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“The legal requirements for the proclamation of Air Defense
Identification Zones (ADIZs):

An examination with specific reference to the ADIZ of the
People’s Republic of China”

By

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1. Introduction

On 23 November 2013 the Peoples' Republic of China (hereafter the PRC) announced that it had established an Air Defense Identification Zone (hereafter ADIZ) in the East China Sea (hereafter the ECS)¹. Even though ADIZs had been around since the cold war, the concept took centre stage in the public international law arena². The Chinese announcement received critical reception from other ADIZ proclaiming States because; *prima facie* the features of its newly formed ADIZ appeared to be inconsistent with over sixty years of state practice. In particular the following three characteristics: Firstly, the airspace covered by the ADIZ includes the airspace over the Senkaku/ Diaoyu islands and leodo rock, which are the subject of on-going territorial disputes between the PRC, Japan, and Taiwan; and the PRC and South Korea respectively³. Secondly, the dimensions of the ADIZ are such that it overlaps with the existing ADIZs established by Japan, Taiwan, and South Korea. Thirdly, the prescribed ADIZ identification requests apply to all aircraft and not only those intending to enter Chinese national airspace, and the PRC threatened to use defensive measures in the event of non-compliance with these identification requests.

¹ The PRC MND issued the following statement on November 23, 2013:

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.

Statement by the Government of the People's Republic of China on establishing the East China Sea Air Defense Identification Zone, http://www.news.xinhuanet.com/english/china/2013-11/23/c_132911634.htm (Accessed on 19 February 2015).

³ Rinehart I & Elias B (2015) *Congressional Research Service* 7.

There are several geopolitical and other reasons why the PRC chose this particular designation for its ADIZ. One of the most prominent speculations is that the PRC intends to use its ADIZ to advance its claims to, and challenge Japan's administration of the Senkaku/Diaoyu islands⁴. It is the burden of this dissertation to argue that the PRC's intention for its ADIZ is irreconcilable with the traditional purpose of an ADIZ, and that such deviation from standard practice threatens to undermine the importance of ADIZ as a security mechanism.

1.1. ADIZ: The Basics

1.1.1. Definition

ADIZs are neither expressly prohibited nor permitted under international law⁵. Nevertheless Annex 15 of the Convention on International Civil Aviation (hereafter the Chicago Convention) defines an ADIZ as:

“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).⁶”

In other words ADIZs are unilaterally declared areas in airspace over waters adjacent to a state's sovereign territory, in which civil aircraft must comply with certain identification requests by air traffic control if they intend to fly from non-sovereign airspace into sovereign airspace⁷.

ADIZs should not be confused with Flight Information Regions (FIRs). The entire Earth's airspace is divided into FIRs designated by the International Civil Aviation Authority (hereafter

⁴ Rinehart I & Elias B (2015) *Congressional Research Service* 7.

⁵ Hsu k (2014) *U.S –China Economic and Security Review Commission Staff Report* 1.

⁶ Annex 15 to the Chicago Convention of 1944.

⁷ Dutton (2009) 103 *Am. J. Int'l L.* 691.

ICAO)⁸. FIRs are assigned to states and it is the responsibility of the assigned states to provide air traffic services such as, navigational and weather information, in its assigned location⁹.

According to Bao three important points can be inferred from the definition of ADIZs¹⁰. Firstly, the function of an ADIZ is to establish a buffer area outside sovereign airspace to facilitate the early identification of civil aircraft intending to enter sovereign airspace¹¹. Therefore the purpose of an ADIZ is to act as a precautionary security measure for the protection of territorial sovereignty¹². Secondly, the definition indicates that an ADIZ must include airspace above marine territory, such as an Exclusive Economic Zone (hereafter EEZ) or the High Seas¹³. In other words an ADIZ cannot serve its purpose if it does not include a portion of international airspace. Bao's inference is corroborated by the fact that no land locked state has ever established an ADIZ¹⁴. Finally, because an ADIZ generally expand outside sovereign airspace and into international airspace, the rights and duties of aircraft operating in that area may be affected by its establishment¹⁵.

To summarise Bao's observations: ADIZs are exclusively established by coastal states and generally expand into international airspace, their function and purpose is to aid early identification of potential aerial threats in order to protect territorial sovereignty.

When a civil aircraft enters an ADIZ it is expected to submit itself to the so-called ADIZ procedures¹⁶. These procedures generally require aircraft intending to enter sovereign airspace

⁸ Rinehart I & Elias B (2015) *Congressional Research Service* 6.

⁹ Rinehart I & Elias B (2015) *Congressional Research Service* 6; Cuadra (1977) 18 *Va. J. Intl' L.* 490.

¹⁰ Bao (2014) 1 *ISLRev* 5.

¹¹ Bao (2014) 1 *ISLRev* 5.

¹² Bao (2014) 1 *ISLRev* 5.

¹³ Bao (2014) 1 *ISLRev* 5.

¹⁴ Bao (2014) 1 *ISLRev* 5.

¹⁵ Bao (2014) 1 *ISLRev* 5.

¹⁶ The PRC MND issued the following statement on November 23, 2013:

The Ministry of National Defense of the People's Republic of China, in accordance with the Statement by the Government of the People's Republic of China on Establishing the East China Sea Air Defense Identification Zone, now announces the Aircraft Identification Rules for the East China Sea Air Defense Identification Zone as follows:

to identify themselves by submitting their Instrument Flight Rules (IFR) or Defense Visual Flight Rules (DVFR) flight plans and/or reporting their location¹⁷.

According to Cuadra these procedural requirements are not considered as being burdensome, because of the substantial air navigational aids, control, and communication requests that international flights are normally subjected to¹⁸.

The definitional elements of ADIZs are crucial, they provide a point of reference when assessing newly proclaimed ADIZs and determining their legitimacy.

First, aircraft flying in the East China Sea Air Defense Identification Zone must abide by these rules. Second, aircraft flying in the East China Sea Air Defense Identification Zone must provide the following means of identification: 1. Flight plan identification. Aircraft flying in the East China Sea Air Defense Identification Zone should report the flight plans to the Ministry of Foreign Affairs of the People's Republic of China or the Civil Aviation Administration of China. 2. Radio identification. Aircraft flying in the East China Sea Air Defense Identification Zone must maintain the two-way radio communications, and respond in a timely and accurate manner to the identification inquiries from the administrative organ of the East China Sea Air Defense Identification Zone or the unit authorized by the organ. 3. Transponder identification. Aircraft flying in the East China Sea Air Defense Identification Zone, if equipped with the secondary radar transponder, should keep the transponder working throughout the entire course. 4. Logo identification. Aircraft flying in the East China Sea Air Defense Identification Zone must clearly mark their nationalities and the logo of their registration identification in accordance with related international treaties.

Third, aircraft flying in the East China Sea Air Defense Identification Zone should follow the instructions of the administrative organ of the East China Sea Air Defense Identification Zone or the unit authorized by the organ. China's armed forces will adopt defensive emergency measures to respond to aircraft that do not cooperate in the identification or refuse to follow the instructions.

Fourth, the Ministry of National Defense of the People's Republic of China is the administrative organ of the East China Sea Air Defense Identification Zone.

Fifth, the Ministry of National Defense of the People's Republic of China is responsible for the explanation of these rules. Sixth, these rules will come into force at 10 a.m. November 23, 2013

"Statement by the government of the People's Republic of China on the East China Sea Air Defense Identification Zone" http://www.news.xinhuanet.com/english/china/2013-11/23/c_132911634.htm
(Accessed on 19 February 2015)

¹⁷ Cuadra (1977) 18 *Va. J. Intl' L.* 495-496; Beckman R & Phan H (2014) *Centre for International Law, University of Singapore 2.*

¹⁸ Cuadra (1977) 18 *Va. J. Intl' L.* 495-496.

1.1.2. State Practice

The United States established the first ADIZ during the Cold War in order to minimize the risk of an aerial attack by the Soviet Union¹⁹. ADIZs gained increased importance after the events of 11 September 2001 when civil aircrafts were used to violate the territorial integrity of the United States²⁰

Presently several coastal states maintain ADIZs as a security measure, including Canada; Japan; the United Kingdom; South Korea; Norway; Pakistan; and India²¹.

Most scholars agree that state practice in respect of ADIZs is neither uniform nor consistent²². In the *Asylum* case the ICJ held that practice must be uniform and constant²³. However, despite the fact that state practice may not be constant and uniform states still actively enforce their ADIZs without any objections²⁴. Customary law in respect of ADIZs is emerging and it is increasingly important to promote legal certainty during this time. Therefore it is important to follow international best practice and avoid actions that threaten international peace and security²⁵. This can be done by having regard to current state practice, regardless of minor differences, and evaluating the legitimacy of ADIZs against the function and purpose it is designed for.

¹⁹ Hsu k (2014) *U.S –China Economic and Security Review Commission Staff Report* 1.

²⁰ Lamont (2014) 39 *Air and Space L.* 189.

²¹ Hsu k (2014) *U.S –China Economic and Security Review Commission Staff Report* 1.

²² Beckman R & Phan H “(2014) *Centre for International Law, University of Singapore* 3.

²³ Colombian-Peruvian Asylum case (Colombia v. Peru), Judgment, (1950) ICJ Report 266, at 277 as cited in Beckman R & Phan H (2014) *Centre for International Law, University of Singapore* 6.

²⁴ Beckman R & Phan H (2014) *Centre for International Law, University of Singapore* 3.

²⁵ Beckman R & Phan H (2014) *Centre for International Law, University of Singapore* 3.

