

*Joshua Abhay Patnigere**

I. INTRODUCTION

As the sun rose over a part of the East China Sea on the morning of 23 November 2013, it was hard to tell what was different. The clock in Beijing's Ministry of Defense read '10 am'. There was nothing on the horizon that tangibly would suggest that the *status quo* of these waters, which touch the shores of the People's Republic of China, Taiwan, Vietnam, South Korea, and extend as far as Japan, had undergone a drastic change in the past 24 hours. As the day progressed, the world finally awoke to China's establishment of an Air Defence Identification Zone (ADIZ)¹ connected by six co-ordinates: 33°11'N (North Latitude) and 121°47'E (East Longitude), 33°11'N and 125°00'E, 31°00'N and 128°20'E, 25°38'N and 125°00'E, 24°45'N and 123°00'E, 26°44'N and 120°58'E.² Neutral observers may not find a major cause for alarm,

[†] This article reflects the position of law as on 30 September 2016.

^{*} The author is an alumnus of Government Law College, Mumbai and is presently working as an Associate at Indian Law Partners. He may be contacted at joshuapatnigere@gmail.com. The article is written by the author in his own capacity and does not in any way reflect the position of the firm.

¹ In this paper, a reference to an ADIZ would, if the context so mandates, include the plural thereof.

² The Ministry of National Defense of the People's Republic of China notified the co-ordinates of the ADIZ on its official website. The official announcement stated that the ADIZ would come into force as soon as the clocks in Beijing read the time as 10 am. The text was carried by the Xinhua news agency, the official press agency of the State. The full text reads thus: 'Statement by the Government of the People's Republic of China on Establishing the East China Sea Air Defense Identification Zone Issued by the Ministry of National Defense on November 23: The government of the People's Republic of China announces the establishment of the East China Sea Air Defense Identification Zone in accordance with the Law of the People's Republic of China on National Defense (March 14, 1997), the Law of the People's Republic of China on Civil Aviation (October 30, 1995) and the Basic Rules on Flight of the People's Republic of China (July 27, 2001). The zone includes the airspace within the area enclosed by China's outer limit of the territorial sea and the following six points: 33°11'N (North Latitude) and 121°47'E (East Longitude), 33°11'N and 125°00'E, 31°00'N and 128°20'E, 25°38'N and 125°00'E, 24°45'N and 123°00'E, 26°44'N and 120°58'E.' The statement is available at http://news.xinhuanet.com/english/china/2013-11/23/c_132911635.htm# (last visited 30 September 2016).

and might suggest the proclamation did not merit a second glance. The declaration of this ADIZ could be seen as muscle-flexing by an emerging world power.

The Western world and China's immediate neighbours, however, viewed this ADIZ declaration as unwelcome. The announcement ruffled feathers³ across the echelons of power in Washington DC, Seoul, Tokyo, Canberra and London. These States were concerned that China had unilaterally established an ADIZ without consulting its neighbours that this ADIZ overlapped pre-existing Korean and Japanese ADIZ, and that this overlap included the airspace within Japan's ADIZ over the Senkaku/Diaoyu Islands and Korea's ADIZ above Socotra Rock. Unlike

³ In a statement released to the media on 23 November 2013, then US Secretary of Defense, John Kerry made the following statement: 'The United States is deeply concerned about China's announcement that they've established an "East China Sea Air Defense Identification Zone." This unilateral action constitutes an attempt to change the status quo in the East China Sea. Escalatory action will only increase tensions in the region and create risks of an incident. Freedom of overflight and other internationally lawful uses of sea and airspace are essential to prosperity, stability, and security in the Pacific. We don't support efforts by any State to apply its ADIZ procedures to foreign aircraft not intending to enter its national airspace. The United States does not apply its ADIZ procedures to foreign aircraft not intending to enter U.S. national airspace. We urge China not to implement its threat to take action against aircraft that do not identify themselves or obey orders from Beijing. We have urged China to exercise caution and restraint, and we are consulting with Japan and other affected parties, throughout the region. We remain steadfastly committed to our allies and partners, and hope to see a more collaborative and less confrontational future in the Pacific.' John Kerry, 'Statement on the East China Sea Air Defense Identification Zone' (2013) *US Department of State*, available at <http://www.state.gov/secretary/remarks/2013/11/218013.htm> (last visited 30 September 2016). Likewise, Australian Foreign Minister Julie Bishop summoned Ambassador Ma Zhaouxu of the People's Republic of China to seek an explanation from the top diplomat about the intention of the Chinese establishment for setting up the ADIZ. Calling it a 'coercive and unilateral action to change the status quo in the East China Sea', Bishop said that China would have to explain its actions. Karen Barlow, 'Australia Expresses Concern over China Air Defence Zone' (2013) *ABC News Australia*, at <http://www.abc.net.au/news/2013-11-26/an-aust-calls-in-china-ambassadorover-air-defence-zone-announc/5117974> (last visited 30 September 2016). Japan, calling the ADIZ a moot contention that would 'escalate' tensions, said that it would 'never accept the zone.' 'China's New Air Defense Zone Above Senkakus 'Very Dangerous' Escalation, Japan says' *Japan Times*, available at <http://www.japantimes.co.jp/news/2013/11/23/national/china-sets-up-air-defense-id-zone-abovesenkakus/#.VKwX4pSSwqM> (last visited 30 September 2016).

other ADIZ declarations, China purported to require compliance by commercial aircraft, even when they were not entering into China's national airspace, as well as military aircraft, which are protected from the application of foreign laws by the legal doctrine of sovereign immunity.

This article explores the concept of an ADIZ and addresses the key issues pertaining to it. Part I of this article is introductory in nature. Part II deals with the concept of an ADIZ and explains what it entails. It also looks at the history behind this concept and current locations of ADIZ demarcations. The ingredients needed to constitute an ADIZ also find mention in this part, and the difference between ADIZ, and national and international airspace is further explored. Part III addresses the issue of whether an ADIZ is justified under international law, and delves into the concept of state sovereignty. Part IV explains the method of declaration of an ADIZ. This part also includes how States deal with current ADIZ. Part V examines what transpires when ADIZ overlap, and implications of non-compliance with ADIZ. Part VI focuses on the ADIZ within the context of national security. Finally, Part VII of this article proposes discrete guidelines to govern the establishment and management of ADIZ to better ensure conflict avoidance in international relations.

