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Freedom of overflight: a study of coastal State jurisdiction in international airspace

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4 Flight information regions and air defence identification zones

4.1 Introduction

This chapter addresses two areas in international airspace that do not arise from the law of the sea. The first, FIRs, have their basis in international civil aviation law, while the second, ADIZs, have no foundation in international law but are imposed by a number of States, with various requirements and corresponding legal justifications.[774]

FIRs are established for the purpose of the provision of ATS, which is solely a technical and operational function. They are generally not controversial but where a State's FIR encompasses a neighbouring State's territory there can be practical challenges and disputes involving the exercise of the ATS responsibility.[775] This chapter examines an aspect one of these scenarios, specifically the ban imposed by the Gulf States on Qatar in mid-2017. Although this case involved both national and international airspace, it is the prohibition as it applied to Qatari-registered aircraft in international airspace within these States' FIRs, as applied early on and for a short period of time, that will form the foundation for the analysis in this chapter. On the basis of freedom of overflight, the ban as it applied to international airspace was a violation of international law, as to which see the discussion on what the concept of freedom of overflight entails in Sections 2.7.1 and 2.7.3.2. This chapter instead will step aside from freedom of overflight to examine whether there is also a prohibition independently under international civil aviation law. From this perspective, the first part of the chapter will examine whether a State is prohibited under international civil aviation law from discriminating against a foreign aircraft in international airspace within the first State's FIR based on the State of registration, i.e. the nationality, of the aircraft. The principle of non-discrimination does not apply expressly to the provision of ATS in international airspace under international civil aviation law and so this examination will involve determining whether an implicit prohibition exists.

In contrast to FIRs, there is no clear legal basis for the establishment of ADIZs in international airspace and the legality of these unilaterally declared zones will be the focus of the research in the second part of this chapter. ADIZs have received significant attention in the media and in academia, both examining their origin and their possible legal basis in international law. This chapter will consider the main arguments used

774 The States and basic requirements are set out in Section 4.3.2 and the legal bases relied on, in Section 4.3.3.

775 See for instance, those addressed in Section 4.2.1.2.

to justify them, before turning to examine whether the zones are, on the contrary, prohibited under international law. Certain features of ADIZ, such as military authorities having the right to issue instructions in addition to ATS authorities, arguably pose safety risks to international civil aviation. This chapter will explore whether ADIZ are in breach of international civil aviation law on this basis,[776] before finally turning to the matter of whether ADIZ are consistent with the principle of freedom of overflight.

Section 4.2 will address the basis of FIRs in international law and ultimately, the scope of a coastal State's responsibility within the region. This section will first set out the legal framework for the establishment of an FIR over international airspace and the allocation of responsibility for ATS provision within it (Section 4.2.1.1). Closely linked to this, Section 4.2.1.2 will make clear that the responsibility for an FIR does not confer sovereignty, notwithstanding the association States continue to make between the two. The chapter will then discuss the prohibition on Qatari-registered flights as an example of States discriminating against aircraft in international airspace within their FIRs based on the State of registration of the aircraft. These sections will outline the facts of the case, its relevance to this research and Qatar's arguments for the discrimination amounting to a violation of international law (Sections 4.2.2.1 – 4.2.2.3). At this point, the chapter will turn to the central research question regarding FIRs: does the principle of non-discrimination apply under international civil aviation law to prohibit a State from discriminating against a foreign aircraft in international airspace within the first State's FIR based on the State of registration of the aircraft? This section sets aside the law of the sea to first set out the narrow scope of the authority of coastal States within their FIRs over international airspace, as prescribed by Annex 11 (Section 4.2.3). The chapter will then turn to consider the context of Annex 11 within the Chicago Convention more broadly, under Section 4.2.4, to examine whether it is possible to argue there is an implicit application of the principle of non-discrimination in the provision of ATS over international airspace. This section will consider the integral role that the principle of non-discrimination plays in international civil aviation law (Section 4.2.4.1), including the relationship of the principle with State sovereignty (Section 4.2.4.2) and its purpose in national airspace (Section 4.2.4.3). It will then turn to consider whether, based on the foregoing sections, it is possible to interpret an overarching implied principle of non-discrimination applying to navigation in international airspace (Section 4.2.4.4) and the implications of the principle of non-discrimination in the broader Chicago Convention framework on the interpretation of Annex 11 (Section 4.2.4.5).

Section 4.3 will examine the legality of ADIZ under international law. It will begin by discussing the most recent significant developments regarding ADIZ, illustrating the relevance of the topic as well as the discrepancies in

776 As will be discussed in Section 4.3.6.1.

the regulations that apply to the zones (Section 4.3.1). Section 4.3.2 will outline the origins and definition of ADIZ before revisiting the main legal bases used to justify them, examining whether these bases are legitimate. The justifications that will be addressed in these sections (Sections 4.3.3.1 – 4.3.3.4) are a State's laws and regulations relating to admission to territory, restricting military activities in the EEZ, the right to self-defence, and customary international law. Section 4.3.4 will address the *Lotus Case*, examining the contemporary approach towards the *Lotus* principle and thereby considering whether the determination of extra-territorial prescriptive jurisdiction involves demonstrating a legal basis for the exercise of the jurisdiction or merely the absence of a prohibition. In either case, the PCIJ made clear in *Lotus* that a State is not permitted to enforce its laws outside its territory. This will be addressed in Section 4.3.5, which will demonstrate that the actions a coastal State may take against an aircraft in international airspace are the same regardless of whether or not the State has established an ADIZ over that airspace. Finally, the chapter will examine whether in establishing and maintaining ADIZs, coastal States are violating their obligations under international law, considering both the safety obligations of States under international civil aviation law (Section 4.3.6.1) and the right to freedom of overflight (Section 4.3.6.2).

4.2 Flight information regions

4.2.1 Legal framework governing the provision of ATS in international airspace

4.2.1.1 Definition of and general responsibility for FIRs[777]

The world's airspace is divided into FIRs for the purpose of the provision of ATS.[778] Over territory, FIRs generally follow territorial borders. International airspace, on the other hand, is divided and allocated to coastal States on the basis of those coastal States having accepted responsibility for the regions (see Figure 4.1).[779] Annex 11, Standard 2.1.2 outlines this arrangement:

> 'Those portions of the airspace over the high seas or in airspace of undetermined sovereignty where air traffic services will be provided shall be determined on the

777 The information in this section builds on that in Section 2.7.2.2.1, particularly Section 2.7.2.2.1.3, addressing the application of Annex 11 to international airspace.

778 Both 'FIR' and 'ATS' are defined below.

779 This is with the exception of one FIR that has not yet been allocated to a State. The FIR sits off the west coast of central America and a number of States – Chile, Ecuador, France Peru and the US – have put forward their interest in it before ICAO, which is in the process of hosting discussions to allocate it (ICAO Summary of Discussions, *First Unassigned High Seas Airspace*, Special Coordination Meeting, Lima (24 July 2019)).

basis of regional air navigation agreements. A contracting State having accepted the responsibility to provide air traffic services in such portions of airspace shall thereafter arrange for the services to be established and provided in accordance with the provisions of this Annex'.

An FIR is defined by ICAO in Annexes 2 and 11 to the Chicago Convention as 'an airspace of defined dimensions within which flight information service and alerting service are provided'.[780] While the definition of FIR refers to 'flight information service' and 'alerting service', Standard 2.1.2 noticeably instead refers to ATS, also the title of Annex 11, where ATS consists of[781] flight information service[782] and alerting service,[783] but also air traffic advisory service,[784] and ATC.[785] The definition of FIR does not refer to ATS as a whole because ATC is not or cannot be provided in all airspace i.e. in uncontrolled airspace.

The regional air navigation agreements, or plans (RANPs), referred to in Standard 2.1.2 are further defined in the Annex as 'the agreements approved by the Council of ICAO normally on the advice of Regional Air Navigation Meetings'.[786] Thus, States agree at a regional level[787] on the responsibilities for the provision of air navigation services in international airspace, as published in the RANPs, which are finally approved by ICAO.

780 Chicago Convention, Annex 2 (10th edn, July 2005), 1-5; Annex 11 (15th edn, July 2018) 1-8.

781 In accordance with the Chicago Convention, Annex 11, 1-3.

782 Flight information service is 'a service provided for the purpose of giving advice and information useful for the safe and efficient conduct of flights' (Annex 11, 1-8) and includes information on, for example, 'meteorological conditions, volcanic activity, the release into the atmosphere of radioactive materials or toxic chemicals, and changes in the serviceability of navigation aids' (Francis Schubert, 'Air Navigation' in Paul Stephen Dempsey and Ram S Jakhu (eds), *Routledge Handbook of Public Aviation Law* (Routledge 2017) 92).

783 Alerting service is 'a service provided to notify appropriate organizations regarding aircraft in need of search and rescue aid, and assist such organizations as required' (Annex 11, 1-4).

784 Air traffic advisory service is 'a service provided within advisory airspace to ensure separation, in so far as practicable, between aircraft which are operating on IFR flight plans' (Annex 11, 1-3). This service is typically employed as a temporary measure in a portion of airspace where the flight information service is not sufficient but where the responsible State does not have the means to provide ATC in the portion of airspace (ICAO Doc 4444, *ICAO Procedures for Air Navigation Services on Air Traffic Management* (16th edn, 2016) 9.1.4.1.2).

785 ATC service is 'a service provided for the purpose of preventing collisions between aircraft… and expediting and maintaining an orderly flow of air traffic' (Chicago Convention, Annex 11, 1-3).

786 Chicago Convention, Annex 11, 2.1.2, *Note 1*.

787 There are nine ICAO Air Navigation Regions: the Asia (ASIA) and Pacific (PAC) region, the Middle East (MID) region, the African-Indian Ocean (AFI) region, North American (NAM) and Caribbean (CAR) region, the South American (SAM) region, the European (EUR) and North Atlantic (NAT) region (ICAO, 'Global Air Navigation Strategy', available at <www4.icao.int/ganpportal/GanpDocument#/?_k=d978it> accessed 4 August 2019).

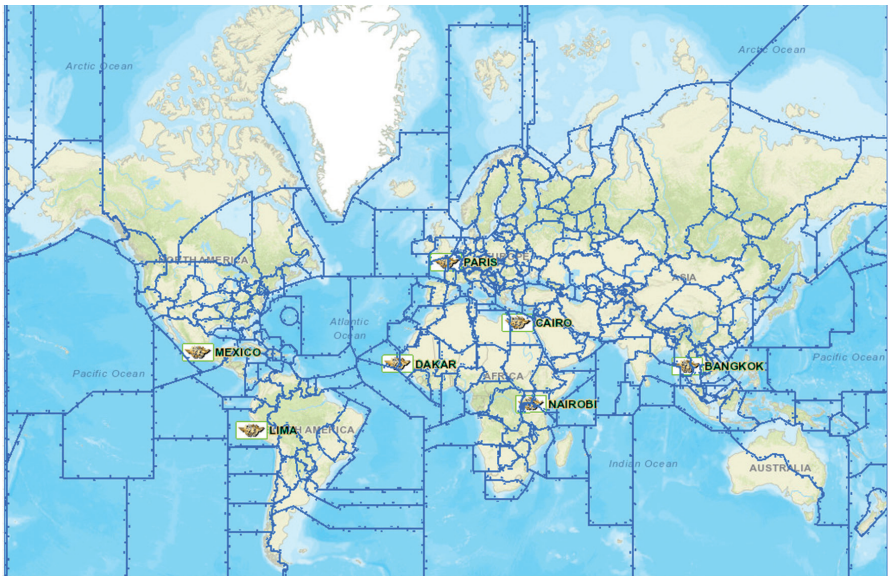


Figure 4.1: Map of the world's airspace divided into its FIRs[788]

The ATS provider in an FIR also plays a role in search and rescue. It is responsible for collecting and distributing information about aviation emergencies, as well as coordinating search and rescue aircraft.[789] These are the functions that fall within the 'alerting service' responsibilities of an ATS provider. The ATS provider feeds into the search and rescue function through the provision of alerting services but search and rescue does not further fall within the scope of the activities of an ATS provider.

For the purpose of search and rescue services at sea, international airspace – together with national airspace over maritime areas – is divided into aeronautical search and rescue regions (SRRs) pursuant to international civil aviation law.[790] Like FIRs, the provision of aeronautical SRRs[791] in

788 Source: Created using ICAO GIS, available at <gis.icao.int/> accessed 14 July 2019.

789 Chicago Convention, Annex 11 (15th edn, July 2018) 2.2 e).

790 Annex 12 establishes the SARPs applying specifically to aeronautical search and rescue, however other annexes also contain provisions contributing to search and rescue operations. These include, Annex 11 which sets out the responsibility of ATS in the context of search and rescue operations, as well as Annex 10 (Vol III, 2nd edn, July 2007) which provides technical standards for communication systems in search and rescue operations, and Annex 15 which details the search and rescue arrangements that are required for the purpose of aeronautical information services.

791 SRR is defined as 'an area of defined dimensions, associated with a rescue coordination centre, within which search and rescue services are provided', where 'search and rescue service' is defined as 'the performance of distress monitoring, communication, coordination and search and rescue functions, initial medical assistance or medical evacuation, through the use of public and private resources, including cooperating aircraft, vessels and other craft and installations' (Chicago Convention, Annex 12 (8th edn, July 2004) 1-2).

international airspace is determined on the basis of the RANPs.[792] Also like FIRs, the boundaries of SRRs should be determined solely on the basis of technical and operational considerations[793] and States are directed to ensure that, 'in so far as practicable', SRR boundaries align with FIR boundaries (see Figure 4.2 for the global division of airspace for each).[794] Considering the role of the ATS provider in search and rescue operations, the general alignment of the two regions is operationally beneficial.[795]

Maritime SRRs, governed by the Search and Rescue Convention of 1979 (Search and Rescue Convention),[796] partition the sea itself for the purpose of carrying out search and rescue operations, where the sea and air regions are closely coordinated.[797] Maritime SRRs are not aligned with either FIR or aeronautical SRRs but many are similar to the latter (compare Figure 4.3 in relation to the north of the Pacific Ocean). As with FIRs and aeronautical SRRs, it is desirable to align aeronautical and maritime SRRs as much as possible, at the most basic level to ensure that the responsible authority is easily identifiable in the case of an emergency.[798]

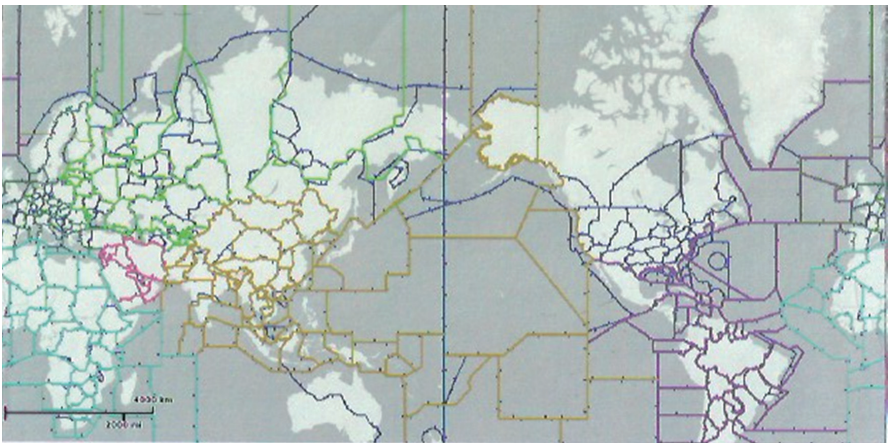


Figure 4.2: FIRs (blue) and aeronautical SRRs (colour)[799]

792 Chicago Convention, Annex 12, 2.1.1.1.
793 Chicago Convention, Annex 12, 2.2.1, *Note 2.*
794 ibid 2.2.1.1 (Recommendation).
795 International Aeronautical and Maritime Search and Rescue (IAMSAR) Manual, Volume I: Organization and Management (2016) 2.3.15 (b) ('IAMSAR Manual - Volume 1').
796 International Convention on Maritime Search and Rescue (Hamburg, 27 Apr. 1979) 1405 U.N.T.S. 118, *entered into force* 22 Jun. 1985 ('Search and Rescue Convention').
797 The IAMSAR Manual provides guidelines to achieve a common search and rescue approach. Article 98(2) UNCLOS includes a general statement on the role of all coastal States in search and rescue: 'Every coastal State shall promote the establishment, operation and maintenance of an adequate and effective search and rescue service regarding safety on or over the sea and, where circumstances so require, by way of mutual regional arrangements cooperate with neighbouring States for this purpose'.
798 IAMSAR Manual - Volume I, 2.3.15 (d).
799 Source: Created using ICAO GIS, available at <gis.icao.int/> accessed 2 July 2019.

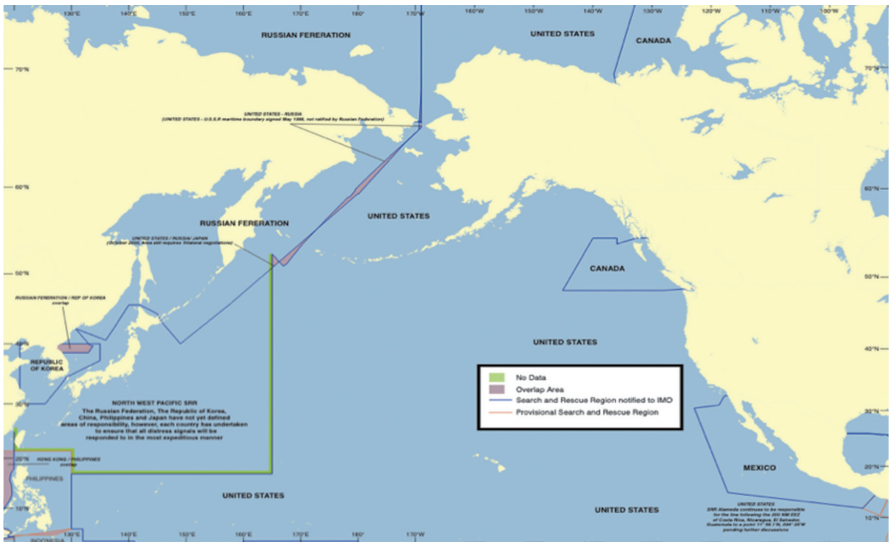


Figure 4.3: Maritime search and rescue regions in the Pacific Ocean[800]

4.2.1.2 FIR allocation does not confer sovereignty over airspace

The general alignment of FIR and State territory borders reflects the overarching principle in international civil aviation law of sovereignty over airspace. As acknowledged in Section 2.2.2.3, national security was a paramount concern in the drafting of the Chicago Convention. This is illustrated in the Preamble to the Convention: 'the future development of international civil aviation can greatly help to create and preserve friendship and understanding… yet its abuse can become a threat to the general security' and, 'it is desirable to avoid friction and to promote that cooperation between nations and peoples upon which the peace of the world depends'. With sovereignty as the cornerstone of international civil aviation, the delineation of FIR boundaries in the years following the conclusion of the Chicago Convention, not surprisingly followed national borders.[801]

800 Source: Compiled from individual maps obtained from US Coast Guard, 'IMO Maritime SAR Regions', available at <www.dco.uscg.mil/Portals/9/CG-5R/nsarc/IMO%20Maritime%20SAR%20Regions.pdf> accessed 25 October 2019.

801 Francis Schubert, 'Limits in the Sky: Sovereignty and Air Navigation Services' in Pablo Mendes de Leon and Niall Buissing (eds), *Behind and Beyond the Chicago Convention: The Evolution of Aerial Sovereignty* (Wolters Kluwer 2019) 148; Niels van Antwerpen, *Cross-Border Provision of Air Navigation Services with Specific Reference to Europe: Safeguarding Transparent Lines of Responsibility and Liability* (Kluwer Law International 2008) 151.

However, FIRs do not give rise to sovereignty and nor are they intended to be aligned geographically with sovereign airspace.

As to the former, for national airspace, Article 1 of the Chicago Convention recognises that a State has sovereignty over its territory, as defined in Article 2. No additional grounds for sovereignty over airspace are provided in the Chicago Convention or further under international law. The only airspace over which a State has sovereignty in its FIR therefore, is that which also forms part of its national airspace. This conclusion is supported by the fact that the definition of 'FIR' indicates that the regions are established strictly for the provision of ATS. For international airspace, beyond the narrow purpose for which FIRs are established, ICAO has emphasised that,

> '[t]he approval by the Council of regional air navigation agreements relating to the provision by a State of air traffic services within airspace over the high seas does not imply recognition of sovereignty of that State over the airspace concerned'.[802]

Regarding the latter point, geographical alignment of FIRs and sovereign borders, FIR boundaries should be determined solely to achieve the safest and most efficient provision of air navigation services. ICAO is unequivocal on this matter:

> 'The limits of ATS airspaces, whether over States' territories or over the high seas, shall be established on the basis of technical and operational considerations with the aim of ensuring safety and optimizing efficiency and economy for both providers and users of the services'.[803]

Despite this, States continue to pursue the alignment of their FIRs with their territorial borders and in some instances, the pursuit has become more pronounced.

Nationalist sentiment has resulted in an increased interest in aligning FIR and territorial boundaries in Indonesia, where the national airspace is

802 ICAO Assembly Resolution A38-12, Consolidation Statement of Continuing ICAO Policies and Associated Practices Related Specifically to Air Navigation (4 October 2013), Appendix G, 7.

803 ibid Appendix G, 1. Consider also, Chicago Convention, Annex 11, 2.11.1 (Recommendation): 'The delineation of airspace, wherein air traffic services are to be provided, should be related to the nature of the route structure and the need for efficient service rather than to national boundaries'; ICAO Assembly Resolution A38-12 (n 802): 'Member States should seek the most efficient and economic delineation of ATS airspaces, the optimum location of points for transfer of responsibility and the most efficient coordination procedures in cooperation with the other States concerned and with ICAO' (Appendix G, Associated Practices – 1); 'Established ATS airspaces should not be segmented for reasons other than technical, operational, safety and efficiency considerations' (Appendix G, 2).

partially encompassed by Singapore's FIR (see Figure 4.4).[804] The leaders of each State are in the process of negotiating a revised framework for the FIR boundaries. A media report following discussions between Prime Minister Lee Hsien Loong and Indonesian President Joko Widodo in October 2019 declared that,

> 'Indonesia wants Singapore to respect 'Indonesia's sovereignty over its territory, including its territorial waters, archipelagic waters and its airspace' and 'to understand Indonesia's strong desire to align the FIR in a timely manner which corresponds to its territorial sovereignty''.[805]

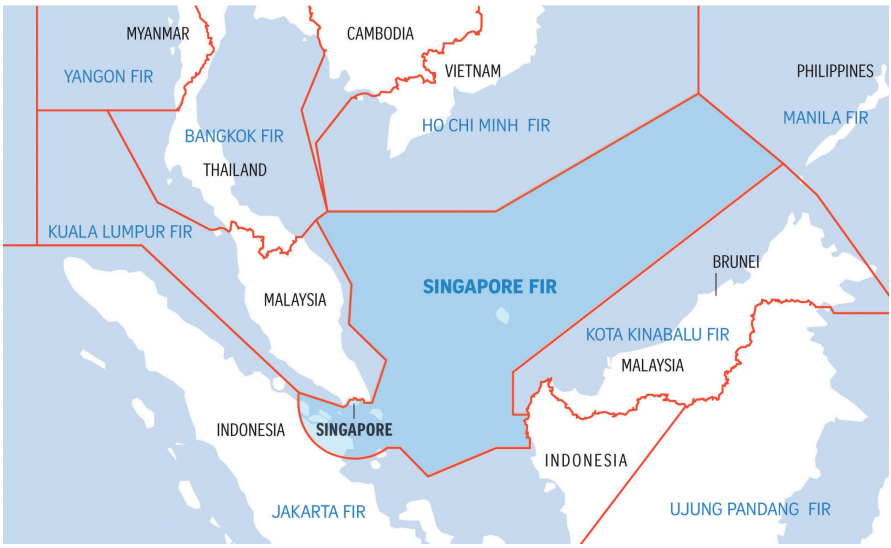


Figure 4.4: Singapore's FIR, spanning part of Indonesian territory in the south west[806]

804 Ida Bagus Rahmadi Supancana, 'Realignment of FIR from Singapore to Indonesia' in Pablo Mendes de Leon and Niall Buissing (eds), *Behind and Beyond the Chicago Convention: The Evolution of Aerial Sovereignty* (Wolters Kluwer 2019) 171: '[i]t is clear that the realignment of the FIR is not only a purely technical and operational measure designed to promote the safety of international civil aviation but also it affects Indonesian sovereignty and even dignity'; Chappy Hakim, 'A Strange Anomaly in Management of Airspace' (The Straits Times, 21 March 2016), available at <www.straitstimes.com/opinion/a-strange-anomaly-in-management-of-airspace> accessed 13 May 2019: 'This is a problem of dignity! The problem of national awareness, the awareness of the dignified attitude of a nation! The pride that I Am An Indonesian!'; Chappy Hakim, *FIR di Kepulauan Riau Wilayah Udara Kedaulatan NKRI* (Penerbit Buku Kompas 2019) 43-45.

