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Is the Establishment of Air Defence Identification Zones Outside National Airspace in Accordance with International Law?

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Abstract

Whereas the right of a state to establish an air defence identification zone (ADIZ) in national airspace falls squarely within its sovereignty, the question whether coastal states may claim such zones outside national airspace remains a matter of controversy. The latter category, referred to as 'offshore ADIZs', usually do not amount to sovereignty claims over the open airspace outside national airspace or involve threat or use of force. The right of coastal states to identify aircraft in the open airspace near coastal areas has arguably become part of customary international law. This customary right, however, only extends to 'passive identification' by radar detection, radio communication or close visual checks, which thus is only capable of justifying the establishment of offshore ADIZs for this purpose. The identification of aircraft in offshore ADIZs, through either voluntary or passive measures, is nevertheless within the parameters of the obligation of paying due regard to the freedom of overflight. This explains why 'passive identification' is 'permissible' under customary international law, while 'voluntary identification' is at least 'tolerated' albeit in the absence of a permissive customary rule.

1 Introduction

Air defence identification zones (ADIZs) are '[s]pecial designated airspace of defined dimensions within which aircraft are required to comply with special identification and/or reporting procedures additional to those related to the provision of air traffic

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services (ATS)'.[1] The inception of ADIZs can be traced back to the height of the Cold War, when they were established to provide early warning of aerial intrusions. The past few decades have witnessed the disbandment of a few old ADIZs and the emergence of new ones. Today, at least 26 states and regions maintain one or multiple ADIZs permanently.[2] Whereas nine of them limit their ADIZs to national airspace (hereinafter territorial ADIZs),[3] the other 17, which are all coastal states or regions, claim ADIZs that are entirely or in part outside their national airspace (hereinafter offshore ADIZs).[4] In addition, some temporary ADIZs that have been established for special events also have an 'offshore' part.[5] Identification measures commonly employed in ADIZs fall within two categories: (i) 'voluntary identification measures' – that is, measures with which aircraft are expected to comply 'voluntarily' prior to entry and during transition of ADIZs, such as flight plan submission and position reports; (ii) 'passive identification measures' – that is, measures by which aircraft that fail to

1 Annex 4 to the Convention on International Civil Aviation, 11th edn, July 2009, ch. 1, 1-1; Annex 15 to the Convention on International Civil Aviation, 16th edn, July 2018, ch. 1, 1-2. Annexes 4 and 15 also require the publication of information on air defence identification zones (ADIZs), if established, in an aeronautical information publication (AIP) and charts. An 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'.

2 For a comprehensive survey of state practice on ADIZs, see Su, 'The Practice of States on Air Defense Identification Zones: Geographical Scope, Object of Identification, and Identification Measures', 18 *Chinese Journal of International Law* (*CJIL*) (2019) 811. As an update, Uruguay claimed a 'territorial ADIZ' in 2020. See AIP Uruguay, 5 November 2020, ENR 5.2-2, ENR 6.4. The primary source for the geographical scope and identification rules of ADIZs is an AIP. However, some states have not published information on their ADIZs in their AIPs as per Annexes 4 and 15 to the Chicago Convention; some AIPs are not easily accessible to the public. In alternative, reference can be made to the *Airway Manuals of Jeppesen*, a Boeing company, and its JeppView application.

3 In alphabetical order, Argentina, Brazil, Finland, Libya, Peru, Poland, Sri Lanka, Turkey and Uruguay. See Su, *supra* note 2, at 814–815, citing AIP Argentina, 31 January 2019, ENR 5.2; AIP Brazil, 9 March 2019, ENR 5.2; Jeppesen JeppView (Cycle 1905) (Libya); AIP Finland, 10 November 2016, ENR 5.2.8; AIP Peru, Supplement no. 16/16, 8 April 2016; AIP Poland, 7 December 2017, ENR 5.2.2; AIP Sri Lanka, 30 January 2015, ENR 2.2, 2.1; *Jeppesen Middle East Airway Manual*, 20 June 2019, at 42 (Turkey).

