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Back to Air in Disarray?: Disparity in Practices and Interpretations on ADIZs Disrupting the Safety of Civil Aviation

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**BACK TO AIR IN DISARRAY?: DISPARITY IN PRACTICES
AND INTERPRETATIONS ON ADIZS DISRUPTING THE
SAFETY OF CIVIL AVIATION**

SANGHOON LEE*

ABSTRACT

The interconnectivity of civil aviation has been long praised with the success of the International Civil Aviation Organization (ICAO) in harmonizing navigation standards and procedures, along with the utilization of Flight Information Regions (FIRs). However, continuing geopolitical tensions with different implementations of Air Defense Identification Zones (ADIZs) have belittled the technical achievement. Among different State practices, some ADIZs have expanded beyond territorial airspace and even overlapped with other FIRs, requiring overflying aircraft to submit flight plans and abide by procedures separate or in addition to air traffic control obligations.

The purpose of this Article is to review the ongoing political tensions that are common in issues with ADIZs beyond territorial airspace and to explore different legal schemes put forth by States. While there is no prevailing rule of law that defines the scope and procedure of ADIZs, this Article further revisits the due regard principle under international law and State practices beyond territorial airspace. Due to its reciprocal characteristic, this principle does not solely advocate for the coastal State to arbitrarily put limitations on the freedom of flight beyond its territorial airspace. Rather, the established FIRs have already given considerable certainty and accountability to the overflowed State, where the principle also directs both the overflying and

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overflowed States to actively engage in communication and practices involving liaisons. This principle envisions regional confidence-building measures on aerial communication and the technical leadership of ICAO to support these States in reducing the relational gap and facilitating civil–military cooperation.

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I. INTRODUCTION

THERE IS NO DOUBT THAT SPEED and interconnectivity have contributed to the airline industry’s success in achiev-

ing annual passenger-traffic growth of approximately 5%, which has not been witnessed in any global industry throughout history.¹ While many factors certainly contribute to this ever-succeeding field, the facilitation of air navigation and air traffic control has led the whole aviation mechanism to function in a “safe and orderly manner.”² In particular, the interconnected communication system between aircraft and air traffic control, using the Flight Information Regions (FIRs) promulgated by the International Civil Aviation Organization (ICAO), has been the most successful case of cooperation between States to ensure safety in both the subjacent (including coastal) State and civil aircraft.³

However, continuing geopolitical tensions with the establishment and different implementations of Air Defense Identification Zones (ADIZs) have belittled the technical achievement. The ongoing disputes in or near the East China Sea and the South China Sea have raised awareness among States and the airline industry by alerting aircraft commanders to submit flight information and equip the necessary radiocommunication systems subject to overlapping ADIZ and FIR procedures.⁴

¹ See Int’l Civ. Aviation Org. [ICAO], *Facts and Figures: World Aviation and the World Economy*, www.icao.int/sustainability/pages/facts-figures_worldeconomy_data.aspx [https://perma.cc/WMQ2-WGJW]. From 1995 to 2012, annual air traffic growth reached an average of 5%, despite the crises that had impacted the global economy. *Id.* According to the report published by the International Air Traffic Association (IATA), the years 2017-2019 also recorded an annual increase of 5% on average before the advent of the COVID-19 pandemic. Int’l Air Transp. Ass’n [IATA], *Economic Performance of the Airline Industry: 2019 Mid-Year Report*, at 4 (June 2, 2019), www.iata.org/en/iata-repository/publications/economic-reports/airline-industry-economic-performance-june-2019-report/ [https://perma.cc/B55D-UFBA].

² The Preamble of the 1944 Chicago Convention states that “the undersigned governments having agreed on certain principles and arrangements in order that *international civil aviation may be developed in a safe and orderly manner* and that international air transport services may be established on the basis of equality of opportunity and operated soundly and economically.” Chicago Convention on International Civil Aviation pmbl., Dec. 7, 1944, 15 U.N.T.S. 295 [hereinafter Chicago Convention] (emphasis added).

³ See PAUL STEPHEN DEMPSEY, *PUBLIC INTERNATIONAL AIR LAW* 280–81 (2nd ed. 2017). A FIR is a contiguous zone established under Annex 11 of the 1944 Chicago Convention for the purpose of dividing air traffic services which are provided when an aircraft enters the region. *Id.* The division of FIRs and the allocation of air traffic services are irrelevant to States’ control of national airspaces because the objectives of air traffic services are to prevent collisions between aircraft and avoid unnecessary flight delays. *See id.* at 281.

⁴ *See infra* Part III.

While an ADIZ serves as a tool to anticipate any airborne threats against national territory, different State implementations of those contiguous zones *ultra vires* beyond territorial airspace seriously question the role and effectiveness of international law. Especially when such zones require each aircraft that enters the zone to submit its flight plans, which is repetitive and burdensome, they deflate the airline industry with unnecessary costs and safety risks.⁵

This Article aims to review the ongoing political tensions that are common in ADIZ issues beyond territorial airspace and explore different legal schemes put forth by States under the regime of the high seas. This Article will analyze how States have established ADIZs and legitimized their arguments based on international law, including the 1982 United Nations Convention on the Law of the Sea (UNCLOS) and the 1944 International Convention on Civil Aviation (Chicago Convention). While it is important for States to protect themselves against and anticipate any airborne threats to their national security and sovereignty, several scholars have argued for the lack of a firm legal basis for setting up such an arbitral zone on the high seas.⁶

Where there is no prevailing rule of law that defines the scope and procedure of ADIZs, this Article revisits the due regard principle under international law and State practices that are particularly common in establishing ADIZs beyond territorial airspace. This Article concludes that the principle of due regard is not a monologue driven by national security; it is a stereophonic instrument to induce bilateral and multilateral communication. In that regard, technical confidence-building measures that include air liaison mechanisms should be utilized for civil–military cooperation, while ICAO’s role of reviewing different ADIZ procedures and making it transparent would give States and the industry a credible amount of certainty. One would also suggest that ICAO’s role ideally includes facilitating civil–military cooperation and establishing the best standards for ADIZs.

⁵ See, e.g., Roncevert G. Almond, *The Weaponization of Airspace: Sovereignty and Disorder from Above*, DIPLOMAT (Oct. 15, 2018), thediplomat.com/2018/10/the-weaponization-of-airspace/ [https://perma.cc/HK6X-SG5Y] (expressing that States in numerous cases have established and utilized ADIZs, “wielding the principle of sovereign airspace as a coercive tool in the grey zone of economic and diplomatic warfare.”).

⁶ See *infra* Section II.B.

II. DEFINITION OF ADIZ AND ITS LEGAL BACKGROUND

Aviation's use and development enormously come from a military background.⁷ With the advent of fighter jets, States have always expressed their concern for national defense in their sovereign airspace.⁸ Even after World War II, with the conclusion of the 1944 Chicago Convention, States have generally agreed to jurisdiction and control over the airspace that is drawn from their territorial waters.⁹ In this sense, Article 1 of the 1944 Chicago Convention reaffirms Article 1 of the Paris Convention of 1919 by recognizing the pre-existing rule of customary international law that "every State has complete and exclusive sovereignty over the airspace above its territory."¹⁰

However, the Cold War and the Korean War in the 1950s brought an additional need for States to establish an anticipatory defense system that extends beyond their national airspace. In particular, enhanced missile capabilities and fighter-jet performances have become a critical threat to national security, considering that they would reach the coast in minutes, making it impossible to react duly.¹¹

The United States was the first to establish a surveillance zone that extended beyond its territorial waters right before the Korean War in 1950 and required aircraft bound to the United States to communicate their flight plans and purposes.¹² This zone, referred to as an ADIZ, has since then become a contiguous space for approximately 27 States—including Canada, India, Japan, Pakistan, Norway, the United Kingdom, China, South Korea, and Taiwan¹³—to identify any flying objects prior

⁷ See James T. Lowe, *The Story of Military Aviation*, 2 AIR AFFS. 404, 408, 413, 431, 439 (1948).