805 'Leaders' Retreat: Singapore and Indonesia Agree on Framework to Discuss Airspace Management, Military Training' (The Straits Times, 8 October 2019), available at <www.straitstimes.com/politics/leaders-retreat-singapore-and-indonesia-agree-on-framework-to-discuss-airspace-management> accessed 28 December 2019, citing The Jakarta Post.

806 Source: Karamjit Kaur, 'Aviation's Shifting Centre of Gravity' (The Straits Times, 4 June 2016), available at <www.straitstimes.com/singapore/aviations-shifting-centre-of-gravity> accessed 16 March 2020, originally sourced from the Civil Aviation Authority of Singapore (CAAS).

At the same time, Indonesia's FIR covers East Timor's territory, as well as Australia's over Christmas Island.[807]

There are also practical reasons for the recent shift in focus towards an alignment of FIR and territorial boundaries. As Boyd explains,

> '…it is anticipated that a need for precise geofencing for drone operations may increase the desire to align an FIR 'perfectly' with national borders'.[808]

For instance, he points outs, in reference to Figure 4.5, 'a drone programmed to operate within the NIAMY FIR [Burkina Faso] will be in and out of Burkina Faso and Côte d'Ivoire numerous times as it moves along the south western FIR boundary'.[809]



Figure 4.5: Map showing the discordant territorial and FIR borders between Burkina Faso and Côte d'Ivoire (and between Burkina Faso and Mali)[810]

The above situations demonstrate that, despite ICAO materials reiterating otherwise, States continue to associate FIRs with national airspace, whether as a matter of perceived national pride as in the case of Indonesia, or because of practical implications arising from their interaction, as in the case of Burkina Faso and Côte d'Ivoire.

807 Hakim, 'A Strange Anomaly' (n 804).
808 Correspondence from Mike Boyd (Technical Officer, ICAO) to the author, dated 3 December 2019.
809 ibid.
810 Source: Mike Boyd (ICAO).

Regardless of the association, there is no support in international law for any claim to sovereignty arising from a State's administration of an FIR, whether over national or international airspace.

4.2.1.3 Jurisdiction in FIRs

Whilst a State administering an FIR that encompasses international airspace does not have sovereignty over that airspace, it does have jurisdiction in the airspace to the extent necessary to carry out the services it is responsible for. This is functional jurisdiction: jurisdiction in a defined geographical area that is for the sole purpose of carrying out a particular right or obligation. Csabafi, addressing the concept of functional jurisdiction in the context of activities in outer space, highlights that 'claims to this kind of jurisdiction must be founded on the requirements of and contained by the inherent nature of a specific activity' and he furthermore emphasises the essential element of a 'close link' between the defined geographical space and the activity.[811]

Recalling Section 2.7.2.2.1.3, a State that accepts to provide ATS 'over the high seas or in areas of undetermined sovereignty' may apply the SARPs in Annex 11 'in a manner consistent with that adopted for airspace *under its jurisdiction*',[812] that is, subject to differences to the relevant SARPs having been filed by the State responsible for the provision of services in the FIR. The use of the term 'jurisdiction' considers the situation of delegation: national airspace of another State in which the provision of air navigation services has been delegated to another State comes under the jurisdiction of the latter State to the extent necessary for the provision of those services. The Foreword to Annex 11 also uses this terminology, stating that the SARPs in Annex 11 'apply in those parts of the *airspace under the jurisdiction* of a contracting State wherein air traffic services are provided'.

The wording in Annex 11 is ambiguous though. By providing that a State is permitted to deliver ATS over the high seas in a manner consistent with that in airspace under its jurisdiction, suggests that high seas airspace is not under the providing State's jurisdiction. Furthermore, the section of the Foreword referred to above continues, '…*and also* wherever a State accepts the responsibility... over the high seas',[813] suggesting the same.

Interestingly, the US Federal Aviation Administration (FAA) has rephrased the statement in the Foreword to Annex 11 in its Federal Register to assume that the coastal State responsible for an FIR exercises jurisdiction in that airspace:

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811 Imre Anthony Csabafi, *The Concept of State Jurisdiction in International Space Law: A Study in the Progressive Development of Space Law in the United Nations* (Martinus Nijhoff 1971) 131.

812 Chicago Convention, Annex 11, (ix) and 2.1.2 *Note 2*.

813 ibid (ix).

> '[t]he SARPs in Annex 11, apply to airspace under the jurisdiction of a Contracting State that has accepted the responsibility of providing air traffic services over the high seas (oceanic airspace), or in airspace of undetermined sovereignty'.[814]

In this respect, an analogy can be drawn between the provision of air navigation services in FIRs and the provision of search and rescue services at sea. Article 2(1) of the Search and Rescue Convention sets out that the treaty does not prejudice the development of the law of the sea or of coastal or flag State jurisdiction. Furthermore, like the boundaries of FIRs, those of SRRs have no impact on national borders, but are purely designated as areas 'of defined dimensions in which search and rescue services are provided'.[815] Trevisanut describes the relationship between these areas and the jurisdiction of the States providing the services as follows:

> 'SAR regions [SRRs] are non-jurisdictional areas, that is to say in those regions states have obligations but not rights. States are thus deemed to be responsible for the SAR regions and to exercise a limited jurisdiction, which is exclusively functional to the performance of SAR services'.[816]

The above passage stands equally true for ATS provision in FIRs: if 'SAR regions' was substituted for 'FIRs' and 'SAR services' for 'ATS', they would hold. The limited jurisdiction referred to here is restricted to prescriptive jurisdiction and an FIR does not provide the coastal State with any corresponding enforcement jurisdiction. The distinction between these types of jurisdiction will be addressed in Section 4.3.4.

4.2.2 Gulf States' prohibition of Qatari-registered aircraft in their FIRs

4.2.2.1 Relevant facts of the case

On 5 June 2017 a number of Gulf States – Bahrain, Egypt, Saudi Arabia and the UAE – issued NOTAMs that imposed a ban on Qatari flights in their airspace, as part of a broader severance of diplomatic relations with Qatar.[817] The ban denied Qatari-registered aircraft entry to the national airspace of the States and to international airspace within those States' FIRs.

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814 US Federal Register, Department of Transportation – FAA, 'Designation of Oceanic Airspace: Notice of Provision of Air Traffic Services in Oceanic Airspace' (Volume 80-No. 126, 1 July 2015) 37711.

815 Search and Rescue Convention, Annex 12, 2.1.7 and 1.3.1, respectively.

816 Seline Trevisanut, 'Is there a Right to be Rescued at Sea? A Constructive View' (2014) 4 QIL 3, 12.

817 Memorial Presented by the State of Qatar to the Application (a) of the State of Qatar – Disagreement on the Interpretation and Application of the Convention on International Civil Aviation (Chicago 1944) and of its Annexes (30 October 2017), c).

The States also imposed restrictions on non-Qatari registered aircraft using their airspace when operating to and from Qatar.[818]

To the extent that the ban applied to Qatari-registered aircraft, Qatar brought the matter before the ICAO Council, invoking the dispute settlement mechanism in Article 84 of the Chicago Convention. In its application, Qatar submitted that the prohibition was imposed when the States:

> '… announced, with immediate effect and without any previous negotiation or warning, that Qatar- registered aircraft are not permitted to fly to or from the airports within their territories and would be banned not only from their respective national air spaces, but also from their Flight Information Regions (FIRs) extending beyond their national airspace even over the high seas'.[819]

Figure 4.6 and Figure 4.7 depict the peninsula of Qatar and its surroundings. Figure 4.6 shows, in blue, the boundaries of the FIRs administered by Saudi Arabia, Bahrain, the UAE and Iran, as well as the delimitation of national airspace at the outer edge of the territorial sea, in green. As is evident from this image, the territory of Qatar sits wholly within Bahrain's FIR. This heightened the consequences of the ban in that Qatar relies on access to Bahrain's FIR to operate flights in and out of its territory via its coast. In announcing its restrictions, Bahrain maintained two entry and exit points through its FIR to Qatar's airspace (Figure 4.8),[820] in contrast to the thirteen that were in operation prior to the ban (Figure 4.9).

818 ibid.

819 Application (A) of the State of Qatar – Disagreement on the Interpretation and Application of the Convention on International Civil Aviation (Chicago 1944) and of its Annexes, Submitted on behalf of the State of Qatar by its Agent, Essa Abdulla Almalki, Qatar Civil Aviation Authority Permanent Representative to ICAO (30 October 2017).

820 Appeal Relating to the Jurisdiction of the ICAO Council under Article 84 of the Convention on Civil Aviation (Bahrain, Egypt, Saudi Arabia and United Arab Emirates v. Qatar) I.C.J. Counter-Memorial of the State of Qatar – Vol I (filed Feb. 25, 2019) 2.9.

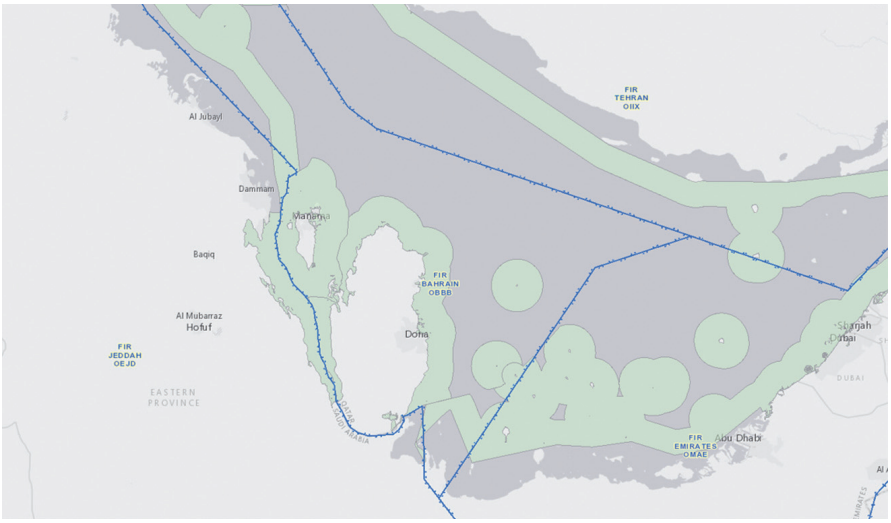


Figure 4.6: Delimitation of FIRs and territorial seas in the area[821]

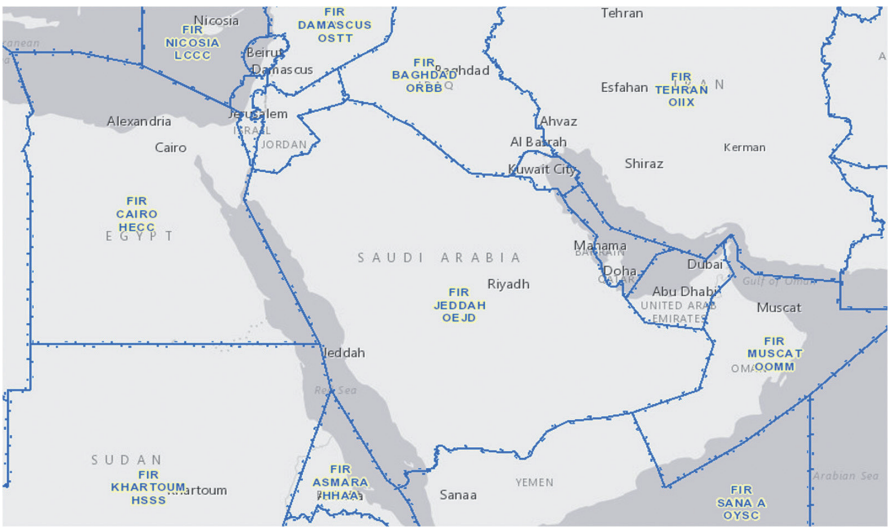


Figure 4.7: FIRs in the region more broadly[822]

821 Source: Created using ICAO GIS, available at <gis.icao.int/> accessed 14 July 2019.
822 Source: ibid.

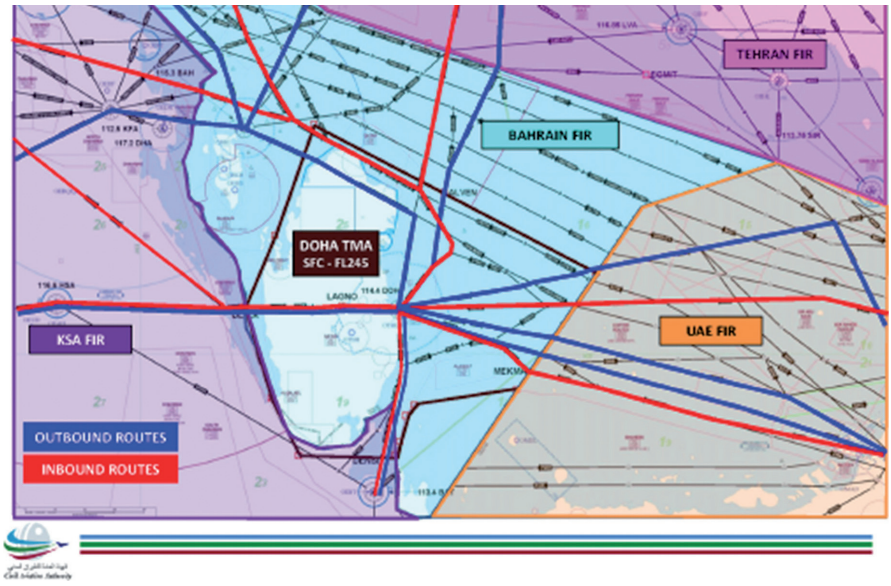


Figure 4.8: Thirteen routes available to/from Qatari airspace prior to 5 June 2017[823]

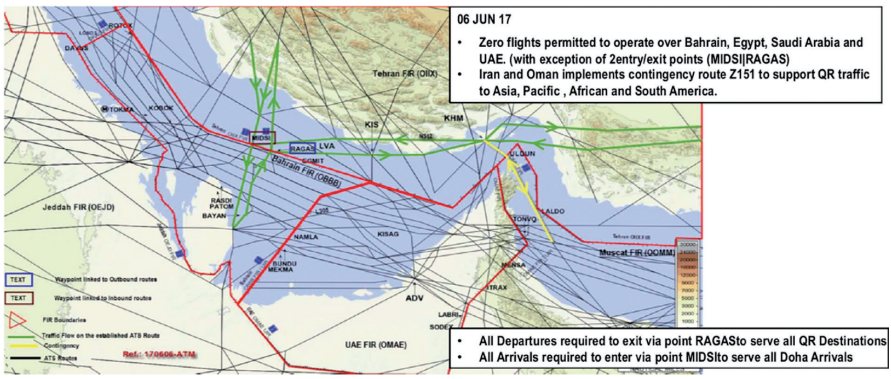


Figure 4.9: Two ATS routes available as at 6 June 2017[824]

823 Source: Appeal Relating to the Jurisdiction of the ICAO Council under Article 84 of the Convention on Civil Aviation (Bahrain, Egypt, Saudi Arabia and United Arab Emirates v. Qatar) I.C.J. Counter-Memorial of the State of Qatar – Vol I (filed Feb. 25, 2019) Figure 1. Originally sourced from Qatar Civil Aviation Authority.

824 Source: ibid Figure 2. Originally sourced from Qatar Airways.

That Qatar is contained within Bahrain's FIR reflects the fact that both States were protectorates of Britain until their independence in 1971 and that the FIR was established prior to this date, based on where the radars had been installed.[825] The FIR arrangement was maintained following independence for reasons of safety and efficiency, with the alternative requiring multiple ATC handover/takeovers in a short space of time.[826] Since the 2017 blockade, Qatar has requested an amendment to the RANP for the establishment of its own FIR.[827] The amendment process involves addressing any objections to the proposal from affected provider and user States and international organisations,[828] which could be a lengthy process: in the past amending RANPs has sometimes taken up to thirty years.[829]

4.2.2.2 Relevance of the case to this research

This research is concerned only with the prohibition imposed on: (1) Qatari-registered aircraft;[830] and, (2) in international airspace, that is, in the States' FIRs in the areas outside their national airspace. The purpose of this research is to examine what, under international civil aviation law, if anything, prevents a State from discriminating against foreign aircraft in international airspace within its FIR based on the State of registration of the aircraft.

825 Alex Macheras, 'Here for the long haul: How Qatar is overcoming the aviation blockade' (The New Arab, 8 January 2018), available at <english.alaraby.co.uk/english/comment/2018/1/8/how-qatar-is-overcoming-the-aviation-blockade> accessed 12 April 2019.

826 ibid.

827 CAA (Qatar), Request of the State of Qatar for Consideration by the ICAO Council under Article 54(n) of the Chicago Convention: Supplement to our letter reference no. 2017/15995, dated 15 June 2017, 10: '…the State of Qatar urges the ICAO Council to take immediate steps for the establishment of a distinct Qatari Flight Information Region (FIR), encompassing the area over the exclusive economic zone and contiguous with the Tehran FIR'.

828 ICAO Council, Procedure for the Amendment of Regional Air Navigation Plans (18 June 2014) 5.5.

829 Correspondence from Mike Boyd (Technical Officer, ICAO) to the author, dated 3 December 2019, in which he also explains that, in previous situations, a vertical separation of the airspace has provided a workable solution. This model is currently applied between Rwanda and Tanzania where the Kigali FIR extends to 24,500 feet in altitude and then above that, the Dar es Salaam FIR covers Rwandan territory.

830 Non-Qatari-registered aircraft operating to and from Qatar were not physically prohibited from operating in the States' airspace but were required to obtain prior approval from the CAAs of the States to overfly their airspace (Counter-Memorial of the State of Qatar (n 820) 2.6-2.10).

There are three preliminary matters to address in order to establish the context in which this matter is being examined.

Firstly, as of early January 2021, the restrictions are no longer in place.[831] Up to this point, Qatari-registered aircraft were forbidden to operate in the national airspace of the four States, but access to international airspace within the FIRs had been reinstated earlier. In fact, this access was reinstated relatively quickly, approximately a week after the first NOTAMs were issued, when, following closed negotiations at the ICAO Council, Bahrain, Egypt and the UAE issued revised NOTAMs which limited the prohibitions only to their national airspace.[832] As such, this research does not apply to the current scenario but is instead an examination of the situation during that limited period of time. In this way, this research is relevant in the case of discrimination arising in future rather than to this specific case.

Secondly, as mentioned in Section 4.1, this research begins from the position that a State is not permitted to prohibit the overflight of aircraft registered in a particular State from international airspace within its FIR because doing so is a violation of the customary international law principle of freedom of overflight, as recognised under UNCLOS. Akbar al-Baker, the CEO of Qatar Airways, alluded to this in an interview with Al Jazeera in the days following the sanctions, stating that, 'Bahrain and the UAE have illegally blocked that airspace. The airspace that they have blocked does not belong to them. It belongs to the international community'.[833] The almost immediate reinstatement of access to the international airspace within the States' FIRs suggests that this was also the advice of the ICAO Council. The following sections will instead take a step back from the interaction between the law of the sea and international civil aviation law to examine whether the application of the principle of non-discrimination under international civil aviation law is implicit in international airspace, as the framework of law that is the foundation for FIRs and which subsequently forms the basis for the governance of the responsibility of coastal States in international airspace.

831 'ICAO Welcomes Resolution of Gulf Airspace Restrictions' (ICAO, 7 January 2021) <www.icao.int/Newsroom/Pages/ICAO-welcomes-resolution-of-Gulf-airspace-restrictions.aspx> accessed 21 January 2021.

832 Counter-Memorial of the State of Qatar (n 820) 2.16; 'UAE and Bahrain Grant Qatar Airways New Routes' (Reuters, 9 August 2017), available at <www.aljazeera.com/news/2017/08/uae-bahrain-grant-qatar-airwaysroutes170808161602538.html> accessed 26 August 2019.

833 'Akbar al-Baker on the Gulf Crisis and Qatar Airways' (Al Jazeera, 14 June 2017), available at <www.aljazeera.com/programmes/talktojazeera/2017/06/akbar-al-baker-qatar-airways170613020759574.html > accessed 27 August 2018.

Thirdly and finally, the States implementing the ban relied on non-aviation laws[834] to support its legality, claiming that it is a response to Qatar allegedly breaching the so-called Riyadh Agreements,[835] by sponsoring terrorism.[836] They argued that the sanctions were 'lawful counter-measures authorized by general international law'.[837] Further to this, the States brought the matter before the ICJ, contesting the ICAO Council's rejection of the States' objections to the Council's competence to hear the matter, the objections in part resting on the argument that the subject matter is not

834 Although the basis of these prohibitions is based on the customary international law principle, recognised in Article 1 of the Chicago Convention, of sovereignty over national airspace.

835 These agreements are between the States making up the Gulf Cooperation Council (GCC) and contain measures addressing anti-terrorism and non-interference. The First Riyadh Agreement was signed on 23 November 2013 by Kuwait, Qatar and Saudi Arabia and, a day later, by Bahrain, Oman and the UAE. The second Riyadh Agreement, known as the Mechanism Implementing the Riyadh Agreement, was signed by the GCC States on 17 April 2014, in an attempt to 'strengthen the obligations in the First Riyadh Agreement'. Finally, the Supplementary Riyadh Agreement was concluded on 16 November 2014 by all GCC States but Oman, and was 'intended to reinforce the obligations in the earlier Agreements' (Opening Statement of the Agent of the Kingdom of Bahrain, Public sitting held on Monday 2 December 2019 – Verbatim Record in the case concerning, Appeal Relating to the Jurisdiction of the ICAO Council under Article 84 of the Convention on Civil Aviation (Bahrain, Egypt, Saudi Arabia and United Arab Emirates v. Qatar) I.C.J. Joint Application Instituting Proceedings (filed Jul. 4, 2018), pp. 20-21 paras. 5, 6 9 and 10).

836 For example, the States allege that, '[i]n April 2017, Qatar paid a sum of hundreds of millions of US dollars to terrorist groups, on the pretext that it was a ransom' (Opening Statement of the Agent of the Kingdom of Bahrain (n 835) p. 21 para. 11). See also, 'Update 2 – Saudi Arabia says Airspace Ban on Qatari Flights to Protect Citizens' (Reuters, 13 June 2017) available at <www.reuters.com/article/gulf-qatar-flightsidUSL8N1JA1FK> accessed 7 May 2019, which describes the States as accusing Qatar of 'fomenting regional unrest, supporting terrorism and getting too close to Iran', adding: 'all of which Doha denies'.