4 In alphabetical order, Bangladesh, Canada, China, Cuba, Iceland, India, Indonesia, Iran, Japan, Republic of Korea (ROK), Myanmar, Pakistan, Panama, the Philippines, Taiwan Region, Thailand and the USA. See Su, *supra* note 2, at 815–820, citing AIP Bangladesh, 28 March 2019, ENR 5.2, 3.1; Canadian Aviation Regulations, Doc. SOR/96-433, 600.01; Statement by the Government of the People's Republic of China on Establishing the East China Sea Air Defense Identification Zone, 23 November 2013, available at www.chinadaily.com.cn/china/2013-11/23/content_17126611.htm; AIP Cuba, 25 April 2019, ENR 5.1; Jeppesen JeppView (Cycle 1905) (Iceland); AIP India, 19 July 2018, ENR 5.2, 5.2.2.1; AIP Indonesia, 20 September 2012, ENR 5.1; AIP Islamic Republic of Iran, 28 February 2019, ENR 1.1, 2; AIP Japan, 1 March 2018, ENR 5.2, 5.1; AIP Republic of Korea, 27 September 2018, ENR 5.2, 2; AIP Myanmar, 29 March 2018, ENR 1.1, 3.1.2; Jeppesen JeppView (Cycle 1905) (Pakistan); Jeppesen JeppView (Cycle 1905) (Panama); Jeppesen JeppView (Cycle 1905) (the Philippines); AIP Taipei FIR, 14 May 2015, ENR 5.2, 5.2.3; Jeppesen JeppView (Cycle 1905) (Thailand); 14 C.F.R. § 99.43, § 99.45, § 99.47, and § 99.49 (USA).

5 AIP Australia, Supplement no. H62/14, 5.2, Appendix 4 (temporary ADIZs for the G-20 Leader's Summit of 2014); AIP Australia, Supplement no. H183/17, 7.2, Appendix 3 (temporary ADIZs for the 21st

comply with the above voluntary measures are identified in a passive manner by the coastal state, such as radar detection, radio communication and close visual checks.[6]

While the right of a state to establish a 'territorial ADIZ' falls squarely within the complete and exclusive sovereignty that it has over the airspace above its territory, the claim of offshore ADIZs is not explicitly prohibited or permitted in international law. To resolve this legal uncertainty is imperative, as the open airspace near coastal areas, which offshore ADIZs often cover, is also the place where peacetime aerial military activities take place frequently. To seek legal justification, some writers have resorted to the right of self-protection or have drawn an analogy with the regime of contiguous zones in the law of the sea.[7] Such efforts may attest to the great value of offshore ADIZs to national security, but they do not seem to afford adequate legal ground for their establishment. With respect to the issue of legality, traditional positivism lays particular emphasis on state consent. As the Permanent Court of International Justice (PCIJ) enunciated in the *Lotus* case, '[t]he rules of law binding upon States … emanate from their own free will. … Restrictions upon the independence of States cannot therefore be presumed'.[8] But it has become increasingly controversial to equate the absence of a prohibition to accordance with international law.[9] As Judge Simma declared in the *Kosovo* Advisory Opinion, the possible degrees of non-prohibition range from 'tolerated', to 'permissible', to 'desirable'.[10]

In light of the above, this article is aimed to provide a fuller treatment of the accordance with international law of the claim of offshore ADIZs. Section 2 examines two prohibitive rules that are most likely to be violated by the claim of offshore ADIZs – that is, the prohibition of sovereignty claims over the open airspace outside national airspace and the prohibition of threat or use of force. Section 3 examines the permissive rules by which coastal states identify aircraft near coastal areas, which, as this article argues, form part of customary international law. But this customary right only extends to 'passive identification' and can only justify the establishment of offshore ADIZs for this purpose. Section 4 argues that the identification of aircraft in offshore ADIZs, either through voluntary or passive measures, is within the parameters of the obligation of paying due regard to the freedom of overflight, which explains why passive identification is 'permissible' under customary international law, while voluntary identification is only 'tolerated', albeit in the absence of a permissive customary rule.

Commonwealth Games of 2018); AIP Argentina, Supplement no. A 28/2018, 11 October 2018, 4.1, Appendix 1 (temporary ADIZ for the G-20 Summit of 2018).

6 See Su, *supra* note 2, at 825.

7 Cuadra, 'Air Defense Identification Zones: Creeping Jurisdiction in the Airspace', 18 *Virginia Journal of International Law* (1978) 485, at 497–505; Head, 'ADIZ, International Law, and Contiguous Airspace', 3 *Alberta Law Review* (1964) 182, at 190, 192.

8 *Case of the S.S. 'Lotus' (France v. Turkey)*, 1927 PCIJ Series A, No. 10, at 18.

9 *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, 14 February 2002, ICJ Reports (2002) 3, at 78, Joint Separate Opinion of Judges Higgins, Kooijmans, and Buergenthal; *Fisheries Case (United Kingdom v. Norway)*, Judgment, 18 December 1951, ICJ Reports (1951) 116, at 152, Separate Opinion of Judge Alvarez.

10 *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, 22 July 2010, ICJ Reports (2010) 403, at 478, 480, Declaration of Judge Simma.