1.1.3. The Function and Purpose

As previously stated the function and purpose of ADIZs can be inferred from its definition. Primarily ADIZs are security measures aimed at advancing national security. The function of an ADIZ is to allow air traffic control to request information from civil aircraft relating to identification and location. The purpose gathering this information is to enable air traffic control to recognise potential threats before they enter sovereign airspace.

It is asserted that the only function of an ADIZ should be to act as a security mechanism that enables information gathering to identify potential aerial threats. This function will be used as the yardstick to assess the legitimacy of all ADIZs. Distinguishing between the different functions that ADIZs are created for, assists in emphasizing why ADIZs need to meet certain criteria in order to comply with international state practice. It is asserted that an ADIZ that does not meet the yardstick test is destabilizing to the concept of ADIZs as it distorts the true function and compromises the legality of these zones.

The different types of ADIZs, based on various their various functions, which are introduced, are designated so by looking at the ADIZs dimensions, identification requirements, and enforcement procedures. The use of ADIZs for divergent functions is not condoned but is useful in illustrating how the PRC ADIZ deviates from state practice thus far.

As early as 1977 Cuadra provided a sceptical view of ADIZs²⁶. She forewarned about the possibility that ADIZs may be manipulated by states and used to assert sovereignty over resource rich areas in the seabed²⁷. She also expressed concern that states' would use their ADIZs to disguise otherwise unlawful activities as actions necessary for security or self-defence²⁸. With the proclamation of the PRC ADIZ it appears that Cuadra's concerns were well founded.

²⁶ Cuadra (1977) 18 Va. J. Intl' L. 486.

²⁷ Cuadra (1977) 18 Va. J. Intl' L. 489.

²⁸ Cuadra (1977) 18 Va. J. Intl' L. 501.

1.2 The Current Situation

1.2.1 The Legal Basis for ADIZs

Any discussion regarding ADIZs must begin with questioning their legal basis under international law. Establishing a proper foundation supporting the existence of a legal basis is crucial since ADIZs are currently neither expressly allowed nor prohibited under international law.

ADIZs include portions of the airspace above the High Seas, this so-called international airspace is not subject to state sovereignty. Instead, the airspace concerned is regulated by Article 12 of the Chicago Convention. Article 12 provides that the airspace above the High Seas shall be regulated by the Standards and Recommended Practices (SARPs or Annexes) promulgated by ICAO²⁹. This *lacuna* leaves room for States, such as the PRC, to use ADIZs as a catalyst for furthering their own geopolitical and other aims.

1.2.2 Questions raised by the PRC ADIZ

As previously stated the PRC ADIZ has been met with critical reception because of its controversial features³⁰. They are: the dimensions of the ADIZ, which include airspace above disputed land and marine territory and overlaps with existing ADIZ; and the intention of the PRC to apply its ADIZ procedures to all aircraft and enforce compliance by employing defensive measures. These controversial features are designated so because they appear to be in violation of two core principles of public international law.

²⁹ Article 12 provides “Each contracting State undertakes to adopt measures to insure that every aircraft flying over or manoeuvring within its territory and that every aircraft carrying its nationality mark, wherever such aircraft may be, shall comply with the rules and regulations relating to the flight and manoeuvre of aircraft there in force. Each contracting State undertakes to keep its own regulations in these respects uniform, to the greatest possible extent, with those established from time to time under this Convention. ***Over the high seas, the rules in force shall be those established under this Convention. Each contracting State undertakes to insure the prosecution of all persons violating the regulations applicable.***” (Own emphasis).

³⁰ See paragraph 1.1 above.

The first being the principle of territorial sovereignty, and aerial sovereignty. Sovereignty is a general term that can be defined as the right to exercise complete control within a geographical area³¹. The PRC is accused of having designated its ADIZ in such a way that it is able to advance its territorial claims by exerting administrative control over the airspace. Based on the principle of territorial sovereignty, this raises the questions whether or not an ADIZ may be declared over disputed territory to which a state only bears a claim and whether or not ADIZs may be used to significantly advance territorial claims.

The second core principle is the prohibition on the use of force. The PRC has indicated that it will use 'defensive measures' in the event of non-compliance with its ADIZ procedures. This statement has raised many red flags in the international community, because it is trite law that the use of force against another state is prohibited, save for the exercise of self-defence. Most ADIZ procedures do not allow for direct military response³². This begs the question as to what action a state may take in enforcing its ADIZ procedures.

The questions raised by the PRC ADIZ are indicative of a distorted understand by the PRC with regard to the function and purpose of these zones. It is therefore the aim of the writer to answer these questions in relation to the standard function and purpose of ADIZs.

1.3. Research Questions

The main research questions are:

- Do ADIZs have a legal basis under public international law?
- Is territorial sovereignty an indispensable requirement when establishing an ADIZ to regulate entry into the airspace over that territory?
- What action is the proclaiming state allowed to take when an aircraft enters its ADIZ and does not comply with its ADIZ procedures?
- Based on the above, is it possible to propose pre-requisites for establishing a legal ADIZ under the current legal framework?

³¹ Bennet T & J Strug (2013) 48.

³² Lee (2014) 18 *ASIL Insights* 1.

1.4. Research Aims

The writer has three main aims. The first is to evaluate the legality of ADIZs in light of the applicable rules of public international law, since they are neither explicitly allowed nor prohibited. Secondly, since a determination of whether individual ADIZs are consistent with these rules needs to be made on an *ad hoc* basis, the writer will assess the validity of the PRC ADIZ in relation to the function and purpose of ADIZs³³. The writer acknowledges the importance of the interpretation of silence in international law and the presumption of good faith, when approaching this task³⁴. Finally, the writer will recommend prerequisites for the establishment of ADIZs in order to emphasise that practices which are inconsistent with the function and purpose, are destabilizing and threaten to undermine the role of these zones as important security measures.

1.5. Chapter Breakdown

The above mentioned research questions and research aims will be addressed in the following chapters:

Chapter 2: the legal basis for ADIZs under international law

The various arguments presented for and against the existence of a legal basis for ADIZs under international law will be discussed. This chapter is a vital starting point for understanding that not all states rely on the same legal basis for their ADIZs, and ultimately the legal basis they choose informs their understanding of the function and purpose of ADIZs. This is important because it introduces the idea that ADIZs may be established for divergent functions and purposes. This idea will form the basis of the discussion to follow.

Chapter 3: territorial sovereignty and ADIZs: indispensable?

³³ Lee (2014) 18 *ASIL Insights* 3.

³⁴ Lee (2014) 18 *ASIL Insights* 3.

In this chapter the writer distinguishes between the use of ADIZs as a security measure and the use of ADIZs as an extension of sovereignty. The writer asserts that the latter should be condemned as it distorts the purpose of an ADIZ and allows the proclaiming state to use its ADIZ to unilaterally extend its sovereignty over international waters. To illustrate the concept of sovereignty, specifically aerial sovereignty, is discussed. The writer then discusses the relationship between ADIZs and sovereignty, and focuses on how a state's understanding of the function and purpose of an ADIZ determines this relationship. This is illustrated using the PRC ADIZ, which is founded on an understanding which condones the unilateral expansion of PRC sovereignty.

The writer concludes that territorial sovereignty is an indispensable requirement when establishing an ADIZ, because the purpose of an ADIZ is to protect state sovereignty and this purpose is fulfilled by regulating air traffic into sovereign territory.

Chapter 4: ADIZ enforcement measures: what is reasonable?

In this chapter the writer distinguishes between the information gathering function and the military enforcement function. These two functions determine the extent of the enforcement measures a state will employ in the event of non-compliance with its ADIZ requirements. The writer asserts that enforcement measures will only be reasonable if an ADIZ is established with an information gathering function.

The reasonability of these enforcement measures will be evaluated under the Chicago Convention, specifically Article 3 *bis*, and the UN Charter, specifically the prohibition on the use of force and the exception thereto namely, the right to self-defence.

In this chapter the writer aims to show that a direct military response in the event of non-compliance with ADIZ requirements is disproportionate and unreasonable when evaluated against the function and purpose of an ADIZ. Furthermore, the writer aims to show that a direct military response may also violate certain obligations under current international law, such as the prohibition on the use of force.

Chapter 5: Recommendations

In this chapter the writer puts forward a number of recommendations with the aim of showing that the current legal framework can be developed establish a list of prerequisites for establishing an ADIZ. These prerequisites are aimed at clarifying what an ADIZ is and the limits within which it must operate in order to maintain its integrity as a security measure.

The recommendations made are focused on the criticisms against the PRC ADIZ, and do not constitute an exhaustive list of ADIZ features that can be improved to achieve greater legal certainty. They deal with the issue of territorial sovereignty, prior consultations before establishing ADIZs, the extent of the application of ADIZs procedures, and reasonable enforcement measures used in the event of non-compliance with ADIZ procedures.

The recommendations are informed by the discussions in previous chapters and are aimed at showing that regulation of the establishment and implementation of ADIZ is possible.

Chapter 6: Conclusion

In this chapter the writer concludes that ADIZs do have a legal basis under international law but that the time is ripe for ADIZs to be explicitly regulated. The writer suggests that the conclusions drawn in this dissertation may be used to form a list of prerequisites for establishing an ADIZ, the aim of this list will be to ensure that ADIZs are established and enforced for their specific purpose only and not abused by states to further geo-political and other aims.

1.6. Limitations and Scope

The writer uses existing ADIZs as a reference point to assess the new PRC ADIZ, while acknowledging that it is not the first ADIZ to deviate from state practice but it is certainly the most extreme deviation. The controversial nature of the PRC ADIZ allows the writer to illustrate the importance of using ADIZs for their intended function only, the dangerous consequences that flow from the misuse of ADIZs, and the pressing need to develop the substantive law governing ADIZs. However, the writer will not make any definitive determination regarding the

legality of any territorial claims made by the PRC or any military action the PRC proposes to take.