837 Appeal Relating to the Jurisdiction of the ICAO Council under Article 84 of the Convention on Civil Aviation (Bahrain, Egypt, Saudi Arabia and United Arab Emirates v. Qatar) I.C.J. Joint Application Instituting Proceedings (filed Jul. 4, 2018) p. 8 para. 9. See Section 2.6.6.

within the Council's competence.[838] The ICJ rejected the States' arguments, leaving the matter open to be decided by the ICAO Council.[839] A discussion of these arguments is outside the scope of this research, as is the legality of the bans in general under international civil aviation law, which largely focuses on the prohibition of the aircraft from national airspace. Other authors have addressed these points though, considering the Chicago Convention, the Transit Agreement and the relevant ASAs, and seem to conclude that there is little support for the ban.[840]

838 The States brought the matter before the ICJ in two separate cases, which were considered jointly by the Court. One related to the ICAO Council's jurisdiction to hear the matter under Article 84 of the Chicago Convention and the other to its jurisdiction under Article II, Section 2 of the Transit Agreement: Appeal Relating to the Jurisdiction of the ICAO Council under Article 84 of the Convention on Civil Aviation (Bahrain, Egypt, Saudi Arabia and United Arab Emirates v. Qatar) I.C.J. Joint Application Instituting Proceedings (filed Jul. 4, 2018); Appeal Relating to the Jurisdiction of the ICAO Council under Article II, Section 2, of the 1944 International Air Services Transit Agreement (Bahrain, Egypt and United Arab Emirates v. Qatar) I.C.J. Joint Application Instituting Proceedings (filed Jul. 4, 2018). Saudi Arabia is not a State party to the Transit Agreement and so was not involved in the second proceedings. The States brought the matter before the ICJ also on two other grounds: (1) that the Council 'erred in fact and in law' in its rejection of the States' objection to the Council's competence which was based on the argument that Qatar had not met the precondition of sufficiently attempting to resolve the dispute through prior negotiations; (2) that the Council's decision in rejecting the States' objections to its competence on the two grounds mentioned should be set aside because the procedure adopted by the Council in reaching its decision was 'manifestly flawed and in violation of fundamental principles of due process and the right to be heard' (Appeal Relating to the Jurisdiction of the ICAO Council under Article 84 of the Convention on Civil Aviation (Bahrain, Egypt, Saudi Arabia and United Arab Emirates v. Qatar) I.C.J. Joint Application Instituting Proceedings (filed Jul. 4, 2018); Appeal Relating to the Jurisdiction of the ICAO Council under Article II, Section 2, of the 1944 International Air Services Transit Agreement (Bahrain, Egypt and United Arab Emirates v. Qatar) I.C.J. Joint Application Instituting Proceedings (filed Jul. 4, 2018) p. 14 paras. 32 and 30, respectively; Appeal Relating to the Jurisdiction of the ICAO Council under Article 84 of the Convention on Civil Aviation (Bahrain, Egypt, Saudi Arabia and United Arab Emirates v. Qatar) I.C.J. Joint Application Instituting Proceedings (filed Jul. 4, 2018) p. 14 paras. 31 and 29, respectively).

839 Appeal Relating to the Jurisdiction of the ICAO Council under Article 84 of the Convention on Civil Aviation (Bahrain, Egypt, Saudi Arabia and United Arab Emirates v. Qatar), Judgment, I.C.J. 2020 (Jul. 14); Appeal Relating to the Jurisdiction of the ICAO Council under Article II, Section 2, of the 1944 International Air Services Transit Agreement (Bahrain, Egypt and United Arab Emirates v. Qatar), Judgment, I.C.J. 2020 (Jul. 14).

840 See, for example, SJ Sreejith, 'Legality of the Gulf Ban on Qatari Flights: State Sovereignty at Crossroads' (2018) 43(2) A&SL 191; Elena Carpanelli, 'To Overfly or Not to Overfly…? Autonomous Sanction in International Civil aviation Amidst the Recent 'Gulf Crisis' – Part II' (Blog of Groningen Journal of International Law, 25 September 2017), available at <grojil.org/2017/09/25/to-overfly-or-not-to-overfly-autonomous-sanctions-in-international-civil-aviation-amidst-the-recent-gulf-crisis-pt2/> accessed 2 June 2018.

4.2.2.3 Qatar's arguments for the discrimination as a violation of international law

Further to its primary argument of the ban amounting to a violation of the principle of freedom of overflight, Qatar also invoked the principle of non-discrimination in its Memorial to the ICAO Council. Qatar stated on this point, that the respondent States had,

> '… pursuant to a regional air navigation agreement and as a matter of international trust, the responsibility of providing air traffic services within their FIRs and that function must be performed without discrimination'.[841]

In national airspace, the Chicago Convention expressly prohibits States from discriminating against aircraft on the basis of their State of registry in aspects of air navigation.[842] However, whether the same principle of non-discrimination applies to the provision of ATS in international airspace is less clear. At the same time, nothing in the Chicago Convention or its annexes provides a State with the right to discriminate against aircraft in international airspace within its FIR based on the State of registry of that aircraft.

In its Counter-Memorial to the ICJ, Qatar presented the matter as a breach of Article 12 of the Chicago Convention:

> 'Qatar challenges the aviation prohibitions as violations of multiple provisions of the Chicago Convention and its Annexes, including… Article 12 by discriminatory treatment over the high seas within Joint Appellants' FIRs'.[843]

Specifically, Qatar relies on the Article 12 stipulation that '[o]ver the high seas the rules in force shall be those established under this Convention' and that pursuant to this, the Standards in Annex 2 apply without exception.[844] As discussed in Section 2.7.2.2.1, the rules referred to in Article 12 go beyond the Rules of the Air in Annex 2 and also include Annexes 6, 10, 11 and 12. Annex 2 establishes that the responsibility for providing ATC over the high seas will be arranged under regional air navigation agreements and then the provision of those services is governed by the SARPs in Annex 11. The Foreword to Annex 11 sets out the relationship between the two annexes in stating that,

> '[i]ts [Annex 11's] purpose, together with Annex 2, is to ensure that flying on international air routes is carried out under uniform conditions designed to improve the safety and efficiency of air operation'.[845]

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841 Memorial Presented by the State of Qatar (n 817) e) 3 and 4.
842 See Section 4.2.4.1.
843 Counter-Memorial of the State of Qatar (n 820) 2.22.
844 Memorial Presented by the State of Qatar (n 817) e) 4.
845 Chicago Convention, Annex 11, (ix).

Beyond this aspect of Annex 2's relationship with Annex 11 it is difficult to see further relevance of Annex 2, or Article 12, in relation to Qatar's claim. The analysis from here will therefore focus on the SARPs in Annex 11 and their context within the Chicago Convention legal framework more broadly in examining Qatar's statement, quoted above in this section, that 'the responsibility of providing air traffic services… must be performed without discrimination'.

The fact that the States restricted the prohibition to international airspace (and national airspace) *within their FIRs* leads to the conclusion, that there was an attempt by them to justify the prohibition on the basis of their responsibility for the FIRs.

4.2.3 The scope of responsibility over international airspace in an FIR under Annex 11

ATS is provided in international airspace in accordance with Annex 11 and is consistent with any differences to Standards that have been filed by the State responsible for the FIR, where it is essential to the efficient discharge of responsibilities under the RANP for those differences to apply also in international airspace.[846]

Standard 2.2 of Annex 11 sets out the objectives of ATS, which are as follows:

> 'to prevent collisions between aircraft; to prevent collisions between aircraft on the manoeuvring area and obstructions on that area; to expedite and maintain an orderly flow of air traffic; to provide advice and information useful for the safe and efficient conduct of flights; to notify appropriate organizations regarding aircraft in need of search and rescue aid, and assist such organizations as required'.[847]

These objectives are solely related to safety and efficiency. As discussed in Section 4.2.1.2, safety and efficiency are correspondingly the only two considerations involved in the delimitation of ATS airspace. Consistent with this, ICAO has clarified that the extent of responsibility in international airspace in an FIR is likewise restricted to the safety and regularity of operations in the airspace:

> '…any assignment of responsibility over the high seas shall be limited to technical and operational functions pertaining to the safety and regularity of the air traffic operating in the airspace concerned'.[848]

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846 See Section 2.7.2.2.1.3.

847 Chicago Convention, Annex 11, 2.2 a)-d).

848 ICAO Assembly Resolution A38-12 (n 802) Appendix G, 5.

The limitation of the assignment does not mean that an ATS authority does not have the right to restrict the overflight of aircraft in international airspace. In fact, on the contrary, in order to adequately deliver ATS services, restrictions may be required. Schubert indicates the conditions under which such restrictions will be consistent with international civil aviation law:

> 'For the purpose of maintaining a safe and an orderly flow of air traffic, a State providing ATS in a part of its FIR that extends over the high seas would be entitled to declare some restrictions (e.g. increased separation) on a specific trajectory, including one feeding a particular State. However:
> – The provider State must be able to demonstrate that the restrictions serve a safety or operational efficiency purpose and are dictated by objective reasons;
> – The restriction must apply to all aircraft operating along that trajectory, regardless of their nationality'.[849]

The ICAO PANS-ATM, referred to in Section 3.3.3.2, which complement Annex 11, provide technical and operational procedures including for instances in which ATS authorities may be required to restrict overflight.[850] The provisions in this document recognise the necessary discretion that the ATS authority has in carrying out the services, but in each case, the discretion is limited to safety and efficiency considerations. Two examples are provided here to illustrate this point, the first in relation to capacity management and the second regarding separation methods. The former is addressed under Chapter 3 which provides that,

> 'to ensure that safety is not compromised whenever the traffic demand in an airspace or at an aerodrome is forecast to exceed the available ATC capacity, measures shall be implemented to regulate traffic volumes accordingly'.[851]

These measures include rerouting and rescheduling,[852] in relation to which the ATC authority is directed to implement 'larger separations than the specified minima… whenever exceptional circumstances such as unlawful interference or navigational difficulties call for extra precautions', with the stipulation that '[t]his should be done with due regard to all relevant factors so as to avoid impeding the flow of air traffic by the application of excessive separations'.[853] On this basis, an aircraft or a number of aircraft registered

849 Correspondence from Francis Schubert (Chief Corporate Officer and Deputy CEO, Skyguide, Adjunct Professor, Institute of Air & Space Law, McGill University) to the author, dated 19 February 2020.

850 *ICAO Procedures for Air Navigation Services* (n 784) 16.1. This document also complements Annex 2.

851 ibid 3.1.3.3.

852 ibid 3.2.3.1 b) and c).

853 ibid 5.2.1.3.

in a particular State may temporarily be restricted due to specific circumstances that require the restriction on the basis of safety and efficiency considerations, but where this occurs the sole consideration must be safety and/or efficiency and the restriction must be imposed only to the extent necessary to ensure those objectives.

Thus, the measures taken by a State in its FIR in the course of carrying out the provision of ATS, including in the exercise of ATC discretion, are only justified if they are designed to address the safety and efficiency of international civil aviation. Furthermore, considering that the sole function of a coastal State in international airspace within an FIR for which that State has accepted responsibility is the provision of ATS, there is no other legal basis that can serve as a justification for a measure that does not fulfil at least one of these two purposes.

The narrow scope of responsibility for an FIR set out under Annex 11 therefore support's Qatar's statement that 'the responsibility of providing air traffic services… must be performed without discrimination', at least insofar as the discrimination is not the result of technical or operational functions with a safety and/or efficiency purpose. With this as a foundation, this research aims to go further and examine whether it can be argued that there is, in addition, an implied principle of non-discrimination applicable to the provision of ATS in international airspace, on the basis of the role the principle plays in international civil aviation law more broadly.

4.2.4 The principle of non-discrimination under international civil aviation law

4.2.4.1 The development and application of the principle of non-discrimination in international civil aviation law

At the Chicago Conference, the UK emphasised the importance of 'the great principle of non-discrimination' to the development of international civil aviation law.[854] The UK delegate said of the principle:

> 'Everybody has always paid lip service to it and many indeed have paid more, but nobody can pretend that in the past that concept has been of universal application. What a great advance it would be if we could all agree, one with the other, that there shall be no discrimination in our own practices…'.[855]

854 Proceedings to the Chicago Convention: Vol I, Pt II 'Verbatim Minutes of Joint Plenary Meeting of Committees I, III, and IV, November 22' (Document 372) 451.

855 ibid. At the outbreak of WWII just 33 States had ratified the Paris Convention (Proceedings to the Chicago Convention: Vol I, Pt II 'Delegation Proposals: United Kingdom Proposal on International Air Transport' (Document 48) 567).

The principle of non-discrimination, with its basis in the principle of the sovereign equality of States,[856] has since been referred to as a 'cornerstone of international civil aviation'[857] but, as will be considered here below, the principle has been adopted only in certain aspects. The term 'discrimination' is only explicitly referred to once in the Chicago Convention, in Article 44(g), as one of the objectives of ICAO. Specifically, Article 44 provides that ICAO, in developing principles for air navigation and in fostering the development of air transport, aims to achieve a number of objectives, including 'avoid[ing] discrimination between contracting States'.[858] More broadly speaking, the principle of non-discrimination has recently been at the forefront of discussions in international civil aviation law in respect to ICAO's adoption of its Carbon Offsetting and Reduction Scheme for International Civil Aviation (CORSIA) in 2016. Alongside the principle of non-discrimination,[859] ICAO has accepted the principle of common but differentiated responsibilities and respective capabilities (CBDRRC) in the implementation of these market-based measures (MBMs),[860] with the process and ultimate decision involving debate on the consistency between non-discrimination and CBDRRC.[861]

Further to being recognised amongst ICAO's objectives, the principle of non-discrimination is implemented in the Chicago Convention a number of times: Article 7, prohibiting States from granting exclusive cabotage rights to a State or airline of a particular State; Article 9 in relation to prohibited and restricted areas in national airspace, as discussed in Section 2.6.2; Article

856 Vincent Correia, 'The Legacy of the 1919 Paris Convention Relating to the Regulation of Aerial Navigation' in Pablo Mendes de Leon and Niall Buissing (eds), *Behind and Beyond the Chicago Convention: The Evolution of Aerial Sovereignty* (Wolters Kluwer 2019) 19. See Section 3.3.4.4.

857 Alejandro Piera, Greenhouse Gas Emissions from International Aviation: Legal and Policy Changes (Eleven International Publishing 2015) 51; Benoit Mayer, *The International Law on Climate Change* (CUP 2018) 106.

858 Chicago Convention, Article 44(g).

859 ICAO Assembly Resolution A39-2, Consolidated Statement of Continuing ICAO Policies and Practices Related to environmental Protection – Climate Change (27 September – 6 October 2016) 2 and 9.

860 ibid 9.

861 Alejandro Piera, 'Reconciling CBDR with Non-Discrimination: A Fundamental Requirement for ICAO's Global MBM Success' (Green Air, 23 September 2014), available at <www.greenaironline.com/news.php?viewStory=1983> accessed 3 November 2019: 'CBDR must be reconciled with non-discrimination in a manner compatible with the international aviation environment. This is necessary to enhance political acceptance and ensure that the system is widely implemented'. On the other hand, Leclerc argues that the scope of non-discrimination in international civil aviation law is limited to the legal regime of air navigation and, as MBMs come under the distinct legal regime of air transport, there is in fact no conflict between the principle of non-discrimination and the principle of CBDRRC (Thomas Leclerc, Les mesures correctives des émissions aériennes de gaz à effet de serre. Contribution à l'étude des interactions entre les ordres juridiques en droit international public (PhD thesis, E.M. Meijers Instituut, Leiden University, 2017) 235-69).

11, setting out the applicability of air regulations for entry and departure of national airspace and while operating and navigating therein; Article 12 regarding the application of the Rules of the Air; Article 15 governing the use of airports and air navigation facilities, and charges for such use; and, Article 35(b), in relation to a State's right to regulate the carriage of articles above its territory. The principle of 'national treatment', as a subset of non-discrimination,[862] is furthermore reflected in Article 9(a), for scheduled services, Article 11, Article 15 and Article 35(b), requiring that the law must be applied equally to national aircraft and the aircraft registered in other States.[863] Article 9(a) though does not apply the national treatment principle to non-scheduled flights i.e. the article leaves States with the right to treat aircraft registered in other States engaged in non-scheduled flights differently to their national aircraft likewise engaged. It has also been argued that the national treatment principle applies under Article 9(b)[864] but, in contrast, this article states only that it is 'applicable without distinction of nationality to aircraft of all *other* States' (emphasis added), thereby allowing for aircraft of the State whose territory is involved to be treated differently.[865]

Finally, the Preamble to the Convention recognises that the States agree that, 'international air transport services may be established on the basis of equality of opportunity'. Equality of opportunity, as the reference to international air *transport* indicates, involves the economic aspects of international civil aviation, addressing, among other things, market access and barriers to entry. Wassenbergh describes the principle as implying 'an equal freedom for every State to build up a civil aviation of its own, i.e. not a *right* to a civil aviation' (original emphasis).[866] Equality of opportunity is not the same as non-discrimination but the principle of non-discrimination contributes to achieving it, for example in the context of the allocation of

862 National treatment is a general notion of legal theory in that it is found across different fields of international law. It is particularly prominent in the law and policy of the World Trade Organization (WTO) where the non-discrimination obligation is understood to consist of two main elements: the national treatment obligation and the favoured nations (MFN) treatment obligation (Peter Van den Bossche and Werner Zdouc, *The Law and Policy of the World Trade Organization* (4th edn, CUP 2017) 342). National treatment is also prominent in foreign investment treaty law, where it is 'designed to complete non-discrimination goals derived from the MFN treatment' (Raúl Emilio Vinuesa, 'National Treatment, Principle' (Max Planck Encyclopedia of International Law 2011) 55).

863 YILC (1970) Vol. II, Part 2, 215.

864 Pablo Mendes de Leon, Vincent Correia, Uwe Erling and Thomas Leclerc, 'Possible Legal Arrangements to Implement a Global Market Based Measure for International Aviation Emissions' (Study for the Directorate General Climate Action of the EU Commission, 2 December 2015) 11.

865 Bin Cheng, *Law of International Air Transport* (Stevens & Sons 1962) 124.

866 Henry Abraham Wassenbergh, *Post-War International Civil Aviation Policy and the Law of the Air* (Springer 1957) 137.

airport slots pursuant to Article 15 of the Chicago Convention.[867] The role of the principle of non-discrimination in contributing to the economic aspects of international civil aviation will be discussed in Section 4.2.4.3.

4.2.4.2 Interaction between sovereignty and the principle of non-discrimination in national airspace

The specific references to the non-discrimination principle in the Chicago Convention only apply in the case that the State of registry has negotiated access for its aircraft to the territory of a particular State. This is a direct consequence of the 'complete and exclusive sovereignty' that sits at the heart of international civil aviation law. Non-discrimination in national airspace applies subject to the sovereign power of a State to decide who it admits to its territory and the terms on which it does so. Once this access has been granted however, the principle of non-discrimination under each of the articles means that a State cannot provide different treatment to aircraft navigating or operating within its territory under these articles. This resulting situation, of the simultaneous centrality of non-discrimination to international civil aviation law and the requirement that States separately negotiate the terms of access to each other's national airspace, can be understood in the context of the distinction between air transport and air navigation, recalling Section 2.3.2. This is the approach taken by Leclerc, who argues that:

> '…a close reading of the Chicago Convention provides the observation that the explicit presence of the principle of non-discrimination is limited to the provisions relating to the law of navigation. This does not mean that the application of the principle is definitively restricted to the field of air navigation, but at present it seems largely premature to assert the widespread application of this principle to international air transport'.[868]

As addressed in Sections 2.3.2 and 2.3.3, international air transport is based on the exchange of traffic rights, which is still predominantly undertaken through bilateral ASAs under which the conditions attached to the exercise

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867 ICAO WP/64, *Fair and Equal Opportunities to Access the International Air Transport Market and the Problem of Airports' Congestion*, Presented by Bahrain, Egypt, Iraq, Jordan, Lebanon, Libyan Arab Jamahiriya, Morocco, Oman, Qatar, Saudi Arabia, Sudan, Syria, Tunisia, United Arab Emirates, Yemen and the Observer from Palestine at the 5th Air Transport Conference, Montreal (17 March 2003) 3.4, 4.1 and 5.1 a); Peter PC Haanappel, *The Law and Policy of Air Space and Outer Space: A Comparative Approach* (Kluwer Law International 2003) 45.

868 Leclerc (n 861) 243, translated from the original: '…une lecture attentive de la convention de Chicago permet d'observer que la présence explicite du principe de non-discrimination se trouve limitée aux dispositions relatives au droit de la navigation aérienne. Cela ne signifie pas que l'application du principe soit définitivement restreinte au champ de la navigation aérienne, mais il apparait aujourd'hui largement prématuré d'affirmer l'application étendue de ce principe en matière de transport aérien international'.

of those rights are also negotiated.[869] While States are increasingly adopting more liberal provisions in their ASAs, and negotiating them on a multilateral or regional basis,[870] the system establishes a framework that necessarily results in discrimination.

The interaction of the non-discrimination principle under Article 15 with Article 68 of the Chicago Convention provides an example of the application of the non-discrimination principle subject to the exception of the conditions on which the exercise of the rights has been granted. While the non-discrimination principle in Article 15 applies to all aircraft, the exception to the principle in Article 68 applies only to scheduled services, a matter that will be addressed below. Article 15 of the Chicago Convention applies the non-discrimination principle to the use of airports and air navigation service facilities, and charges for such use. Regarding the former, the article requires that 'every airport in a contracting State which is open to public use by its national aircraft shall likewise… be open under uniform conditions to the aircraft of all the other contracting States'.[871] The exception under Article 68 at the same time reserves States the right to 'designate the route to be followed within its territory by *any international service* and the airports which *such service* may use' (emphasis added). So, although a State cannot provide use of its airports in a discriminatory manner to those aircraft that have access to the airport, the State has the right to provide access to the airport to only certain services and in this respect may distinguish between aircraft based on their State of registry. This is consistent with route schedules in ASAs sometimes specifying routes not only in terms of the city-to-city points, but also the airports within those cities. For example, Bermuda II provided that '[n]onstop services by a United States

869 See Section 2.3.3 (n 195), for the exchange of traffic rights in relation to non-scheduled services. As mentioned, States usually regulate the operation of these services unilaterally under their national legislation, but some include charter services in their ASAs, leading inevitably to different conditions for services between States.

870 See Section 2.3.3 (n 190) on the EU single aviation market and MALIAT, and Section 2.3.3.2 for a brief discussion on the liberalisation of ASA provisions.

871 For example, the procedures for the approach and departure sequence of aircraft clearly exclude the option to discriminate between aircraft in these decisions, making clear that in the case of arrival the sequence is to be determined so as to 'facilitate arrival of the maximum number of aircraft with the least average delay' and in the case of departure, aircraft 'shall normally be cleared in the order in which they are ready for take-off', but that this can be adjusted to, as with arrivals, maximise the number of aircraft that can take off with the least delay (*ICAO Procedures for Air Navigation Services* (n 784) 6.5.6.1.1 and 7.9.1).