II. THE CONCEPT OF AN ADIZ

A. *Definition*

An ADIZ, in the most facile terms, is an area of demarcated airspace that is adjacent to, but not within the jurisdiction of a State. The ADIZ contains regulations that require certain foreign aircraft within the ADIZ to self-identify and respond to national air traffic authorities of the State that has declared the ADIZ. A more technically complete definition of an ADIZ may be obtained from the United States (US) Federal Aviation Administration's (FAA) *Federal Aviation Rules* (FAR). The FAR state that an ADIZ means an area of airspace over land or water in which the ready identification, location, and control of civil aircraft are required in the interest of national security.⁴ Further scrutiny of this definition helps

⁴ *Federal Aviation Administration Regulations* 14 CFR § 99.3, available at <https://www.law.cornell.edu/cfr/text/14/99.3> (last visited 30 September 2016). However, the term 'national security' is not defined in the US regulation.

the reader formulate the following points with regard to an ADIZ under the American approach:

- An area of airspace is required;
- An ADIZ may be declared over either land or water;
- Identification of only civil aircraft may be asked for by the host State; and
- Such identification is for national security.

However, while this definition does seem to include every aspect of identification, it may be seen that identification by a military aircraft does not find mention in this definition. In contrast, the ADIZ formed by China over parts of the East China Sea, seeks identification by every aircraft—including State and military aircraft, failing which unspecified ‘emergency measures may be adopted’ by the Chinese government.⁵ While ADIZ declarations are generally made for security purposes, the requirement by the Chinese government mandating that a military aircraft itself should also identify to the authorities on the Chinese mainland infringes not only the legal doctrine of sovereign immunity, but also the security of the State whose flag such a military aircraft bears, since secrecy of operations is sacrosanct for military forces of any State.

The concept of civilian aircraft and their roles in an ADIZ procedure reveal that most national ADIZ requirements only require identification by civilian aircraft. The FAR, in contrast from China’s requirements, do not mention military aircraft when referring to ‘State aircraft’⁶.

ADIZ have also been defined as ‘zones which are established above the exclusive economic zone or high seas adjacent to the coast, and over the territorial sea, internal waters, and land territory.’⁷ Currently,

⁵ *Supra* n. 2.

⁶ State aircraft are military, police or law enforcement aircraft operated by a State on government, non-commercial service. This definition is analogous to sovereign immune vessels contained in article 95 of the *United Nations Convention on the Law of the Sea* (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3, available at http://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf (last visited 30 September 2016).

⁷ J Ashley Roach, ‘Air Defence Identification Zones’, *Max Planck Encyclopaedia of Public International Law* (2013).

however, there is no definition that captures the essence of an ADIZ, no definition being all inclusive in this context. The author, therefore, has formulated the following definition of an ADIZ:

An ADIZ is a definite demarcated area over international airspace by a declaratory State requiring all aircraft intending to enter into the national airspace of such a declaratory State to identify itself and follow such procedures of navigation as may be mandated by the State issuing such declaration. Violation of such requirements by an unidentified aircraft wanting to enter the national airspace beyond the ADIZ would result in precautionary measures being activated by the declaratory State owing to the security concept of an ADIZ.⁸

B. Evolution of ADIZ

The concept of an ADIZ was first formulated in the post-World War II era. On 25 June 1950, the armies of North Korea marched south into the People's Republic of Korea, the predecessor state to the Republic of Korea. US and its allies under the aegis of the United Nations sided with the Republic of Korea, whereas the Soviet Union and China aided and fought alongside those from the north.

US, in its bid not to be caught off-guard as it was on 7 December 1941 at Pearl Harbour in Hawaii, decided to do something concrete to ensure that any air attack by the Soviet Union following the Korean War did not reach the American mainland. The US Air Force (USAF) undertook a study of the possible air approaches to US where enemy bomber aircraft might penetrate into the US airspace, and if left unchecked would wreak havoc before being neutralised by the American air squadrons.⁹

The USAF report recommended that areas be demarcated near the frontiers, and these areas would serve as buffer zones wherein foreign aircraft on the path of the coordinates leading to the US airspace could be identified and, if needed, intercepted by the US fighter jet aircraft.

⁸ This definition has been formulated by the author in his quest to define an ADIZ. It captures the essential elements of an ADIZ, and is offered to promote further discussion on the concept.

⁹ David F Winkler, *Searching the Skies: The Legacy of the United States Cold War Defense Radar Program*, for the United States Air Force Air Combat Comm and Langley Field, USA (1997), available at http://fas.org/nuke/guide/usa/airdef/searching_the_skies.html (last visited 30 September 2016).

This was the first time that a designated and defined area was to be set up near the US mainland. The first ADIZ had thus been formed across the air corridors leading to North America. Any unidentified aircraft would be asked by radio for identification, and if that did not work, the USAF was, and still is, authorised to launch an interceptor aircraft to investigate.¹⁰ The ADIZ over North America was monitored by the US and Canadian authorities, and subsequently has been folded into the North American Defense Command, which is part of the US Northern Command.¹¹

C. States which have an ADIZ

In the lead-up to the current global order, and following the footsteps of US, several States¹² declared their intention to demarcate regions and issue instructions for all aircraft—civilian or otherwise—in a bid to ensure that the security of the State was not compromised.

US has, since its first declaration of an ADIZ, declared four more ADIZ. Some of these ADIZ extend up to 400 nautical miles (nm) off the coast of California. Interestingly, US has also demarcated an ADIZ off the Alaskan coast, which extends up to 350 nm from its shores.¹³

Asian neighbours and on-and-off rivals India and Pakistan too maintain ADIZ. India has demarcated six ADIZ near its territory. These zones have been declared over the international border with Pakistan, the international border with Nepal, over the Line of Actual Control with China, along the eastern borders with Bangladesh, Bhutan and Myanmar and two in the southern region of India.¹⁴

¹⁰ *Ibid*, 8.

¹¹ *Supra* n. 9.

¹² There are 20 States that have demarcated ADIZ. Some of these include Canada, India, Japan, Iceland, Norway, South Korea, Taiwan, United Kingdom, Pakistan and others.