1.7. Conclusion

The PRC ADIZ clearly shows that ADIZs may be easily abused in the absence of an express legal framework. The purpose of this dissertation is to illustrate, by evaluating the PRC ADIZ, that urgent regulation is necessary to safeguard the effectiveness of these zones as security measures. As inconsistent ADIZ practices threaten to discredit and abuse the ADIZ concept in a time when it is becoming increasingly important to national and international security.

2. The legal basis for ADIZs under international law

2.1. Introduction

Presently, ADIZs are neither explicitly allowed nor prohibited under international law. Debates around the legality of ADIZs are centred on the fact that most ADIZs expand to include the airspace super adjacent to international waters, which are not subject to the sovereignty of any state.

The legality of ADIZs under international law is *per se* well settled³⁵. In principle all ADIZ proclaiming states have a legal basis for the establishment of their zones³⁶. Due to diverse reasons presented as justification for the establishment of ADIZs, the discussion below presents arguments for the legal basis of ADIZs under various sources of public international law.

2.2. The Chicago Convention

The Chicago Convention does not specifically regulate ADIZs; however, it does regulate the airspace above the High Seas. Article 12 provides that the airspace above the High Seas shall be regulated by the Annexes/SARPs promulgated by the ICAO³⁷. The Chicago Convention does not provide for the right of states to establish ADIZs over the High Seas³⁸. However, Cuadra asserts that even though the SARPs promulgated by ICAO are applicable to the airspace above the High Sea, since ICAO is silent on the topic of ADIZs States' are not precluded from establishing rules on ADIZs and it is also not mandatory that they inform ICAO³⁹. Furthermore,

³⁵ Lee (2014) 18 *ASIL Insights* 2.

³⁶ Lee (2014) 18 *ASIL Insights* 2.

³⁷ Article 12 provides "Each contracting State undertakes to adopt measures to insure that every aircraft flying over or manoeuvring within its territory and that every aircraft carrying its nationality mark, wherever such aircraft may be, shall comply with the rules and regulations relating to the flight and manoeuvre of aircraft there in force. Each contracting State undertakes to keep its own regulations in these respects uniform, to the greatest possible extent, with those established from time to time under this Convention. **Over the high seas, the rules in force shall be those established under this Convention.** Each contracting State undertakes to insure the prosecution of all persons violating the regulations applicable." (Own emphasis).

³⁸ Beckman R & Phan H "(2014) *Centre for International Law, University of Singapore* 5.

³⁹ Cuadra (1997) 18 *Va. J. Intl' L.* 490 to 491.

Murchison and Bao assert that Article 11 could provide a legal basis for ADIZ because it expressly confers on every the State, the right to establish laws with regard to the entry to and departure from its territory and compels States to adhere to those laws⁴⁰. The writer is inclined to agree with these assertions, and is of the opinion that it is further supported by the fact that ICAO has not explicitly prohibited ADIZs and has allowed States' to establish them for the past sixty-five years. ADIZs also feature frequently on ICAO meeting agendas and upon examining the available documents; therefore the writer concludes that ICAO approves of the general ADIZs concept⁴¹.

2.3. The United Nations Convention on the Law of the Sea (UNCLOS)

Cooper relies on the Geneva Convention on the High Seas to justify the use of ADIZs. The writer notes that the principle of freedom of flight over the High Seas that Cooper relies on is reiterated in the more recent UNCLOS and therefore the argument still has a legal basis⁴². Cooper asserts that if all States have the right to make use of the airspace above the High Seas

⁴⁰ Bao (2014) 1 *ISLRev* 5; Murchison (1957) 14; Article 11(Applicability of air regulations) "Subject to the provisions of this Convention, the laws and regulations of a contracting State relating to the admission to or departure from its territory of aircraft engaged in international air navigation, or to the operation and navigation of such aircraft while within its territory, shall be applied to the aircraft of all contracting States without distinction as to nationality, and shall be complied with by such aircraft upon entering or departing from or while within the territory of that State."

⁴¹ Available at : www.icao.int/search/pages/results.aspx?k=ADIZ&s=All%20Sites (last accessed 15 May 2015)

⁴² Cooper (1965) 7 *U.S.A.F. JAG L. Rev.* 18. Cooper refers to Article 2 of the Geneva Convention on the High Seas; The United Nations Convention on the Law of the Sea reiterates this in Article 87: "1. The high seas are open to all States, whether coastal or land-locked. Freedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law. It comprises, inter alia, both for coastal and land-locked States: (a) freedom of navigation; (b) freedom of over flight; (c) freedom to lay submarine cables and pipelines, subject to Part VI; (d) freedom to construct artificial islands and other installations permitted under international law, subject to Part VI; (e) freedom of fishing, subject to the conditions laid down in section 2; (f) freedom of scientific research, subject to Parts VI and XIII. 2. ***These freedoms shall be exercised by all States with due regard for the interests of other States in their exercise of the freedom of the high seas, and also with due regard for the rights under this Convention with respect to activities in the Area.***" (Own emphasis)

with reasonable regard to the interests of other states then a coastal state may take action in the airspace to prevent injury to its national airspace⁴³. This includes implementing precautionary military measures to ward off attacks from other states⁴⁴. Cooper opines that ADIZs are a clear assertion of control for preventative and precautionary purposes exercised in the usable airspace above the High Seas⁴⁵. Some scholars argue that ADIZs limit the right of freedom of over flight, however, ADIZs do not prohibit over flight *per se*⁴⁶. ADIZs are distinguishable from No-Fly zones in that states are still able to exercise their freedom of over flight, the ADIZ proclaiming state simply requests states to submit to certain identification requests for the sake of national security⁴⁷. The writer agrees that the proclaiming state is well within its rights to make use of the airspace above the High Seas in a way that balances its own security interests while having reasonable regard to the rights of other States. Additionally, For example, the US ADIZ regulations do not apply to aircraft not intending to enter US airspace⁴⁸.

Yu limits his discussion on legality of ADIZs to the airspace above the Exclusive Economic Zone (EEZ) only. According to Yu the legal status of the airspace above the EEZ can only be understood by taking into consideration the legal regime of the EEZ in its entirety⁴⁹. Therefore he concludes that ADIZs can be justified by Article 59 of the United Nations Convention on the Law of the Sea (UNCLOS) but that the zone will be subject to same limitations imposed on the EEZ⁵⁰. For example the ADIZ should not exceed 200 nautical miles and the proclaiming state should not assert any territorial rights in that airspace⁵¹. Yu asserts that given the increasing importance and popularity of ADIZs, since the events of 9/11, a revision of airspace law is

⁴³ Cooper (1965) 7 *U.S.A.F. JAG L. Rev.* 18.

⁴⁴ Cooper (1965) 7 *U.S.A.F. JAG L. Rev.* 18.

⁴⁵ Cooper (1965) 7 *U.S.A.F. JAG L. Rev.* 18.

⁴⁶ Beckman R & Phan H "(2014) *Centre for International Law, University of Singapore* 6.

⁴⁷ Beckman R & Phan H "(2014) *Centre for International Law, University of Singapore* 6.

⁴⁸ Note: Among others, the Canadian and Chinese ADIZ regulations apply to all aircraft regardless of whether or not they intend to enter sovereign airspace. This discrepancy in practice will be discussed.

⁴⁹ Yu (2012) 4 *Aviation and Space Journal* 5.

⁵⁰ Article 59 provides: In cases where this Convention does not attribute rights or jurisdiction to the coastal State or to other States within the exclusive economic zone, and a conflict arises between the interests of the coastal State and any other State or States, the conflict should be resolved on the basis of equity and in the light of all the relevant circumstances, taking into account the respective importance of the interests involved to the parties as well as to the international community as a whole.

⁵¹ Yu (2012) 4 *Aviation and Space Journal* 8.

crucial⁵². However, Hailbronner is of the opinion that Article 59 does not clearly provide what rights or jurisdictional powers are granted to states or what legal regime should prevail if a settlement cannot be reached⁵³. She asserts that Article 59 must not be considered a *carte blanche* for States to claim jurisdiction in all cases where UNCLOS does not provide for such rights or jurisdiction⁵⁴. Therefore based on a narrow interpretation of Article 59 and the provisions of Article 89, which provides that a state may not assert its sovereignty on the High Seas, Hailbronner concludes that it is difficult to assert that ADIZs are justified under UNCLOS⁵⁵.

2.4. The Charter of the United Nations (UN Charter)

Murchison argues that Article 51 of the United Nations Charter, which articulates right to your force in the exercise of self-defence, allows for the creation of ADIZs by applying the international laws of self-preservation and necessity⁵⁶. On the other hand Head argues that the right to self-defence is only guaranteed to states in the event of an imminent attack and therefore ADIZs cannot be seen as a form of self defense because they operate during peacetimes as well⁵⁷. He asserts that self-defence cannot stretch so far as to include the right to self-preservation and that such an inflated version of the doctrine could have dire consequences⁵⁸. Head suggests that ADIZs fall under the category of self-preservation which involves taking precautionary measures to protect a state rather than defensive measures⁵⁹.

On the other hand, Cuadra fears that perhaps measures such as ADIZs are not expressly provided in treaty law because of the availability of the right to self-defence and the risk that states may cloak unlawful activities as lawful under the guise of security or self defense⁶⁰. Many

⁵² Yu (2012) 4 *Aviation and Space Journal* 10-11.

⁵³ Hailbronner (1983) 77 *Am. J. Int'l L.* 500.