As a side note here, given that this article specifically applies to airports in a State's territory, an airport constructed in a State's EEZ is not within its scope. If, or perhaps when, the construction of international civil airports in EEZs and even on the high seas becomes commonplace, it will be interesting to see how international civil aviation law adapts to meet these lacunas.

airline or airlines between Atlanta and London and between Houston and London will serve London-Gatwick Airport'.[872]

In addressing route designation, Article 68, as cited above, allows a State to designate the routes both for aircraft engaged in services to or from its territory and for those exercising the first freedom. As a result, the exercise of the first freedom, i.e. overflight, is also subject to the conditions under which it was negotiated in terms of the route to be followed, which may differ depending on the State of registration. In essence, there is no non-discrimination principle applying to overflight insofar as the route to be followed is concerned. In discussing Article 68, Bin Cheng stated that the regulation of routes is 'one of the most potent instruments in the bargaining of *transit and traffic rights* in bilateral air services agreements' (emphasis added).[873] The implications of this in the case of Canada and Russia designating North Pole routes over their territories was seen in Section 2.3.3. The Wall Street Journal, reporting at the time, addressed the need for States to negotiate access to the routes independently with the two States:

> '…airlines must seek Russian permission to fly over northern Siberia from Canada, and some have done so on a month-by-month basis. Even after July 1, permission can be denied at anytime [sic]. Canada, with an open-skies policy, would be unlikely to deny access'. And, '…snags in getting airlines access to them [the routes] could still develop. Bilateral overflight agreements with Russia will have to be negotiated on a country-by-country basis. Even Canada needs an overflight agreement with Russia. However, State Department officials in Washington say they're optimistic that once talks begin, they will be easy to conclude'.[874]

Whilst States might be able to use route designation as a bargaining chip in negotiating an ASA, those States that have multilaterally exchanged the right of overflight over their territories under the Transit Agreement equally have the right to subsequently designate the route to be followed by aircraft engaged in scheduled services in their airspace.[875] The inclusion of this provision in the Transit Agreement, which is a restatement, in part, of Article 68 of the Chicago Convention, was pursuant to a proposal from the

872 United Kingdom of Great Britain and Northern Ireland and United States of America, Agreement Concerning Air Services (with Annexes, Exchange of Letters and Agreed Minute dated 22 June 1977) (Bermuda, 23 Jul. 1977) 1079 UNTS 21 (No 16509), Annex 1. More liberal ASAs do not determine routes so precisely, instead only naming cities or, in the case of the particularly liberal ASA between Australia and New Zealand, only that it applies to 'points' in each country (Agreement between the Government of Australia and the Government of New Zealand Relating to Air Services Auckland, Australia-New Zealand, signed 8 August 2002, [2003] ATS 18 (entered into force 25 August 2003), Annex s 1).

873 Cheng, *The Law of International Air Transport* (n 865) 124.

874 Joel Baglole, 'Canada, Russia's Decision to Permit Polar Routes Promises to Cut Hours' (The Wall Street Journal, 8 June 2000), available at <www.wsj.com/articles/SB960415817821812909> accessed 4 March 2018.

875 Transit Agreement, Section 4(1).

UK during the Chicago Conference.[876] The case is different for overflight for non-scheduled flights for which, under Article 5 of the Chicago Convention, States may require aircraft to follow prescribed routes over their territories only 'for reasons of safety' when the aircraft wishes to operate over 'regions which are inaccessible or without adequate air navigation facilities'.[877] Despite the exchange of overflight rights for non-scheduled services under Article 5 of the Chicago Convention, not all States act consistently with the provision: the ASA between Canada and Russia provides that '[a]uthorization of overflights for air carriers of either Contracting Party operating charter services shall be considered on the basis of comity and reciprocity'.[878]

These provisions indicate that sovereignty over national airspace governs when, and in some respects how, the aircraft of certain States are permitted to access the airspace and facilities of that State. The principle of non-discrimination then applies further to these considerations.

4.2.4.3 Purpose of the non-discrimination principle in national airspace

The safety objectives of international civil aviation law have been emphasised in Section 2.3.2, which also addressed the central role of SARPs in facilitating the safety of civil aviation through the harmonisation of regulation. The non-discrimination principle in the Chicago Convention contributes to the safety of international civil aviation law by requiring that all aircraft are subject to the same rules – for example, under Articles 11 and 12 – and by ensuring that all aircraft have access to air navigation facilities – Article 15 – a significant part of the role of which is to ensure the safety of aircraft.

The non-discrimination principle also has an economic purpose. For example, under Article 7 of the Chicago Convention, a State cannot grant cabotage rights to another State on an 'exclusive basis'. The non-discrimination principle in this article does not prohibit a State from granting cabotage rights to one State and not to another, but specifically from granting the right to the *exclusion* of other States. Considering that cabotage stems from the 'mercantilist purpose of protecting domestic commerce from foreign competition', Havel and Sanchez have described the non-discrimination clause under Article 7 as 'a restraint on the degree of sovereignty the Convention's State parties can trade away'.[879] For a weaker aviation State, they explain, this prevents it from being pressured by stronger States in the exchange of

876 Proceedings to the Chicago Convention: Vol I, Pt II 'Minutes of Meeting of Subcommittees 1 and 2 of Committee I, December 2' (Document 465) 653.

877 Chicago Convention, Article 5. As discussed in Section 2.3.3.

878 Air Services Agreement Between the Government of Canada and the Government of the Russian Federation, 18 December 2000, Annex II, A) 5).

879 Brian Havel and Gabriel Sanchez, *The Principles and Practice of International Aviation Law* (CUP 2014) 50-51.

these rights, to the detriment of the domestic market of the former State and, for a stronger State, the article alleviates it from the concern that other strong aviation States are granted cabotage rights in a State to its exclusion.[880]

The non-discrimination principle as an expression of protectionism, as it applies in Article 7, is in contrast to the role that the US delegation envisioned the principle playing in the Chicago Convention. The US delegate at the Chicago Conference, arguing for a highly liberalised multilateral exchange of privileges under the Chicago convention, as discussed in Section 2.2.2.3, compared the need to avoid discrimination in the operation of international air services over national airspace to the significance of access to the high seas for economic purposes:

> 'You will recall that for a time nations forgot the famous Roman observation, I think it was the Emperor Gaius, that the law was lord of the sea, and endeavored to establish great closed zones from which they attempted to exclude all intercourse except through their own ships, or to place any other nation permitted to enter these zones at a discriminatory disadvantage… . These zones became fertile breeding grounds for great commercial monopolies, which sought to levy tribute on the commerce of the world or to exclude or discriminate against the trade of other nations... . The dangers of closed air, where it lies across established or logical routes of commerce, are not dissimilar from the dangers which arose through the closing of sea lanes.[881]

Leaving aside Article 7, the non-discrimination principle in other articles under the Convention serves to restrict the sovereignty of a State by preventing it from imposing regulations to the detriment of the air services of a particular State or States. This economic focus of Article 9(a) for instance, is demonstrated by the fact that national treatment applies specifically to scheduled services, with the commercial potential of non-scheduled services considered to be minimal at the time of the drafting of the Convention.[882] Other instances of non-discrimination in the Convention that apply to air navigation matters but which have economic consequences, in protecting the air services of other States by allowing them to exercise their transit and traffic rights unimpeded by discriminatory regulations of the State whose territory is involved, are found under Articles 9(b), 11, 12 and 15.

Equally in international airspace, there are both safety and economic arguments to be made for the application of the law in a non-discriminatory manner. Qatar's claims in relation to the prohibitions imposed by the Gulf States reflect this:

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880 ibid 51.

881 Proceedings to the Chicago Convention: Vol I, Pt I 'Verbatim Minutes of Second Plenary Session, November 2' (Document 42) 56-57.

882 Rigas Doganis, *Flying Off Course: Airline Economics and* Marketing (4th edn, Routledge 2010) 38.

> 'The blocked FIRs forced the Qatar Airways to use limited airways, leading to danger of congestion. The safety, security, regularity and economy of civil aviation have been seriously compromised'.[883]

There is no doubting the economic importance of access to international airspace to airlines operating international air services. Without access to international airspace, the non-discrimination principle as it applies in the Chicago Convention would be of little value to many airlines which rely on services that operate across the oceans. McDougal and Burke wrote, in reference to the period in the late 1950s and early 1960s:

> '[t]he oceans have perhaps been most efficiently employed as an avenue of transport…' and, 'travel in space above many parts of the ocean has quickly become highly intense, especially in the movement of people'.[884]

Since this time, international civil aviation has grown exponentially, as has the corresponding economic importance of the use of international airspace.

The non-discrimination principle has been adopted in the Chicago Convention for economic and safety purposes. These objectives are equally important in international airspace in the sense that international civil aviation relies on a global network where the segments of operation over international airspace are indivisible from those over national airspace for the purpose of delivering services that span the two.

4.2.4.4 Non-discrimination principle in international airspace on the basis of its application in national airspace

Based on the above, is it possible to interpret an overarching implied principle of non-discrimination applying to navigation in international airspace, including the right to access the airspace? One way of approaching this would be to consider the contrast between access to national airspace and international airspace, in terms of the fact that no State has sovereignty over the latter and that the baseline principle is freedom of overflight, thereby resulting in a situation where the preliminary negotiations over access to airspace, and conditions attached to such rights, are irrelevant and therefore that the principle of non-discrimination applies without preconditions. The logic of this argument is flawed, however.

Firstly, whilst it is a central aspect, the non-discrimination principle is not a blanket principle in international civil aviation law. The principle of non-discrimination in national airspace does not apply to the right to *access* national airspace, or operate routes to and from it, which are governed by the States externally to the Chicago Convention. Therefore, there seems

883 Memorial Presented by the State of Qatar (n 817) c).

884 Myres S McDougal and William T Burke, *The Public Order of the Oceans: A Contemporary International Law of the Sea* (New Haven Press 1987) 732-33.

little basis to subsequently interpret that the non-discrimination principle can be implied as applying in international airspace to prohibit States from banning the aircraft of other States from accessing their FIRs. The Convention also reserves States the right to determine the routes that any air service may operate on, i.e. the non-discrimination principle does not apply to the designation of routes in national airspace. Further to this, the non-discrimination principle in Article 9(a) in relation to prohibited areas applies only to scheduled services as opposed to aircraft in general. It would, as a result, be illogical then to rely on the non-discrimination principle in the Chicago Convention to argue that a State administering an FIR is restricted from discriminating in these aspects against an aircraft navigating in international airspace within its responsibility.

Furthermore, the principle of non-discrimination in national airspace has both safety and economic purposes. These objectives are equally important in international airspace, but the principle of non-discrimination is not necessarily needed to achieve these aims. State sovereignty over national airspace entails the corresponding legal competence of the State in respect to that airspace, including jurisdiction over the operation and navigation of aircraft within its territory to the extent that the laws and regulations are consistent with international law. It is for this reason that the non-discrimination principle is expressly required in the Chicago Convention in respect to national airspace. In contrast, no State has sovereignty over international airspace and the jurisdiction of a coastal State over international airspace within its FIR is found solely in its responsibilities based in Annex 11 as developed and agreed upon under the relevant RANP.

As a result, it is both unhelpful and misguided to consider whether, on the basis of the principle of non-discrimination applying to national airspace, there may be an implied principle of non-discrimination in Annex 11 of the Chicago Convention that prohibits discrimination in international airspace. This does not mean though that a State has the right to discriminate against aircraft in international airspace within its FIR. Rather, as was demonstrated above in Section 4.2.3, the narrow scope of FIR responsibilities under Annex 11 provides a State with no legitimate grounds on which to discriminate against aircraft on the basis of the State of registry of the aircraft. This position is supported by the discussion in the following section, which addresses the principle of good faith in interpreting the responsibilities set forth in Annex 11.

4.2.4.5 Interpretation of Annex 11 consistent with non-discrimination in international airspace

As mentioned in Section 4.2.4.1, one of the objectives of ICAO is 'to develop the principles and techniques of international air navigation… so as to… avoid discrimination between contracting States'.[885] ICAO's normative

885 With specific reference to Article 44(g).

powers within the development of principles and techniques for international air navigation include 'air traffic control practices'[886] for which it is responsible for adopting SARPs. Annex 11 is adopted pursuant to this article.[887]

The provision of ATS in a discriminatory manner based on the State of registration of an aircraft, with no legitimate basis in safety and efficiency objectives, not only goes beyond the provision of the services that the State accepting responsibility is tasked with delivering, but it goes against the non-discriminatory context of the legal framework that the SARPs fall within. To read into the provisions any right to discriminate would be a violation of the principle of *pacta sunt servanda*,[888] which applies to every treaty, including its annexes. [889] The main element of *pacta sunt servanda* is good faith[890] and in accordance with good faith, '[p]arties are required to the best of their abilities to observe the treaty stipulations in their spirit…'.[891] The ICJ, in its *Nuclear Tests Case*, addressed the concept of good faith:

> 'One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international co-operation, in particular in an age when this co-operation in many fields is becoming increasingly essential. Just as the very rule of *pacta sunt servanda* in the law of treaties is based on good faith, so also is the binding character of an international obligation assumed by unilateral declaration. Thus interested States may take cognizance of unilateral declarations and place confidence in them, and are entitled to require that the obligation thus created be respected'.[892]

The Chicago Convention and its annexes, Annex 11 being most relevant to this research, together with the RANPs that are developed pursuant to the Convention, set out the legal framework governing the establishment of FIRs and the responsibilities for the provision of ATS within them. Although the framework does not reference the principle of non-discrimination in setting out its rules for ATS over international airspace, the principle underpins ICAO's law-making capacity and in establishing the responsibilities for the provision of ATS, ICAO has accordingly so narrowly defined the role so at to leave no right for discrimination based on the State of registry of an aircraft.

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886 Chicago Convention, Article 37(c).

887 Annex 11 used to be titled, 'Air Traffic Control', which is now considered an element of ATS, as described in Section 4.2.1.1.

888 See also Section 3.3.2.1.

889 Mark Eugen Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Brill Nijhoff 2009) 365.

890 ibid.

891 ibid 367.

892 *Nuclear Tests Case (Australia v. France)*, Judgment, I.C.J. Rep. 1974 (20 Dec.), p. 253, p. 268 para. 46.

4.2.4.6 *Overflight fees in international airspace*

Although outside the scope of this research – which focuses on prohibition or restrictions on the operation of an aircraft in international airspace – the charging of air navigation fees for services provided in international airspace cannot be considered alongside the provision of those services when it comes to non-discrimination.

In its Policies on Charges for Air Navigation Services, ICAO has stated that,

> '[t]he system of charges must not discriminate between foreign users and those having the nationality of the State or States responsible for providing the air navigation services and engaged in similar international operations, or between two or more foreign users'.[893]

For charges for services used by aircraft when not over the provider State, however, including in international airspace, ICAO is less prescriptive. Recognising that the collection of such fees in this case 'poses difficult and complex problems', ICAO provides that 'it is for the States to find the appropriate kind of machinery on a bilateral or regional basis' to facilitate the rates and method of collection.[894] In this respect, the provision of ATS is distinguishable from the imposition of the fees for those services, in the degree to which it is regulated by ICAO and also, it appears, in the right to discriminate.

4.2.5 In summary: Non-discrimination in international airspace

International airspace is divided into FIRs for the purpose of ATS provision. A State that accepts responsibility for an FIR over international airspace, pursuant to a RANP, provides those services consistently with the SARPs under Annex 11. A State's acceptance of responsibility for an FIR confers no sovereignty on that State over the airspace within the FIR and, whilst FIR boundaries over national territory often follow State borders, the intention is that they are delimited based only on technical and operational considerations and it is not uncommon for the FIR of one State to encompass the territory of another. In the case of Qatar, its territory is entirely encompassed by Bahrain's FIR and so when Bahrain, together with other Gulf States, prohibited Qatari-registered aircraft from the FIRs, including in international airspace, the consequences were particularly severe for the operation of flights to and from Qatar.

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893 ICAO Doc 9082, *ICAO's Policies on Charges for Airports and Air Navigation Services* (9th edn, 2012) 6 iv).

894 ibid 11.

Prohibiting an aircraft from international airspace on the basis of the State of registration of the aircraft is indisputably a violation of freedom of overflight. Leaving this freedom aside, Section 4.2 set out to determine whether there is a prohibition on doing so specifically under international civil aviation law, as the body of law under which FIRs and the responsibility for ATS within them is established. Whilst the principle of non-discrimination applies in the Chicago Convention, the application is to specific aspects, to the exclusion of others, rather than being a cornerstone principle. Furthermore, whilst the safety and economic goals that non-discrimination helps to meet in national airspace are important in international airspace, the principle is not necessary to meet these goals in international airspace on the basis that, cumulatively, no State exercises sovereignty over the airspace and that the terms of Annex 11 provide the State responsible for an FIR with a limited scope of jurisdiction in its provision of ATS. State responsibility for the provision of ATS services, as set out in Annex 11 and the corresponding PANS-ATM are narrow – purely for safety and efficiency – and all decisions must be justifiable on one of these two bases. Supporting this is the consideration that the SARPs in Annex 11 of the Chicago Convention are legislated by ICAO and one of its main objectives in developing its principles for international air navigation is to avoid discrimination between States. To interpret the SARPs as permitting discrimination in the absence of an express permission to do so would be a breach of good faith.

4.3 Air defence identification zones

4.3.1 Recent developments shed light on inconsistent approach to ADIZ

In November 2013 China announced[895] that it had established an ADIZ, reaching more than 300 miles off its coast.[896] The announcement was met with opposition from a number of States, including the US, Japan, South

895 Announcement of the Aircraft Identification Rules for the East China Sea Air Defense Identification Zone of the People's Republic of China', issued by the Ministry of National Defense, China (23 November 2013).

896 Roncevert Almond, 'Clearing the Air above the East China Sea: The Primary Elements of Aircraft Defense Identification Zones' (2016) 7 NSJ 126, 129.

Korea, Australia, Canada and the UK.[897] Despite this, China's actions within its ADIZ are 'largely in line with international norms regarding ADIZs'.[898]

Some of the most vehement opposition to China's ADIZ stemmed from consequences beyond the restrictions that the ADIZ places on aviation.[899] The airspace within China's ADIZ controversially includes disputed territory: the Senkaku/Diaoyu/Tiaoyutai Islands, which are claimed by Japan, China and Taiwan;[900] and the Ieodo/Suyan Reef, claimed by South Korea and China.[901] This issue contributes to demonstrating the political nature of ADIZs, but the territorial disputes themselves are outside the scope of this research.

The dimensions of the ADIZ are also problematic in that the zone overlaps with the ADIZs of Japan, South Korea and Taiwan.[902] It is not exceptional in this respect though: the extension of Japan's ADIZ in 2010 resulted in overlap with Taiwan's,[903] while the extension of South Korea's in 2015

897 See respectively, 'Statement on the East China Sea Air Defense Identification Zone' (John Kerry, Secretary of State – Press Statement, 23 November 2013), available at <2009-2017.state.gov/secretary/remarks/2013/11/218013.htm> accessed 3 November 2019; United States of America Congressional Record, Proceedings and Debates of the 113th Congress – Second Session (Volume 160-Part 8, June 20-July 15 2014) 11803; 'China's Air Defense Identification Zone: Impact on Regional Security' (Centre for Strategic and International Studies, 26 November 2013), available at <www.csis.org/analysis/chinas-air-defense-identification-zone-impact-regional-security> accessed 3 November 2019; 'China's Announcement of an Air-Defence Identification Over the East China Sea' (Minister for Foreign Affairs, Julie Bishop, Press Release, 26 November 2013), available at <www.foreignminister.gov.au/minister/julie-bishop/media-release/chinas-announcement-air-defence-identification-zone-over-east-china-sea> accessed 3 November 2019; 'Baird Concerned over China's Announcement of Air Defence Identification Zone' (Foreign Affairs, Trade and Development Canada, News Release, 2 December 2013), available at <www.canada.ca/en/news/archive/2013/12/baird-concerned-china-announcement-air-defence-identification-zone.html> accessed 3 November 2019; HL Deb 16 January 2014, Vol 751, col 444.

898 Ian E Rinehart and Bart Elias, 'China's Air Defense Identification Zone (ADIZ)' (Congressional Research Service Report, 31 January 2015) 10. Notwithstanding the significant variation in practice in the establishment of ADIZ, as will be demonstrated throughout Section 4.3.

899 'China Establishes 'Air Defence Zone' over East China Sea' (BBC, 23 November 2013), available at <www.bbc.com/news/world-asia-25062525> accessed 5 May 2018.

900 Almond (n 896) 129; Susan V Lawrence et al, 'US-China Relations' (Congressional Research Service Report, 3 September 2019) 29.

901 Christopher K Lamont, 'Conflict in the Skies: The Law of Air Defence Identification Zones' (2014) 39(3) A&SL 187, 188.

902 Lawrence et al (n 900) 29.

903 'Japan Extends Air Defence Identification Zone into Taiwan Space' (BBC Monitoring Asia Pacific, 26 June 2010), text of report in English by Shih Hsiu-chuan on Taiwanese newspaper Taipei Times website on 26 June 2010 written, available at <www.taipeitimes.com/News/front/archives/2010/06/26/2003476438> accessed 3 November 2019; Christopher K Lamont, 'Conflict in the Skies: The Law of Air Defence Identification Zones' (2014) 39(3) A&SL 187, 191.

led to overlap with Japan's.[904] Necessarily, overlapping ADIZs also involve ADIZs crossing FIR boundaries. In addition to the overlapping ADIZs of China, Japan, South Korea and Taiwan, ICAO has referred to an unnamed ADIZ established in 2018, which crossed over into two adjacent FIRs,[905] and Canada's ADIZ crosses very slightly into the FIRs of Greenland and the US, as does Thailand's ADIZ with FIRs under the responsibility of Malaysia and Vietnam.[906] The consequences of ADIZs that result in an overlap in responsibilities or authority in airspace will be addressed in relation to the safety implications of ADIZs in Section 4.3.6.1.

The element of China's ADIZ that caused particular concern amongst States[907] when it was announced, was that the State would be prepared to use force in the case that its ADIZ requirements are not complied with. The announcement specifically stated on this matter, that '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'.[908] As will be discussed in Section 4.3.5, a coastal State has very limited powers to enforce non-compliance of its ADIZ within international airspace. Despite China's claim, however, it has so far not resorted to taking defensive measures against non-complying aircraft, although whether this is a calculated decision is unclear.[909]

A key criticism of the US of China's ADIZ is the fact that it applies to all aircraft in the zone, including those that remain in international airspace.[910] As will be demonstrated in Section 4.3.3.1, there is no legal basis to suggest that the territorial connection claimed by the US legitimises ADIZ. Furthermore, China is once again not unusual in requiring all aircraft to

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904 Chang-Hoon Shin, 'South Korea's Inevitable Expansion of its ADIZ' (Asian Maritime Transparency Initiative 8 December 2014), available at <amti.csis.org/south-koreas-inevitable-expansion-of-its-adiz/> accessed 19 August 2019.

905 ICAO WP/295, *Establishment of Military Requirements and Restrictions on International Civil Aviation*, Presented by IATA and IFALPA at the 13th Air Navigation Conference, Montreal (28 September 2018) 2.3.

906 Jinyuan Su, 'The Practice of States on Air Defense Identification Zones: Geographical Scope, Object of Identification, and Identification Measures' (2019) 18 Chinese JIL 811, 829.

907 See for example, 'Declaration by the High Representative Catherine Ashton on behalf of the European Union on the establishment by China of an 'East China Sea Air Defence Identification Zone'' (European Union, Press Release, 28 November 2013), available at <www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/EN/foraff/139752.pdf> accessed 13 February 2016.

908 Announcement issued by the Ministry of National Defense, China (n 895).

909 Edmund J Burke and Astrid Stuth Cevallos, 'In Line or Out of Order? China's Approach to ADIZ in Theory and Practice' (RAND Project AIR FORCE Strategy and Doctrine Program, 2017) 1: 'whether the lack of enforcement is an operational choice or the result of insufficient capabilities is an open question'.

910 Announcement issued by the Ministry of National Defense, China (n 895). The US voiced its concern immediately upon China's announcement: 'We don't support efforts by any State to apply its ADIZ procedures to foreign aircraft not intending to enter its national airspace' (Statement on the East China Sea ADIZ – US Secretary of State (n 897)).

comply with its ADIZ requirements; Su's comparative research on national regulations in ADIZs found that many States that have imposed ADIZs in international airspace have required aircraft transiting the airspace without entering national airspace to comply with the regulations.[911]

The above comments on the characteristics of China's ADIZ are not statements on the legality of its ADIZ. The comments here are instead included to: (1) address the inconsistencies in the approach States take to ADIZs, which is relevant to the discussion in Section 4.3.3.4 on the lack of clear State practice for the purpose of establishing customary international law, and; (2) to bring attention to the political motivations surrounding ADIZs. These political incentives underlie the basis on which States justify and distinguish ADIZ practices. In the words of the South China Morning Post, in part quoting Alan Tan, 'politics, nationalism and sovereignty 'lurk in the background, and that reality simply has to be acknowledged''.[912] While in reality the political and legal aspects of ADIZs are inextricable, this research aims to set to one side the political considerations to undertake an – insofar as possible – objective legal analysis of the legality of the zones under international law.