⁸ See *infra* Section II.B.

⁹ See Chicago Convention, *supra* note 2, art. 2.

¹⁰ *Id.* art. 1. See DEMPSEY, *supra* note 3, at 941, 941 n.33 (citing Chicago Convention, *supra* note 2, art. 1).

¹¹ See, e.g., Timothy W. Martin, *North Korea's Nuclear Weapons and Missiles: What to Know*, WALL ST. J., <https://www.wsj.com/articles/north-koreas-missiles-and-nuclear-weapons-everything-you-need-to-know-11610712018> [<https://perma.cc/C585-TRWJ>] (Mar. 16, 2022).

¹² See Peter A. Dutton, Comment, *Caelum Liberum: Air Defense Identification Zones Outside Sovereign Airspace*, 103 AM. J. INT'L L. 691, 698 (2009) (noting that "[t]he five ADIZs beyond the U.S. territorial sea were initially established in response to heightened tensions between the United States and the Soviet Union caused by the outbreak of the Korean War in 1950.").

¹³ Jinyuan Su, *The Practice of States on Air Defense Identification Zones: Geographical Scope, Object of Identification, and Identification Measures*, 18 CHINESE J. INT'L L. 811, 834–35 (2019). Twenty-seven States/regions have established ADIZs: eight States

to reaching their territorial waters and perhaps as a tool to hold back other States from reconnoitering around their national territory.

A. DEFINITION OF ADIZ

According to the Chicago Convention and its pertinent Annexes, the term ADIZ comes from the civil air traffic services provision.¹⁴ Annexes 4 and 15 of the Chicago Convention define an ADIZ as a “[s]pecial 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.”¹⁵ The legal effect of ADIZ is not expressed under the Convention and the Annexes, and for the purposes of international civil aviation under the Chicago Convention system, the ADIZ system is separate and independent from international and regional air traffic control procedures; thus, States may exercise an autonomous right to establish one if needed.¹⁶

While the definition and specific procedures of ADIZ may vary, there have been consistent statements about the term’s general purpose and function by the establishing States. For instance, according to 14 C.F.R. § 99.3 of the United States, ADIZ is defined as “an area of airspace over land or water in which the ready identification, location, and control of all aircraft . . . is required in the interest of national security.”¹⁷ South Korea also defines ADIZ similarly to the U.S. regulation, where “easy” identification of aircraft is required for national security purposes. The Act on Operation, Etc. of Military Aircraft of the Republic of Korea regulates the zone as “a specified airspace defined pursuant to Article 9 over land or water where easy identification,

(Sri Lanka, Poland, Finland, Peru, Brazil, Argentina, Libya, and Turkey) have established zones entirely within their territory; two States (China and Cuba) have established zones entirely beyond their territory; and seventeen States (United States, Japan, Canada, Republic of Korea, Thailand, Taiwan, Pakistan, India, Iran, Bangladesh, Myanmar, Australia, Argentina, Indonesia, Philippines, Iceland, and Panama) have established zones partly beyond their territory. *Id.*

¹⁴ See ICAO, *Annex 4 to the Convention on International Civil Aviation: Aeronautical Charts*, at 1-1 (11th ed. 2009) [hereinafter ICAO, *Annex 4*]; ICAO, *Annex 15 to the Convention on International Civil Aviation: Aeronautical Information Services*, at 1-2 (16th ed. 2015) [hereinafter ICAO, *Annex 15*].

¹⁵ ICAO, *Annex 4*, *supra* note 14; ICAO, *Annex 15*, *supra* note 14 (emphasis added).

¹⁶ See ICAO, *Annex 4*, *supra* note 14; ICAO, *Annex 15*, *supra* note 14.

¹⁷ FAA Security Control of Air Traffic, 14 C.F.R. § 99.3 (2022).

location, and control of aircraft are required for the purposes of national security.”¹⁸ Meanwhile, the Designated Airspace Handbook under the Canadian Aviation Regulations¹⁹ stipulates “certain rules for the security control of air traffic” when entering and exiting the zone known as the “[a]irspace of defined dimensions extending upwards from the surface of the earth within which certain rules for the security control of air traffic apply.”²⁰

In this sense, ADIZ can generally be seen as a zone contiguous to national airspace established under national legislation, which ordinarily requires any aircraft to identify itself and to submit itself to the instructions of the appropriate air traffic controller on the surface for national security.²¹

Most of the time, ADIZ poses a geopolitical problem more than a legal problem since many of them do not touch upon other national territorial waters or compromise regional military agreements. Rather, as Nicholas Grief well understood, military and political conflicts have taken place beyond territorial waters—international straits, high seas, and Exclusive Economic Zones (EEZs)—that gave rise to the way ADIZs should be interpreted within the context of international law.²²

As this Article reviews in the following Section, UNCLOS does not define ADIZ *per se* but applies different legal effects as to different zones that are established under the law. There is no explicit legal basis as to the establishment of ADIZ. States rather rely on the due regard principle of aircraft and ships for coastal States or residual rights since none of the legal instruments explicitly prevent States from establishing such anticipatory zones for national security purposes.

B. LEGAL BASIS FOR THE ESTABLISHMENT OF ADIZ UNDER INTERNATIONAL LAW

1. *The Law of the Sea*

Suppose that a government official from a State is ordered to review the legality of its national ADIZ that extends beyond its territorial water. What would one initially choose to look for in

¹⁸ See Act on the Operation, Etc. of Military Aircraft, art. 2 para. 3 (S. Kor.).

¹⁹ Canadian Aviation Regulations, SOR/96-433, s. 602.145(1) (Can.).

²⁰ TRANSP. CAN., DESIGNATED AIRSPACE HANDBOOK 4 (2021), <https://www.navcanada.ca/en/dah-next-prochaine.pdf> [<https://perma.cc/E7JJ-JMJR>].

²¹ See JULIAN G. VERPLAETSE, INTERNATIONAL LAW IN VERTICAL SPACE: AIR, OUTER SPACE, ETHER 83 (1960).

²² See NICHOLAS GRIEF, PUBLIC INTERNATIONAL LAW IN THE AIRSPACE OF THE HIGH SEAS 157–58 (1994).

terms of an appropriate international framework regulating the rights and duties in the airspace?

Concerning the law of the sea, UNCLOS would be the initial reference to review the legal effects in different established zones: territorial water, contiguous zone, EEZ, continental shelf, international strait, and others. Regarding the airspace, there is no direct reference as to the international public rules of different air zones, except that national airspace is above the territorial water, the high seas are free for navigation and use, and each State's flight procedures are subject to the Chicago Convention for the safety of civil aviation.²³

Article 2 of UNCLOS clearly states that State sovereignty extends to the territorial sea, to the airspace over the territorial sea, and to its bed and subsoil.²⁴ Therefore, a State can establish both *juris-action* and *juris-faction* within the airspace over the territorial sea and may also exercise self-defense when an armed attack occurs in that part of its territory. In this sense, a State can also establish an air-defense identification system within that airspace over the territorial sea that requires all aircraft, including the overflying ones, to conform with its national rules regarding identification and air navigation.

The problem, however, derives from the breadth of such a request for aerial identification. While Article 3 of UNCLOS states that “[e]very State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles,”²⁵ many States have established ADIZs that extend well beyond the maximum distance.²⁶

For instance, Article 33 of UNCLOS mentions the control of a State in the contiguous zone for reasons of preventing and punishing “infringement of its customs, fiscal, immigration, or sanitary laws and regulations[.]”²⁷ However, the provision does not state the reason of national security; the International Law Commission also opposed the inclusion of security reasons since “the vagueness of the term ‘security’ would lead to abuse and that

²³ Chicago Convention, *supra* note 2, arts. 1, 12.