⁵⁴ Hailbronner (1983) 77 *Am. J. Int'l L.* 509-510.

⁵⁵ Hailbronner (1983) 77 *Am. J. Int'l L.* 509-510.

⁵⁶ Murchison (1957) 58-66.

⁵⁷ Head (1963) 3 *Alta. L. Rev.* 192.

⁵⁸ Head (1963) 3 *Alta. L. Rev.* 196.

⁵⁹ Head (1963) 3 *Alta. L. Rev.* 196. Self-preservation can be defined as a unilateral action by a State in response to a compelling need to preserve the State in one form or another. An act of self-preservation need not consist of the use of military force.

⁶⁰ Cuadra (1977) 18 *Va. J. Intl' L* 501.

states share this scepticism with regard to the PRC and the writer shares this concern. Cuadra concludes that ADIZs do not qualify as a form of anticipatory self-defence because the requirements of necessity, proportionality, and imminent attack are not met⁶¹. Lee opines that ADIZs can be seen as a measure to prepare for anticipatory self-defence and the writer agrees that ADIZs may afford a state time to prepare for defensive measures but is it first and foremost a tool for early identification meant to avoid unnecessary use of defensive measures⁶². The writer acknowledges that Article 52 is a rocky basis on which to justify ADIZs however, the writer is inclined to agree with the views of Head and Lee, as their arguments take into account the ultimate purpose of ADIZs, which is to act as a precautionary measure, and reconcile it within the narrower concept of self-defence.

2.5. Customary International law

According to Lee the legal basis is arguably found in customary international law given the fact that states have engaged in ADIZ practice with few objections over several decades⁶³.

Abeyratne asserts that the customary law precautionary principle provides the theoretical justification for ADIZ⁶⁴. The precautionary principle is an emerging norm of customary international law and it asserts that states should not be precluded from taking action to prevent harm before it occurs, based on the absence of empirical or scientific evidence⁶⁵. In order for the precautionary principle to apply a state must take measures according to their capabilities and in a cost effective manner, furthermore, a response must only be given to threats which are serious and irreversible⁶⁶. The general concept of ADIZs falls well within the ambit of the precautionary principle. The rationale behind establishing ADIZs is to prevent harm from occurring before the harm manifests and becomes irreversible; furthermore, given the sanctity of the concept of state sovereignty it is reasonable to conclude that ADIZs are aimed at

⁶¹ Cuadra (1977) 18 *Va. J. Intl' L* 502.

⁶² Lee (2010) 7 *J. E. Asia & Int'l L*. 278.

⁶³ Lee (2014) 18 *ASIL Insights* 2.

⁶⁴ Abeyratne (2015) 5 *J. Transp. Secur.* 89.

⁶⁵ Abeyratne (2015) 5 *J. Transp. Secur.* 91. See Abeyratne in general for a discussion on the precautionary principle.

⁶⁶ Abeyratne (2015) 5 *J. Transp. Secur.* 89.

addressing serious and irreversible threats. Therefore the writer agrees with the assertion made by Abeyratne.

2.6. Conclusion

Based on the above analysis of the relevant sources of international law with regard to ADIZs, it is clear that strong arguments can be made both for and against the general concept of ADIZs. However, despite the fact that the legal status of ADIZs under international law is not crystal clear, nearly all states submit to ADIZ procedures because they further safety and security by doing so⁶⁷. The writer approves of the concept of ADIZs because it provides clear guidance regarding the operation of aircraft in its designated area thereby furthering the aims of the Chicago Convention regarding safety and order. Furthermore, this study of ADIZs is informed by an aviation law perspective, therefore the writer concludes that ADIZs find their legal basis in Article 12 because the Chicago Convention has not expressly established rules that prohibit them and ADIZs do not contravene the provisions of the Chicago Convention, the only conclusion to be drawn is that ADIZs are permissible under current international law.

⁶⁷ Beckman R & Phan H “ (2014) *Centre for International Law, University of Singapore* 6.

3. Territorial Sovereignty and ADIZs: indispensable?

3.1. Introduction

The PRC ADIZ covers a large portion of the airspace above the High Seas; this feature is not unlike any existing ADIZ. However, it also includes the airspace above two disputed territories, the Senkaku/Diaoyu Islands (the Islands) which are currently subject to territorial claims by the PRC, Japan, and Taiwan and leodo reef which is claimed by South Korea and the PRC⁶⁸. Additionally, the PRC ADIZ overlaps with the existing ADIZs established by Japan, South Korea, and Taiwan⁶⁹.

Traditionally ADIZs expand outwards and include at least some portion of the airspace above international waters⁷⁰. However, an ADIZ that includes the airspace above disputed land territory is a fairly new phenomenon⁷¹. The inclusion of the airspace above the disputed territory coupled with the fact that the ADIZ procedures are imposed on *all aircraft* essentially means that the PRC will be able to exert administrative control over territory to which it bears no sovereign rights.

The inclusion of the disputed territory and the extensive application of the ADIZ procedures raise one main question: is territorial sovereignty an indispensable requirement when establishing an ADIZ to control air traffic into that territory? In other words, can a state use an ADIZ to control air traffic in the airspace above land territory in which it has no sovereign rights.

The aim of this chapter is to determine whether or not a State may declare an ADIZ around land territory in which it has only a claim and no sovereign rights. This question will be answered by discussing the principle of sovereignty and its relationship with ADIZs, as well as the function and purpose of ADIZs and the PRC's understanding thereof.

⁶⁸ For more information on the territorial dispute please see: Su (2005) 36 *Ocean Dev. & int'l L* 45 – 55 in general.

⁶⁹ Beckman R & Phan H “(2014) *Centre for International Law, University of Singapore* 8.

⁷⁰ Bao (2014) 1 *ISLRev* 5.

⁷¹ The South Korean ADIZ includes a group of islands which are also claimed by Japan, see Beckman R & Phan H (2014) *Centre for International Law, University of Singapore* 8.

3.2. The Principle of Sovereignty

Sovereignty is a fundamental principle of international law⁷². Sovereignty must be defined by considering the context and discipline in which it is being used⁷³. Dodge notes that sovereignty can be defined in many different ways, but that the most prominent definition is the total or superior control of a territory⁷⁴. The principle of sovereignty is deemed to be so crucial that it receives protection in Article 2 (1) of the UN Charter, which states: “The organisation is based on the core principle of the sovereign equality of all its members”⁷⁵.

3.3. The Principle of Aerial Sovereignty

The doctrine of absolute sovereignty is entrenched in international law and has been included in the most important air law treaties⁷⁶. Before airspace sovereignty can be understood, airspace must be defined. At present there is no official definition of airspace under international law, however, airspace is defined with reference to its dimensions. Airspace extends vertically and horizontally. The horizontal dimension is determined by states' sovereign borders. The vertical dimension is determined with reference to the maximum height needed for the practical use of an aircraft⁷⁷. This maximum height is known as the Karman Line, which is 100km above sea level⁷⁸.

Aerial sovereignty refers to the right of a state to exercise absolute power over the airspace above its sovereign territory. The first formal recognition of the principle of aerial sovereignty

⁷² Dugard (2012) 126.

⁷³ Dugard (2012) 126.

⁷⁴ Dodge (2009) 35 *J. Space L.* 8.

⁷⁵ Article 2 (1) of the UN Charter.

⁷⁶ Dodge (2009) 35 *J. Space L.* 14.

⁷⁷ Dodge (2009) 35 *J. Space L.* 28.

⁷⁸ Dodge (2009) 35 *J. Space L.* 28.

occurred when it was included in the Paris Convention of 1919⁷⁹. The Chicago Convention of 1944 echoes this principle and focuses on the sovereign right of States to regulate national and international air traffic within the airspace over their territory⁸⁰. Article 1 and 2 of the Chicago Convention provide “The contracting States recognize that every State has complete and exclusive sovereignty over the airspace above its territory” and “For the purposes of this Convention the territory of a State shall be deemed to be the land areas and territorial waters adjacent thereto under the sovereignty, suzerainty, protection or mandate of such State”⁸¹.

This means that a state exercises sovereignty over its territory and the airspace above it, and as Hughes correctly deduces, a state does not exercise sovereignty over the airspace above any land or sea territory which is not under its sovereignty⁸²

Cuadra notes that the Chicago Convention affirms the principle of aerial sovereignty as customary international law and therefore member and non-member states alike have exclusive sovereignty in the airspace above their territories⁸³.

3.4. The relationship between Sovereignty and ADIZs

As previously stated the function and purpose of a ‘standard’ ADIZs is to enable air traffic control to request information from civil aircraft relating to identification and location. The purpose gathering this information is to enable air traffic control to identify potential threats *before* they enter sovereign airspace. Based on this rationale it can be deduced that ADIZs are designed to protect sovereignty. The PRC itself has cited the protection of state sovereignty as one the reasons for the establishment of its ADIZ⁸⁴.

⁷⁹ Shrewsbury (2003) 68 *J. Air L. & Com.* 130.

⁸⁰ Dutton (2009) 103 *Am. J. Int'l L.* 692.

⁸¹ Article 1 and 2 of the Chicago Convention.

⁸² Hughes (1952) 19 *J. Air L. & Com.* 144.

⁸³ Cuadra (1977) 18 *Va. J. Int'l L.* 488.

⁸⁴ Swaine (2014) 43 *China Leadership Monitor* 4.

” with the aim of *safeguarding state sovereignty*, territorial land and air security, and maintaining flight order. This is a necessary measure taken by China in exercising its self-defense right⁸⁵”

In other words, sovereignty must exist in order to justify the proclamation and subsequent enforcement of an ADIZ. Due to the absence of explicit laws regulating ADIZs states have divergent understandings of what an ADIZ is and therefore they have different rationales and enforcement procedures⁸⁶. As a result of these divergent practices it is asserted that the function and purpose of an ADIZ must be used as a yardstick to determine which practices should be permitted or prohibited.