¹³ The list of ADIZ demarcated by US may be accessed by referring to the FAA Flight Manual, note 4. A geographic description of each ADIZ is provided in the manual.

¹⁴ The Indian ADIZ have been mentioned in the form of co-ordinates on the website of the Airports Authority of India. They have been converted into geographical regions for convenience sake. ENR -1.12 Interception of Civil Aircraft – Identification and Interception Procedures, *Airports Authority of India*, at http://www.aai.aero/public_notices/aaisite_test/eAIP/PUB/2012-04-01/html/eAIP/EC-ENR-1.12-en-GB.html (last visited 30 September 2016).

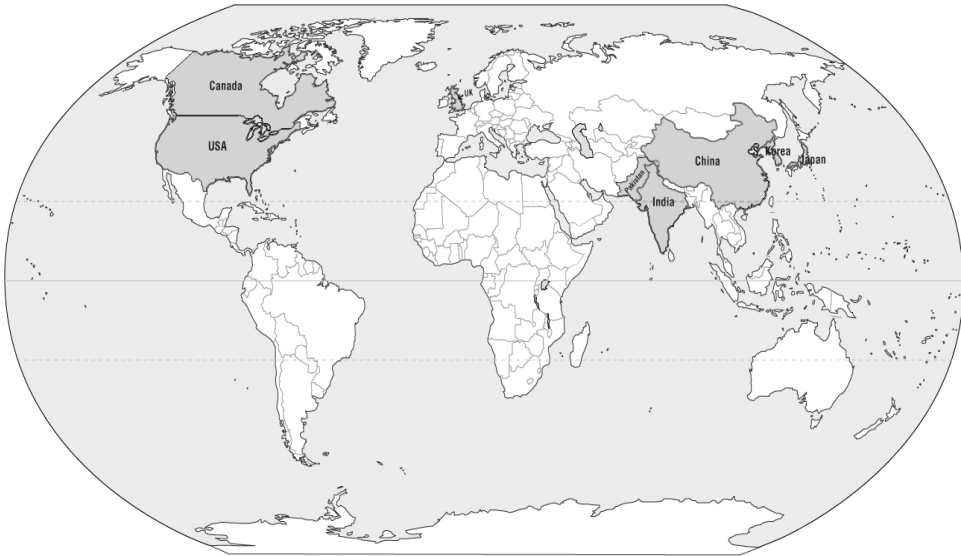


Figure 1: A map of the world which has the list of countries with ADIZ highlighted. Blank map used with permission, before highlights made by the author. Map provided by Johomaps.com

D. Rights of States that declare an ADIZ

Any State may declare an ADIZ. The declaratory State has the right to request identification from foreign commercial aircraft in the ADIZ that seek to enter its national airspace, and the source of this requirement is notification as a condition of port entry. If a foreign aircraft is not bound to enter national airspace, it is not legally required to comply with any ADIZ rules. The FAR state that two-way communication is important.¹⁵ This requirement is designed to learn if the aircraft is friendly or is flying towards the territory of a State with questionable intentions.

The rules set forth in almost all ADIZ declarations mandate that two-way communication be maintained at all possible times, and that the aircraft pilot must identify himself and comply with the instructions meted out by the respective Air Traffic Controller (ATC) on the ground.

¹⁵ Rules of the FAA explicitly mention that two-way communication is a must and the pilot has to answer the ground controller with regards to the origin of the aircraft and/or its destination.

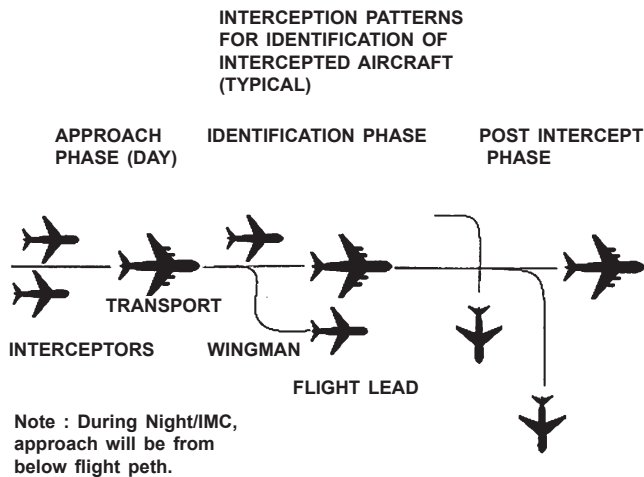


Figure 2: US ADIZ Interception Procedures

Image courtesy: FAA

Figure 2 demonstrates how an aircraft that has strayed into the US ADIZ is treated by the USAF. Failing identification procedures, two aircraft, one a leader and the other a wingman, will be launched from the nearest air station to investigate. If the foreign aircraft is just passing through the ADIZ without an intention to enter the US national airspace, the fighter jets will closely monitor it and escort it until it departs the ADIZ. These procedures may be found on various US Government websites, more particularly, those dealing with civil aviation. A similar pattern is followed by other States that have declared an ADIZ.

While such procedures may be followed, it is interesting to note that this right does not give the host State the legal right to fire upon an aircraft that has strayed into its ADIZ, or even into the airspace above its territory, except as permitted by the law of national self-defence under article 51 of the *Charter of the United Nations*, and the rules of international humanitarian law. It is now a settled principle of customary international law that when an aircraft that has not obtained the required Air Defense Certificate flies into an ADIZ without identifying itself, the host State may launch interceptor fighter jets to investigate. These fighter jets may then require that the unidentified foreign commercial aircraft with an evident intention to enter into national airspace either leave the area and change its flying coordinates or be ‘requested’ to land at the nearest airfield of the State, where it may be investigated. However, such ‘requests’ have been rare.

These fighter jet interceptors may carry air-to-air missiles. However, they may not engage foreign aircraft without some other *indicia* of hostile intent or a hostile act. Engagement may occur only in response to a refusal to comply with instructions accompanied by suspicious movement into national airspace without complying with orders meted out by the ATC on the ground or the squadron leader of the intercepting fighter jet.