²⁴ United Nations Convention on the Law of the Sea art. 2, Dec. 10, 1982, S. TREATY DOC. NO. 103-39, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

²⁵ *Id.* art. 3.

²⁶ See Su, *supra* note 13, at 815–18.

²⁷ UNCLOS, *supra* note 24, art. 33(1).

the right of self-defence would avail a coastal State in the event of an imminent and direct threat to its national security.”²⁸

Another argument in favor of identifying flights outside national airspace would be that coastal States are given specific rights in the EEZs vested under UNCLOS. According to Article 56 of the Convention, the coastal State has sovereign rights and jurisdiction in the EEZ to explore and exploit natural resources, establish and use artificial islands, and protect and preserve the marine environment.²⁹ While other States retain the right to navigation, overflight, and the laying of submarine cables and pipelines under Article 58 and Article 87 of the Convention, those States “shall have due regard to the rights and duties of the coastal State.”³⁰

As this Article reviews, coastal States argue that certain limitations and restrictions apply to flights entering the EEZ based on the rights specified under the above provisions.³¹ In particular, coastal States persistently call upon other States to exercise the principle of due regard for the rights of the coastal States in the EEZ and argue that the overflying aircraft also need to submit a flight plan when entering the zone regardless of the FIR procedures.³² This Article will separately review the different instances that demonstrate disparities among State implementations of national security measures outside territorial airspace and will revisit the principle regarding those exercises.

2. *The Principle of Self-Defense*

John T. Murchison argued during the early 1950s that the status of contiguous zones is not clearly defined as to whether it is *res communis* or *res nullius*.³³ Thus, Murchison argued that the airspace above that zone should also enjoy that status while bearing in mind that aviation is a completely new transport medium.³⁴ He then further based his argument justifying ADIZ on

²⁸ GRIEF, *supra* note 22, at 153 (citing Int'l Law Comm'n, Rep. on the Work of Its Eighth Session, U.N. Doc. A/3159, at 295, Commentary to Draft Article 66 ¶ 4, (1956), in 2 YEARBOOK OF THE INT'L LAW COMM'N (1956)).

²⁹ UNCLOS, *supra* note 24, art. 56(1)(a)–(b).

³⁰ *Id.* arts. 58, 87(1).

³¹ See *infra* Sections III.B, IV.A.

³² See *infra* Sections III.B, IV.A.

³³ JOHN TAYLOR MURCHISON, THE CONTIGUOUS AIR SPACE ZONE IN INTERNATIONAL LAW 52 (1957).

³⁴ See *id.*

the principle of necessity and self-preservation that is rooted in the jurisprudence of the *Caroline* case from 1841:

It is no secret that anti-aircraft guns, even the most modern ones, are no longer any defence against an attack of this nature for the very reason that if the bomber is within range of the guns it is already too close and the damage will have been done. The only effective defence, therefore, is interception and destruction by defending fighter aircraft or guided missiles . . . Such a defence depends vitally on adequate identification in point of time.

The very existence of the State makes these identification zones seaward a necessity.³⁵

However, the principle of necessity and self-preservation cannot be applied to allow a State to establish a zone that applies its rules and regulations to every coast far beyond its territorial waters. According to the early *Caroline* case in 1841, Daniel Webster, then-Secretary of State, argued that the attack within the territory of the United States by the British government was not legitimate, and that the British government had the onus to prove that the necessity of anticipatory self-defense was “instant, overwhelming, leaving no choice of means, and no moment for deliberation . . . [T]he act[, even if] justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it.”³⁶

There have been some discussions about whether self-preservation differs from anticipatory self-defense during the dispute in the case.³⁷ However, R. Y. Jennings observed that “throughout the dispute there does not seem to have been any disagreement as to the law involved” and thus, the notion of self-preservation—or *locus classicus* of the law of self-defense—cannot also escape its limitation of necessity.³⁸ This would mean that even

³⁵ *Id.* at 56. Meanwhile, John Cobb Cooper also advocates for this theory that the high seas would appear to be subject to “the principle that every sovereign State may, under certain circumstances, act beyond the limits of its territory to assure itself from injury.” See John Cobb Cooper, *Space Above the Seas*, in *EXPLORATIONS IN AEROSPACE LAW: SELECTED ESSAYS 1946-1966* 194, 198 (Ivan A. Vlasic ed., 1968).

³⁶ Correspondence between Great Britain and the United States, Respecting the Arrest and Imprisonment of Mr. McLeod, for the Destruction of the Steamboat *Caroline* (Apr. 24, 1841), https://avalon.law.yale.edu/19th_century/br-1842d.asp [<https://perma.cc/5TGY-B8WJ>].

³⁷ See, e.g., R. Y. Jennings, *The Caroline and McLeod Cases*, 32 AM. J. INT’L L. 82, 91 (1938).

³⁸ *Id.* at 92. To be specific, Jennings stated, “Most important of all, the conception was rescued from the Naturalist notions of an absolute primordial right of self-preservation, which still vitiated the doctrine of the writers, and was subjected

when one establishes an ADIZ based on the principle of self-preservation, the establishment must be a necessary action in response to a situation that is “instant, overwhelming, leaving no choice of means, and no moment for deliberation.”³⁹

On the other hand, the concept of such anticipatory self-defense has been controversial among scholars as to whether it should be regarded as customary international law and whether Article 51 of the UN Charter can be interpreted to allow such future-based self-defense.⁴⁰ Even States that have asserted such a right do not seem as if they have had consistent State practices or *opinio juris*.⁴¹ Nonetheless, the equation can only be drawn when there is a future or anticipated threat of an “armed attack,” which triggers “self-defense.”

The mere installation of ADIZ on every coast of the State cannot be regarded as an action of self-defense since there is no link to an armed attack or even an “aggression.” For instance, W. Michael Reisman reviewed the U.S. blockade of Cuba during the 1962 Cuban Missile Crisis and argued that preemptive self-defense is “an asserted legal right to use offensive military force against a target that does not yet, but may in the future, pose a threat,” concluding that the blockade could be characterized as either preemptive conduct or a means of self-defense, but not preemptive self-defense.⁴²

Interestingly, Li Juqian further argues that the establishment of an ADIZ cannot even be considered a measure of national defense, based on the idea that a State’s jurisdiction can only be expanded beyond its national territory when the rights of the State or the citizens of that State have been infringed by foreign-

to the limiting condition of necessity; and necessity is nowhere more carefully defined than in Webster’s letter to Fox.” *Id.*

³⁹ See Correspondence between Great Britain and the United States, *supra* note 36.

⁴⁰ JOHN H. CURRIE, PUBLIC INTERNATIONAL LAW: ESSENTIALS OF CANADIAN LAW 521 (2d ed. 2008).

⁴¹ *Id.* at 524. Currie remarks,

What is striking about all of this—with the exception of Israel’s stance against Iraq in 1981—is that it at best evidences *opinio juris* divorced from [S]tate practice, or [S]tate practice divorced from *opinio juris*. Given that customary international law is formed or evidenced by *general and consistent* [S]tate practice *accompanied by opinio juris*, it must be admitted that the evidence supporting a customary right of anticipatory self-defence is very scanty indeed.

Id.

⁴² W. Michael Reisman & Andrea Armstrong, *Centennial Essay: The Past and Future of the Claim of Preemptive Self-Defense*, 100 AM. J. INT’L L. 525, 527 n.7 (2006).

ers or a foreign country according to that State's penal law (this is also referred to as "protective jurisdiction").⁴³

Therefore, Murchison's assertion that ADIZ is based on necessity and a state's preservation of its national defense cannot be justified under the rules of international law. Rather, ADIZ can only be regarded as an autonomous national defense measure.