Lamont distinguishes between two groups of ADIZ proclaiming States⁸⁷. The first group of states understand ADIZs to be purely security instruments⁸⁸. These states do not intend to use their ADIZs to regulate air traffic outside their national airspace⁸⁹. These ADIZ proclaiming states are hesitant to impose strict reporting obligations⁹⁰. An example of a group one state is the United States, which only imposes ADIZ reporting obligations on aircraft intending to enter its national airspace⁹¹. The second group of states is fundamentally different, this group of states understand ADIZs to be an extension of territorial sovereignty⁹². These states employ

⁸⁵ “Defense Spokesman Yang Yujun’s Response to Questions on the Establishment of The East China Sea Air Defense Identification Zone,” Ministry of National Defense of the People’s Republic of China, November 23, 2013. Swaine (2014) 43 *China Leadership Monitor* 31. (own emphasis)

⁸⁶ Lamont (2014) 39 *Air and Space L.* 190.

⁸⁷ Lamont (2014) 39 *Air and Space L.* 190

⁸⁸ Lamont (2014) 39 *Air and Space L.* 190.

⁸⁹ Lamont (2014) 39 *Air and Space L.* 190.

⁹⁰ Lamont (2014) 39 *Air and Space L.* 190.

⁹¹ Lamont (2014) 39 *Air and Space L.* 190.

⁹² Lamont (2014) 39 *Air and Space L.* 191.

broader ADIZ reporting obligations in order to assert administrative control over international airspace in their ADIZs, for example, by imposing the reporting obligations on all aircraft and not only on those intending to enter the their national airspace⁹³. Essentially these states exert control over aircraft operating in international airspace without a legitimate reason. Canada may be used as an example of a group two state as it is guilty of imposing its ADIZ procedures on all aircraft including those not intending to enter Canadian airspace⁹⁴.

The question whether or not territorial sovereignty is an indispensable requirement when proclaiming an ADIZ will be answered by using the categories advanced by Lamont and discussing them in relation to the function and purpose of ADIZs.

3.5. The function and Purpose of ADIZs

3.5.1. ADIZs as a security measure

The first group designated by Lamont are those states that understand ADIZs to be security mechanisms aimed at protecting national sovereignty⁹⁵. The rationale that these states put forward for the proclamation of their ADIZs is in line with the theoretical function of an ADIZ.

Group one states are designated so by looking at the state's rationale for proclaiming its ADIZ *and* the extent of its reporting obligations and enforcement measures. These factors need to be considered in conjunction with one another in order to determine what the proclaiming state's understanding of ADIZs is. If considered in isolation these characteristics may not be reconcilable. For example, the United States cited the need to ensure national security, to control illicit drug activities, to minimize unnecessary intercept and search-and- rescue operations and to decrease the risk of mid-air collisions and other public hazards, as justification for its ADIZ⁹⁶. This rationale is supported by the fact that the United States only imposes its

⁹³ Lamont (2014) 39 *Air and Space L.* 191.

⁹⁴ Lamont (2014) 39 *Air and Space L.* 191.

⁹⁵ Lamont (2014) 39 *Air and Space L.* 191.

⁹⁶ FAA FLIGHT MANUAL, national security, Para. B as cited in Dutton (2009) 103 *Am. J. Int'l L.* 670 (fn. 54)

reporting obligations on aircraft intending to enter national airspace. The United States is firm in that it does not recognise ADIZ procedures that apply to foreign aircraft regardless of its intended destination. According to the U.S. Navy's Commander's Handbook on the law of Naval Operations:

“The United States does not recognize the right of a coastal nation to apply its ADIZ procedures to foreign aircraft not intending to enter national airspace nor does the United States apply its ADIZ procedures to foreign aircraft not intending to enter U.S. airspace. Accordingly, U.S. military aircraft not intending to enter national airspace should not identify themselves or otherwise comply with ADIZ procedures established by other nations, unless the United States has specifically agreed to do so⁹⁷.”

In fact the United States was one of the first states to criticise the PRC ADIZ for its wide application of reporting obligations. Shortly after the PRC announced its ADIZ procedures the United States released a statement affirming that it does not support the efforts of any state to apply its ADIZ procedures to foreign aircraft not intending to enter its national airspace⁹⁸. To further cement its position the United States air force flew two US B52 bombers from Guam into the PRC ADIZ without submitting any prior notification, this incident occurred inky four days after the PRC's announcement⁹⁹. Since 2015, the U.S. military continues to fly aircraft through the zone without responding to requests for identification¹⁰⁰. However, The Federal Aviation Administration (FAA) has distributed China's requirements for operating in the ECS ADIZ to

⁹⁷ “The Commander's Handbook on the Law of Naval Operations: Edition July 2007,” Department of the Navy and Department of Homeland Security, July 2007, Section 2.7.2.3 pp. 2-13 as cited in Swaine (2014) 43 *China Leadership Monitor* 5.

⁹⁸ Statement of the Secretary of State on the East China Sea Air Identification Zone (23 November 2013), online: <http://www.state.gov/secretary/remarks/2013/11/218013.htm>. As cited in Beckman R & Phan H “(2014) *Centre for International Law, University of Singapore* 9.

⁹⁹ Zachary Keck, ‘US Bombers Challenge China's Air Defense Identification Zone’, *The Diplomat* (27 November 2013), online: <http://thediplomat.com/2013/11/us-bombers-challenge-chinas-air-defenseidentification-zone/>. As cited in Beckman R & Phan H (2014) *Centre for International Law, University of Singapore* 9.

¹⁰⁰ Rinehart I & Elias B (2015) *Congressional Research Service* 1.

commercial airlines¹⁰¹. The strong stance adopted by the United States is a clear indication that the PRC's actions are irreconcilable with the function and purpose of ADIZs.

By limiting the imposition of reporting obligations to those aircraft that have the intention of entering the state's sovereign airspace the proclaiming state is reconciling its enforcement of ADIZ procedures with the purpose of an ADIZ. To these states sovereign territory is crucial to the enforcement of its ADIZ. If no aircraft intended to enter its airspace there would be no need to impose any reporting obligations, because doing so would mean abusing the ADIZ mechanism to exert control in international airspace.

3.5.2. ADIZs as an extension of territorial sovereignty

The second group designated by Lamont are those states that understand ADIZs to be an extension of sovereignty¹⁰². These states do not boldly claim sovereign control over the airspace encompassed by their ADIZs, such claims would undoubtedly be met with harsh criticism. Instead, these states adopt a broader approach when it comes to reporting obligations. Requesting an aircraft to identify itself may not seem invasive but in reality what the state is doing is exerting administrative control over non –sovereign territory without a reasonable justification. To these states sovereign territory is not crucial to the enforcement of its territory because even if no aircraft is intending to enter its national airspace, it still exerts administrative control over aircraft simply passing through the ADIZ. Australia, Myanmar, Taiwan, and Canada are some of the ADIZ proclaiming states that impose their ADIZ procedures on all aircraft entering their ADIZs¹⁰³. Group two states also use ADIZs to advance territorial claims¹⁰⁴

Upon examining the features of the PRC ADIZ, specifically its dimensions and broad enforcement of ADIZ procedures, it can be deduced that it would be categorised as a second group state. The PRC is using its ADIZ to assert to justify control over disputed territory and to

¹⁰¹ Rinehart I & Elias B (2015) *Congressional Research Service* 1.

¹⁰² Lamont (2014) 39 *Air and Space L.* 191.

¹⁰³ Beckman R & Phan H (2014) *Centre for International Law, University of Singapore* 9.

¹⁰⁴ Lamont (2014) 39 *Air and Space L.* 191.

lay a legal foundation to strengthen its claims¹⁰⁵. However, the actions of the PRC should not come as a surprise, the PRC has a tendency of using existing legal concepts to assert sovereignty in non-sovereign areas¹⁰⁶. For example, most states exclusively exercise economic rights in their EEZs whereas the PRC is amongst the few states that reserve the right to regulate and protect security interests in its EEZ¹⁰⁷.

However, some authors support the PRC's understanding and implementation of its ADIZ. Bao states, in support of the PRC ADIZ, that there is no rule of customary international law which prohibits the establishment of ADIZs over marine territory that is subject to a territorial dispute¹⁰⁸. In support of his assertion he cites the fact that the Japanese ADIZ includes territory that is subject to claims by Taiwan, and the fact that South Korea recently expanded its ADIZ to include leodo rock, which is claimed by the PRC¹⁰⁹.

However, regardless of how many ADIZs encompasses disputed territory, the practice of establishing ADIZs over disputed territory and using ADIZ procedures to control air traffic over that territory, will never be reconcilable with the function and purpose of an ADIZ. This is essentially what the PRC is doing, it is using its ADIZ to control the airspace over the disputed territory in order to strengthen its claim thereto¹¹⁰. According to Hsu the PRC now has greater flexibility to assert sovereignty over the Senkaku/Diaoyu islands without contravening its obligations under international law¹¹¹.

¹⁰⁵ Hsu k (2014) *U.S –China Economic and Security Review Commission Staff Report 2*.

¹⁰⁶ Hsu k (2014) *U.S –China Economic and Security Review Commission Staff Report 2*.

¹⁰⁷ Hsu k (2014) *U.S –China Economic and Security Review Commission Staff Report 1-2*.

¹⁰⁸ Bao (2014) 1 *ISL Rev 7*.