E. Differentiating between an ADIZ and the national airspace of a State

International law stipulates that national airspace of a State extends to the territory above it and throughout the airspace above the territorial sea, which may extend up to 12 nm off its coast. This defined rule puts to rest all confusions relating to how far the airspace of a country can extend from its coast.¹⁶ While national airspace may extend no more than 12 nm from the coast, ADIZ are not subject to any such limit. States therefore may declare an ADIZ even farther than the 12 nm of airspace permitted as national airspace. States have only been happy to demarcate ADIZ in areas that are in some cases more than a few hundred miles off their coasts, since no legal rule prevents them from doing so. An example of such declarations is the US ADIZ off the coasts of Hawaii and California.¹⁷

An ADIZ is also different from warning zones during peacetime and no-fly zones during armed conflict. Warning zones are sometimes put in place to ensure that aircraft do not interfere or endanger special activities in a discrete section of national or international airspace. A State may declare a no-fly zone within its national airspace for any

¹⁶ Article 2 of the *United Nations Convention on the Law of the Sea* reads: Legal status of the territorial sea, of the air space over the territorial sea and of its bed and subsoil

2.1 The sovereignty of a coastal State extends, beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea.

2.2 This sovereignty extends to the air space over the territorial sea as well as to its bed and subsoil.

2.3 The sovereignty over the territorial sea is exercised subject to this Convention and to other rules of international law.

Article 3 of the *United Nations Convention on the Law of the Sea* explicitly states that the territorial seas of a State extend to 12 nautical miles off its coast.

¹⁷ *Supra* n. 13.

reason. For instance, when a Head of State visits a foreign State, the host State may demarcate a no-fly zone over the area where the visiting Head of State is residing.

Warning zones are announced for military or security purposes and are in most cases temporary. The zones are also put in place when military establishments are testing new ballistic missiles, or running war exercises. Generally, if warning zones are established in international airspace, they may not be considered ‘no-fly zones’ in which foreign military aircraft are altogether prohibited. A Congressional research committee report stated that the ‘legality of a no-fly zone operation may depend, at a minimum, on both authorisation for the operation and the extent to which the manner of execution of the operation comports with relevant international law.’¹⁸ Warning zones, no-fly zones and ADIZ derive their legal rationale from customary international law.

F. How high can an ADIZ be?

An ADIZ may not extend beyond the atmosphere of the earth. In other words, an ADIZ cannot be enforced in outer space. It is an accepted practice that anything above the Karman line¹⁹ may be said to fall in space. US, however, chooses to bring a twist of sorts to this particular rule. The USAF defines an astronaut as someone who has flown over the 80 kilometre mark.²⁰ The National Aeronautics and Space Administration, interestingly, follows the Karman Line Principle.

It is a settled rule of international law that outer space is the common heritage of mankind and that no State may exploit it for its own

¹⁸ Congressional Research Service, ‘No Fly Zones: Strategic, Operational and Legal Considerations for Congress’ (2013), available at <https://www.fas.org/sgp/crs/natsec/R41701.pdf> (last visited 30 September 2016).

¹⁹ The Karman Line is about 100 kilometres above sea level and is said to be the boundary between outer space and the Earth’s atmosphere. Any object flying above this line is accepted to be a space vehicle.

²⁰ See Jay Levine, ‘A Long Overdue Tribute, National Aeronautics Space Administration’ (2005) *NASA*, at http://www.nasa.gov/centers/dryden/news/X-Press/stories/2005/102105_Wings.html (last visited on 30 September 2016).

personal gain.²¹ Therefore, an ADIZ declaration may not be declared in outer space. Such a declaration would not mandate the following of any protocol as wished for by the declaratory State, since this declaration would infringe on the rights of other States.

III. IS AN ADIZ JUSTIFIED UNDER INTERNATIONAL LAW?

It is now accepted and settled that international law does not prohibit a State from declaring an ADIZ in an area adjacent to its national airspace.²² The concept of an ADIZ may better be understood by using settled principles of international law.

A. *Sovereignty*

1. What is sovereignty?

Sovereignty has been defined as ‘unlimited power by a country; a country’s independent authority and the right to govern itself.’²³

In his book, ‘Neutrality of Great Britain during the American Civil War’, Montague Bernard stated, ‘By sovereignty, we mean a Community or number of persons permanently organised under a Sovereign Government of their own, and by a Sovereign Government, we mean a Government, however constituted, which exercises the power of making and enforcing law within a Community, and is itself not subject to any superior Government. These two factors, the one positive, the other negative, the exercise of power and the absence of superior control, compose the notion of Sovereignty and are essential to it.’

A glance at this definition further illustrates the fact that sovereignty *ipso facto* grants ultimate power to a State to act within its territory as it pleases.

²¹ See *Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies* (adopted 27 January 1967, entered into force 10 October 1967) 610 UNTS 205, available at http://www.unoosa.org/pdf/publications/ST_SPACE_061Rev01E.pdf (last visited on 30 September 2016).

²² James Kraska and Raul Pedrozo, *International Maritime Security Law* (2013) § 6.4.2.1, US Department Of The Navy and Department Of Homeland Security, ‘Commander’s Handbook On The Law Of Naval Operations’ (2007) § 2.7.2.3, 2-13.

²³ ‘Sovereignty’, *Merriam-Webster*, at <http://www.merriam-webster.com/dictionary/sovereignty> (last visited 30 September 2016).

2. An ADIZ does not constitute Sovereign Space

Besides the four tests mentioned in Part II above, the *United Nations Convention on the Law of the Sea* (UNCLOS) also states that the jurisdiction of a State extends to only 12 nm off its coast, and areas beyond that fall under international waters, and may fall under the Exclusive Economic Zone (EEZ) of a State, where that particular State will have exclusive rights over all living and non-living resources (fisheries, oil and gas, and seabed minerals) found within that region, including as settled by customary international law, the production of energy by either wind or water.²⁴

Thus, it may be seen that the mere declaration of an ADIZ does not constitute a claim for sovereignty. As much as some proponents of this phenomenon would want such a declaration to ensure that the demarcated territory falls within their territorial jurisdiction, conventions and the laws simply do not support that position.