3. *The 1944 Chicago Convention*

Meanwhile, the Chicago Convention stipulates the exclusive and sovereign right of the State to its national airspace.⁴⁴ In that regard, scheduled commercial and State aircraft must obtain authorization from the other State for overflight or landing above that State's territory.⁴⁵ Moreover, as states have agreed that the rules applied on the high seas shall be those established under this Convention,⁴⁶ the pertinent Annexes specify flight rules for civil operations in international airspace above the high seas.

For example, Annex 2 "Rules of the Air" describes the procedures and standards for identification and control of aircraft in the air, which are applied to the high seas without exception.⁴⁷ Rule 3.3.1.1 prescribes that the information relative to an intended flight or portion of a flight that is provided to air traffic service units "shall be in the form of a flight plan."⁴⁸ Accordingly, a flight plan shall be submitted prior to operating any flight or portion thereof that will require air traffic control service, any Instrument Flight Rules (IFRs), any flight within advisory airspace, any flight within or into designated areas or along designated routes when so required by the appropriate air traffic service authority, or any flight across international borders.⁴⁹

⁴³ See Li Juqian, *Air Defense Identification Zone: The Restriction on the Free Sky Due to the Residual Right Principle*, 2 CHINA LEGAL SCI. 12, 25 (2014). On the other hand, protective jurisdiction can only be attached to the person or the entity of a State that has committed a crime under another State's penal code, while an ADIZ is a fixed area that gives legal effect under a State's regulation to any aircraft that enters the zone. In that regard, not all measures of national defense are necessarily bound to such a jurisdictional issue, and as this author reviews in the paper, an ADIZ does not seem to be an issue that concerns a jurisdictional dispute but rather concerns the issue of due regard of the coastal State. See *id.* at 22.

⁴⁴ Chicago Convention, *supra* note 2, art.1.

⁴⁵ *Id.* arts. 3(c), 6.

⁴⁶ *Id.* art. 12.

⁴⁷ ICAO, *Annex 2 to the Convention on International Civil Aviation: Rules of the Air*, at v (10th ed. 2005).

⁴⁸ *Id.* at 3-4.

⁴⁹ *Id.*

Furthermore, Annex 11 assigns a standardized rule for air traffic systems in international airspace and imposes responsibility on its member states to abide by those procedures for the safety and security of civil aviation.⁵⁰ In this sense, an FIR, which is “[a]n airspace of defined dimensions within which flight information service and alerting service are provided,”⁵¹ is set and managed by ICAO.

One might observe that regarding the obligations to file a plan and give position reports, the procedure when one enters an ADIZ would also be consistent with ICAO’s rules of the air. Nicholas Grief specified that under ICAO rules,

[The] flight plan must be submitted prior to operating any flight to be provided with air traffic control service; any flight across international borders; and any flight within designated areas when so required by the appropriate Air Traffic Services authority in order to facilitate co-ordination with military units and thus avoid the need for interception for the purpose of identification.⁵²

However, the above ICAO standards are limited to technical and operational considerations and do not impose any sovereignty or security rights on any State. For instance, the purpose of establishing an FIR is solely for the facilitation of air traffic services—it is thus recommended that the delineation of airspace “should be related to the nature of the route structure and the need for efficient service rather than to national boundaries.”⁵³ Also, when a State delegates to another State the responsibility for establishing and providing air traffic services in FIRs, the providing State’s responsibility is limited to technical and operational considerations.⁵⁴

While ICAO standards require all aircraft to submit their flight information seamlessly along their flight route, they are certainly apart from domestic security considerations. Thus, States would still maintain their claim to require flight information based on temporal and spatial conditions under their domestic legislation.

⁵⁰ ICAO, *Annex 11 to the Convention on International Civil Aviation: Air Traffic Services*, at ix (15th ed. 2018).

⁵¹ *Id.* at 1-8.

⁵² GRIEF, *supra* note 22, at 154 (citing *Annex 2 to the Convention on International Civil Aviation: Rules of the Air*, *supra* note 47, at 3-7 to 3-8).

⁵³ See *Annex 11 to the Convention on International Civil Aviation: Air Traffic Services*, *supra* note 50, at 2-6.

⁵⁴ *Id.* at 2-1.

III. DISPARITY IN STATE PRACTICES BEYOND TERRITORIAL AIRSPACE

A. CASES OF ESTABLISHED ADIZ AND THE SAFETY RISK ON CIVIL AVIATION

1. *The East China Sea ADIZ*

A careful analysis is always needed in measuring and reviewing the geopolitical situation. China, Japan, and Korea had been in frequent conflict with regard to maritime disputes in the East China Sea until a full-fledged polemic unfolded when China declared its new ADIZ in the East China Sea (the ECS ADIZ) in November 2013, specifically covering the disputed Senkaku (or Diaoyu) Islands.⁵⁵

The United States and Japan promptly condemned China's unilateral establishment, with the United States flying unarmed bombers through the airspace and Japan instructing its civilian airlines not to comply with the requirements of this new ADIZ.⁵⁶ A few days after the establishment of the ECS ADIZ, ANA, Japan Airlines Co. (JAL), and Peach Aviation flights flew through the declared zone without notifying China about its flight information, while other countries' air carriers awaited their government's guidance.⁵⁷ According to the International Air Transport Association (IATA), the creation of the zone had not immediately affected the operations of commercial flights, but some airlines had to file flight plans manually until the issuance of official guidance.⁵⁸

China, on the other hand, stated that (i) ECS ADIZ was a measure to protect its State sovereignty and territorial airspace security, and (ii) the establishment of ADIZ varies by State and, since the Japanese Air Defense Identification Zone (JADIZ) extended to 130 km towards China's coastline from its west end,

⁵⁵ Chris Buckley, *China Claims Air Rights over Disputed Islands*, N.Y. TIMES (Nov. 23, 2013), www.nytimes.com/2013/11/24/world/asia/china-warns-of-action-against-aircraft-over-disputed-seas.html [https://perma.cc/8MTC-69ZQ].

⁵⁶ Mark Felsenthal & David Alexander, *U.S. Affirms Support for Japan in Islands Dispute with China*, REUTERS (Nov. 27, 2013, 9:56 PM), <https://www.reuters.com/article/us-usa-china/u-s-affirms-support-for-japan-in-islands-dispute-with-china-idUSBRE9AQ0T920131128> [https://perma.cc/F9UC-WCX2]. See also ANA, JAL, Peach Now Disregard China ADIZ, JAPAN TIMES (Nov. 27, 2013), www.japantimes.co.jp/news/2013/11/27/business/corporate-business/ana-jal-peach-now-disregard-china-adiz/ [https://perma.cc/8976-PPUN].

⁵⁷ See JAPAN TIMES, *supra* note 56.

⁵⁸ See *id.*

Japan and the United States were not qualified to “make irresponsible remarks on China’s lawful and rational act.”⁵⁹

Accordingly, South Korea expanded its ADIZ (KADIZ) two weeks after China’s declaration, covering the southern Ieodo Reef.⁶⁰ The expanded air defense zone followed the boundaries of South Korea’s FIR, having no impact on civilian flights in terms of submitting flight information when entering.⁶¹ While some have raised concerns of heightening military tensions due to the overlap of ECS ADIZ, KADIZ, and JADIZ, there was no immediate antagonistic response from China or Japan.⁶²

2. *Taiwan ADIZ and Flight Route M503*

In the case of the South China Sea, there has not been any recent declaration of an ADIZ by any regional State ever since the Philippine ADIZ was established in 1954.⁶³ Rather, a contrary case occurred when China declared an expansion of its civil-flight route that passes the Taiwanese ADIZ, absent prior consultation with the Taiwan civil-aviation authority.⁶⁴

In January 2018, China’s Civil Aviation Administration announced a modification of its flight route M503, which was originally a southbound route that passed the Taiwan Strait and covered the northbound route.⁶⁵ With both directions applied, civil flights would be able to serve the cities of Xiamen, Fuzhou efficiently, and Dongshan, both inbound and outbound.⁶⁶ The Taiwanese authority condemned such unilateral action, only to be dismissed by Chinese government officials who argued that they did not need permission since the flight route is under

⁵⁹ Geng Yansheng, Defense Ministry Spokesman, Statement on China’s Air Defense Identification Zone (ADIZ) (Dec. 3, 2013), www.chinamission.be/eng/more/dhfkbsbq13/t1109762.htm [<https://perma.cc/8RPL-NACV>].