¹⁰⁹ Bao (2014) 1 *ISL Rev 7*. "East Asia—Strong Opposition to PRC ADIZ, ROK Announces ADIZ Expansion," Open Source Center, Report, December 10, 2013. As cited in Swaine (2014) 43 *China Leadership Monitor 31*.

¹¹⁰ Hsu k (2014) *U.S –China Economic and Security Review Commission Staff Report 2*.

¹¹¹ Hsu k (2014) *U.S –China Economic and Security Review Commission Staff Report 2*.

3.6. Conclusion

Based on the function and purpose of ADIZs the following is deduced: sovereignty is crucial to the establishment of an ADIZ. The protection of sovereignty is the primary justification for the existence of ADIZ under international law. ADIZs should not be used to create sovereignty or extend it. Using ADIZs for this purpose amounts to abuse and ultimately undermines its important role in maintaining national and international peace and security.

The PRC cited protection of national sovereignty as one of the reasons for the proclamation of its ADIZ, therefore in theory the PRC ADIZ serves as a security measure. However, in practice the PRC ADIZ also serves as a measure to extend state sovereignty over disputed territory. The PRC's true rationale for creating the ECS ADIZ is unclear, it could have been a political statement or representative of a plan to further administrative control of the disputed territory¹¹². Unfortunately, at this point arguments can be made in favour of and against this practice. However, it must be stressed that such a practice threatens to severely undermine the concept of ADIZs by taking advantage of the lack of an express legal framework and manipulating concepts to further political aims. Additionally overlapping ADIZs are hazardous and increase the risk of mid-air collisions, with aircraft having to follow instructions from multiple authorities regardless of its destination¹¹³.

¹¹² Rinehart I & Elias B (2015) *Congressional Research Service* 13.

¹¹³ Rinehart I & Elias B (2015) *Congressional Research Service* 23.

4. ADIZ enforcement measures: what is reasonable?

4.1. Introduction

While the PRC ADIZ leaves many questions unanswered, one thing that the PRC has made clear is the action it is willing to take should there be non-compliance with its ADIZ procedures. The initial statement by the spokesperson for the MND contained the following warning

“...Aircraft flying in the East China Sea Air Defense Identification Zone should follow the instructions of the administrative organ of the East China Sea Air Defense Identification Zone or the unit authorised by the organ. China’s armed forces *will adopt defensive emergency measures to respond to aircraft that do not cooperate* in the identification or refuse to follow instructions¹¹⁴.”

The PRC established its ADIZ with the aim of, *inter alia*:

“Safeguarding state sovereignty, territorial land and air security, and maintaining flight order. This is a necessary measure taken by China *in exercising its self-defence right*¹¹⁵”

It is clear from the statements above that the Chinese armed forces have been authorised to use defensive measures in order to ensure compliance with its ADIZ procedures, by relying on its inherent right to use force in self-defence. This leaves open the possibility, however slim it may be, that foreign aircraft that fail to submit to voluntary identification may be intercepted and shot down by the Chinese armed forces.

The function of an ADIZ is to assist in protecting national sovereignty by aiding early identification through gathering information regarding the intent of incoming foreign civil aircraft

¹¹⁴ “Statement by the government of the People’s Republic of China on the East China Sea Air Defense Identification Zone” http://www.news.xinhuanet.com/english/china/2013-11/23/c_132911634.htm (Accessed on 19 February 2015) (writer’s own emphasis).

¹¹⁵ “Defense Spokesman Yang Yujun’s Response to Questions on the Establishment of The East China Sea Air Defense Identification Zone,” Ministry of National Defense of the People’s Republic of China, November 23, 2013 as cited in Swaine (2014) 43 *China Leadership Monitor* 4.

before they may be allowed to enter sovereign airspace. The PRC ADIZ represents a shift from the standard information gathering function to a questionable military enforcement function¹¹⁶. Aircraft that fail to comply with requests in an information-gathering-ADIZ are subject to administrative regulation or penalties and possible interception as a standard reaction, whereas aircraft that fail to comply with requests in a military-enforcement-ADIZ may be subject to an immediate and direct military response¹¹⁷.

The intentions of the PRC, as expressed by the MND spokesperson, indicate a misunderstanding as to what actions a proclaiming state is permitted to take in the event of non-compliance with its ADIZ procedures. Particularly, in respect of defensive actions. The aim of this chapter is to answer this question by drawing parallels between the standard function and the PRC ADIZ function, namely, the information gathering function (early identification) and the military enforcement function (anticipatory self-defence).

4.2. The information gathering function: early identification

The purpose of a 'standard' ADIZ is to allow the relevant authorities to gather certain information regarding the identity and location of aircraft intending to enter sovereign airspace in order to determine whether or not such entry should be permitted. This serves national security interests in that by identifying hostile aircraft prior to its entry into national airspace the relevant authorities have enough time *to prepare defensive measures*. The purpose of an ADIZ is *not to condone the disproportionate use of defensive measures*.

Title 14, Section 99.9 of the United States Federal Regulations provides that no civilian aircraft may operate within a US ADIZ unless a flight plan is filed, activated, and closed with the appropriate aeronautical facility, or if the aircraft is otherwise instructed by air traffic control¹¹⁸. The section also requires pilots to report their location and estimated time of ADIZ penetration¹¹⁹. The reason for these regulations are to ensure that all aircraft entering from

¹¹⁶ Lee (2014) 18 *ASIL Insights* 1.

¹¹⁷ Lee (2014) 18 *ASIL Insights* 1.

¹¹⁸ 14 C.F.R. §99.9; Dutton (2009) 103 *Am. J. Int'l L.* 698-699.

¹¹⁹ 14 C.F.R. §99.9; Dutton (2009) 103 *Am. J. Int'l L.* 698-699.

outside sovereign airspace provide for identification prior to entry, as a measure to ensure, amongst others, *unnecessary intercept*¹²⁰.

4.2.1. The Chicago Convention

The Chicago Convention does not explicitly regulate ADIZs, however, it does provide specific guidance with respect to the interception of civil aircraft in Article 3 *bis* and Annex 2. Article 3 *bis* requires all state parties to ensure that the aircraft and the lives of people on board are not endangered in the event of an interception¹²¹. The provision also acknowledges the right of state parties to intercept civil aircraft if such aircraft is overflying its territory without authorization or if there are reasonable grounds to conclude that the aircraft is operating in violation of the Chicago Convention¹²².

Appendix 2 to Annex 2 provides more detailed guidelines regarding interceptions. It states, *inter alia*, that:

- “a) interception of civil aircraft will be undertaken only *as a last resort*,
- b) if undertaken, an interception will be limited to determining the identity of the aircraft, unless it is necessary to return the aircraft to its planned track, direct it beyond the boundaries of national airspace, guide it away from a prohibited, restricted or danger area or instruct it to effect a landing at a designated aerodrome;
- c) Practice interception of civil aircraft will not be undertaken;
- d) Navigational guidance and related information will be given to an intercepted aircraft by radiotelephony, whenever radio contact can be established; and
- e) In the case where an intercepted civil aircraft is required to land in the territory overflown, the aerodrome designated for the landing is to be suitable for the safe landing of the aircraft type concerned¹²³”

¹²⁰ Dutton (2009) 103 *Am. J. Int'l L.* 699.

¹²¹ Article 3 *bis* of the Chicago Convention.

¹²² Article 3 *bis* of the Chicago Convention.

¹²³ Appendix 2 to Annex 2 of the Chicago Convention.

It is generally accepted in Customary International Law and under the Chicago Convention that civil aircraft may be intercepted by air force but may not be attacked upon¹²⁴. However, Paragraph 1.1 (a) explicitly states that interception of a civil aircraft shall only be undertaken as a measure of last resort. The fact that the Chicago Convention explicitly condones interception only as a measure of last resort is a clear indication that a direct military response against a civil aircraft would be wildly disproportionate.

The instructions for interception contained in Annex 2 are specific to the interception of civilian aircraft operating within a state's sovereign airspace. The Chicago Convention does not offer guidance with respect to interception of civil aircraft operating outside sovereign airspace¹²⁵. However, having regard to the objects and purpose of the Chicago Convention, and its focus on creating uniform practices in civil aviation¹²⁶, these rules of interception should be observed even where interception of civil aircraft occurs outside sovereign airspace.

4.3. The military enforcement function – anticipatory self-defence

According to Lee the PRC ADIZ replaces the information-gathering-function with a military-enforcement-function because it is formulated as a 'military emergency action plan'¹²⁷. The possibility of the PRC using defensive measures against civil aircraft is one of the main reasons for the heavy criticism against the PRC ADIZ. There is a striking difference between ADIZ procedures that prescribe interception as a measure of last resort and the PRC ADIZ that immediately refers to defensive action. This is especially alarming because of the prohibition on the use of force, which is a core principle of public international law.

When announcing the establishment of its ADIZ the PRC failed to distinguish between state and civil aircraft. Therefore the use of defensive measures against both state and civil aircraft must be discussed.

¹²⁴ Bao (2014) 1 *ISLRev* 8.

¹²⁵ Rinehart I & Elias B (2015) *Congressional Research Service* 6.

¹²⁶ Preamble to the Chicago Convention.

¹²⁷ Lee (2014) 18 *ASIL Insights* 2.

4.3.1. The UN Charter – The prohibition on the use of force

Article 2 (4) of the UN Charter contains the prohibition on the use of force, which is also a rule of customary international law. It reads as follows: All members shall refrain in their international relations from the threat or use of force against the territorial or political independence of any state, or in any other manner inconsistent with the purpose of the United Nations¹²⁸.