The ruling of the Permanent Court of Arbitration (Tribunal) on 12 July 2016 in favour of the Republic of Philippines, that seemed to counter China's claim to the man-made islands in the South China Sea, on basis of their being present within China's 'historic exclusive waters'²⁵ saw the Chinese establishment trash the award as 'illegal'.²⁶ The Chinese establishment has now further threatened to establish an ADIZ over

²⁴ *United Nations Convention on the Law of the Sea* (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3, at http://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf (last visited 30 September 2016).

²⁵ See *The South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China)* (Press Release) (12 July 2016) Permanent Court of Arbitration, Press Release No. 11, 2.

²⁶ The Chinese ambassador to the Netherlands, Wu Ken, referred to the award of the Permanent Court of Arbitration as a 'black Tuesday for international law.' Mr. Ken said, 'China is deeply dissatisfied and firmly rejects this ruling which dishonors international law and damages regional stability'.

He further added, 'China has both the legal basis and the ability to recover islands and reefs illegally occupied by the occupier. Nevertheless, in a bid to safeguard peace and stability in the region, we have always sought for a peaceful settlement of disputes and upheld maritime cooperation with maximum restraint'.

The full text of Mr. Ken's statement is available at http://news.xinhuanet.com/english/2016-07/13/c_135508353.htm (last visited on 30 September 2016).

the South China Sea.²⁷ While the Chinese establishment may, in the aftermath of the award of the Tribunal, consider this newly proposed ADIZ to grant it some rights within the South China Sea, albeit in the air, if not as part of its EEZ, China does not have the backing of law to claim any rights in the air over the region. As much as China would want its proposed declaration of an ADIZ to give it some rights within the South China Sea, international law is not on China's side this time since even the UNCLOS, which has been ratified by China, gives a country the right of sovereignty only up to 12 nm from its territory.

3. The Restricted State Rights Phenomenon²⁸

While the mere declaration of an ADIZ does not guarantee States sovereign rights in that demarcated region, it does raise interesting questions of law and policy:

- a. Does the State have sovereignty in the ADIZ?
- b. If yes, what type of sovereignty does the State enjoy?

The answer to both these questions, interestingly, is the same. The State does not have any sovereignty in an ADIZ zone, and may not lawfully attempt to enforce such a claim. While the first question has already been dealt with in these enunciated points, the second merits a further scrutiny. International law states that there are two types of accepted sovereignty—absolute sovereignty and limited sovereignty.²⁹ Samantha Besson writes that, 'Even if, by definition, a sovereign State cannot be limited by the laws of another State, it may be limited when these laws result from the collective wills of all States.'³⁰

A State may not create any additional rights other than those afforded in international law, and it does not acquire any greater rights by the mere demarcation of an ADIZ. In other words, demarcating an ADIZ over international airspace does not give the declaratory State

²⁷ See Katie Hunt and Steven Jiang 'South China Sea: China May Establish Air Defense Zone after Losing Court Ruling', *CNN*, available at <http://edition.cnn.com/2016/07/13/asia/south-china-sea-ruling-reaction-adiz/> (last visited on 30 September 2016).

²⁸ This is the author's proposed theory of State rights which seeks to understand the rights of the declaratory State with regard an ADIZ.

²⁹ Samantha Besson, 'Sovereignty' *Max Planck Encyclopaedia of Public International Law* (2011).

³⁰ *Ibid*, para 31.

any additional rights that it did not enjoy before such a declaration. UNCLOS recognises that foreign ships enjoy the right of innocent passage through the territorial waters of a State, but it expressly omits any mention of a similar right for foreign aircraft.³¹

While article 19 of UNCLOS bestows power on a State, although indirectly, to refuse the right of innocent passage to an aircraft, it must be mentioned that UNCLOS fixes the outer limit of the territorial waters of a State at 12 nm. This means that a State does not have the power to restrict any aircraft flying outside its territorial waters, as the aircraft will be flying within international airspace. Any such attempt to curb the flight of an aircraft will not be valid, and may cause an uproar from the international community. The declaratory State does not have any greater right in such a region.

Hence, the concept of restricted rights comes into play, where the State may in an ADIZ ask for identification, but may not do anything contrary to international law.

B. The Lotus Principle

In a bid to determine the legality behind the concept of an ADIZ, an analysis of the Lotus Principle is of paramount importance to help justify this phenomenon. The Lotus Principle was formulated in the year 1927 in a case involving Turkey and France, when two ships collided with each other.³² The Bench hearing the case formulated a principle, which in the years to follow have come to be known as the Lotus Principle.

The first element of the principle formulated in this case laid down that jurisdiction is territorial, and owing to this, a State may not exercise its jurisdiction outside its territory. The only exception to this rule is that a State may do so only if an international treaty or a law permits it to do so. In the case of an ADIZ, it has already been settled from the above points that a demarcation of such a territory cannot be said to be within the territorial jurisdiction of a State nor can it satisfy the criterion

³¹ Article 19 of the *United Nations Convention on the Law of the Sea* mentions only innocent passage of ships and does not extend the right of innocent passage to an aircraft.

³² *SS Lotus (The Government of the French Republic v. The Government of the Turkish Republic)* [1927], PCIJ Series A No 10, available at http://www.icjci.org/pcij/serie_A/A_10/30_Lotus_Arret.pdf (last visited 30 September 2016).

needed for sovereignty.

The second element of this principle is that a State may, within its territory, be permitted to exercise jurisdiction on any issue if there is no specific rule of international law that prohibits it from doing so. To analyse this principle with regards to an ADIZ, the State has the right to do anything in its territory as long as that action is not in contravention of international law. The concept of an ADIZ is not mentioned in any international treaty or convention. Instead, the concept has emerged from State practice and customary international law. However, as brought to light from the aforementioned points, an ADIZ is not said to be the territory of a State, thereby giving the State, sovereignty and rights, but may be said to be a check of sorts to control unidentified aircraft in the likelihood of them entering into the territory of a State and being a threat to the State's national security.

C. Customary International Law

The theories behind ADIZ emerged from customary international law. In the context of international treaties, the International Civil Aviation Organization (ICAO), the civil aviation arm of the United Nations, has served as the international organisation for States to implement their obligations under the *1944 Chicago Convention*.³³ The convention highlights certain important points regarding the management of air traffic in international law. State rights, including the right to prescribed safe routes, right to refusal of inter-state traffic and others were mentioned in the convention. However, the convention did not bring to the fore anything that would serve as a legal basis for the governance of an ADIZ, with regards to demarcation of an area for military purposes. It was about five years after this convention that US demarcated the first ADIZ at the height of the Korean War.