⁶⁰ See Choe Sang-Hun, *South Korea Announces Expansion of Its Air Defense Zone*, N.Y. TIMES (Dec. 8, 2013), www.nytimes.com/2013/12/09/world/asia/east-china-sea-air-defense-zone.html [<https://perma.cc/5HHM-CDS8>].

⁶¹ *Id.*

⁶² See *id.*; Ankit Panda, *The East China ADIZ and the Curious Case of South Korea*, DIPLOMAT (Nov. 28, 2013), <https://thediplomat.com/2013/11/the-east-china-adiz-and-the-curious-case-of-south-korea/> [<https://perma.cc/J7QD-RPVE>].

⁶³ See Su, *supra* note 13, at 816–17.

⁶⁴ *A Primer on M503 and Civil Aviation in Asia*, ASIA MAR. TRANSPARENCY INITIATIVE (Mar. 14, 2018), <https://amti.csis.org/primer-m503-civil-aviation-asia/> [<https://perma.cc/J4JD-QSJH>].

⁶⁵ *Id.*

⁶⁶ *Id.*

Shanghai's FIR and "involves no Taiwan flight route or destination and will not affect Taiwan flight safety."⁶⁷

The Taiwanese authority based its assertion under Part I, Section 2, Item 4.2.6 of ICAO's Air Traffic Services Planning Manual, which states that changes to the network should only be made after they have been coordinated with all parties concerned.⁶⁸ While the issue triggered the ICAO to provide mediation, since it is responsible for coordinating the rules and procedures of the air traffic system, the organization seemed reluctant to resolve the matter as it could be exacerbated into a political conflict.⁶⁹

Meanwhile, the new M503 route passes through the Taiwanese ADIZ. While the original route had been agreed to by both parties in 2015 and was then managed under ICAO's supervision, China's unilateral expansion of the air traffic route in 2018 had promptly caused the Taiwanese air transport control to halt Chinese flights using M503 and suspend applications for additional charter flights.⁷⁰ Where it is debatable whether China had failed to exercise due regard for the safety of navigation of civil aircraft in the region, ICAO had certainly failed to abide by the Chicago Convention in which it had been under-signed to ensure international civil aviation develops in a safe and orderly manner.⁷¹

B. THE EP-3 INCIDENT AND THE LEGAL CHARACTERISTIC OF THE DUE REGARD PRINCIPLE

The controversial principle of due regard with coastal States versus freedom of flights is well-demonstrated in the famous EP-3 incident between the United States and China. On April 1, 2001, a U.S. Navy EP-3 surveillance plane collided with a Chinese fighter jet in the airspace above China's EEZ in the South

⁶⁷ *Id.*

⁶⁸ ICAO, *Air Traffic Services Planning Manual*, at I-2-4-2, ICAO Doc. 9426-AN/924 (1st ed. 1984) ("Once the route network has been established or reviewed in accordance with the above, the detailed ATS route network should be reviewed as a whole to evaluate its coherence. Changes to the network should be made only after they have been co-ordinated with all parties concerned.").

⁶⁹ See Stacy Hsu, *Flight Route Stance Declared to ICAO*, TAIPEI TIMES (Jan. 10, 2018), <https://www.taipetimes.com/News/front/archives/2018/01/10/2003685506> [<https://perma.cc/XZ5T-Y299>].

⁷⁰ Chiu Bihui, *China vs. Taiwan – Controversy over Flight Route M503*, DW (Feb. 2, 2018), www.dw.com/en/china-vs-taiwan-controversy-over-flight-route-m503/a-42430594 [<https://perma.cc/CMR2-EY7F>].

⁷¹ See Chicago Convention, *supra* note 2, at pmbl.

China Sea.⁷² While the United States had argued that its EP-3 was exercising a routine surveillance mission in the international airspace, China had argued that the flight was approaching its territorial waters off the city of Sanya, dispatching two fighter jets to monitor the plane.⁷³ Both States strongly accused each other of the dangerous maneuvers despite their casual practice.⁷⁴

The core issue in this case is that both States alleged their rights based on contradictory principles under international law. The United States argued that the EP-3 “was flying an overt reconnaissance and surveillance mission, in international space, in an aircraft clearly marked as ‘United States Navy,’” which is an understood freedom under international law.⁷⁵ The U.S. government then posited that the coastal State’s interception should usually end up with short communication and a safe return to each base, despite the United States’ potential threat to the coastal State’s national security.⁷⁶ Then-Secretary of Defense, Donald Rumsfeld, stated in his briefing:

We had every right to be flying where we were flying. They have every right to come up and observe our flight. What one does not have the right to do, and nor do I think it was anyone’s intention, is to fly into another aircraft.

...

... There frequently is a period where there is some sort of hand signals or communications between them. And they go about their business.

There is no reason to believe that suddenly the pattern or rhythm of planes flying surveillance and reconnaissance flights, and their being intercepted is going to end up in some pilot crashing into another airplane.⁷⁷

John Bellflower also argued for the United States by stating that China’s interception against routine military exercises

⁷² Embassy of the People’s Republic of China in the Republic of Turkey, *Spokesman Zhu Bangzao Gives Full Account of the Collision between US and Chinese Military Planes*, MINISTRY FOREIGN AFFS. (Apr. 4, 2001), tr.china-embassy.org/eng/xwdt/t160956.htm [<https://perma.cc/A5KP-VA2D>].

⁷³ *Id.*

⁷⁴ See *id.*; *Transcript of News Briefing: Secretary of Defense Donald Rumsfeld*, CNN (Apr. 13, 2001, 2:00 PM), transcripts.cnn.com/show/se/date/2001-04-13/segment/02 [<https://perma.cc/8ZU2-7EW7>].

⁷⁵ CNN, *supra* note 74.

⁷⁶ See *id.*

⁷⁷ *Id.*

lacked safety standards and routinely failed to exercise “due regard” for the safety of aerial navigation.⁷⁸

On the other hand, China accounted for the United States violating the due regard principle when exercising its freedom of overflight near China’s coastal areas.⁷⁹ The spokesman of the Chinese government made its statement:

[T]he US military surveillance plane violated the principle of “free over-flight,” because the incident incurred by the US plane happened in airspace near China’s coastal areas and China’s exclusive economic waters. . . [T]he Convention and general international law stipulate at the same time that the rights of the coastal country should be considered. The US surveillance plane’s reconnaissance acts were targeted at China in the airspace over China’s coastal area and its flight was far beyond the scope of “over-flight,” and thus abused the principle of over-flight freedom.⁸⁰

The Chinese government expressly based its argument under Article 58 of UNCLOS, which says that while States enjoy the freedom of navigation and overflight in a State’s EEZ, they shall have “due regard to the rights and duties of the coastal State and shall comply with the laws and regulations adopted by the coastal State in accordance with the provisions of this Convention and other rules of international law.”⁸¹

It is important to note that the principle of due regard can always be a double-edged sword, especially when there is no superior right ensured on the high seas. When applying the limitation of “peaceful purposes” on the freedom of use of the high seas under Article 88 of UNCLOS, Eric Donnelly observed that while the Chinese government considered U.S. activities to not be taking due regard or for a peaceful purpose, the Chinese government weakens its legal argument on an equitable basis because it practices surveillance on the high seas.⁸²

While there are never-ending contentions on the validity of military practices and the intercept activity between those States concerned in the South and the East China Sea, the aforemen-

⁷⁸ John W. Bellflower, *Contested Airspace: The Legality of Military Use of Airspace Above the Exclusive Economic Zone*, 39 ANNALS AIR & SPACE L. 247, 259 (2014).