Article 2(4) prohibits both the threat and use of force. The type of threat that is prohibited by Article 2 (4) was described by the ICJ in the advisory opinion on the *Legality of The Threat or Use of Nuclear Weapons*¹²⁹. It reads as follows:

“If the envisaged use of force is itself unlawful, the stated readiness to use it would be a threat prohibited under Article 2, paragraph 4. Thus it would be unlawful for a State to threaten force to secure territory from another State, or to cause it to follow or not to follow certain political or economic paths.¹³⁰”

Threats of force are generally manifested in acts or verbal declarations which imply that the makers will resort to the use of force if certain demands are not met¹³¹. The statement made by the MND spokesperson contains a verbal declaration indicating that if there is non-compliance with the PRC ADIZ requirements the Chinese armed forces will resort to defensive measures. However, International law and practice indicates that threats to the use of force are usually tolerated, especially if made by a major power, such as the PRC¹³².

The decision by the ICJ provides guidance regarding the threat of use of force, which is used more often than the use of force itself. It makes it clear that using the threat of force to motivate compliance is illegal. The PRC is a member of the United Nations therefore it is bound by customary law and Article 2 (4) to refrain from the use of force. However, the prohibition on the

¹²⁸ Article 2 (4) of the UN Charter.

¹²⁹ Advisory opinion on the *Legality of The Threat or Use of Nuclear Weapons* (1996) ICJ Rep 226 para 47 as cited in Bennet T & J Strug (2013) 328.

¹³⁰ Advisory opinion on the *Legality of The Threat or Use of Nuclear Weapons* (1996) ICJ Rep 226 para 47 as cited in Bennet T & J Strug (2013) 328.

¹³¹ Bennet T & J Strug (2013) 327.

¹³² Bennet T & J Strug (2013) 327.

use, and threat, of force is not without legal exceptions. In order to fully understand Article 2 (4) it must be read with Article 51, which articulates the right to self-defence.

4.3.2. The UN Charter – Self-defence and Anticipatory self-defence

The right to use force in self-defence is a long established rule of customary international law, and it is a core provision in the UN Charter¹³³. The *Caroline* case is generally accepted as the leading authority with respect to the customary law on self-defence, the court in this case laid down the criteria for the successful invocation of the defence¹³⁴. In terms of the *Caroline* decision the state invoking the defence must show that its interests were threatened with an actual or imminent violation, and that the force used was both necessary and proportionate to the actual or threatened harm¹³⁵. The customary right to self-defence is affirmed in Article 51 of the UN Charter which reads:

“Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security¹³⁶”.

The most important criteria for the invocation of the self-defence exception are the requirements of necessity and proportionality, and these apply to both the customary law right and Article 51 of the UN Charter¹³⁷. Although the exception of self-defence is available to justify the use of force, it is not always a sure fire way to exempt a state from state responsibility. In the *Corfu Channel* case the International Court of Justice (hereafter ICJ) decided that some actions taken for the purpose of self-defence may be considered unlawful if the purpose is not consistent with

¹³³ Bennet T & J Strug (2013) 332.

¹³⁴ Bennet T & J Strug (2013) 332.

¹³⁵ (1837) 29 *British and Foreign State Papers* 1137 cited in *Harris Cases and Materials on International Law* 7 ed (2010) 746 as cited in Bennet T & J Strug (2013) 332.

¹³⁶ Article 51 of the UN Charter.

¹³⁷ Bennet T & J Strug (2013) 334.

the UN Charter¹³⁸. Whether or not the PRC's use of defensive measures may amount to the use of force taken in self-defence will have to be considered on an *ad hoc* basis, in the event of an attack in its ADIZ. However, the PRC's intention to employ defensive measures against civil or state aircraft that do not submit to voluntary identification may amount to the intention to use force in anticipatory self-defence.

Anticipatory or pre-emptive self-defence refers to a situation in which a state uses force against another state, before an attack occurs, but where the state believes that an attack is imminent and therefore uses force in self-defence¹³⁹. For example, an aircraft enters the PRC ADIZ and does not respond to requests for identification, as a result of non-compliance the PRC authorities employ defensive measures against the aircraft because they believe that the reason for non-compliance is an imminent attack.

The term 'defensive measures' is vague and could include a number of different responses. However, how the PRC will react to aircraft that fail to comply with its ADIZ procedures can be inferred from its initial response to aerial incursions shortly after the establishment of its ADIZ¹⁴⁰. In December 2013 the MND spokesperson announced that China had *controlled* the flight activity of 800 foreign war planes that had entered the area between November 23 and December 22¹⁴¹. Additionally 56 airline companies from 23 countries reported 21 475 flights to China and 51 rounds of surveillance aircraft, early warning aircraft, and fighters on 87 flights for the purpose of patrolling its ADIZ¹⁴². Based on this MND statement it appears that the PRC had up to that point made use of peaceful methods of monitoring and identifying activities in its ADIZ¹⁴³. In spite of this initial reasonable and proportionate reaction, the possibility that the PRC may use defensive measures still exists. In defence of the PRC Bao notes that neither the Chicago Convention nor Customary International Law proscribes the shooting down of military aircraft operating in its ADIZ¹⁴⁴.

¹³⁸ The *Corfu Channel case*, UK v Alb. 1949 I.C.J. 4, 29-35.

¹³⁹ Bennet T & J Strug (2013) 335.

¹⁴⁰ Swaine (2014) 43 *China Leadership Monitor* 21.

¹⁴¹ Swaine (2014) 43 *China Leadership Monitor* 21.

¹⁴² Swaine (2014) 43 *China Leadership Monitor* 21.

¹⁴³ Swaine (2014) 43 *China Leadership Monitor* 21.

¹⁴⁴ Bao (2014) 1 *ISLRev* 8.

The importance of discussing the prohibition on the use of force and the right to act in self-defence was is not to determine whether or not the PRC is in breach of the rule or can successfully raise the exception. Instead it is to illustrate how the PRC's ADIZ is designed to serve a military enforcement purpose which is strikingly different from an information gathering purpose, and to emphasise that its intended enforcement mechanisms are neither reasonable nor proportionate, in light of the general rules of international law.

4.3.3. The Chicago Convention- Article 3 *bis*

Apart from Article 2 (4) that prohibits the PRC from using force against other states, and the narrow interpretation of the right to self-defence, the Chicago Convention also prohibits the use of force against civil aircraft. Article 3 *bis* of the Chicago Convention provides protection to civilian aircraft by requiring state parties to refrain from using force against civilian aircraft¹⁴⁵.

Article 3 *bis* places an obligation on states to refrain from using weapons against civilian aircraft in flight¹⁴⁶. The inclusion of Article 3 *bis* was spurred on by the shooting down of Korean Airlines flight 007 in 1983¹⁴⁷. The Korean Airlines aircraft was shot down by Soviet jets because it had entered an area of Soviet airspace that was military sensitive¹⁴⁸. Nearly 300 lives were lost and in to avoid another calamity Article 3 *bis* was adopted in May 1984¹⁴⁹. Article 3 *bis* also provides that state parties must take care not to endanger the lives of persons on board and the safety of the aircraft in the event of interception, and it confirms the right of states to require civilian aircraft to land at a designated airport if such aircraft is flying in its airspace without authority or if there are reasonable grounds to believe it is being used for purposes inconsistent with the aims of the convention¹⁵⁰.

¹⁴⁵ Bao (2014) 1 *ISLRev* 8.

¹⁴⁶ Lee (2010) 7 *J. E. Asia & Int'l L.* 279.

¹⁴⁷ Dugard (2012) 397.

¹⁴⁸ Dugard (2012) 397.

¹⁴⁹ "The ICAO Council Resolutions on March 6, 1984 stated: "[c]ondemns the use of armed force which resulted in the destruction of the Korean airliner and the tragic loss of 269 lives." Then, on May 10, 1984, the 25th Session (Extraordinary) of the ICAO Assembly adopted an amendment to the Chicago Convention by adding Article 3 *bis*."- as cited in Lee (2010) 7 *J. E. Asia & Int'l L.* 280 fn 27.

¹⁵⁰ Article 3 *bis* of the Chicago Convention.

The PRC ratified article 3 *bis* in 1997 and it entered into force in October 1998¹⁵¹. According to Bao the PRC's ratification of an Article prohibiting the use of weapons against civil aircraft in flight is proof that it is incorrect to conclude that the PRC will employ unnecessary force directly against a civil aircraft that refuses to submit to its ADIZ procedures¹⁵². However, in spite of the international obligations owed by the PRC, the language used to communicate its intentions regarding enforcement of its ADIZ procedures clearly indicates that the PRC is willing to use defensive measures. This alone indicates that the PRC's intended enforcement methods are disproportionate and unreasonable.

4.4. Conclusion

ADIZs and their procedures are in most cases only applicable to civil aircraft. The use of defensive measures against civil aircraft is strictly prohibited by Article 3 *bis* of the Chicago Convention. Furthermore, the Chicago explicitly refers to the interception of civil aircraft as a measure of last resort in Annex 2. Regardless of the actions the PRC might take to respond to state aircraft operating in its ADIZ, it is clear that the same action should not be taken in response to civil aircraft. The function and purpose of an ADIZ is to enable early identification of threats to allow time for a non-military response as far as possible. The immediate use of force cannot be reconciled with this purpose and therefore it is concluded that a direct military response is not a reasonable enforcement measure and that all ADIZ enforcement measures should be in line with the guidance offered by the Chicago Convention.

¹⁵¹ Bao (2014) 1 *ISLRev* 8.

¹⁵² Bao (2014) 1 *ISLRev* 8.