4.3.2 Defining ADIZ

In 1950,[913] the US was the first State to claim an ADIZ,[914] which extended, and still does, up to 400 miles off its coast in parts.[915] Canada established its ADIZ soon after, in 1951,[916] while in the same year the US established Japan's during its administration of the country following World War II,

911 Su (n 906) 820-822. Su identified the following States as falling within this category: Argentina, Australia, Bangladesh, Canada, China, Taiwan, India, Iran, South Korea, Myanmar, Pakistan and Thailand.

912 Toh Ee Ming, 'Explained: What's Behind Indonesia's Move to Reclaim Control of Riau Islands Airspace from Singapore?' (South China Morning Post, 22 August 2019), available at <www.scmp.com/week-asia/explained/article/3023918/whats-behind-indonesias-move-reclaim-control-riau-islands> accessed 30 September 2019.

913 Elizabeth Cuadra, 'Air Defense Identification Zones: Creeping Jurisdiction in the Airspace' (1978) 18 Va J Int'l L 485, 492; Pratik Jakhar, 'Analyisis: Why is Airspace in East Asia becoming Contentious?' (BBC Monitoring, 31 July 2019), available at <monitoring.bbc.co.uk/product/c200zen7> accessed 14 November 2019.

914 'US ADIZ' will be used throughout this chapter as a collective term for the four ADIZ that surround US territory: Contiguous US ADIZ, Alaska ADIZ, Guam ADIZ, and Hawaii ADIZ.

915 Rinehart and Elias (n 898) 5. The breadth of ADIZ apparently developed to mirror the contiguous zone for vessels. The distance of 400 miles represented the approximate distance an aircraft could travel over the duration of one hour in the 1950s when ADIZ were first implemented. At the time, the concept of a contiguous zone was beginning to emerge – although was far from being customary international law – and the breadth of it was in general the distance a vessel could travel in one hour (Ivan L Head, 'ADIZ, International Law, and Contiguous Airspace' (1964) 3 Alta L Rev 182, 188).

916 Pai Zheng, 'Justifications and Limits of ADIZs under Public International Law' (2015) 14(2) Issues in Aviation Law and Policy 183, 197.

and South Korea's during the Korean War.[917] Towards the end of the 1970s around twelve States had declared ADIZs[918] and this number was maintained through to the end of the 20th century.[919] There has been a renewed focus on ADIZs since the events of September 11[920] and to-date approximately thirty States[921] have imposed an ADIZ off their coasts at some point.[922] Some States, such as Sri Lanka and Turkey, have restricted their ADIZs to territorial sea.[923] These ADIZs, along with those that are restricted to national airspace over land,[924] are not relevant to this research, which is interested in ADIZs in international airspace. A number of States have also recently extended their ADIZs. In addition to the extensions of Japan and South Korea's ADIZs, as mentioned in Section 4.3.1, Canada extended its ADIZ in 2018 to encompass Ellesmere Island.[925]

ICAO defines an ADIZ as a '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

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917 Kimberly Hsu, 'Air Defense Identification Zone Intended to Provide China Greater Flexibility to Enforce East China Sea Claims' (US-China Economic and Security Review Commission, 14 January 2014) 3.

918 Cuadra (n 913) 495 and 507.

919 Michel Bourbonniere and Louis Haeck, 'Military Aircraft and International Law: Chicago Opus 3' (2001) 66(3) J Air L&C 885, 954, Note 255 (citing, Barry E Carter and Phillip R Trimble, *International Law* (3rd edn, Wolters Kluwer 1999) 1028).

920 Natalie Klein, *Maritime Security and the Law of the Sea* (OUP 2011) 60; Pratik Jakhar, 'Analyisis: Why is Airspace in East Asia becoming Contentious?' (BBC Monitoring, 31 July 2019), available at <monitoring.bbc.co.uk/product/c200zen7> accessed 14 November 2019, quoting a Russian newspaper *Izvestiya* from 25 July 2019: 'The trend of 'self-appointed seizure' of international airspace and the expansion of identification zones has become apparent in the past decade'.

921 These include Australia, Argentina, Bangladesh, Canada, China, Cuba, France, Iceland, India, Indonesia, Iran, Italy, Japan, Myanmar, Norway, Oman, Pakistan, Panama, the Philippines, Russia, South Korea, Sri Lanka, Sweden, Taiwan, Thailand, Turkey, United Kingdom, United States and Vietnam, as to which see, variously, Su (n 906) 814-819; Cuadra (n 913) 495 and 507; J Ashley Roach, 'Air Defence Identification Zones' (Max Planck Encyclopedia of Public International Law 2017) 6 and 14; Zoltán Papp, 'Air Defense Identification Zone (ADIZ) in the light of Public International Law' (2015) 2 Pécs Journal of International and European Law 28, 33.

922 ADIZ may be temporary, such as when they are imposed for security purposes for a certain event. See for example, the two ADIZ established off the coast of Brisbane, Australia, during the 2018 Commonwealth Games: Australia Aeronautical Information Service – AIP Supplement (SUP), XXI Commonwealth Games, Gold Coast, April 2-18 2018, 7.2; Airservices Australia, 'Commonwealth Games Airspace Procedure Guide', available at <www.airservicesaustralia.com/wp-content/uploads/17-0067-BRO-Commonwealth-Games-airspace-new.pdf> accessed 23 May 2019.

923 Su (n 906) 814.

924 ibid 814-15. Such as Poland, Finland, Libya, Peru and Brazil.

925 Canadian Air Defence Identification Zone Now Aligned with Canada's Sovereign Airspace' (Canada National Defence, News Release, 24 May 2018), available at <www.canada.ca/en/department-national-defence/news/2018/05/canadian-air-defence-identification-zone-now-aligned-with-canadas-sovereign-airspace.html> accessed 26 June 2018.

provision of air traffic services'.[926] Little else is provided by ICAO on ADIZs but for requirements that States identify them in their aeronautical charts and aeronautical information publications (AIPs).[927] The broad definition provided by ICAO is indicative of the variation in practices associated with the imposition and administration of the zones. The purpose of ADIZs is generally to enhance national security,[928] but they are also arguably used in an attempt to bolster territorial claims through the exertion of control over an area of international airspace.[929] Considering ICAO's role is to ensure the safety of international civil aviation it is perhaps not surprising that it has not adopted further SARPs in the area. ADIZs do however, have safety implications for international civil aviation, as will be addressed in Section 4.3.6.1.

As an indication of the types of procedures that apply in an ADIZ, China and the US both require that in order to operate an aircraft within the zone a pilot must file a flight plan,[930] and maintain a two-way radio connection[931] and an operating radar transponder.[932] The definition of a flight plan according to ICAO is a '[s]pecified information *provided to air traffic services units*, relative to an intended flight or portion of a flight of an aircraft'

926 Chicago Convention, Annex 4 (11th edn, July 2009) 1-1 and Annex 15 (16th edn, July 2018) 1-2. The inclusion of the definition is a recognition of the potential safety implications for international civil aviation as opposed to being a statement on their legality (Papp (n 921) 37).

927 Chicago Convention, Annex 4, 7.9.3.1.1 l), 16.9.5.2, 17.9.5.2, 18.8.4.2, and Annex 15, 6.2.1 a) 6). An aeronautical information publication (AIP) is, 'a publication issued by or with the authority of a State and containing aeronautical information of a lasting character essential to air navigation' (Chicago Convention, Annex 15, 1-2).

928 ICAO WP/295, *Establishment of Military Requirements and Restrictions on International Civil Aviation*, Presented by IATA and IFALPA at the 13th Air Navigation Conference, Montreal (28 September 2018) 1.3: 'IATA and IFALPA… recognise that, often the establishment of an ADIZ is driven by military or political sensitivities attributed to national security'; See also, in relation to the US and Canada ADIZs, Head (n 915) 183.

929 See for example in the East Asia maritime region, Rinehart and Elias (n 898) 12: 'The ECS ADIZ did not involve aggressive actions by the PLA in the initial phase, but some observers view the declaration of the ADIZ as another of the PRC's incremental law-enforcement and military actions, especially since 2005, to advance its national interests'; 'Military Experts Explain China's Air Defense Identification Zone' (People's Daily Online, 24 November 2013), available at <en.people.cn/90786/8464466.html> accessed 15 March 2019: 'Military expert Yin Zhuo said that China's establishment of the zone is based on the need to tackle a more complex security environment, and the move is a justified act to maintain the sovereignty and security of the country's territory and airspace'; Lamont (n 901) 191 and 200.

930 14 C.F.R. § 99.11 (2015); Announcement issued by the Ministry of National Defense, China (n 895).

931 14 C.F.R. § 99.9; Announcement issued by the Ministry of National Defense, China (n 895).

932 14 C.F.R. § 99.13, referring to a 'coded radar beacon transponder'; Announcement issued by the Ministry of National Defense, China (n 895): 'if equipped with the secondary radar transponder'.

(emphasis added),[933] however in the case of China's ADIZ, the flight plan is to be submitted to the CAA *or* the Ministry of Foreign Affairs.[934] No further direction is provided in the announcement as to which body applies to which flight, but it is logical to assume that flight plans for civil aircraft are required to be submitted to the CAA while the Ministry of Foreign Affairs applies in the case of State aircraft. The US regulations state that the flight plan must be filed with 'an appropriate aeronautical facility'.[935] It defines this body as 'a communications facility where flight plans or position reports *are normally filed* during flight operations', suggesting that it refers to the ATC unit applicable in the airspace.[936]

Pilots must also comply with the instructions of the relevant authorities in each State's ADIZ. In China's ADIZ that authority is the Ministry of National Defence.[937] In the case of the US, these 'special security instructions', as they are termed, are issued by 'the Administrator'.[938] The US ADIZ, together with the Canadian ADIZ, is jointly administered by the ATC authorities and militaries of each State, through a body known as the North American Aerospace Defense Command (NORAD).[939] In both cases, failure to comply with these instructions, or failure to comply with the ADIZ requirements in general, may result in action being taken against the aircraft in international airspace. As mentioned in Section 4.3.1, China's ADIZ announcement stated that its armed forces would be prepared to adopt defence measures, and the US AIP on interception of aircraft states that,

> '[p]ilots of aircraft that do not adhere to the procedures [which include ADIZ procedures][940]… may be intercepted, and/or detained and interviewed by federal, state, or local law enforcement or other government personnel'.[941]

These requirements, and their deviation from standard ATC procedures, will be discussed further in Section 4.3.6.2 but at this point, they serve to demonstrate that ADIZs impose additional obligations on pilots operating in the airspace, and that these obligations can be issued by defence, who may also enforce them if they are not complied with.

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933 Chicago Convention, Annex 2 (10th edn, 2005) 1-6.
934 Announcement issued by the Ministry of National Defense, China (n 895).
935 14 C.F.R. § 99.11.
936 14 C.F.R. § 99.3.
937 Announcement issued by the Ministry of National Defense, China (n 895).
938 14 C.F.R. § 99.7.
939 Rinehart and Elias (n 898) 3. There is no ADIZ between the US and Canada (US FAA, 'Entering, Exiting and Flying in United States Airspace', available at <www.faa.gov/air_traffic/publications/us_restrictions/airspace/> accessed 14 February 2020).
940 'ENR 1.12 National Security and Interception Procedures – National Security', 1.4, available at <www.faa.gov/air_traffic/publications/atpubs/aip_html/part2_enr_section_1.12.html#Para_1_8_4> accessed 2 July 2019.
941 ibid 1.2.5.

4.3.3 Examination of international law used to support establishment of ADIZ

Both in terms of State response to ADIZs and academic argument, Cuadra notes that '[t]here is considerable weight of opinion on both sides of the question whether ADIZ's [sic] are legitimate under international law', whilst concluding that '[i]nternational law provides no support for such coastal-State jurisdiction'.[942] Conversely, States that impose ADIZs not surprisingly argue that there is no prohibition on doing so under international law.[943] Both of these arguments may be correct and the first does not necessarily mean that ADIZs are prohibited, while the second does not necessarily legitimise them, as will be explained in Section 4.3.4. In light of this complexity, Haanappel describes ADIZs as being 'on the margin of unilateral illegality'.[944] Consistent with the diversity in the procedures adopted in ADIZs, States use various arguments to justify the zones.

4.3.3.1 A State's laws and regulations relating to admission to territory

As mentioned in Section 4.3.1, the US only applies its ADIZ requirements to aircraft – both State and civil – that are entering or departing its national airspace. That is, the ADIZ regulations do not apply to aircraft operating in the ADIZ without the intention of entering US national airspace, or without having departed US national airspace. This is stipulated in the Code of Federal Regulations that sets the rules for the US ADIZ (14 C.F.R. § 99), which states that it 'prescribes rules for operating all aircraft… *into, within, or out of the United States* through an Air Defense Identification Zone' (emphasis added).[945]

Secretary of State John Kerry, in his statement on the denouncement of the US of China's ADIZ, clarified the State's position: '[t]he United States does not apply its ADIZ procedures to foreign aircraft not intending to enter U.S. national airspace'.[946] Furthermore, the Commander's Handbook on the Law of Naval Operations confirms that the legal basis of the US ADIZ regulations rests on this territorial connection:

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942 Cuadra (n 913) 505 and 507.

943 See, for example, the US: The Commander's Handbook on the Law of Naval Operations (Department of the Navy – Department of Homeland Security and US Coast Guard, August 2017) 2.7.2.3: 'International law does not prohibit States from establishing air defense identification zones (ADIZs) in the international airspace adjacent to their territorial airspace'.

944 Peter Haanappel, 'Aerial Sovereignty: From Paris 1919, Through Chicago 1944, to Today' in Pablo Mendes de Leon and Niall Buissing (eds), *Behind and Beyond the Chicago Convention: The Evolution of Aerial Sovereignty* (Wolters Kluwer 2019) 28.

945 14 C.F.R. § 99.1(a). At the same time, Su questions the wording of §§ 99.9(a), 99.11(a) and 99.15(a) (2015), which seem to require all aircraft in the ADIZ, regardless of any connection of their operation to US national airspace, to maintain a two-way radio connection, to have submitted a flight plan and to submit position reports.

946 Statement on the East China Sea ADIZ – US Secretary of State (n 897).

> 'The legal basis for ADIZ regulations is the right of a State to establish reasonable conditions of entry into its territory. Accordingly, an aircraft approaching national airspace can be required to identify itself while in international airspace as a condition of entry approval…'.[947]

This includes State aircraft, on which the US government has explicitly stated its position:

> '… in accordance with the norm of airborne innocent passage [sic],[948] the United States does not recognize the right of a coastal nation to apply its ADIZ procedures to foreign state aircraft not intending to enter national airspace nor does the United States apply its ADIZ procedures to foreign state aircraft not intending to enter United States airspace'.[949]

Based on this, the Commander's Handbook directs US military aircraft not intending to enter another State's national airspace to 'not identify themselves or otherwise comply with ADIZ procedures established by other States, unless the United States has specifically agreed to do so.'[950]

In practice though, the US does not necessarily adhere to the exclusion of State aircraft from its ADIZ procedures. For instance, in March 2020 Russian fighter jets were intercepted and 'escorted' through the US ADIZ off the coast of Alaska for the duration of their four-hour flight.[951] This response is difficult to reconcile with the US's stated exemption of foreign State aircraft from its ADIZ procedures. It indicates that while the US does not expressly impose its ADIZ procedures on State aircraft that do not intend to enter national airspace, practice – at least on this occasion – suggests that it acts towards such aircraft in the same manner as if it would in the case that the ADIZ procedures did apply to them and had been breached. Having said this, and as will be discussed in Section 4.3.5, there is no express prohibition under international law on intercepting State aircraft in international airspace, or rules regulating the action.

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947 The Commander's Handbook (n 943) 2.7.2.3.

948 The use of this term is peculiar given that States have freedom of overflight outside national airspace. Under international law there is no 'airborne innocent passage' and innocent passage applies only to vessels and only in territorial seas.

949 United States of America Congressional Record, Proceedings and Debates of the 113th Congress – Second Session (Volume 160-Part 8, June 20-July 15 2014) 11803.

950 The Commander's Handbook (n 943) 2.7.2.3; Peter A Dutton, 'Caelum Liberum: Air Defense Identification Zones Outside Sovereign Airspace' (2009) 103 Am J Int'l L 691, 700.

951 'US and Canadian Jets Intercepted Russian Reconnaissance Planes near Alaska' (Business Insider, 10 March 2020), available at <www.businessinsider.com/us-canadian-jets-intercept-russian-reconnaissance-planes-near-alaska-2020-3?international=true&r=US&IR=T> accessed 11 March 2020.

The US[952] and some academics[953] have referred to the Chicago Convention as providing a legal basis for ADIZs in the case that a State only applies the procedures to aircraft bound for, or exiting, national airspace.

For civil aircraft, Article 11, 'Applicability of air regulations', reads,

> '…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,… shall be complied with by such aircraft upon entering or departing from… the territory of that State'.

The US legitimises the application of ADIZs to State aircraft through Article 3(c) of the Chicago Convention.[954] Although State aircraft are excluded from the scope of the Chicago Convention, Article 3(c) requires 'authorization by special agreement' to have been obtained for a State aircraft to operate a flight over the territory of another State.[955] The argument proceeds that the coastal State may impose the ADIZ requirements through the terms of the diplomatic arrangements that have been made between the States pursuant to Article 3(c) of the Chicago Convention. Given that States decide on the terms of these agreements bilaterally, this section will instead focus on the scope of application of Article 11.

Kaiser[956] and Papp[957] argue that, while Article 11 is to be interpreted literally, it does not extend to providing a legal basis for ADIZs. The grounds on which Kaiser and Papp reach this conclusion are different, however.

Kaiser argues that that Article 11 'expressly permits national identification procedures which bind aircraft… in international airspace, provided they are entering or departing national airspace' but that ADIZs go beyond this and cannot therefore be justified under this article.[958] He points out, in support of this line of reasoning, that it is standard practice in international civil aviation to require identification and reporting of aircraft at certain locations and that there is no need to establish a zone to do so.[959]

Papp argues that Article 11 does not provide 'explicit legal grounds for regulating acts/events occurring abroad' and that it therefore cannot serve as an express rule permitting ADIZs. Papp's initial statement is accurate,

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952 Stefan A Kaiser, 'The Legal Status of Air Defense Identification Zones: Tensions over the East China Sea' (2014) 63 ZWL 527, 538.

953 Roach (n 921) para 7: The author argues that a State does not have the right to require aircraft to comply with ADIZ requirements if they are not intending to enter national airspace; Head (n 915) 189-90.

954 Kaiser, 'The Legal Status of ADIZ' (n 952) 538.

955 See Section 2.4 for discussion on Article 3(c).

956 Kaiser, 'The Legal Status of ADIZ' (n 952) 529.

957 Zoltán Papp, 'Air Defense Identification Zone (ADIZ) in the light of Public International Law' (2015) 2 Pécs Journal of International and European Law 28, 38-39.

958 Kaiser, 'The Legal Status of ADIZ' (n 952) 530 and 542.

959 ibid 530. See also, Su (n 906) 824: 'Under international law, a State need not establish an ADIZ so as to require identification of entering aircraft'.

however the conclusion is *non sequitur*. Article 11, when considered in the context of the Chicago Convention as a whole, implicitly includes laws and regulations that make entry conditional upon obligations fulfilled abroad. For example, Annex 9 of the Chicago Convention, 'Facilitation', which mentions Article 11, among others, as having 'special pertinence' to the SARPs it contains, includes provisions recognising that States may establish prior obligations for flights to be permitted to enter their territory.[960]

The above arguments cannot be used by States with an ADIZ that also applies to aircraft not intending to enter national airspace. There are two main, more general, arguments that are relied upon to support a State's right to establish an ADIZ in this case. First, that coastal States have the right to restrict the military activities of other States in their EEZs and secondly, the right of self-defence, as to which see the discussion in the following sections.

4.3.3.2 Restricting military activities in the EEZ

China is one of approximately twenty States asserting what it claims as its right as a coastal State, to regulate or prohibit military activities in its EEZ,[961] a position which objection to has resulted in serious consequences.[962] In practice, the conflict that has arisen in relation to China's ADIZ has centred on the restrictions it places on foreign military aircraft.[963] China's establishment of its ADIZ is possibly in pursuance of this interpretation of coastal State power in the EEZ to restrict the operation of foreign military aircraft in the zone. Burke and Cevallos present this view more bluntly, stating that the Chinese government saw the establishment of its ADIZ as 'a means to legitimize and promote this interpretation and limit US and other foreign and military surveillance activities above the EEZ'.[964] In 2018, Bangladesh,

960 Chicago Convention, Annex 9 (15th edn, October 2017) Foreword (ix) and 2.33, respectively.

961 States include Bangladesh, Brazil, Burma, Cape Verde, Guyana, India, Indonesia, Iran, Kenya, Malaysia, the Maldives, Mauritius, Pakistan, Peru, Portugal, North Korea, and Uruguay. See, variously: Stuart Kaye, Freedom of Navigation in the Indo-Pacific Region (Papers in Australian Maritime Affairs No. 22, Sea Power Centre Australia, 2008) 8-12; Euan Graham, 'Southeast Asia's Neglected Navigational and Overflight Challenges' (The Interpreter, 27 February 2017), available at <www.lowyinstitute.org/the-interpreter/southeast-asia-s-neglected-navigational-and-overflight-challenges> accessed 13 August 2018; Dutton (n 950) 696-97; Raul Pedrozo, 'Military Activities in the Exclusive Economic Zone: East Asia Focus' (2014) 90 Int'l L Stud 514, 521-22.

962 In 2001 a mid-air collision between an F-8-II fighter aircraft from China and an EP-3E Aries aircraft from the US, led to the death of the pilot of the Chinese aircraft. China intercepted the US aircraft on the basis that it was an intelligence gathering flight in its EEZ, which China views as being a violation of international law. For a discussion of this case see, Stuart Kaye, 'Freedom of Navigation, Surveillance and Security: Legal Issues Surrounding the Collection of Intelligence from Beyond the Littoral' (2005) 24 Aust YBIL 93, 102-4.

963 Burke and Cevallos (n 909) 8.

964 ibid 11.

another State declaring the right of a coastal State to control foreign military activity in its EEZ, established an ADIZ that coincided with the dimensions of its EEZ. In commenting on this feature, the ICAO Secretariat reiterated that the EEZ has no effect on airspace.[965]

The interpretation of coastal State powers to include the right to regulate military activities in the EEZ is problematic as a justification for ADIZs on a practical level for two reasons. Firstly, it fails to legitimise the application of the zones to civil aircraft and secondly, even if the ADIZ procedures were applied solely to military air operations, the argument still does not hold for those States whose ADIZs extend beyond their EEZs, which is the case for China.[966]

Beyond these practical reasons the interpretation is, more crucially, problematic because there is no legal basis for restricting military operations in the EEZ, provided they do not interfere with the coastal State's exercise of its EEZ rights and jurisdiction. UNCLOS regulates military activities of foreign States in the territorial seas but it provides little in the way of further regulation.[967] In the high seas, military activities are accepted as a high seas freedom[968] provided that they are conducted for peaceful purposes.[969] In the EEZ, both the explicit, limited sovereign rights and jurisdiction of the coastal State and the freedoms enjoyed by other States in the zone, including freedom of overflight, support the conclusion that the coastal State does not have the right to interfere with peaceful military activities.[970]

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965 ICAO WP/29, *Civil/Military Cooperation Update*, Presented by the Secretariat, 9th Meeting of the South Asia/Indian Ocean ATM Coordination Group, Bangkok (26 – 29 March 2019) 2.15. See also, Section 2.7.3.2.