⁷⁹ See *id.* at 260–61.

⁸⁰ Embassy of the People’s Republic of China in the Republic of Turkey, *supra* note 72.

⁸¹ UNCLOS, *supra* note 24, art. 58(2)–(3).

⁸² See Eric Donnelly, *The United States–China EP-3 Incident: Legality and Realpolitik*, 9 J. CONFLICT & SEC. L. 25, 32–33 (2004).

tioned disruptions in aerial navigation could invite potential military conflicts and pose a safety threat to civil aviation. Such power games cannot take civil aviation hostage. In peacetime, safety must be guaranteed to civil aircraft, and other member states must criticize any inconsistency of ADIZ procedures to civil aircraft in the agora of ICAO.

In the final chapter, this Article will revisit the due regard principle under general international law and identify how it could apply to State activities outside national airspace. Furthermore, in mitigating the legal and political uncertainty which stemmed from the different State practices and unilateral establishment of ADIZ on the high seas, this Article will review the utility of several confidence-building measures, including liaison mechanisms. In this case, ICAO's technical role will be further examined in reducing the procedural gap between FIR and ADIZ in order to achieve safe and harmonious civil aviation.

IV. COMPREHENDING AND FULFILLING THE DUE REGARD PRINCIPLE TO MITIGATE THE SAFETY RISK OF ADIZ

A. IDENTIFYING THE APPLICATION OF THE DUE REGARD PRINCIPLE BEYOND TERRITORIAL AIRSPACE

The duty of due regard is one of the most general principles that directs a State exercising its rights or duties to consider an affected State's rights or duties.⁸³ Its codification mostly appears under UNCLOS, which stipulates that a State should follow the provisions when exercising its rights on the high seas or approaching another coastal State.⁸⁴

⁸³ See, e.g., Tullio Scovazzi, *'Due Regard' Obligations, with Particular Emphasis on Fisheries in the Exclusive Economic Zone*, 34 INT'L J. MARINE & COASTAL L. 56, 56–57 (2019). The basic principle of self-restraint appears in the commentary of the draft of Article 27 covering the freedom of the high Seas, which says "States are bound to refrain from any acts which might adversely affect the use of the high seas by nationals of other States." Int'l Law Comm'n, *supra* note 28, at 278, Commentary to Draft Article 27 ¶ 1. This later became codified as the principle of reasonable regard in the 1958 Convention on the High Seas and the principle of due regard in UNCLOS. See Bernard H. Oxman, *The Principle of Due Regard, in THE CONTRIBUTION OF THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA TO THE RULE OF LAW: 1996-2016*, at 108, 108–09 (2018).

⁸⁴ For all due regard principles that appear in the context of a State's rights and duties when performing certain activities within certain areas defined under UNCLOS—territorial seas, international straits, exclusive economic zones, continental shelves, high seas, and international seabeds—see UNCLOS, *supra* note

According to Article 87(2) of UNCLOS, the freedom of the high seas “shall be exercised by all States with due regard for the interests of other States in their exercise of the freedom.”⁸⁵ Similarly, Article 2 of the 1958 Convention on the High Seas also states that the freedom of the high seas “shall be exercised by all States with *reasonable regard* to the interests of other States in their exercise of the freedom.”⁸⁶

While it is generally understood that this principle is elusive and open-texture, it provides flexibility in every circumstance it is applied;⁸⁷ Joanna Mossop stated that the rights and duties of the coastal State and those of other States must coexist on the high seas and the EEZ like other areas regulated under UNCLOS.⁸⁸

Furthermore, Zang Goubin understood that the principle in the high seas is “an active legal directive instead of a merely passive obligation.”⁸⁹ In that regard, the Arbitral Tribunal for the *Chagos Marine Protected Area* case (*Chagos Award*) also considered the active nature of the principle despite the lack of any uniform obligation:

In the Tribunal’s view, the ordinary meaning of “due regard” calls for the United Kingdom to have such regard for the rights of Mauritius as is called for by the circumstances and by the nature of those rights. The Tribunal declines to find in this formulation any universal rule of conduct. The Convention does not

24, arts. 27(4), 39(3)(a), 56(2), 58(3), 60(3), 66(3)(a), 79(5), 87(2), 142(1), 148, 234, 267.

⁸⁵ *Id.* art. 87(2).

⁸⁶ United Nations *Convention on the High Seas* art. 2, Apr. 29, 1958, 450 U.N.T.S. 11 (emphasis added). The freedom and rule on the high seas traces back to the Grotian concept of *mare clausum* from the seventeenth century. See Zhang Guobin, *A Discussion on “Due Regard” in the United Nations Convention on the Law of the Sea*, 2014 CHINA OCEANS L. REV. 70, 74 (2014). In this case, the terms “due regard” and “reasonable regard” would convey the same meaning, identified as a foundational principle in modern international law. See *id.* at 75.

⁸⁷ See Julia Gaunce, *On the Interpretation of the General Duty of “Due Regard,”* in 32 OCEAN YEARBOOK 27, 27–28 (Aldo Chircop, Scott Coffen-Smout & Moira L. McConnell eds., 2018). The test of due diligence is accepted as the most appropriate standard to hold States accountable for breaches of obligations specified in particular instruments; although, it is less clear what the principle actually means, and the standard differs among specific provisions. See IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 426 (6th ed. 2003) (stating that tribunals can set “due diligence” standards but oftentimes relate to States’ actions and issues of causation).

⁸⁸ JOANNA MOSSOP, THE CONTINENTAL SHELF BEYOND 200 NAUTICAL MILES: RIGHTS AND RESPONSIBILITIES 182 (2016).

⁸⁹ Goubin, *supra* note 86, at 78.

impose a uniform obligation to avoid any impairment of Mauritius' rights; nor does it uniformly permit the United Kingdom to proceed as it wishes, merely noting such rights.⁹⁰

In this sense, the due regard principle under UNCLOS cannot be regarded as a power conferred to a coastal State to selectively authorize the activities of other States. Rather, due regard is a principle that guides States to refrain from or actively engage in an action that will have international effects. In the *Chagos* Award, the tribunal gave further practical advice on this aspect of State relations; it observed that more meetings or consultations could have satisfied one State's obligation to have "due regard" for the other State.⁹¹

The tribunal accepted the United Kingdom's argument that "consultation need not continue indefinitely or 'until the other party is happy,'" but concluded that "the United Kingdom created an expectation that further bilateral consultation 'about the ideas [would take place] beforehand' and that Mauritius would be offered a further opportunity for discussion before a final decision was taken."⁹² Since the United Kingdom announced its decision to establish a Marine Protected Area shortly after assuring Mauritius that there would be continued dialogue, the tribunal found it "difficult to reconcile [such] course of events with the spirit of negotiation and consultation or with the need to balance the interests at stake in the waters of the Archipelago."⁹³

On the other hand, this principle would be even harder to apply when States have conflicts in an EEZ. As China had argued, Article 58(3) obliges the overflying State to have due regard to the rights and duties of the coastal State.⁹⁴ However, the provision itself is articulated under the rules on EEZs, with limited jurisdiction over the establishment and use of artificial islands, installations and structures, marine scientific research, and the protection and preservation of the marine environ-

⁹⁰ *In re* the Chagos Marine Protected Area Arbitration (Mauritius v. U.K.), PCA Case Repository No. 2011-03, Award, ¶ 519 (Perm. Ct. Arb. 2015) [hereinafter *Chagos* Award], <https://files.pca-cpa.org/pcadocs/MU-UK%2020150318%20Award.pdf> [<https://perma.cc/UQE8-Y59N>].

⁹¹ *See id.* ¶ 530.

⁹² *Id.* ¶ 531.