5. Recommendations

5.1. Introduction

The PRC ADIZ is not unique, nor is its features. However, it has highlighted the fact that an express legal framework to regulate ADIZs is desperately needed. The discrepancies in states' understanding and implementation came to light after the PRC ADIZ was announced. The following recommendations are offered in response to the PRC ADIZ and the various reactions thereto.

5.2. Pre-requisites for establishing an ADIZ

5.2.1. Territorial Sovereignty

The inclusion of disputed territory in the PRC ADIZ is arguably one of its most controversial features. Many states have argued that by including the disputed territory in its ADIZ the PRC is attempting to strengthen its territorial claims thereto. However, according to some authors the fact that PRC military aircraft would not have the effect of enhancing the PRC's territorial claims¹⁵³. However, it appears as though some states are under the impression that including disputed territory in their ADIZs will somehow strengthen their territorial claims. For example, shortly after the PRC announced its new ADIZ, South Korea expanded its existing ADIZ to include leodo rock, which is subject to claims by the PRC and South Korea¹⁵⁴.

This practice is dangerous. Territorial disputes often prompt direct military confrontation and using ADIZs to aid such disputes could drastically undermine its function and importance. As previously discussed, the purpose of establishing an ADIZ is to protect state sovereignty. Therefore the only reasonable inference to be drawn is that sovereignty is a pre-requisite for establishing an ADIZ. The inclusion of non-sovereign land territory in an ADIZ, coupled with extensive reporting obligations is irreconcilable with the purpose of establishing an ADIZ, because it results in the ADIZ proclaiming state exerting administrative control over non-sovereign territory.

¹⁵³ Beckman R & Phan H (2014) *Centre for International Law, University of Singapore* 9.

¹⁵⁴ "East Asia—Strong Opposition to PRC ADIZ, ROK Announces ADIZ Expansion," Open Source Center, Report, December 10, 2013 as cited in Swaine (2014) 43 *China Leadership Monitor* 31.

It is therefore recommended that territorial sovereignty be a pre-requisite when establishing an ADIZ. No state should be allowed to establish an ADIZ over land or marine territory to which it only bears a claim. However, in the event that a disputed territory is included in the area immediately adjacent to a state's sovereign territory and if excluding the disputed airspace would render the ADIZ unable to serve its purpose, the state should be allowed to include that airspace on condition that it does not impose reporting obligations on aircraft not intending to enter its sovereign airspace. This will ensure that the ADIZ proclaiming state will not be able to exercise control over air traffic over the disputed territory.

5.2.2. Prior consultation/notice

One of the criticisms against the PRC is the manner in which it announced its ADIZ, unilaterally, immediately, and without prior consultation¹⁵⁵. The act of prior consultation may be described as the exercise of due regard¹⁵⁶. However, it is unclear whether or not a clear and constant practice of consultation exists amongst ADIZ proclaiming states¹⁵⁷.

It is important to note that engaging in prior consultation does not equate to obtaining prior consent from other states¹⁵⁸. Japan reportedly engaged in consultation with Taiwan before expanding its ADIZ in 2010 and despite a registered objection nevertheless proceeded with its expansion¹⁵⁹. The aim of prior consultation is to inform states with an interest in the proclamation in a considerate and timely fashion, so as to mitigate any objections. There is no doubt that the tensions created by the PRC's announcement of its ADIZ could have been mitigated had it engaged in prior consultation with Japan, South Korea, and the United States¹⁶⁰.

The benefit of engaging in prior consultation with interested states is evidenced by the reaction of Japan, the PRC, and the United States to the expansion of the South Korean ADIZ in

¹⁵⁵ Swaine (2014) 43 *China Leadership Monitor* (Fn 78).

¹⁵⁶ Beckman R & Phan H (2014) *Centre for International Law, University of Singapore* 10-11.

¹⁵⁷ Beckman R & Phan H (2014) *Centre for International Law, University of Singapore* 10-11.

¹⁵⁸ Beckman R & Phan H (2014) *Centre for International Law, University of Singapore* 10-11.

¹⁵⁹ Beckman R & Phan H (2014) *Centre for International Law, University of Singapore* 10-11.

¹⁶⁰ Beckman R & Phan H (2014) *Centre for International Law, University of Singapore* 10-11.

2013¹⁶¹. South Korean officials reportedly held consultation with these three states prior to expanding its ADIZ into an area overlapping the existing zones of the PRC and Japan¹⁶². The calm reaction can be partly attributed to the consultation, especially when bearing in mind the harsh reactions the PRC received because its ADIZ overlapped other existing zones¹⁶³.

Although South Korea's decision to expand its ADIZ seems to condone the PRC's actions, the manner in which it was carried out is applauded. Engaging in prior consultation also allows the proclaiming state to make its intentions clear; and in the case of overlapping zones it can minimize the risk of accidents and miscalculations. It is for these reasons that the writer recommends that prior consultation/notice be a prerequisite for the establishment of ADIZs, especially in the case of overlapping zones.

5.2.3. Extent of application of ADIZ procedures

Another prominent criticism against the PRC ADIZ is the extensive nature of its ADIZ procedures. The fact that the PRC plans to impose its ADIZ procedures on military and civil aircraft irrespective of whether or not the aircraft intends to enter Chinese sovereign territory has been heavily criticized because it essentially amounts to exerting administrative control over international airspace. However, the PRC is not the only ADIZ proclaiming state that adopts an extensive application, other states include Taiwan, Australia, Myanmar, and the Philippines¹⁶⁴.

As previously discussed the extent of reporting obligations provides a clear indication of the proclaiming state's rationale for establishing its ADIZ. The purpose of establishing and enforcing an ADIZ is to protect state sovereignty and not to create or expand it. It was concluded that widely extensive reporting obligations indicate an attempt to expand state sovereignty on to international airspace by attempting to control air traffic. Therefore it is recommended that reporting obligations be strictly limited to those civil aircraft intending to enter the proclaiming state's sovereign airspace.

¹⁶¹ "East Asia—Strong Opposition to PRC ADIZ, ROK Announces ADIZ Expansion," Open Source Center, Report, December 10, 2013 as cited in Swaine (2014) 43 *China Leadership Monitor* 31.

¹⁶² Rinehart I & Elias B (2015) *Congressional Research Service* 30-31.

¹⁶³ Rinehart I & Elias B (2015) *Congressional Research Service* 30-31.

¹⁶⁴ Swaine (2014) 43 *China Leadership Monitor* 5; Beckman R & Phan H (2014) *Centre for International Law, University of Singapore* 9.

5.2.4. Reasonable enforcement measures

The PRC ADIZ procedures indicate that ‘defensive measures’ will be used in the event of non-compliance with reporting obligations. However, the use of immediate and direct military action cannot be reconciled with the function and purpose of ADIZs or the principles enshrined in the Chicago Convention. As previously discussed the function and purpose of an ADIZ is to enable information gathering and to assist in early identification of aircraft. Furthermore the Chicago Convention prohibits the use of force against civil aircraft in Article 3 *bis*.

Since it has been recommended that ADIZ procedures be imposed strictly on civil aircraft, it is further recommended that all enforcement measures be informed by the Chicago Convention, particularly with regard to the interception of civil aircraft. Article 3 *bis* and Annex 2 of the Chicago Convention regulates interception of civil aircraft and some authors agree that a similar framework should be adopted in respect of military aircraft¹⁶⁵.

5.3. Conclusion

The above recommendations are in no way presented as the best possible solution to the problems highlighted by the PRC ADIZ. However, they serve as evidence that a legal framework can be developed to serve the international community in understanding and enforcing ADIZs in a manner that maintains the integrity of the concept as a security measure aimed at assisting in the maintenance of international peace and security.

¹⁶⁵ Beckman R & Phan H (2014) *Centre for International Law, University of Singapore* 14.

6. Conclusion

The purpose of this dissertation has been to show that there is an urgent need for a regulatory framework in respect of ADIZs. By evaluating the PRC ADIZ, its features, and its enforcement, the writer has identified certain questions and advanced possible answers.

Firstly, it is concluded that ADIZs do have a legal basis under international law, and that not all states rely on the same legal basis. Due to the fact that this dissertation is informed by an air law perspective it is concluded that the legal basis for ADIZs lies in Article 12 of the Chicago Convention and it is further supported by the fact that ADIZs are not in contravention of the principles contained in the Chicago Convention and the general concept is approved by ICAO.

Secondly, it is concluded, based on the definition; function; and purpose, of an ADIZ that territorial sovereignty is an indispensable requirement for its establishment. Furthermore, the use of ADIZs to expand territorial sovereignty or advance claims to territory is irreconcilable with its purpose and threatens to undermine the integrity of ADIZs as a security measure.

Thirdly, it is concluded that any action taken in the enforcement of ADIZ procedures should be reasonable and proportionate, which should be determined in light of its function and purpose; and the principles enshrined in the UN Charter and the Chicago Convention. Furthermore, the use of immediate and direct military action to enforce ADIZ procedures is disproportionate and potentially destabilizing.

Fourthly, a number of recommendations are advanced regarding a potential list of pre-requisites that may be used to ensure that ADIZ are properly understood, designed, and implemented. So that they may continue to aid national and international security.

Finally, the need for an express international law framework must once again be stressed. The PRC is reportedly considering proclaiming a second ADIZ in the South China Sea, this leaves open the possibility of increasing tensions in the region as a number of territorial and marine disputes occupy the South China¹⁶⁶. To prevent ADIZs being reduced to weapons used to secure territorial claims it is advisable that states approach ICAO and become actively involved in establishing a guiding legal regime¹⁶⁷.

¹⁶⁶ Swaine (2014) 43 *China Leadership Monitor* 20.

¹⁶⁷ Rinehart I & Elias B (2015) *Congressional Research Service* 38.

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