Customary international law has been defined as law that is not treaty based, but exists because of state practice and international custom,

³³ *Convention on International Civil Aviation* (adopted 7 December 1944, entered into force 4 April 1947) ICAO, available at <http://www.icao.int/publications/pages/doc7300.aspx> (last visited 30 September 2016).

combined with a sense of legal obligation or *opinio juris*.³⁴ In the context of an ADIZ, this has to be looked at from the point of view of the following issues:

1. The Legality

Customary international law has come to include two elements—repeated conduct of States (*diuturnitas*) and an inherent belief that the behaviour of a State depends upon a legal obligation (*opinio juris sive necessitatis*).³⁵

When US and Canada demarcated the first ADIZ in North America, they introduced the world to a new concept of aviation security. This concept was then followed by other States, who demarcated their own regions with aviation guidelines in the form of ADIZ. These events stemmed from state practice and developed into custom, which then became prevalent as aircraft that entered into the North American ADIZ were required to provide their coordinates, place of origin and destination and to maintain two-way radio contact with the ATC on the ground.³⁶ Over the course of time, this practice then became custom and is now followed by almost every country which has declared an ADIZ.

³⁴ *R v. NY*, 2008 CanLII 24543 (ON SC).

³⁵ Tullio Treves, 'Customary International Law', *Max Planck Encyclopaedia of Public International Law* (2006). Tullio Treves writes that, 'While the *opinio juris* is by definition an opinion, a conviction, a belief, and thus does not depend on the will of States, the conduct of States is always the product of their will. What makes the discussion complex is that in willing to behave in a certain manner States may or may not be wilfully pursuing the objective of contributing to the creation, to the modifications or to the termination of a customary rule. This applies also to the expressions of views as to whether certain behaviours are legally obligatory or as to whether a certain rule of customary law exists: these may be real expressions of belief—manifestations of *opinio juris*—or acts, corresponding or not to true belief, voluntarily made with the purpose of influencing the formation, the modification or the termination of a customary rule. These latter expressions of views are objective facts rather than subjective beliefs. The difficulty of distinguishing behaviours and expressions of views that are, or are not, made with the will of influencing the customary process, explain why in modern international law, together with the prevailing theory of the two elements of customary law, theories are often held supporting the view that only the objective, or only the subjective element, is decisive for the existence of a rule of customary international law and views that consider decisive only material facts and others that consider manifestations of opinion are relevant.'

³⁶ *Supra* n. 15.

An interesting case highlights this point: A proposal was formulated by the Republic of Indonesia, which approached the ICAO requesting certain amendments to the *Chicago Convention*. The Indonesian delegation wanted to ensure that the airspace over its archipelagic waters and superjacent airspace would come under its sovereignty. The Legal Committee of the ICAO considered the proposal and submitted a report to the ICAO. On the basis of the report, the ICAO ruled that since no rights of any aircraft were being infringed, no amendment was necessary to the *Chicago Convention*.³⁷

The legality of an ADIZ lies in the fact that a State is free to do what it wants as long as the action of that State does not violate any international law or convention, or the rights of other states in the international system. Perhaps guidelines are yet to be framed because an ADIZ has not caused a full-blown confrontation between States.

The point of contention from the international community, however, against the Chinese ADIZ declaration lies in the fact that the Chinese establishment requires identification even from transiting aircraft having no intention of entering into Chinese airspace, in direct contravention of articles 58(1) and 87(1)(b) of UNCLOS.³⁸

2. The Custom

An ADIZ is internationally accepted as customary international law. This law, while not codified, finds its authoritative power in how States react to customs that have been followed and are accepted as lawful practice all over the world.

Thus, an ADIZ is justified under international law, not by a written code holding together its rules, but by an unwritten code which arises out of customary international law. All states have a right to ask for identification from an aircraft approaching it, and an ADIZ provides a formal structure for doing so. The State also has the right, if anything

³⁷ See ICAO Legal Committee, 'Working Paper LC/33-WP/4-7' (17 April 2008), available at http://icao.int/Meetings/AMC/MA/2008/LC33/lc33_wp4_7e.pdf (last visited 6 September 2016) and Recommendations of the ICAO Legal Committee at its 33rd Session (1 May 2008), available at http://www.icao.int/Meetings/AMC/MA/2008/LC33/lc33_wp8_2e.pdf (last visited 30 September 2016).

³⁸ Raul Pedrozo, 'The Bull in the China Shop' (Vol 90 *International Law Studies Department of the US Naval War College* 2014), 12.

goes awry, to take emergency measures to defend itself from any attack under the law of self defence. While UNCLOS specifically mentions that the territorial jurisdiction of a State extends only to 12 nm, which is 22.2 kilometres off its coast, a modern fighter jet aircraft can cover that distance in less than one minute.

The Indian Government has entered into a 7.8 billion euro agreement to purchase 36 French-made Dassault Aviation Rafale fighter jets that come equipped with long-range missiles to boost the combat capabilities of the Indian Air Force³⁹. These fighter jets can fly at a top-speed of 2,130 kilometres per hour. Arithmetic calculations suggest that the Rafale fighters could traverse the 12 nm distance in under a minute at top speed⁴⁰. The Pakistani Air Force operates several squadrons of JF-17 Thunderbird aircraft jointly built with China. The top speed of this aircraft is 1,960 kilometres per hour. This means that the distance of 12 nm will be covered by this aircraft in less than a minute when flying at top speed.⁴¹ This further means that in the event of a war with India, the Indian Air Force will have that time limit to neutralise an intruder if early warning systems fail. While the JF-17 Thunderbird is not among the fastest fighter aircraft, US does boast of some of the finest aircraft. The F-22 Raptor with a top speed of 2,140 kilometres per hour is likely to traverse the 12 nm distance in even lesser time thereby being faster than the Rafale fighter jets and the JF-17 Thunderbird aircraft.