966 China's ADIZ extends more than 300 miles from its coast (Section 4.3.1), which amounts to more than 260nm and therefore exceeds China's EEZ by more than 60nm.

967 Making clear that innocent passage does not include: research or survey activities, which is understood to include military surveillance; the launching, landing or taking on board of any military device; interference with systems of communication or other facilities or installations; or, 'any other activity not having a direct bearing on passage' (UNCLOS, Article 19(j), (f), (k) and (l)). In addition, submarines and other underwater vehicles are required to surface when navigating in territorial seas (UNCLOS, Article 20. This applies to all underwater vehicles, military and non-military alike). Finally, Article 30 provides that a coastal State may require a warship to leave its territorial sea in the case that the warship 'does not comply with the laws and regulations of the coastal State concerning passage though the territorial sea and disregards any request for compliance'.

968 Myron H Nordquist, Neal R Grandy, Sataya N Nandan and Shabtai Rosenne (eds), *United Nations Convention on the Law of the Sea 1982: A Commentary – Volume II* (Martinus Nijhoff 1993) 85.

969 UNCLOS, Article 88.

970 Bernard H Oxman, 'The Regime of Warships under the United Nations Convention on the Law of the Sea' (1984) 24 Va J Int'l L 809, 838; Umberto Leanza and Maria Cristina Caracciolo, 'The Exclusive Economic Zone' in David J Attard, Malgosia Fitzmaurice and Norman A Martínez Gutiérrez (eds), *The IMLI Manual on International Maritime Law: Volume 1 – The Law of the Sea* (OUP 2014) 192-93; Klein (n 920) 46-47; Pedrozo (n 961) 524. See Section 3.2.2 for a discussion on the sovereign rights and jurisdiction granted to the coastal State under the EEZ regime.

The purpose of the EEZ is, as the name indicates, for the economic benefit of the coastal State through the State's protection and exploitation of the natural resources in the area and beyond this, it does not have a national security purpose. From the perspective of the rights of the other States in the zone, UNCLOS stipulates that freedom of overflight applies in the EEZ which, as mentioned previously, applies to both State and civil aircraft and includes the right to conduct aerial military activities.[971] The only exception to this is that freedom of overflight in the EEZ, as with the rights and freedoms of other States in general in the EEZ, must be exercised with due regard to the coastal State's rights and duties in the zone.[972] It is in this limited context that the coastal State has the right under UNCLOS to regulate activities, including military activities, in its EEZ. Whilst it is perhaps more relevant to vessels rather than aircraft, considering that interference with EEZ rights are more likely to occur from activities on or under the surface of the sea, it applies equally to aircraft. It is unclear to what extent coastal States are permitted to regulate activities, including whether certain activities, such as the use of weapons, are *per se* prohibited.[973] The beginning of this section noted that there are a number of States who claim a right, to varying extents, to regulate military activities in their EEZs. Some practices of these States may be justified as regulations to protect their coastal State EEZ rights and obligations, however other practice goes beyond the scope of this right, for example, to serve purely national security interests, which is considered by Klein as a position that 'at present… could well be construed as in violation of international law'.[974] The establishment of ADIZs are not justified as measures to protect the limited EEZ rights and jurisdiction provided to the coastal State under UNCLOS and would instead need to be justified on the basis of a customary international law right to regulate military activities beyond the scope of UNCLOS, the formation of which, as suggested here, there is currently insufficient evidence to support.

4.3.3.3 The right to self-defence

ADIZs are predominantly explained as a tool for protecting national security, the idea being that a State will be able to perceive a threat from the air in advance. The right to self-defence is frequently explored as a

971 See Sections 1.3.1 and 2.6.5.

972 UNCLOS, Article 58(3).

973 Charlotte Beaucillon, 'Limiting Third States' Military Activities in the EEZ: 'Due Regard Obligations' and the Law of the Use of Force Applied to Nuclear Weapons' (2019) 34 IJMCL 128, 133; Klein (n 920) 49-50.

974 Klein (n 920) 47.

possible legal basis for ADIZs on these grounds and whilst it is still used as a justification,[975] it meets widespread criticism.[976]

The right to self-defence is recognised in Article 51 of the UN Charter, which states:

> '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…'.[977]

Both the threat that the right to self-defence is designed to address and the act of self-defence, are not those that apply in the case of the establishment of ADIZs. It is the former of these that this section will examine in more detail. Specifically, it will demonstrate that even if the right to self-defence includes the right to act in the case of an imminent threat – as opposed to an armed attack – the 'threat' that ADIZs are designed to address is not the type of threat giving rise to the right to self-defence.

In terms of the latter, the right of self-defence exists as an exception to the prohibition against the use of force: it justifies the *use of force* by a State where that force would otherwise not be permitted under international law.[978] The principle of self-defence exists as an interim measure for States to protect themselves pending action by the UN Security Council, not as an ongoing tool to mitigate the risk of breaches of national security.[979] It does not envisage the establishment of a zone in international airspace for reporting and notification of aircraft, even if those aims are for the purpose of national security.

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975 Peace and Security Research Unit at East Asia Institute, Interview with Min Gyo Koo, Associate Professor, Seoul National University (10 December 2013), available at <www.eai.or.kr/main/english/search_view.asp?intSeq=8929&board=eng_multimedia> accessed 17 January 2019.

976 See for example, Head (n 915) 192; Kay Hailbronner, 'The Legal Regime of the Airspace Above the Exclusive Economic Zone' (1983) 8(1) Air Law 30, 42-43; Papp (n 921) 45-47; Kaiser, 'The Legal Status of ADIZ' (n 952) 531-33; Cuadra (n 913) 501-4; Eugène Pépin, *The Law of the Air and the Draft Articles Concerning the Law of the Sea Adopted by the International Law Commission at Its Eighth Session* (A/CONF.13/4) – Extract from the *Official Records of the United Nations Conference on the Law of the Sea*, Volume I (Preparatory Documents), United Nations Conference on the Law of the Sea, Geneva, 24 February-27 April 1958, 70.

977 UN Charter, Article 51. The armed attack need not necessarily be carried out by regular armed forces for a State to have recourse to the right of self-defence (Christopher Greenwood, 'Self-Defence' (Max Planck Encylcopedia of Public International Law 2011) 11, referring to, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, I.C.J. Rep. 1986 (Jun. 27) p. 14, p. 103 para. 195 ('*Military and Paramilitary Activities Case (Nicaragua v. United States of America*)')).

978 YILC (2001) Vol. II, Part 2, 74.

979 UN Charter, Article 51: '…until the Security Council has taken the measures necessary to maintain international peace and security'. See also, Christine Gray, *International Law and the Use of Force* (4th edn, OUP 2018) 48; Greenwood (n 977) 2.

4.3.3.3.1 Not an imminent threat

The right to self-defence arises in the case of an armed attack but, depending on interpretation, it may also apply in the case of an imminent threat. The former – an armed attack having occurred – is clearly not relevant when talking of the establishment of an ADIZ, and so if customary international law does allow for acts of self-defence in the case of an imminent attack, the question then is whether the establishment of ADIZs can be justified on the basis of an 'imminent threat'.

There is ongoing debate about whether the right to self-defence includes the right to act against an *imminent* threat as opposed to an armed attack.[980] The question of imminence is seen as an element of consideration of the necessity of the act of self-defence,[981] with necessity and proportionality being the well-established criteria for determining its legality.[982] States including the US, the UK and Australia claim that under customary international law the right to self-defence applies to an imminent threat.[983] The position is controversial not least because it goes against the literal interpretation of Article 51, which clearly requires that the right be exercised only 'if an armed attack occurs'. Opponents of an interpretation that includes the right to act against an imminent threat argue that 'the limits imposed on self-defence in Article 51 would be meaningless if a wider customary law right to self-defence survives unfettered by these restrictions'.[984] In pursuit

980 See for example, David Kretzmer, 'The Inherent Right to Self-Defence and Proportionality in Jus Ad Bellum' (2013) 24(1) EJIL 235, 247; Daniel Bethlehem, 'Principles Relevant to the Scope of a State's Right of Self-Defense Against an Imminent or Actual Armed Attack by Non-State Actors' (2012) 106 Am J Int'l L 1, 1; Marko Milanovic, 'The Solemani Strike and Self-Defence Against an Imminent Armed Attack' (EJIL:Talk! 7 January 2020), available at <www.ejiltalk.org/the-soleimani-strike-and-self-defence-against-an-imminent-armed-attack/> accessed 27 June 2019.

981 Jeremy Wright, 'The Modern Law of Self-Defence' (Speech delivered at the International Institute for Strategic Studies, London, 11 January 2017).

982 *Military and Paramilitary Activities Case (Nicaragua v. United States of America)*, p. 103 para. 194.

983 Brian J Egan, 'International Law, Legal Diplomacy, and the Counter-ISIL Campaign' (Speech delivered at the American Society of International Law, Washington DC, 1 April 2016): 'Under the *jus ad bellum*, a State may use force in the exercise of its inherent right of self-defense not only in response to armed attacks that have occurred, but also in response to imminent ones before they occur'; Wright (n 981): '…the long-standing UK view is that Article 51 of the UN Charter does not require a state passively to await an attack, but includes the 'inherent right' – as it's described in Article 51 – to use force in self-defence against an 'imminent' armed attack, referring back to customary international law'; George Brandis, 'The Right of Self-Defence Against Imminent Armed Attack in International Law' (Public Lecture delivered at the University of Queensland, Brisbane, 11 April 2017), available at <www.ejiltalk.org/the-right-of-self-defence-against-imminent-armed-attack-in-international-law> accessed 27 June 2019, 6: '…it is now recognised that customary international law permits self-defence not only against an armed attack that has occurred but also against one that is imminent. It has certainly been the long-held Australian position that acting in self-defence does not require a State passively to await attack'.

984 Gray (n 979) 124.

of considering whether the establishment of ADIZs can be justified on the basis of the right to self-defence, this section will proceed on the basis of the more generous interpretation, encompassing an imminent threat.

A State's right to self-defence under Article 51 of the UN Charter is a recognition of the right under customary international law.[985] Those in favour of the right of self-defence in the case of an imminent attack point to the Caroline case of 1837 as providing the foundation of the customary international law of self-defence.[986] This case involved the destruction of the US vessel, the *Caroline*, by British forces in US territory, and ultimately in the vessel being sent over Niagara Falls. The legal test that has endured was part of a series of notes that formed the subsequent negotiations between the two States. In the correspondence, both States agreed that the exercise of the right of self-defence 'should be confined to cases in which the necessity of that self-defence is instant, overwhelming, and leaving no choice of means, and no moment for deliberation', a statement that established the concept of anticipatory self-defence, or self-defence in response to an imminent threat, in international law.[987]

Based on this, returning to the initial question of whether the establishment of ADIZs can be justified on the basis of an imminent threat, the short answer is no. If a State does indeed have a right to self-defence in the case of an imminent threat, it does not apply in the case of a mere possibility of a future attack by air, as ADIZs are established to address. The ambiguity around imminence instead arises in the case that a 'highly probable and severe threat exists', in which case a State might have the right to self-defence even if the threat is temporally remote.[988] Considering this, ADIZs fail to meet the test of necessity to be justified through the principle of self-defence and more so, the future threat that ADIZs are employed to mitigate are so far removed from what can be considered as imminent, that the principle of self-defence is not relevant.

4.3.3.3.2 Self-defence in the case of non-compliance with ADIZ procedures

Another way of considering the legality of ADIZs under the principle of self-defence is in relation to the measures taken within ADIZs, where the armed attack or imminent threat is the failure of an aircraft to follow the procedures within the zone and the act of self-defence is the measure taken against the aircraft in response.

985 *Military and Paramilitary Activities Case (Nicaragua v. United States of America)*, p. 94 para. 176.

986 HL Deb 21 April 2004, Vol 660, col 370: 'Article 51 recognises the inherent right of self-defence that states enjoy under international law. That can be traced back to the 'Caroline' incident in 1837'.

987 Letter from Mr Webster to Lord Ashburton (Department of State, Washington, 6 August 1842).

988 Dapo Akande and Thomas Liefländer, 'Clarifying Necessity, Imminence, and Proportionality in the Law of Self-Defence' (2013) 107(3) Am J Int'l L 563, 565.

This proposition cannot be supported by international law, however. Whilst the term 'armed attack' is not defined under international law, it is uncontroversial that it does not include non-military threats 'no matter how damaging they may be to that State's rights and interests'.[989] Failure to comply with ADIZ procedures cannot be framed as an armed attack or, consistent with the above analysis, as an imminent threat, at least not without accompanying factors that suggest such intent. As Kaiser has noted, '[n]on-compliance with unilateral procedures within such an ADIZ does not in any instance indicate a hostile intent'.[990]

If an aircraft's failure to comply with orders is perceived as constituting a threat to national security, just as if it is seen as being a threat to the safety of other airspace users, there are protocols to follow under international civil aviation law to manage the threat, as will be explained in Section 4.3.5. ADIZs are irrelevant to implementing these protocols. Similarly, if an aircraft is used to conduct an armed attack or pose an imminent threat, as determined under international law, the right to self-defence applies regardless of an ADIZ being in place.

4.3.3.4 The right to establish ADIZs as customary international law

4.3.3.4.1 Academic consideration

There is mixed opinion in academia as to whether a State has the right to establish an ADIZ under customary international law. Cuadra, writing in 1978, saw the practice as 'customary law in the making',[991] whilst Hailbronner, writing soon after, believed that this was doubtful.[992] Both authors indicated that the crystallisation, if it were to occur, would be in conflict with codified international law.[993] As discussed in Section 3.3.4.6, customary law can develop in conflict with codified international law, but the standard required to show its formation is more rigorous. In the context of ADIZs, Cuadra noted this, stating that,

> 'any legal basis for ADIZ's [sic] extending over the high seas must derive from some aspect of customary international law that is so fundamental a principle as to prevail over the will of the community of nations as expressed in these conventions'.[994]

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989 Greenwood (n 977) 9.

990 Kaiser, 'The Legal Status of ADIZ' (n 952) 531.

991 Cuadra (n 913) 485.

992 Hailbronner, 'The Legal Regime' (n 976) 43.

993 Cuadra in reference to, among others, the Convention on the Territorial Sea and the Contiguous Zone 1958, and the fact that 'security' is not included amongst the purposes for which coastal States may exercise jurisdiction in their contiguous zones (Cuadra (n 913) 499); Hailbronner referring to the impending UNCLOS, in particular the decision to exclude security from the list of purposes for which States may act in their contiguous zone (Hailbronner, 'The Legal Regime' (n 976) 43).

994 Cuadra (n 913) 500-1.

This is relevant in the case that, in establishing an ADIZ off its coast, the coastal State is acting in breach of a codified norm of international law. This will be considered below in Sections 4.3.6.1 and 4.3.6.2 in the context of, respectively, safety obligations under international civil aviation law and the principle of freedom of overflight under UNCLOS.

In contrast to Cuadra, O'Connell, arguing that the freedom of the seas is a fluid concept that shifts in accordance with the changing balance of the needs of the international community, states that 'the abstract freedom of the sea will not stand in the way' of States imposing ADIZs.[995] He furthermore describes ADIZs as an example of 'where it is generally thought acceptable that States should insist upon certain conduct on or over the high seas'.[996] As discussed in Section 1.2.1, freedom of the seas and specifically freedom of overflight in this context, is not static; it must and it does adapt as our uses of the sea develop over time. Although it is abstract, in that there is no defined, exhaustive list of permitted or prohibited activities that fall within it, it is a foundational principle of the law of the sea and the unilateral exercise of jurisdiction over international airspace for the purpose of national security must be carefully considered in light of other rights and freedoms, which will be further examined in respect to ADIZs in Section 4.3.6.2. Seemingly contradictorily, O'Connell also recognises this, asserting,

> '…self-defence or national security is an insecure foundation for seeking to qualify the freedom of the seas, for it could lend plausibility to restraints that would not sustain the balance of the interests of the international community'.[997]

In any case, O'Connell's comment suggests that he was of the opinion that the establishment of ADIZs had become customary international law, which is the purpose for which his observations above have been included at this point.

Today, views range from the right to establish an ADIZ having been crystallised as customary international law,[998] to it possibly having been crystallised,[999] to there being no evidence to support its crystallisation.[1000] The lack of comprehensive, publicly available ADIZ procedures from some States contributes to this absence of a consensus.[1001]

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995 DP O'Connell, *The International Law of the Sea – Vol II* (OUP 1982) 796-97.
996 ibid 797.
997 ibid.
998 Roach (n 921) 6; Su (n 906) 812-13.
999 Papp (n 921) 347.
1000 Haanappel, 'Aerial Sovereignty' (n 944) 28; Kaiser, 'The Legal Status of ADIZ' (n 952) 537.
1001 Su (n 906) 813-14 and 822-23. Cuba, Iceland, Indonesia, Panama, and the Philippines are mentioned, specifically in relation to whether their ADIZ procedures apply to transiting aircraft or only to aircraft that intend to enter national airspace (pp 822-23). More generally, the author explains that 'some States have not published their rules for ADIZs in AIPs and some AIPs are difficult to access for the public' (p 814).

4.3.3.4.2 State practice

As discussed in Section 3.3.4.2, the ICJ demonstrated a shift in its determination of State practice between the 1969 *North Sea Continental Shelf Cases* and the 1986 decision in the *Military and Paramilitary Activities Case*, to what seems to be a less rigorous threshold. Recalling this section, in the former, the practice was required to be 'extensive and virtually uniform' whilst in the latter, it was determined that it 'should, in general, be consistent with such rules'.[1002] Balancing these statements, the ILC has indicated that the practice 'must be generally consistent' and 'sufficiently widespread and representative [but]… need not be universal'.[1003]

Kaiser argues against the right to establish an ADIZ being customary international law on the basis that, although a number of States have established them, there is too great a variation in them for there to be sufficiently formed State practice and furthermore, the response of States to ADIZs does not reflect the existence of *opinio juris*, as to which see Section 4.3.3.4.3.[1004] Referring back to Section 4.3.1, Kaiser points out that in contrast to there being a customary international law, 'there is discrepancy in the understanding of States about the legal nature of an ADIZ [and] the positions of the US and Canada signify the archetypes of this discrepancies [sic]'.[1005]

The determination of whether State practice in the case of ADIZs is sufficient for the purpose of customary international law depends on how the divergence between States is viewed in terms of its significance. Arguing for the existence of sufficient State practice in the establishment of ADIZs, we know that there are a number of States[1006] that currently have, or have in the past established, ADIZs outside their territorial boundaries and that the purpose of these ADIZs is, at least formally, national security. In general, the zones require reporting conditions, radar and transponder requirements, and the obligation to follow the orders of certain national authorities. Beyond this though, there are significant variations in the practice, including in relation to: the breadth of the ADIZ; its confinement to the State's FIR or extension beyond into another State's; whether its procedures apply to transiting aircraft or only to aircraft flying into or out of the State's territory; whether they apply to military aircraft or civil aircraft, or both; purported enforcement measures in the case of non-compliance; whether an aircraft is required to report to the CAA or to a particular government ministry; whether an aircraft is obliged to follow orders from a national

1002 *North Sea Continental Shelf (Federal Republic of Germany/Netherlands; Federal Republic of Germany/Denmark),* Judgment, I.C.J. Rep. 1969 (Feb. 20), p. 3, p. 43 para. 74; *Military and Paramilitary Activities Case (Nicaragua v. United States of America)*, p. 98 para. 186.

1003 Michael Wood, 'Second Report on Identification of Customary International Law' (ILC 66th Session, 22 May 2014) 45.

1004 Kaiser, 'The Legal Status of ADIZ' (n 952) 537.

1005 ibid 537.

1006 See Section 4.3.2 (n 921). Noting that the number of States adopting the practice is only one element for consideration and a small number of States adopting the practice or a large number, is not determinative either way (Wood, 'Second Report' (n 1003) 38).

authority and which body that is; how transparent the procedures are, including how and to what extent they are communicated to airspace users; whether the ADIZ is temporary or permanent; whether prior approval is required for aircraft to operate in the zone; and, of course, what information the procedures require the commander of the aircraft to impart and through which method.[1007]

When the ICJ, in the *Military and Paramilitary Activities Case*, determined that State practice 'should, in general, be consistent with such rules', it also added that it need not be in '*absolute rigorous* conformity' (emphasis added). Although this latter statement is in the negative, it indicates a high threshold in determining when State practice is considered 'consistent': the practice does not have to demonstrate *absolutely* rigorous conformity, but it should meet a significant degree of conformity. As an example of what does not constitute sufficiently consistent practice, the ILC refers to the *Asylum Case*, in which the ICJ referred to practice which displays 'so much uncertainty and contradiction, so much fluctuation and discrepancy… it is not possible to discern in all this any constant and uniform usage, accepted as law, with regard to the alleged rule'.[1008] This is not to say that this is the standard required for practice not to be sufficient; State practice in this category is *clearly* not State practice that gives rise to customary international law.

There are significant variations in the practice of ADIZ establishment. On the other hand, if the core elements of ADIZ – a zone extending into international airspace for the, at least formal, purpose of national security – are evidence of State practice, with all of the surrounding discrepancies put aside, then on this basis alone, State practice may be sufficiently consistent for the purpose of customary international law.

4.3.3.4.3 Opinio juris

One of the factors that Cuadra raises as support for the development of customary international law in respect to ADIZs is the lack of protest against the zones that existed back then.[1009] Certainly this seems to have been the initial response to the US ADIZ, which has been described as 'one of quiet compliance'.[1010] In examining whether this has been the case in intervening decades, and what the current state of *opinio juris* is in relation to ADIZ, it is necessary to draw a distinction between compliance with the zones by military aircraft and other, predominantly civil, aircraft.

1007 Many of these factors are considered and State practice compared in, Su (n 906) 834-35. As mentioned earlier, Su concludes that the right to establish ADIZ is customary international law despite these discrepancies in the establishment and operation of ADIZ between States. This is consistent with the divergence in academic opinion on the matter, where the opposite conclusion is reached based on the same factual circumstances.

1008 Wood, 'Second Report' (n 1003) 41, citing *Asylum Case (Colombia/Peru)*, Judgment, I.C.J. Rep. 1950 (Nov. 20), p. 266, p. 277.

1009 Cuadra (n 913) 504.

1010 Head (n 915) 182.

Whilst highlighting the fact that military aircraft are the primary subjects of ADIZs, as the predominant security threat *vis-à-vis* civil aircraft and other State aircraft, Su states that military aircraft transiting ADIZs 'usually do not comply with voluntary identification measures in foreign ADIZs, except perhaps out of courtesy or cooperation between military allies'.[1011] This is consistent with reports of Russian and Chinese military aircraft operating in the ADIZs of South Korea and Japan, [1012] as well as Russia's fly-overs in the US's ADIZ, mentioned in Section 4.3.3.1. US military aircraft are, again as discussed in Section 4.3.3.1, only compliant with a State's ADIZ procedures when they intend to enter the State's airspace. Given that most ADIZs also apply to transiting aircraft,[1013] US military aircraft also contravene ADIZs under these circumstances, for instance in China's ADIZ: the US has continued to 'assert US prerogatives' by operating its military aircraft in the ADIZs without complying with the prescribed procedures.[1014] On this basis, there is no evidence to suggest that there is *opinio juris* insofar as ADIZs apply to military aircraft. Considering both the national security purpose of ADIZs and that ATC procedures under international civil aviation law independently of ADIZs lead to the identification of civil aircraft in international airspace, this results in a peculiar situation insofar as the practical contribution of ADIZs in protecting national security. This is all the more so considering that coastal States have no greater enforcement jurisdiction in their ADIZs than they do in any other portion of international airspace.