⁹³ *Id.*

⁹⁴ *See* Embassy of the People's Republic of China in the Republic of Turkey, *supra* note 72.

ment.⁹⁵ Eric Donnelly viewed the provisions of the EEZ as exclusively resource-related, concluding that the U.S. surveillance aircraft did not violate freedoms of flight while over China's EEZ.⁹⁶ Tullio Scovazzi also stated that:

Within the exclusive economic zone, where the applicable regime is the result of the balancing of the rights of the coastal [S]tate with those of other [S]tates, international practice shows that the balance shifts in favour of the coastal [S]tate if conflicting fishing activities are at stake. The balance may change if other kinds of activities are in conflict within the same zone.⁹⁷

Moreover, Kay Hailbronner focused on the concept of the "Castaneda formula" given under Article 59 of UNCLOS, which states that when conflict arises between the coastal State and other States over the EEZ concerning rights or jurisdiction that the Convention did not specify, "the conflict should be resolved on the basis of equity and in the light of all relevant circumstances."⁹⁸ He argued that the concept "does not justify restrictions of the traditional freedom of overflight," and "[t]herefore, a third [S]tate would not be precluded by Article 59 from claiming a right to peaceful military uses of the airspace above the EEZ under Articles 58 and 88."⁹⁹

Hence, the legal implication is that when the due regard principle applies to overflying aircraft, it provides the coastal State the authority to apply its national rules and regulations to overflying aircraft in the EEZ so that it does not overwhelm the same right of the other State. At a minimum, the exercise of the authority should not unjustifiably interfere with the operations of aircraft and ships. Therefore, considering that the facilitation of the FIR system has already given considerable certainty and accountability to the overflowed State in terms of safety and security, the establishment of ADIZ cannot go further than the FIR requirements. However, one must note that the scope of discussion can only be limited to civil aircraft, and thus, State aircraft can be interfered with in terms of the due regard principle that is reciprocal to the other State.

In this sense, the facilitation of cooperation between civil and military air traffic controllers would once again be important to

⁹⁵ UNCLOS, *supra* note 24, art. 56(1)(b).

⁹⁶ Donnelly, *supra* note 82, at 35.

⁹⁷ Scovazzi, *supra* note 83, at 72.

⁹⁸ Kay Hailbronner, *Freedom of the Air and the Convention on the Law of the Sea*, 77 AM. J. INT'L L. 490, 505 (1983).

⁹⁹ *Id.*

avoid impediments to civil aviation from expanding ADIZs and other air-defense procedures.

B. TECHNICAL CONFIDENCE-BUILDING MEASURES BETWEEN
STATES AND THE ROLE OF ICAO FOR MILITARY–CIVIL
AVIATION COOPERATION

1. *Enhancing State Communication Mechanism for Civil Aviation*

According to ICAO standards, all civil aircraft are required to submit their flight information before and during their flights for safety purposes.¹⁰⁰ There could be no objection from that aircraft to submit the information since its absence would cause an overflown State to return the flight or, in the worst scenario, to intercept the aircraft as part of its national security measures.¹⁰¹ In that regard, Article 37 of the Chicago Convention stipulates that states collaborate to secure “the highest practicable degree of uniformity in regulations, standards, procedures, and organization in relation to aircraft, personnel, airways and auxiliary services.”¹⁰²

However, States agreed to the principle of freedom of navigation and use on the high seas established under customary international law and later codified under UNCLOS.¹⁰³ It must be noted that while the high seas are free for navigation and use, anticipatory defense zones have been set up and encroach on the high seas for the sake of national security.¹⁰⁴ Therefore, the optimal measure to balance the freedom of flight with the principle of due regard to the coastal State would be to facilitate confidence-building measures, from bilateral to multilateral, that would function as a consistent liaison mechanism which the *Chagos Award Tribunal* had also considered ideal to execute the principle of due regard.

For instance, in June 2018, Japan and China agreed on a maritime–aerial communication mechanism to avert unintended

¹⁰⁰ See *Annex 2 to the Convention on International Civil Aviation: Rules of the Air*, *supra* note 47, at 3-4 (Rule 3.3.1).

¹⁰¹ See *id.* at APP 2-1.

¹⁰² Chicago Convention, *supra* note 2, art. 37.

¹⁰³ UNCLOS, *supra* note 24, art. 87.

¹⁰⁴ See, e.g., NAT’L OCEANIC & ATMOSPHERIC ADMIN., MARITIME ZONES AND BOUNDARIES, https://www.gc.noaa.gov/gcil_maritime.html [<https://perma.cc/LU5M-KC7S>] (Sept. 3, 2021).

clashes in the East China Sea.¹⁰⁵ The mechanism was initially agreed to in 2007, and recently, discussions have resumed and expanded to improve communication and crisis management, which serve as confidence-building mechanisms.¹⁰⁶

Although the mechanism primarily focuses on averting unintended military clashes in the East China Sea, both sides agreed in 2015 to expand the mechanism to air activities and envisioned it being used in their respective EEZs, high seas, and ADIZs.¹⁰⁷ Moreover, as non-military activities are increasing in the region, the agreed annual meetings would be expected to include considerations for maritime law enforcement and civil aviation as a whole.¹⁰⁸ As for the 2018 agreement, Japan and China further agreed to use direct communications between vessels and aircraft using both the Code for Unplanned Encounters at Sea (CUES)¹⁰⁹ and the Chicago Convention, indicating future cooperation to manage civil aviation risks when necessary.¹¹⁰

Another useful tool to facilitate communication between States concerning flights on international waters would be to sign and actively participate in International Aeronautical and

¹⁰⁵ *Japan, China Launch Maritime-Aerial Communication Mechanism*, MAINICHI (June 8, 2018), <https://mainichi.jp/english/articles/20180608/p2a/00m/0na/002000c> [<https://perma.cc/X9QD-7BCW>].

¹⁰⁶ See James Manicom, James J. Przystup & John Bradford, *Japan-China Maritime Confidence Building and Communications Mechanisms*, PACNET CTR. FOR STRATEGIC & INT'L STUD. (Aug. 20, 2013), www.cigionline.org/articles/japan-china-maritime-confidence-building-and-communications-mechanisms/ [<https://perma.cc/PRE4-G3H6>]; Marta McLellan Ross, *The Japan-China Maritime and Air Communication Mechanism: Operational and Strategic Considerations*, JAPAN INST. INT'L AFFS. 1 (June 30, 2015), https://www2.jiia.or.jp/pdf/fellow_report/150630_Ms_Ross_ECS.pdf [<https://perma.cc/HA7V-7EFE>].

¹⁰⁷ See Ross, *supra* note 106, at 1, 3.

¹⁰⁸ See *id.* at 3.

¹⁰⁹ The Code for Unplanned Encounters at Sea (CUES) was originally promulgated in 1999, based on international legal and navigational rules to promote safe naval activities when vessels were unexpectedly encountered at sea. See Anh Duc Ton, *Code for Unplanned Encounters at Sea and Its Practical Limitations in the East and South China Seas*, 9 AUSTRALIAN J. MARITIME & OCEAN AFFS. 227, 229 (2017). The CUES is subject to regular review, and an updated version signed by twenty-one nations became effective in 2014. *Id.* at 229–30; *Document: Code for Unplanned Encounters at Sea*, USNI News (June 17, 2014, 3:16 PM), <https://news.usni.org/2014/06/17/document-conduct-unplanned-encounters-sea> [<https://perma.cc/Q6A6-87Y8>]. However, the practical limitations of CUES 2014 are that it is voluntary, non-binding, and applies only to naval vessels with communication rules that are independent of multinational maritime tactical signals (which is based on the Multinational Maritime Tactical Signal and Maneuvering Book, or MTP). See Ton, *supra* note 109, at 231–32.

¹¹⁰ See MAINICHI, *supra* note 105.