IV. METHOD OF DECLARATION OF AN ADIZ

Under the current framework as found within international law, there is no definitive set of guidelines to formulate a one-size-fits-all kind of declaration of an ADIZ. There have been various ways of declaring an ADIZ. However, what has remained constant is that every State that has demarcated an ADIZ has gone on to announce it. This declaration is

³⁹ See 'Rafale Deal: India Sign Agreement with France to Acquire 36 Jets' *Indian Express*, available at <http://indianexpress.com/article/india/india-news-india/rafale-deal-france-india-sign-agreement-36-fighter-jets-3045870/> (last visited 30 September 2016).

⁴⁰ $\text{Speed} = \text{Distance}/\text{Time}$, a variation of this equation helps us formulate how long a modern fighter jet will take to traverse the 22.2 kilometre distance when flying at its top speed.

⁴¹ The time taken by an aircraft to traverse the 22.2 kilometre distance (12 nautical miles which constitutes the territory of a State off its coast) may be arrived at by dividing 22.2 kilometres with the top speed at which the aircraft may fly when in full throttle.

mandatory in order to enable foreign aircraft to know what the protocol that needs to be followed entails.

Thus, historically, an ADIZ has been declared as follows:

- A State decides to demarcate a region as an ADIZ.
- This demarcation is publicly announced along with the protocol to be followed by the aircraft flying through such territory to enable such aircraft to comply with the regulations of the ADIZ.
- The aircraft that fly through such an area, in most cases, follow the protocol laid out, failing which the declaratory State may intercept the foreign aircraft, and if necessary for self-defence, pursue emergency measures.

V. OVERLAPPING ADIZ: THE INTERNATIONAL RELATIONS SAGA

There are times when an ADIZ overlaps with one declared by another State. In such scenarios, neither State will in all likelihood follow the requirements of the other's ADIZ. In such a case, the State that has declared an ADIZ has to rely heavily on bilateral relations with other States and try to build international pressure to ensure that its strategic interests are maintained. A question then arises—what should a State do when another State declares an ADIZ that overlaps one which has already been declared by the former?

To seek an answer to this question, one has to again remember that there are no sets of codified laws that govern an ADIZ. The Lotus Principle and customary international law prove that a State is at liberty to do anything as long as *jus cogens* are not flouted. A State does have the liberty, according to international law, to declare an ADIZ and there is no clarity on what happens if this ADIZ overlaps another. The fact that no rules exist in such a context means that a State may then declare an overlapping ADIZ without any repercussions with regards to concerns of violation of international law. However, such a declaration may be met with vociferous protest at the international stage, and may cause other countries to take sides in the dispute. If an overlapping ADIZ is formed, what should a pilot of an aircraft do? In such

scenarios, the pilot should inform the ATC of the State whose airspace the aircraft intends to enter. The language used by the States in their respective ADIZ declarations may in all likelihood contain a defence mechanism clause, and in order to ensure that this is not flouted, the pilot would do well to maintain two-way communication on both sides.⁴²

A. International Relations

In order to further delve into the concept of an ADIZ and find out from where this phenomenon finds its backing, it is imperative that a study of international relations concepts is looked into, to try and find answers which may justify this phenomenon.

The relationship a State shares with another is of paramount importance to understand this concept. Among the requirements of an ADIZ is the fact that the territory which has been demarcated must be defined. But what happens when even after such a definition, another State refuses to accept it and comply? A case in point is the Japanese ADIZ over the Daiyou/Senkaku Islands, which is now overlapped by the Chinese ADIZ. When Japan had declared the ADIZ, both Russia and China had refused to recognise it. The same was followed when China's declaration of an ADIZ was met with resistance by US and Japan, who said that they would not recognise it.⁴³ So how does the declaration by the State of an ADIZ result in its recognition by another State? The answer to this question may only be found in this one fact—the diplomatic relations that the State demarcating the ADIZ shares with another. This

⁴² The pilot would do well to inform both sides to ensure that interceptor aircraft are not launched and his entry into an ADIZ region is not viewed as hostile. In situations like these, it is now an accepted norm that the pilot must maintain two-way communication with the declaratory State into whose national airspace he intends to fly his aircraft. However, with regard the Chinese overlapping ADIZ, the pilot would have to inform the Chinese ATC and maintain two-way communication with them even though he may not intend to enter into Chinese national airspace since China's ADIZ declaration mandates that pilots do so.

⁴³ 'US Refuses to Recognize New Chinese Air Defense Zone' (2013) *Russia Today*, at <http://rt.com/usa/biden-seoul-air-dispute-849/> (last visited 30 September 2016), and 'Japan Scrambling Jets puts Aviation, Maritime at Risk: China' (31 October 2014) *Japan Times*, available at <http://www.japantimes.co.jp/news/2014/10/31/national/politics-diplomacy/japans-scramblingputting-aviation-maritime-safety-risk-china/#.VFZhtjSUEh8> (last visited 30 September 2016).

is one of the most important reasons why a State would recognise the ADIZ of another.

This point may be highlighted by using a territorial example. The Diaoyu/Senkaku Islands are an uninhabited mass of seven square kilometres in the middle of the East China Sea. Historically, the islands belonged to the Japanese, who relinquished control of them after World War II to US. Later, the islands were returned by the Okinawa Reversion Deal⁴⁴ signed between the two States. China also stakes claim to the islands. While the Chinese are adamant that the land masses are theirs, the Japanese are firm in stating that the islands belong to Japan. While these two States argue over which one the land belongs to, it is interesting to note that other States take sides based on whether the claimant is an ally. US has over time hinted that Japan has rights over the islands, but has stopped short of actually acknowledging it, by calling on both sides to ensure that things do not spiral out of control. It is the same with an ADIZ. A State may only recognise another ADIZ if it shares good bilateral relations with the State declaring such a zone.

A prime example of this is the US Vice-President Joe Biden stating that US would not recognise the Chinese ADIZ.⁴⁵ Subsequently, the USAF flew over the region two B-52 bombers stationed in Guam. Japan too joined in and held naval exercises within the region.⁴⁶ However, later statements by the US Administration said that US would recommend that the US-flagged aircraft and carriers should comply with the Chinese ADIZ.

There have been occasions when an ADIZ has been declared over a disputed territory. In such instances, the bilateral relations between States play a major role.