The determination of *opinio juris* in respect to civil aircraft is more ambiguous. A State that believes its rights have been infringed by the unilateral exercise of jurisdiction will usually object upon the exercise of prescriptive jurisdiction, that is, in this case, upon the declaration of the establishment of an ADIZ:

1011 Su (n 906) 825.

1012 Josh Smith, 'Explainer: Competing Claims Make Northeast Asia Sea a Flashpoint' (Reuters, 25 July 2019), available at <www.reuters.com/article/us-southkorea-russia-aircraft-explainer/explainer-competing-claims-make-northeast-asian-sea-a-flashpoint-idUSKCN1UK0NO> accessed 28 November 2019; Jakhar (n 920).

1013 Su (n 906) 832.

1014 'China's Air Defense Identification Zone: Impact on Regional Security' (Centre for Strategic and International Studies, 26 November 2013), available at <www.csis.org/analysis/chinas-air-defense-identification-zone-impact-regional-security> accessed 3 November 2019: 'China Says US Should Respect China's Air Defense Zone' (Reuters, 23 March 2017), available at <www.reuters.com/article/us-china-usa-defence-idUSKBN16U0SB> accessed 26 October 2018: 'China said on Thursday the United States should respect its air defense identification zone (ADIZ), after Chinese officials warned a U.S. bomber it was illegally flying inside China's self-declared zone in the East China Sea. The Pentagon rejected the Chinese call and said it would continue its flight operations in the region'.

> '…a State ordinarily protests as soon as another State makes undesirable assertions of prescriptive jurisdiction. The former State will not wait until the enforcement of these assertions, because it will believe that the latter will sooner or later go on to effectively enforce its laws'.[1015]

The State's *initial* objection may not necessarily correspond with the State's subsequent actions however, and indeed a State's *ongoing* verbal objections may not be consistent with their actions. Taking China's ADIZ again as an example, many States protested against the zone when it was established[1016] but airlines of these same States comply with the procedures in the ADIZ. Whilst the US specifically rejects China's ADIZ, it informed its commercial aircraft that it expected them to comply with the procedures in the zone.[1017] South Korea's aircraft also comply with the reporting requirements in China's ADIZ despite the State objecting to the zone. Korean Airlines and Asiana Airlines initially failed to comply but then did so once the South Korean government provided that its airlines may decide to comply for safety reasons.[1018] On the other hand, Japan Airlines and All Nippon Airways initially adhered to the procedures but then changed their position after pressure from the Japanese government to ignore them.[1019]

The discord between States' verbal protests and practical adherence to China's ADIZ procedures no doubt arises out of the States' primary obligation to ensure the safety of civil aviation.[1020] It may also be a recognition by States of the fact that failing to comply with China's ADIZ requirements could conflict with the procedures they impose in their own ADIZs, or that they comply with in another State's ADIZ. As outlined in Section 4.3.1, the vigorous protest of a State against a feature of one State's ADIZ may illicit little or no response from the first State in relation to the ADIZ of another State with the same feature. In an area that is heavy with political intentions, ascertaining *opinio juris* is particularly difficult and the above examples demonstrate that the assessment of *opinio juris* needs to take into account not just the protest or adherence by States but also the reasons behind them. This has been emphasised by the ILC in its statement that adherence to a rule, regardless of the frequency with which the adherence occurs, is not sufficient to indicate the existence of *opinio juris* but rather, 'the motivation

1015 Cedric Ryngaert, *Jurisdiction in International Law* (OUP 2015) 41.
1016 See Section 4.3.1.
1017 Rinehart and Elias (n 898) 16; Jennifer Thompson, Simon Mundy and Jung-a Song, 'Japan to Take up Spat over China Air Zone with US' (Financial Times, 2 December 2013), available at <www.ft.com/content/d4be05c6-5a61-11e3-942a-00144feabdc0> accessed 16 March 2019.
1018 Demetri Sevastopulo, 'Q&A: What is an Air Defence Identification Zone?' (Financial Times, 12 December 2013), available at <www.ft.com/content/26cf55ce-58da-11e3-a7cb-00144feabdc0> accessed 10 May 2019.
1019 ibid. Singapore Airlines, Cathay Pacific and Taiwanese airlines complied from the outset.
1020 See Section 2.2.2.3.

behind a certain practice must be discernible in order to identify a rule of customary international law'.[1021]

It is proposed here, based on the above analysis, that there is currently insufficient evidence to argue that there is a customary international law right to establish an ADIZ. Both elements of customary international law – State practice and *opinio juris* – present hurdles in terms of the approach of States being inconsistent and conflicting, although demonstrating a sufficient standard of *opinio juris* at this stage is particularly problematic. Certainly, it is not present in relation to State aircraft and for civil aircraft, the subjective intentions of States remain ambiguous.

4.3.4 The persistence of the Lotus principle

The 1927 *Lotus Case* of the Permanent Court of International Justice (PCIJ) is still the only case in which the PCIJ/ICJ has directly addressed the matter of jurisdiction.[1022] Despite the particular context of the case,[1023] the judgment became 'the main standard of reference for such conflicts [i.e. jurisdictional conflicts] in all legal areas' and continues to be 'the basic framework of reference for questions of jurisdiction under international law'.[1024] The ICJ has recognised the *Lotus* principle in subsequent decisions[1025] and most recently, although not explicitly referring to the case, was seen to have reaffirmed the reasoning in *Lotus* in its *Kosovo Advisory Opinion*.[1026]

In the *Lotus Case*, France asserted the argument that 'the Turkish Courts, in order to have jurisdiction, should be able to point to some title to juris-

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1021 Wood, 'Second Report' (n 1003) 58 and 56, respectively.

1022 Ryngaert, *Jurisdiction* (n 1015) 4.

1023 On this point, President Bedjaoui stated in his Declaration to the *Nuclear Weapons Advisory Opinion* that: 'The Court's decision in the '*Lotus*' case, which some people will inevitably resurrect, should be understood to be of very limited application in the particular context of the question which is the subject of this Advisory Opinion. It would be to exaggerate the importance of that decision of the Permanent Court and to distort its scope were it to be divorced from the particular context, both judicial and temporal, in which it was taken. No doubt this decision expressed *the spirit of the times*, the spirit of an international society which as yet had few institutions and was governed by an international law of strict coexistence, itself a reflection of the vigour of the principle of State sovereignty' (Declaration of President Bedjaoui on *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Rep. 1996 (Jul. 8), p. 226, p. 270 para. 12 ('*Nuclear Weapons Advisory Opinion*')).

1024 Ryngaert, *Jurisdiction* (n 1015) 30 and 31.

1025 See for example, *Nuclear Weapons Advisory Opinion*, p. 238 para. 21; *Military and Paramilitary Activities Case (Nicaragua v. United States of America)*, p. 24 para. 29.

1026 *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, I.C.J Rep. 2010 (Jul. 22) p. 403, pp. 425-426 para. 56 ('*Kosovo Advisory Opinion*'). For discussion on the Court's reasoning in this Opinion as based on the *Lotus Case* see, Photini Pazartzis, 'Judicial Activism and Judicial Self Restraint' in Malgosia Fitzmaurice and Christian J Tams (eds), *Legacies of the Permanent Court of International Justice* (Martinus Nijhoff Publishers 2013) 332-33; Helmut Philipp Aust, *Complicity and the Law of State Responsibility* (CUP 2011) 68.

diction recognised by international law in favour of Turkey', whereas Turkey argued, in contrast, that a State is permitted to exercise jurisdiction 'whenever such jurisdiction does not come into conflict with a principle of international law'.[1027] In addressing the matter, the Court drew a distinction between prescriptive and enforcement jurisdiction or, respectively, the capacity to make law and the capacity to ensure compliance with the law, as outlined in Section 1.2.1.

Addressing enforcement jurisdiction, the Court made clear that it 'cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention'.[1028] However, a State does have the right, the Court went on to declare, failing the existence of a rule under international law prohibiting it, to exercise jurisdiction in its territory for acts committed outside its national borders.[1029] In other words, a State may prescribe laws for acts outside its territory provided that there is no prohibition under international law.

The *Lotus* principle, as the Court's approach to extra-territorial jurisdiction is referred to, has met widespread criticism for its positivist approach to international law. Positivist theory, at its most simplistic, says that the law consists of that which has been posited; depending on the system this may include for example, legislation, common law and custom.[1030] A positivist understanding of international law says that the law is made by States for States; they 'enjoy unrestricted authority and freedom on the international plane, which flows from their statehood status and as an ontological consequence of (external) sovereignty'.[1031] The *Lotus* principle has continued to influence the reasoning of the ICJ, but more broadly it is viewed as being outdated in an international legal order that has evolved into a more complex and collective-interest oriented system.[1032]

In its *Kosovo Advisory Opinion*, the ICJ asked the question not of whether Kosovo had a right under international law to unilaterally declare independence from Serbia but, consistent with the *Lotus* principle, whether it was prohibited from doing so by a rule of international law.[1033] Judge Simma in his Declaration on the Opinion, criticised the Court's approach:

1027 *The Case of S.S. Lotus (France v. Turkey)* (1927) P.C.I.J. Series A, no. 10, p.18.

1028 ibid pp. 18-19.

1029 ibid pp. 19.

1030 Leslie Green and Thomas Adams, 'Legal Positivism' (Stanford Encyclopedia of Philosophy, 17 December 2019), available at <plato.stanford.edu/entries/legal-positivism/#> accessed 2 February 2020.

1031 Stéphane Beaulac, 'The *Lotus* Case in Context: Sovereignty, Westphalia, Vattel, and Positivism' in Stephan Allen, Daniel Costelloe, Malgosia Fitzmaurice, Paul Gragl and Edward Guntrip (eds), *The Oxford Handbook of Jurisdiction in International Law* (OUP 2019) 48.

1032 ibid 54; See also, as will be discussed below, Declaration of President Bedjaoui on *Nuclear* Weapons *Advisory Opinion*, p. 270-71 para. 13.

1033 *Kosovo Advisory Opinion*, p. 438 para. 83: 'To answer that question, the Court need only determine whether the declaration of independence violated either general international law or the *lex specialis* created by Security Council resolution 1244 (1999)'.

> 'The Court's reading of the General Assembly's question and its reasoning, leaping as it does straight from the lack of a prohibition to permissibility, is a straightforward application of the so-called *Lotus* principle. …Under this approach, everything which is not expressly prohibited carries with it the same colour of legality'.[1034]

Rather, he opines, the Court could have,

> 'explored whether international law can be deliberately neutral or silent on a certain issue, and whether it allows for the concept of *toleration,* something which breaks from the binary understanding of permission/prohibition and which allows for a range of non-prohibited options. That an act might be 'tolerated' would not necessarily mean that it is 'legal', but rather that it is 'not illegal'. … The neutrality of international law on a certain point simply suggests that there are areas where international law has not yet come to regulate, or indeed, will never come to regulate'.[1035]

In the *Nuclear Weapons Advisory Opinion,* the ICJ, expressly referring to the *Lotus* decision, considered that 'States are free to threaten or use nuclear weapons unless it can be shown that they are bound not to do so *by reference to a prohibition* in either treaty law or customary law' (emphasis added).[1036] President Bedjaoui, in his Declaration on the opinion, expressed his opposition to the Court's approach:

> 'The resolutely positivist, voluntarist approach of international law still current at the beginning of the century – and which the Permanent Court did not fail to endorse in the aforementioned Judgment [*Lotus*] – has been replaced by an objective conception of international law, a law more readily seeking to reflect a collective juridical conscience and respond to the social necessities of States organized as a community'.[1037]

Finally, in their separate joint decision in the *Arrest Warrant Case*, Judges Higgins, Kooijmans and Buergenthal, made clear their position that the *Lotus* principle is no longer the reference point for extraterritorial jurisdiction, stating that 'the dictum represents the high water mark of laissez-faire in international relations, and an era that has been significantly overtaken by other tendencies'.[1038] These views are supported by those of academics who argue that State practice suggests that the *Lotus* principle may no longer be valid and that instead, it seems that 'the international community has embraced a more restrictive approach, by requiring that the

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1034 Declaration of Judge Simma on *Kosovo Advisory Opinion*, p. 480 para. 8.
1035 ibid p. 480 para. 9.
1036 *Nuclear Weapons Advisory Opinion*, p. 238 para. 21.
1037 Declaration of President Bedjaoui on *Nuclear Weapons Advisory Opinion*, p. 270-71 para. 13.
1038 *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)*, Judgment, I.C.J. Rep. 2002 (Feb. 14) p. 3, p. 78 para. 51 (Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal).

asserting state rely on a permissive principle for the exercise of jurisdiction to be lawful'.[1039] These permissive principles refer to bases of jurisdiction including territoriality, personality, the protective principle, and universality.[1040]

If the *Lotus* principle stands, States have prescriptive jurisdiction to impose ADIZ unless prohibited by international law.[1041] Section 4.3.6 will examine whether there is a prohibition under international law on a State to establish an ADIZ. In doing so, it will consider the safety and procedural regulations under international civil aviation law and the principle of freedom of overflight. These have been chosen, once again, as the most commonly raised matters in international law in respect to ADIZs.

On the other hand, if we have moved beyond the *Lotus* principle, a permissive rule of international law is required for States to establish ADIZ in international airspace. This view is supported by Cuadra who claims that '[e]ven if there had been no protests whatever [to ADIZs], the unilateral adoption of any aspect of sovereignty on or above the high seas must have some foundation in international law if it is to be lawful'.[1042] Hailbronner also argues in favour of this view: 'States claiming to have acquired new rights have a burden of proof. They may rely on the Convention [UNCLOS] only to the extent that it explicitly grants regulatory competence and enforcement power'.[1043] As has been established in Section 4.3.3, there is no legal basis for coastal States to rely on to justify the establishment of ADIZs.

Before turning to consider the possible prohibitions on establishing an ADIZ, the following section will briefly address the coastal State's right to respond to foreign aircraft in their ADIZs in the case of non-compliance. As has been made clear here in this section, regardless of whether the *Lotus* approach to prescriptive jurisdiction is accepted or not, States may only exercise enforcement jurisdiction in their territories in respect to acts that take place in their ADIZs, unless there is a permissive rule under international law providing for extraterritorial jurisdiction.

4.3.5 No enforcement jurisdiction in international airspace

The Court in *Lotus* held that a State is not permitted to enforce their laws outside its territory unless there is a permissive rule in international law – a treaty law or customary law – providing them with the right to do so. This

1039 Cedric Ryngaert, 'The Concept of Jurisdiction in International Law' in Alexander Orakhelashvili (ed), *Research Handbook on Jurisdiction and Immunities in International Law* (Edward Elgar Publishing 2015) 55; See also, Rain Liivoja, *Criminal Jurisdiction over Armed Forces Abroad* (CUP 2017) 60: 'Ultimately, the claims that *Lotus* is invalid seem well grounded in State practice'; Malcolm Shaw, *International Law* (6th edn, CUP 2008) 656.

1040 Ryngaert, *Jurisdiction* (n 1015) 29.

1041 For a brief discussion on the *Lotus* decision in relation to ADIZ see, Papp (n 921) 33-34.

1042 Cuadra (n 913) 505.

1043 Kay Hailbronner, 'Freedom of the Air and the Convention on the Law of the Sea' (1983) 77 Am J Int'l L 490, 520.

is true even in the case that the State has jurisdiction to prescribe their laws extraterritorially.[1044] The basis for this is the principles of non-intervention and the sovereign equality of States.[1045]

As a result, the prosecution of crew in the case of failure to comply with ADIZ procedures can only occur upon entry into the coastal State's national airspace. In the absence of being able to rely on any international law as a legal basis for ADIZs, including the enforcement of them, States are only able to justify actions taken against aircraft in their ADIZs that would otherwise be justified under international law. This section will examine the measures that States are permitted to take against aircraft in their ADIZs and the purposes for which they are permitted to do so.

International civil aviation law makes clear that States have a right to intercept aircraft in certain limited circumstances. Beyond these, including in the case of a failure to fulfil ADIZ requirements, there are no provisions for interception. Further to interception, the use of force against aircraft is expressly prohibited and the only justification for the use of force against them is the right of self-defence entailing, as it does, the stringent circumstances for it to be legitimate, as discussed in Section 4.3.3.3.

The prohibition on the use of force against civil aircraft is set out in Article 3 *bis* (a) of the Chicago Convention:

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

This article begins with the words '[t]he contracting States recognize…', suggesting that it is a restatement of customary international law. This is so insofar as the article applies to an attack attributable to one State against an aircraft registered in another State, which amounts to a breach of the prohibition on the use of force, recognised as customary international law[1046] and as codified under Article 2(4) of the UN Charter.[1047] Cheng argues that Article 3 *bis* also applies more broadly than this though, as a prohibition against the use of force towards all civil aircraft, including a State's against its own, which is not within the scope of Article 2(4).[1048] Milde disagrees

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1044 Ryngaert, 'The Concept of Jurisdiction' (n 1039) 58.

1045 The sovereign equality of States has been mentioned previously in Sections 3.3.4.4 and 4.2.4.1.

1046 *Military and Paramilitary Activities Case (Nicaragua v. United States of America)*, pp. 98-101 paras. 187-190; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Rep. 2004 (Jul. 9) p. 136, p. 171 para. 87.

1047 As discussed in Kimberly Trapp, 'Uses of Force Against Civil Aircraft' (EJIL:Talk! 28 June 2011), available at <www.ejiltalk.org/uses-of-force-against-civil-aircraft/> accessed 12 July 2017.

1048 Bin Cheng, 'The Destruction of KAL flight KE007' in JWE Storm van 's Gravensande and A van der Veen Vonk (eds), *Air Worthy: Liber Amicorum Honouring Professor Dr IHPH Diederiks-Verschoor* (Kluwer 1985) 63.

with this position however, arguing that the scope of Article 3 bis is restricted to foreign aircraft on that basis that if it were to be interpretated otherwise, 'such regulation would have exceeded the scope of the Convention which deals with international civil aviation'.[1049]

The rules for the interception of civil aircraft are set out in Annex 2 to the Chicago Convention.[1050] There are two elements to the interception rules that are key to ADIZs. The first is that interception is only to be performed as a last resort.[1051] The second is that the purpose for doing so should be limited to determining the identity of the aircraft or 'to return the aircraft to its planned track, direct it beyond the boundaries of national airspace, guide it away from prohibited, restricted or danger areas or instruct it to effect a landing at a designated aerodrome'.[1052] The first two of these – identification and returning an aircraft to its planned track – are possibly relevant in the case of ADIZs. Beyond these two purposes a State cannot justify the interception of a civil aircraft in its ADIZ. Keeping in mind that interception is only to be used as a last resort, States would be required to first ascertain the aircraft's identification or direct the aircraft back to its stated flight plan, as the case may be, through communication with the aircraft via the applicable ATC unit. In the case that interception is necessary, given the specific purposes for which it may be conducted, it should be undertaken only to the extent required to achieve these purposes and the method of interception, including the proximity of the intercepting aircraft, should 'avoid any hazard for the intercepted aircraft'.[1053] A failure to adhere to these measures could also amount to the intercepting aircraft, as a State aircraft, breaching its obligation of due regard to the civil aircraft, which it owes under Article 3(d) of the Chicago Convention.[1054]

Furthermore, when it comes to the violation of the rules referred to in Article 12 of the Chicago Convention – recalling Section 2.7.2.2 – that is, those rules of international civil aviation law applicable in international airspace, the coastal State has no greater power to prosecute than any other State. Article 12 provides this expressly: '[e]ach contracting State undertakes to insure [sic] the prosecution of all persons violating the regulations applicable'. Thus, if a civil aircraft conducting a flight in international airspace fails to comply with, for example, its position reporting obligations

1049 Michael Milde, 'Interception of Civil Aircraft vs. Misuse of Civil Aviation' (1986) 11 Annals Air & Space L 126.

1050 See also, ICAO Doc 9433, *Manual Concerning Interception of Civil Aircraft* (1990). This manual is a consolidation of ICAO provisions and special recommendations related to the interception of civil aircraft, which have been extracted from Annexes 2, 4, 6, 7, 10, 11 and 15, as well as PANS-OPS and PANS-ATM.

1051 Chicago Convention, Annex 2, Appendix 2, 1.1 a).

1052 ibid Appendix 2, 1.1 b).

1053 ibid Appendix 2, 3.1.

1054 See Section 2.4.3 for discussion on the due regard obligation owed by State aircraft to civil aircraft.

pursuant to Standard 3.6.3 of Annex 2 to the Chicago Convention, the article clearly provides that it is formally the role of each State to take the relevant steps to prosecute the persons responsible.[1055]

State aircraft operating in another State's ADIZ are not protected by the above prohibitions and limitations relating to the use of force and interception, given that these aircraft fall outside the scope of the Chicago Convention and its annexes.[1056] In this environment, interception of military aircraft is not infrequently carried out in international airspace, whether in a State's ADIZ or beyond.[1057] There is no right to do so under international law but at the same time, there is no prohibition. Further to interception, the engagement of, i.e. the use of force against, a State aircraft may be justified under the right to self-defence. Outside this exception though, State practice demonstrates that the use of force against a State aircraft amounts to a breach of Article 2(4) of the UN Charter.[1058]

The opposition by States to China's announcement that it would be willing to exercise enforcement jurisdiction within its ADIZ in the case of non-compliance with its ADIZ procedures, is based on the fact that if it were to do so it would be exceeding its jurisdictional powers. A State has no right to enforce its ADIZ in international airspace and any action it takes in its ADIZ against another State's aircraft, be it a civil aircraft or a State aircraft, must be justified under international law as it applies in international airspace more broadly.

1055 Niels van Antwerpen notes, in regard to the provision of air navigation services over international airspace, that the laws of the coastal State are relevant. In the case of an act or omission of an air navigation services provider, a victim may bring a claim for damages in the instance that the national law of the State providing those services (a coastal State) allows for such a claim. Reference here is made to *Blumenthal v. United States of America*, (1960) 189 F. Supp. 439, in which damages were awarded by the US government in the case of wrongful death over the high seas (van Antwerpen (n 801) 98-99).

1056 Although, as recognised in the previous paragraphs and as addressed in Section 2.4.3, State aircraft are not completely excluded from the scope of international civil aviation law. For example, it is State aircraft that carry out the interception of civil aircraft and Article 3 *bis* of the Chicago Convention and the interception provisions under Annex 2 apply to them in carrying out these operations.

1057 In addition to the interception of Russian aircraft off the coast of Alaska in March 2020, as mentioned in Section 4.3.3.1, see for example, 'Allied Fighter Jets Intercept Russian Aircraft' (NATO, 11 March 2020), available at <www.nato.int/cps/en/natohq/news_174349.htm> accessed 14 April 2020; Ben Blanchard and Yimou Lee, 'Taiwan Again Scrambles Jets to Intercept Chinese Planes, Tensions Spike' (Reuters, 9 February 2020), available at <www.reuters.com/article/us-taiwan-china-defence/taiwan-again-scrambles-jets-to-intercept-chinese-planes-tensions-spike-idUSKBN2030AE> accessed 14 April 2020.

1058 Oliver Dörr, 'Prohibition of Use of Force' (Max Planck Encyclopedia of Public International Law 2015) 24.

4.3.6 Prohibition under international law

4.3.6.1 Safety regulations under international civil aviation law

The potential negative safety consequences of ADIZs most often stem from particular aspects of their management and of surrounding circumstances, including the political climate of the region, rather than from the presence of the zone itself. Furthermore, whilst nothing in international civil aviation law expressly provides States with the right to establish ADIZs, there is also nothing to prohibit them from doing so, either directly or indirectly. Based on these factors, ICAO's approach to ADIZs is to mitigate the safety risks they pose to the safety of international civil aviation. This approach is also consistent with the fact that ICAO is a political forum,[1059] primarily tasked with the promotion of the safety of international civil aviation, and that ADIZs are attached to national security, a highly sensitive area sitting at the heart of State sovereignty.