Maritime Search and Rescue (IAMSAR), which is co-promulgated by the International Maritime Organization and ICAO.¹¹¹ IAMSAR consists of three-volume manuals, providing “guidelines for a common aviation and maritime approach to organizing and providing search and rescue.”¹¹²

While search and rescue aim to enhance State management concerning distressed vessels and individuals, cooperation between States in the region could also lead to positive development for the region’s security environment. For example, a multinational Search and Locate (SAL) operation was conducted in the Java Sea after the crash of Air Asia flight QZ8501 in December 2014.¹¹³ The SAL operation was led by Indonesia and included Singapore, Malaysia, Australia, the United States, China, and Russia as parties.¹¹⁴ Improving SAR had been the main focus of the Association of Southeast Asian Nations (ASEAN) Regional Forum on Maritime Security; accordingly, ASEAN prioritized the agenda of improving SAR cooperation in its regional security mechanisms in 2015.¹¹⁵ In this regard, ICAO had also recognized in several meetings that civil–military cooperation would be effective in supporting air traffic services, search and rescue operations, disaster relief, and humanitarian assistance.¹¹⁶

2. *Technical Role of ICAO for Military–Civil Aviation Cooperation*

Indeed, the civil aviation industry and ICAO itself have also seriously considered that the establishment of national military requirements could unduly restrict international civil aviation as a whole. A working paper was presented at the Thirteenth Air Navigation Conference of ICAO by the IATA and the International Federation of Air Line Pilots’ Associations (IFALPA), both private organizations that represent the industrial needs in

¹¹¹ See Int’l Maritime Org., *IAMSAR Manual* (2019), www.imo.org/en/OurWork/Safety/Pages/IAMSARManual.aspx [<https://perma.cc/DF92-R3N8>].

¹¹² *Id.*

¹¹³ See Eva Pejsova, *Asia: Disasters as Opportunities?*, EUROPEAN UNION INST. FOR SEC. STUD., at 1 (Mar. 2015), publications.europa.eu/resource/cellar/51eebad3-251a-4dad-89a7-d7905d88bd1d.0001.01/DOC_1 [<https://perma.cc/7KPE-6Y53>].

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 2.

¹¹⁶ See ICAO, *Thirteenth Air Navigation Conference: Draft Report of Committee A on Agenda Item 3*, at 3-7, ¶ 3.25, ICAO Doc. AN-Conf/13-WP/303 (Oct. 15, 2018) [hereinafter ICAO, *Thirteenth Air Navigation Conference: Draft Report*].

civil aviation.¹¹⁷ In particular, the paper contained concerns about the industrial burden and risk of military interventions, specifically due to incoherent standards of requiring Air Defense Clearance (ADC) codes.¹¹⁸ The paper noted that, before entering an ADIZ, an ADC was required to avoid possible interceptions by military authorities; some reports even indicated an airline “showing 65 [percent] of their flights required multiple attempts in order to obtain an ADC clearance number.”¹¹⁹

As several recommendations of regional conferences had also stated, it is important that ICAO take active measures to reduce civil and military gaps. For example, the most recent triennial Assembly made several serious considerations on the matter, calling upon contracting states to “cooperate to the fullest extent practicable in improving coordination between military and civil communications systems and air traffic control agencies so as to enhance the safety of international civil aviation during the identification and interception of civil aircraft.”¹²⁰ ICAO should convene regional conferences to establish appropriate data sharing among military authorities concerning protocols for entering ADIZs, including ADCs. Regarding ADCs in particular, ICAO had already expressed its view that there is a need for data sharing among military authorities in the Asia–Pacific region according to the Asia/Pacific Seamless ATM Plan, which would make divergent ADC protocols obsolete.¹²¹

Moreover, ICAO should establish navigation standards and rules that incorporate the military dimension to future versions of the Global Air Navigation Plan (GANP)¹²² by proposing a uni-

¹¹⁷ See ICAO, *Thirteenth Air Navigation Conference: Working Paper Presented by the International Air Transport Association (IATA) and the International Federation of Air Line Pilots’ Associations (IFALPA) on Establishment of Military Requirements and Restrictions on International Civil Aviation*, ICAO Doc. AN-Conf/13-WP/295 (Sept. 28, 2018).

¹¹⁸ *Id.* at 2, ¶ 2.5.

¹¹⁹ *Id.* at 3, ¶ 2.10.

¹²⁰ ICAO, *Assembly Resolutions in Force*, at I-12, ICAO Doc. 10140 (Oct. 4, 2019). Appendix I of Assembly Resolution A40-4 had specifically suggested establishing guidance on best practices for civil and military cooperation, including inviting representatives of military authorities in their delegations. *Id.* at II-14 to -15.

¹²¹ See ICAO, *Ninth Meeting of the South Asia/Indian Ocean ATM Coordination Group, Working Paper presented by the Secretariat: Civil/Military Cooperation Update*, at 8, ¶ 2.18, ICAO Doc. SAIOACG/9-WP29 (Mar. 26–29, 2019).

¹²² The ICAO promulgates the GANP as the highest air navigation strategic document for facilitating enhanced communication with technical and high-level managers from a global to national level. In line with the Global Air Traffic Management Operational Concept (GATMOC) and the Manual on Air Traffic Man-

form protocol for civil flights when entering the ADIZ. According to the Thirteenth Air Navigation Conference of ICAO, the Air Navigation Committee decided that ICAO should develop a mechanism to collaborate with the military community and further incorporate the military dimension, including civil–military cooperation and collaboration, in future editions of GANP.¹²³ It is important to note that on the high seas, the only means of imposing restrictions on civil aircraft other than by specific provisions of international law would be ICAO’s standards and rules.¹²⁴

V. CONCLUSION

This Article has reviewed the legitimacy of ADIZs from both a legal and political perspective, only to summarize that any legal position cannot completely put weight on the freedom of flight against national security and *vice versa*. In particular, the principle of due regard does not completely support the argument of the coastal State to limit the freedom of flight beyond its territorial airspace arbitrarily. Rather, the principle itself obliges both the overflying and overflowed State to engage in communication to consider the interests of each other as comity, which has been the main pillar of the international community since the Peace of Westphalia.¹²⁵

The core issue of this conflict is that civil aviation must not be taken hostage to the establishment and divergent standards of ADIZs and other national security measures. As reviewed above, States have established a zone or altered their existing procedures and have caused technical disorder in the airline industry, leading to flight delays, cancellations, or even political conflicts

agement System Requirements, it allows for different stakeholders to access and use the information that is most relevant to their area of interest at the different levels. See ICAO, *Global Air Navigation Plan Strategy: Introduction* (2021), www4.icao.int/ganportal/GanpDocument#/lessons/sKX_rle6SOH4QcBvYFbcjG-V4xaWosA?_k=Meuozu [<https://perma.cc/CYJ3-7G4U>].

¹²³ See ICAO, *Thirteenth Air Navigation Conference: Draft Report*, *supra* note 116, at 3-9 (Recommendation 3.4/1).

¹²⁴ See Chicago Convention, *supra* note 2, art. 12 (“Over the high seas, the rules in force shall be those established under this Convention.”). In this regard, Paul Dempsey finds this unique characteristic of the Chicago Convention as “hard law,” designating ICAO with “lawmaking authority over 72% of the Earth’s surface.” DEMPSEY, *supra* note 3, at 105.

¹²⁵ See Rafael Domingo, *The Crisis of International Law*, 42 VAND. J. TRANSNAT’L L. 1543, 1566 (2009).

between States. These conflicts would threaten airlines that have agreed to services through numerous air-services agreements.

The principle of due regard is a reciprocal guide of State behavior, in which a State might lose its case if it does not have material evidence of communication and meetings, as shown in the *Chagos* case. Technical confidence-building measures must be utilized to facilitate communication between States by cooperating in search and rescue missions, and identifying a regional security environment for development. Also, ICAO's technical leadership is required to review divergent ADIZ procedures and convene a practical agreement among States to consolidate overlapping and excessive procedures to achieve uniformity in civil aviation.