⁴⁴ See *Agreement between Japan and the United States of America Concerning the Ryukyu Islands and the Daito Island* (adopted 17 June 1971, entered into force 15 May 1972) 841 UNTS 249, at <https://treaties.un.org/doc/publication/unts/volume%20841/volume-841-i-12037-english.pdf> (last visited 30 September 2016).

⁴⁵ *Supra* n. 43.

⁴⁶ 'Japan, South Korea Hold Naval Exercise in Disputed China Air Zone' (2013) *Today Online*, at <http://m.todayonline.com/world/asia/japan-south-korea-hold-naval-exercise-disputed-china-airzone> (last visited 30 September 2016).

If a State recognises the right of another State in a particular region, it may not raise any objections to such a declaration. If the area where an ADIZ has been declared is one in which a dispute persists, such a declaration would be met with protests.

Our current world order is increasingly becoming Asia-centric. The world has moved from a uni-polar to bi-polar to a multi-polar world with the majority of what Americans would call ‘action’ seen in Asia.⁴⁷ A China which is staking its claim as one of the world’s superpowers, an economic, military and diplomatic powerhouse in the form of India, a once again nationalistic Japan under its Prime Minister Shinzō Abe and south-east Asian States which, if permitted, may play kingmakers, have all brought the world’s gaze back to Asia. There is greater power being wielded by Asia today, and this may be seen even from the current scenario in the Middle East.

VI. THE SECURITY CONCEPT

Security has played a very crucial role in the formation of ADIZ all over the world. It is this issue that has led States to demarcate zones that require identification by aircraft which may be flying towards their territories. The attacks on the World Trade Center in New York City showed the world how terrorists could use aircraft to create havoc and harm civilians. This attack has further led to proponents of the concept of an ADIZ voicing out in favour of such zones. The fact that an ADIZ acts as a security barrier and allows a State to gather foreign aircraft flight plans before it enters the State territory, and if need be launch interceptor fighter jets, has further helped propagate this concept.

In terms of security, the concept of national security is one that has taken over the world. No State wants to be the victim of an attack. This national security issue has ensured that States have a justification for the declaration of ADIZ. While these justifications may not make perfect sense, the fact that a State may choose to add the phrase ‘national security’ in its declaration may give it the mandate to do so, without raising too much suspicion.

⁴⁷ The rise of the Islamic State in the Middle East, the near skirmish between China, Japan, South Korea and US over China’s declaration of an ADIZ, the tension in the Korean Peninsula, besides others, are just a few of the examples of the rise of problems at the international stage within Asia.

VII. RESOLVING THE ADIZ PARADIGM – GUIDELINES FOR OPERATING AN ADIZ

In order to ensure that there is some clarity with regard to an ADIZ, the author proposes to formulate a few guidelines that may help States further regulate this concept:

- Every State declaring an ADIZ should be required to declare it publicly at relevant forums. These forums would include, apart from official communiqués by the Ministry of Defence of that State, a statement by its representative to the United Nations.
- In the case of overlapping ADIZ, an aircraft should be required to only inform the ATC of the State into whose airspace such aircraft intends to enter.
- All ADIZ declared will have to be submitted in writing by each declaratory State to the United Nations and the ICAO, along with the prescribed list of protocols to be followed. No change in such protocols may be made without updating the United Nations and the ICAO. In case a State changes the protocol without first adhering to such notice, the State may be dragged to the International Court of Justice. Damages may be sought if any emergency action taken by the State during such time of changing protocol without notice results in any loss of life or otherwise.
- The declaratory State should have to provide a list of all interceptions of civilian aircraft to the ICAO along with details of any neutralising action, if any.
- All disputes would be subject to the jurisdiction of the International Court of Justice and the award would be final and binding upon all States.
- States should be required to show substantial need to declare an ADIZ over a particular region. The necessity of such a declaration must be submitted to the ICAO and to the United Nations General Assembly to better regulate ADIZ and to avoid conflicts.
- States that want to declare an ADIZ over that of another State will have to substantiate such a declaration at the ICAO if such a declaration mandates identification from commercial aircraft and both the ICAO and the United Nations General Assembly if such

a declaration mandates identification from both civil and State and/or military aircraft.

- Already existing ADIZ that overlap each other are governed by such treaties as are mutually acceptable to both States.

VIII. CONCLUSION

An ADIZ may be one of two things—an offensive declaration or a defensive one. In its role as an offensive declaration, a State may declare it over a territory which is disputed or even in its bid to ensure that it gains an upper hand in a particular region. On the flip side, an ADIZ as a defensive declaration is one where a State has declared it purely for security reasons.

However, one thing is for certain. This concept is purely a security concept. When a State declares the formation of an ADIZ, it is done with the intention of ensuring that an aircraft that may be headed to its territory may be identified to ascertain whether that aircraft is friendly or is a potential threat. In this highly globalised world, power struggles happen on a daily basis. Each State tries to get one-up over another. An ADIZ, while a security tool, is also a potential arrow in the quiver of players on the global stage. While this concept has seen developments over the past five decades, it is interesting to note that near skirmishes have been caused by this concept in the decades precedent. It now remains to be seen whether such incidents will become a common occurrence in a world which is inching towards confrontation as each State arms itself to the hilt, or if this concept which serves best as a defence mechanism to deter loss of human life ensures that skirmishes do not take place.

The fact that there is no legal treaty or convention which governs an ADIZ, while helping States declare such zones, also leaves a lot wanting. The United Nations could, perhaps, frame international policy to deal with this concept, and not leave it in the ambit of customary international law, thereby giving States the power to do what they want, so long as they do not flout international conventions or practiced customs of international law. A codified set of laws to govern ADIZ, while Utopian in its thought, would decades from now in all possibility prevent a skirmish and save the world and the United Nations from a headache, as there would be a written set of rules to govern this

concept. Sovereign States have rights. However, the rights of a State in an ADIZ are something that needs to be tackled at the earliest.

While proponents of customary international law would disagree with this rationale, it must be remembered that while rules of war developed as customary law, much of it was codified in The *Hague Convention of 1899* and later the *Geneva Convention* after World War II. Perhaps a similar approach is needed for ADIZ to ensure that while States may have the right to declare such zones, issues pertaining to overlapping ADIZ, the refusal of States to accept such zones, and strict guidelines to be followed within them, may be framed and these may be uniform throughout the world.