This section will examine the safety implications of ADIZs in respect to the relevant SARPs in the Chicago Convention's annexes. It will consider whether ADIZs are consistent with the SARPs in Annex 11, setting out rules for the provision of ATS, particularly in the case of a State imposing an ADIZ that overlaps another State's ADIZ or FIR. The section will further discuss how the global approach towards greater civil-military integration aims to reduce the safety risks of ADIZs to international civil aviation by simplifying procedures. Finally, it will briefly explain why Article 12 of the Chicago Convention does not prohibit States from establishing ADIZs.

In a joint Working Paper to ICAO, the International Air Transport Association (IATA) and IFALPA raised the issue of an (unidentified)[1060] ADIZ that crossed the boundaries of two FIRs, leading to confusion of the ATC authorities in those FIRs.[1061] In addition, it reported, the ADIZ requirements were not clear, which created additional uncertainty regarding the procedures to be followed, both for the aircraft operating in the zone and the ATC. As a consequence, flights were ultimately arranged along alternative routes to avoid the area due to fear of interception in the zone.[1062] This is an extreme example of lack of coordination in the establishment of an ADIZ but, as mentioned in Section 4.3.1, the ADIZs of China, Japan, South Korea and Taiwan overlap and this necessarily also involves the overlap of ADIZs with FIRs. Overlapping ADIZs and ADIZs that extend across FIRs are less problematic when there is cooperation in their management, when there are good relations between the authorities administering the zones, such

1059 Ruwantissa Abeyratne, *Regulation of Air Transport: The Slumbering Sentinels* (Springer 2014) 209.

1060 In consideration of the period around which it was established, and the general concerns expressed, it possibly refers to the ADIZ of Bangladesh, as discussed in Section 4.3.3.2.

1061 ICAO *Establishment of Military Requirements and Restrictions* (n 905) 2.3.

1062 ibid 2.9.

as between Japan and Taiwan,[1063] but they become a heightened safety risk when this is not the case.[1064] The increased cooperation required in the case overlapping ADIZs and FIRs adds to a matter that requires attention even where delimitation is clear: the Civil Air Navigation Services Organisation (CANSO) has reiterated through various best practice guides the need to improve 'the safe and efficient crossing of Flight Information Regions' and has highlighted this as a particular priority in the Asia-Pacific region.[1065]

Coordination complexities are also relevant within the boundaries of a coastal State's FIR where the ADIZ procedures require aircraft to follow the requests of, or report to, an authority additional to the ATC unit, such as in the ADIZs off the coasts of China and the US.[1066] In accordance with ICAO's definition of 'ADIZ', provided in Section 4.3.2, an ADIZ necessarily imposes on aircraft '…special identification and/or reporting procedures *additional* to those related to the provision of air traffic services'.[1067] The additional authority that an ADIZ introduces into the affected portion of airspace requires consideration in respect to two main aspects of international civil aviation law. The first is the Standards contained in Annex 11, governing the responsibility of the control of flights and airspace, and the second is ICAO's aim to achieve global enhanced civil-military coordination.

There are two Standards in Annex 11 of the Chicago Convention that are relevant to the management of airspace by more than one authority.[1068] Standard 3.5.1 states that '[a] controlled flight shall be under the control of only one air traffic control unit at any given time' and Standard 3.5.2 provides that '*[r]esponsibility* for the control of all aircraft operating within a given block of airspace shall be vested in a single air traffic control unit' (emphasis added). Unlike Annex 2 in international airspace, a State may file differences for the Standards in Annex 11, meaning that these Standards are not necessarily fixed. Notwithstanding this however, a literal interpretation of the terms does not necessarily prohibit the exercise of control by an additional authority. Specifically, they both refer to an *air traffic control unit* as opposed to using more general phrasing, in order to restrict the control to a

1063 'Japan Extends Air Defence Identification Zone into Taiwan Space' (BBC Monitoring Asia Pacific, 26 June 2010), text of report in English by Shih Hsiu-chuan on Taiwanese newspaper Taipei Times website on 26 June 2010 written, available at <www.taipeitimes.com/News/front/archives/2010/06/26/2003476438> accessed 3 November 2019.

1064 Kaiser, 'The Legal Status of ADIZ' (n 952) 536: '… overlapping ADIZ lead to a non-coordinated practice of ICAO Member States which is detrimental to the safe, efficient and regular air navigation'.

1065 ICAO IP/13, *Automation Interface Between Flight Information Regions*, Presented by CANSO at the 28th Meeting of the Asia/Pacific Air Navigation Planning and Implementation Regional Group, Bangkok (11 – 14 September 2017) 1.1 and 2.1.

1066 See Section 4.3.2 for details of the specific authorities.

1067 Chicago Convention, Annex 4, 1-1 and Annex 15, 1-2.

1068 Kaiser briefly mentions what he refers to as 'the single control unit principle', in reference to the Standards that are discussed in this paragraph (Kaiser, 'The Legal Status of ADIZ' (n 952) 536).

single authority regardless of its purpose and thereby take into account the possibility of the operation of a military authority, for example, exercising control alongside the ATC unit. Secondly, as emphasised, Standard 3.5.2 sets out that responsibility must be vested in one unit, which does not necessarily restrict the provision of services or orders by additional units. Thus, despite the fact that the Annex seems to recognise the importance of aircraft communicating with only one authority in a given airspace, it falls short of considering this situation in respect to a non-ATC authority.

ICAO has however addressed this matter beyond the annexes, by encouraging coastal States to minimise the burden ADIZ requirements place on flight crew through enhanced coordination between the civil and military authorities administering the airspace.[1069] In this manner, aircraft would provide information to the ATC unit which would then communicate it directly to the military authority without further input being required from the aircraft. From an airline/pilot perspective, more streamlined communication channels are advantageous both in terms of efficiency and safety. IATA and IFALPA have, in the context of achieving greater civil/military cooperation, called for changes to ADIZ practices. They suggest that the flight plan and movement information is readily forwarded to the relevant military authorities, where required, and that States work towards the automation of authorisation procedures, an example of this being the generation of a clearance code in advance upon the initial submission of the flight plan.[1070] There is a strong preference expressed by IATA and IFALPA though, for military clearances and other authorisation procedures to be forgone and they ultimately request States 'to obviate the need for pre-authorization for civil flights'.[1071]

Cuadra has suggested that ADIZs may, in one respect, lower the safety risk to aircraft by obviating the need for coastal States to conduct interceptions to identify aircraft as a result of the identification obligations that the zones impose.[1072] Given that identification and reporting procedures are common practice in aviation independently of ADIZs,[1073] it seems unlikely that this safety benefit would result but even if it were to, it would be alongside the above coordination complexities and potential safety consequences that they entail.

One further matter under international civil aviation law is raised in relation to ADIZs regarding the management of airspace: the exclusive jurisdiction of ICAO pursuant to Article 12 of the Chicago Convention. Recalling Section 2.7.2.2, the relevant part of Article 12 reads, '[o]ver the high seas, the rules in force shall be those established under this Convention'.

1069 ICAO *Civil/Military Cooperation Update* (n 965) 2.18.
1070 ICAO *Establishment of Military Requirements and Restrictions* (n 905) 1.3, 2.10, 2.10 a) and b).
1071 ibid 2.10.
1072 Cuadra (n 913) 496.
1073 See Section 4.3.3.1.

As a result of this article, Head concludes that the only laws applicable to civil aviation in international airspace are those rules referred to in Article 12 and that therefore, coastal States are not permitted to exercise prescriptive jurisdiction to establish ADIZs: '[t]hus one state does not have the power within itself to enact regulations effective over the high seas'.[1074] Kaiser appears to agree with Head, stating that the purpose of this section of Article 12 is to 'prevent States from unilaterally mandating compliance with any other or additional rules which contravene this purpose'.[1075] Papp also raises the issue of Article 12 and considers its scope – noting that ADIZs relate to national security, which is outside the jurisdiction of ICAO – but he ultimately leaves the question open.[1076] Article 12 does provide ICAO with exclusive jurisdiction over the high seas but only in respect to those rules that fall within the scope of the article, including the Standards in Annex 2 together with the SARPs in Annexes 6, 10, 11 and 12, as to which see Section 2.7.2.2. ADIZs are not addressed by these annexes, either expressly or impliedly, and as a result, they are not within the exclusive jurisdiction of ICAO or otherwise governed by the scope of Article 12.[1077] As Cuadra notes on this matter,

> 'When ICAO is silent on a given topic States are not precluded from formulating rules they have adopted on such topics, nor is it mandatory that States notify ICAO of rules they have adopted on such topics'.[1078]

In the absence of a prohibition under international civil aviation law, ICAO policy materials instead aim to encourage States to impose their ADIZ procedures in the safest possible manner.

4.3.6.2 Freedom of overflight

As discussed in Sections 2.6.5 and 3.3.3, legitimate restrictions to freedom of overflight are viewed narrowly by the international community. Whilst airspace can be used in a way that leads to it being exclusive in practice, the exclusive use must be restricted geographically and in duration to what is strictly necessary for the activity. For portions of ADIZs that extend into the high seas, this can be understood on the basis of the 'due regard' obligation

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1074 Head (n 915) 186.

1075 Kaiser, 'The Legal Status of ADIZ' (n 952) 535-36. Kaiser in fact refers to the 'third sentence of Article 11 of the Chicago Convention' here, but given the context – including the fact that he discusses Article 12 in the previous sentence – it is most likely that he is referring to Article 12.

1076 Papp (n 921) 40-41.

1077 See also, Section 3.3.3.1 for discussion on the distinction between the rules referred to in Article 12 and the rules applying to the provision of air navigation services in international airspace.

1078 Cuadra (n 913) 491. See Sections 2.6.5 and 3.2.2 for previous consideration of Article 87(2) UNCLOS.

under Article 87(2) UNCLOS, which requires States to have, in exercising their freedoms of the high seas, a 'due regard' obligation for the interests of other States in their exercise of freedoms of the high seas.[1079] The right to establish ADIZs cannot be considered a freedom of the high seas. A high seas freedom applies – at least *de facto* – equally to all States, whilst the ability to establish ADIZs in international airspace necessarily only applies to coastal States. Thus, whilst determining the legality of ADIZs involves a balance of State interests, a consideration of the balancing of interests between the exercise of two high seas freedoms is not relevant to the discussion here. For ADIZ that extend into the coastal State's EEZ, as discussed in Section 4.3.3.2, the zone cannot be justified by arguing that it achieves a balance between the rights established by UNCLOS of the coastal State in the zone and the freedom of overflight exercised by other States therein. The EEZ regime under UNCLOS provides no support for this argument without the formation of a customary international law to support such an interpretation.

Relying on the analysis of what exactly freedom of overflight entails, as presented in Sections 2.7.1 and 2.7.3.2, the question must first be asked of whether ADIZs do in fact interfere with freedom of overflight. This is particularly so given that – leaving aside the matter of enforcement jurisdiction which, as has been established, is the same in international airspace with or without an ADIZ – ADIZs do not *per se* physically prohibit or restrict aircraft from the airspace within the zone. The consideration of whether the establishment of an ADIZ is inconsistent with the right to freedom of overflight is not limited to physical restriction though and requires a broader perspective. Is it a violation of freedom overflight because it involves the unilateral imposition of requests or orders by one State in international airspace?[1080] Or does a violation require a certain degree of burden in its variation from standard procedure?[1081] Is it relevant that the unilateral measures are primarily for national security purposes, rather than being for the purpose of enhancing safety?

Freedom of overflight does not mean freedom from regulation,[1082] as is evident from Article 12 of the Chicago Convention. As indicated previously, identification and reporting procedures are standard at points throughout an international flight. Of course then, the requirement of 'mere identifica-

1079 UNCLOS, Article 87(2).

1080 As Kaiser argues: Kaiser, 'The Legal Status of ADIZ' (n 952) 532.

1081 As considered by Cuadra: Cuadra (n 913) 496: 'The procedural requirements themselves are not burdensome when viewed in the context of the system of air navigational aids, control, and aircraft-to-ground communication to which international (and even domestic) flights are normally subject'.

1082 'Law, Conflict and Airspace: Understanding Air Defense Identification Zones' (Groningen University Blog, 17 January 2014), available at <www.rug.nl/research/east-asian-studies/blogs/blog/blog-17-01-2014-law-conflict-and-airspace-understanding-air-defense-identification-zones> accessed 13 May 2019.

tion by foreign aircraft cannot be regarded as a restriction on the freedom of overflight'.[1083] It is also standard practice for pilots to file flight plans in advance, [1084] and to maintain radio contact en route. The issuing of clearances is also common practice for civil aircraft but under international civil aviation law, they are to be issued by ATC and are 'solely for expediting and separating air traffic'.[1085]

On top of standard ATC procedures, ADIZs impose additional parameters. As addressed in Section 4.3.6.1, ATC should be the only authority to which flights plans need to be submitted, as opposed to defence authorities, as seems to be required by China for certain flights. ADIZs also involve the obligation to comply with the orders of designated authorities, both when operating in the airspace and prior to entering the airspace, often defence bodies. For example, with reference to Section 4.3.2, a person operating an aircraft in the US ADIZ 'must… comply with the special security instructions… in the interest of national security', as issued by NORAD,[1086] while in China's ADIZ, they must comply with orders of the Ministry of National Defence.[1087] Furthermore, Bangladesh requires aircraft to receive military air defence clearance (ADC) numbers prior to entry into its ADIZ,[1088] as does India.[1089]

Drawing an analogy with vessels on the sea, the need to obtain prior clearance has been viewed as a violation of the right of innocent passage. UNCLOS provides a number of military activities that are prohibited from being carried out by a ship in another State's territorial sea,[1090] but the mere passage of a military ship is not deemed to be inconsistent with innocent passage.[1091] China, among many others, but as a high profile State, requires prior authorisation for warships entering its territorial sea.[1092] The US has criticised this on the basis that it 'considers the establishment of

1083 Hailbronner, 'The Legal Regime' (n 976) 43.

1084 Chicago Convention, Annex 2, 3.3.1.4: 'Unless otherwise prescribed by the appropriate ATS authority, a flight plan for a flight to be provided with air traffic control service or air traffic advisory service shall be submitted at least sixty minutes before departure, or, if submitted during flight, at a time which will ensure its receipt by the appropriate air traffic services unit at least ten minutes before the aircraft is estimated to reach: a) the intended point of entry into a control area or advisory area; or, b) the point of crossing an airway or advisory route'.

1085 *ICAO Procedures for Air Navigation Services* (n 784) 4.5.1.1.

1086 14 C.F.R. § 99.7.

1087 Announcement by the Ministry of National Defense, China (n 895).

1088 ICAO *Civil/Military Cooperation Update* (n 965) 2.15.

1089 'ENR-1.12 Interception of Civil Aircraft – Identification and Interception Procedures', available at <aim-india.aai.aero/eaip/PUB/2012-04-01/html/eAIP/EC-ENR-1.12-en-GB.html> accessed 2 July 2019.

1090 As mentioned in Section 4.3.3.2 (n 967).

1091 Unlike the high seas freedom in Article 87, the instances in which the passage of a foreign ship 'shall be considered to be prejudicial to the peace, good order or security of the coastal State in the territorial sea', in accordance with Article 19 UNCLOS, are exclusive.

1092 Kaye, 'Freedom of Navigation' (n 961) 8-12 (table) and 13.

an advanced authorisation or prior notification a 'hindrance' to innocent passage'.[1093] Of course, this example involves the territorial sea as opposed to international airspace, and innocent passage rather than freedom of overflight. In this example though, it is the requirement itself that is relevant, and it is this that is transferable to the current context. The criticism from the US stems solely from the imposition of the requirement: the context and the effect that it has in practice is irrelevant.

It is proposed here that the additional requirements that are placed on aircraft in ADIZs differ from the regulations that apply to the operation of aircraft in international airspace in one principal manner. The regulations that apply, those SARPs in the applicable annexes pursuant to Article 12, apply *to facilitate the freedom of overflight*. By harmonising identification and reporting requirements, the provision of ATS, emergency procedures, among many other areas, these rules enable aircraft to exercise the right to freedom of overflight. As has been discussed, States may file differences to these SARPs with the exception of Annex 2,[1094] and in this respect a degree of unilateral prescription is permitted, but the varied practices are no less part of the legal framework to facilitate the operation of civil aviation in international airspace. In contrast, ADIZ procedures are unilaterally imposed for the purpose of national security and, in some cases, for other national interests such as territorial control. Furthermore, the procedures imposed can jeopardise the safety of international civil aviation, as addressed in Section 4.3.6.1.

The above considerations address *civil* aircraft. Freedom of overflight also applies to State aircraft, as do some States' ADIZ procedures. The above points focused on the additional impositions that ADIZs place on the operation of a civil aircraft in the zone. Whilst 'many air navigation facilities and services are provided for and used by both civil and military aviation',[1095] State aircraft are not required to follow SARPs and are not subject to any reporting procedures in international airspace, as a result of their exclusion from the scope of the Chicago Convention and its annexes.[1096] On this basis, any requirement imposed in respect to the flight of a State aircraft in international airspace within an ADIZ is a violation of freedom of overflight.

The exclusion of State aircraft from obligations that apply to civil aircraft, such as identification and reporting, are necessary in order to be able to fulfil certain mission requirements. In these cases, it is the responsibility of the State aircraft to maintain separation from civil aircraft as the State aircraft can be effectively invisible to ATC, having not filed a flight plan, established radio connection, or identified itself through cooperative

1093 Sébastien Colin, 'China, the US, and the Law of the Sea' (2016) 2 China Perspectives 57, 60.

1094 See Section 2.7.2.2.1.

1095 ICAO Cir 330, *Civil/Military Cooperation in Air Traffic Management* (2011) 1.3.2.

1096 See Section 2.4.1.

surveillance systems.[1097] ADIZ procedures imposed on State aircraft restrict their operation in international airspace in a manner that the exclusion of this category of aircraft from the Chicago Convention protected them from. In doing so, ADIZ procedures interfere with a State aircraft's freedom of overflight by restricting the international airspace in which it is able to undertake certain missions which are permitted under international law.

For these reasons, ADIZs are inconsistent with freedom of overflight, both for civil aircraft and State aircraft. They are an anomaly in international airspace as unilateral extensions of coastal State power, serving the interests only of that State, and to the detriment of other airspace users, at times in terms of safety, but necessarily in terms of limiting freedom of overflight.

4.3.7 In summary: Legality of ADIZ

ADIZs have existed since the 1950s but there has been a renewed interest in them since the events of September 11 and States continue to establish and extend them today.

ADIZs have no foundation in international law and States justify them using different legal bases, where the justifications reflect the requirements that the States impose in their own ADIZs. Although a State has the right to regulate the admission to or departure from its territory, and aircraft identification requirements are an accepted aspect of this, the establishment of a zone, as opposed to a point or a line as is standard for reporting requirements, is unnecessary to achieve this aim and thus, ADIZs cannot be justified on this ground. Neither can an ADIZ be justified on the basis of what a number of States claim to be their right to regulate military activities in their EEZ. The EEZ regime under UNCLOS is established for a specific purpose,[1098] and the coastal State's rights within the zone do not extend to restricting the mere exercise of freedom of overflight of military aircraft. The right to self-defence is a widely referred to but frequently rejected legal basis for ADIZs. The establishment of the zone is not self-defence under the definition of self-defence, which is an exception to the use of force, and the type of threat which gives rise to the right is not the type ADIZs are established in response to. Finally, the right to establish ADIZs does not have customary status. State practice remains varied but, more so, there is little evidence of *opinio juris* to indicate that the right is in the process of crystallising as a customary international law.

The international community is moving away from the *Lotus* principle, in which case a legal basis is required under international law for the exercise of prescriptive extraterritorial jurisdiction. The preceding sections have demonstrated that there is no legal basis that can be relied on to justify

1097 ICAO, *Guidelines to Airspace Users in Order to Raise their Awareness on State Aircraft Operations Especially in the High Seas Airspace over the Baltic Sea* (Eur Ops Bulletin, 15 December 2015) 1.

1098 See Section 2.7.3.

ADIZs. In the alternative, if the *Lotus* principle still stands, a coastal State has the right to establish an ADIZ provided it is not prohibited by international law. In any case, in terms of enforcement jurisdiction, the actions a coastal State may take against an aircraft in international airspace within its ADIZ are the same as in any other international airspace.

Finally, ADIZs are prohibited by international law. Although they may pose a risk to the safety of civil aviation, they are not in violation of international civil aviation law, but rather of the principle of freedom of overflight. As a unilateral exercise of State power over international airspace for the purpose of, among other objectives, mitigating risks to national security, they impose control over the operation of civil aircraft and State aircraft that is not intended by, or consistent with, the understanding of freedom of overflight. As has been illustrated throughout this research, freedom of overflight does not mean freedom from regulation or even, in practice, free access to all international airspace at all times. The regulations and restrictions to access to international airspace though, are specific and narrowly applied, relating to either safety and efficiency of international civil aviation or to the balancing the right of States to exercise their freedoms of the high seas. ADIZs are an anomaly in international airspace, with no legal basis in international law and in violation of the customary international law principle of freedom of overflight.

4.4 Conclusion to chapter

This chapter examined coastal State jurisdiction in respect to FIRs and ADIZs, considering its interaction with freedom of overflight in international airspace and whether the exercise of the jurisdiction is legitimate. It approached the question in relation to FIRs from a specific perspective: that of the application of the principle of non-discrimination to Annex 11, as the legal framework forming the basis for the responsibility of States in FIRs, including international airspace. The question regarding ADIZs was essentially whether they are legitimate under international law.

Contrary to the actions of Bahrain and the UAE, FIR responsibility does not give a coastal State the right to prohibit aircraft from international airspace within the FIR on the basis of the State of registration of the aircraft. This was clear as a result of there being freedom of overflight in international airspace, but this research set out to examine how international civil aviation law, considered in isolation, might prohibit such discrimination, specifically through there being an implied principle of non-discrimination in the rules applying to ATS provision. The rules forming the legal foundation for the allocation of responsibility for FIRs in Annex 11 do not include the principle of non-discrimination, and there is little support for an implied application of the principle on the basis of its importance to the rules governing air navigation in national airspace, but coastal State jurisdiction is very specific in the context of FIRs and must

always be drawn back to technical and operational decisions for safety and efficiency purposes. Furthermore, the SARPs under Annex 11 are adopted by the ICAO Council whose objectives in developing principles for air navigation include avoiding discrimination between States. On this basis, if a State responsible for an FIR interprets its responsibility as permitting it to discriminate, without that decision being based solely on safety and efficiency considerations within the scope of Annex 11, it would be a breach of good faith.

In terms of ADIZs, it is clear that their presence does not affect the coastal State's enforcement jurisdiction in international airspace. The enforcement measures that a State may take in international airspace exist independently of ADIZs and are not specific to coastal States. The question of coastal State prescriptive jurisdiction in respect to ADIZs is more complicated and rests on the legitimacy of ADIZs. Even if no basis of jurisdiction is required for prescriptive jurisdiction in international airspace, ADIZs are a violation of the freedom of overflight, as has been demonstrated, and are therefore prohibited by international law. In the case that a legal basis is required for ADIZs under international law, the only possible grounds would be if the right of a coastal State to establish one has developed as a customary international law, in which case they would be legitimate regardless of any breach of freedom of overflight. This study has concluded that, whilst evidence of sufficient uniformity of State practice could present a hurdle, establishing *opinio juris* currently stands as the greatest barrier to the demonstration of the right to establish ADIZs as being customary international law. This research concludes therefore that, based on the circumstances as they currently stand and the evidence available, ADIZs are not legitimate and that consequently, they do not provide coastal States with a basis for exercising jurisdiction in international airspace.