2 The *Aer Clausum* and Use of Force Concerns

The proliferation of offshore ADIZs, which account for about two-thirds of existing ADIZs, has given rise to the concern that the open airspace above exclusive economic zones (EEZs) and the high seas may come under a wave of creeping jurisdiction by coastal states, as happened with the open high seas in the 19th century. True, if the claim of an offshore ADIZ amounts to one of sovereignty, it would effect a seaward expansion of *aer clausum*, which came into existence at least in the early 1900s and served to grant all states exclusive sovereignty over the airspace above their territory.[11] As ADIZs are essentially security oriented and the military plays an important role in the identification and interception of aircraft failing to comply with ADIZ procedures, there are also concerns that non-compliant aircraft may encounter forceful measures.

A *The* Aer Clausum *Concern*

Today, it is a well-recognized customary principle that 'every State has complete and exclusive sovereignty over the airspace above its territory'.[12] The territory of a state includes 'the land areas and territorial waters adjacent thereto under the sovereignty … of such State'.[13] Similarly, the 1982 United Nations Convention on the Law of the Sea (UNCLOS) provides that the sovereignty of a coastal state 'extends to the air space over the territorial sea as well as its bed and subsoil'.[14] Whereas ships of all states enjoy the right of innocent passage through the territorial sea,[15] no such right is accorded to aircraft in the superjacent airspace. UNCLOS also created the regime of archipelagic states, whereby their sovereignty extends to the archipelagic waters and air space over them.[16] The air space over archipelagic waters is distinct from that above the territorial sea of coastal states in that, in the former, all aircraft enjoy the right of archipelagic sea lanes passage in air routes designated by archipelagic states.[17] Seaward to national airspace, with the scope defined as above, is the open airspace in which all aircraft enjoy the freedom of overflight.[18]

The essence of sovereignty is 'the right to exercise therein, to the exclusion of any other State, the function of a State'.[19] It follows from this principle that foreign

[11] Cuadra, *supra* note 7, at 486–498, 505–507; Lamont, 'Conflict in the Skies: The Law of Air Defence Identification Zones', 39 *Air and Space Law* (2014) 187, at 193.

[12] Convention on International Civil Aviation (Chicago Convention) 1944, 15 UNTS 295, Art. 1; see also Convention Relating to the Regulation of Aerial Navigation (Paris Convention) 1919, 11 LNTS 173, Art. 1. The customary status of this principle is confirmed in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, 27 June 1986, ICJ Reports (1986) 14, at 111.

[13] Chicago Convention, *supra* note 12, Art. 2; see also Paris Convention, *supra* note 12, Art. 1.

[14] United Nations Convention on the Law of the Sea (UNCLOS) 1982, 1833 UNTS 397, Art. 2, para. 2.

[15] *Ibid.*, Art. 17.

[16] *Ibid.*, Art. 49, paras 1, 2.

[17] *Ibid.*, Art. 53, paras 1, 2. If an archipelagic state does not designate sea lanes or air routes, the right of archipelagic sea lanes passage may be exercised through the routes normally used for international navigation (see Art. 53, para.12).

[18] *Ibid.*, Art. 87, para. 1; Art. 58, para. 1.

[19] *Island of Palmas (US v. Netherlands)* (1928), reprinted in UNRIAA, vol. 2, 829, at 838.

aircraft shall not enter sovereign national airspace without permission. However, in none of the existing offshore ADIZs is the claiming state's prior consent asserted as a prerequisite for the entry of foreign aircraft. Noteworthy in this connection is the 'QV916' episode. On 25 July 2015, Laos Airlines Flight QV916, which was scheduled to depart from Gimhae International Airport towards Wattay International Airport, was instructed by Chinese air traffic controllers to turn back just as it approached the East China Sea ADIZ (ECS ADIZ), which was claimed by China as an 'offshore ADIZ' on 23 November 2013.[20] It was speculated that China was implementing sovereignty-like control in the ECS ADIZ.[21] However, as China's Ministry of Defence spokesperson clarified later, the instruction was due to the attempt of QV916 to fly over China's national airspace without permission.[22]

Also noteworthy is the sensitivity of the Republic of Korea (ROK) to the entry of foreign military aircraft, especially those from China and Russia, into its ADIZ.[23] For instance, the ROK summoned Chinese embassy officials to lodge a complaint over the 'intrusion' of Chinese military aircraft into its ADIZ.[24] However, the ROK does not seem to claim sovereignty in its ADIZ. Otherwise, it would have taken forceful measures against foreign military aircraft entering without permission rather than simply tracking and monitoring them.[25] In fact, one should not be surprised to find foreign military aircraft in its 'offshore ADIZ', which is normal and legal. As a Chinese Ministry of Foreign Affairs spokesperson said in response to the ROK's allegation, an ADIZ 'is not a country's territorial space, and according to international law, countries enjoy the freedom of overflight', and 'the Chinese and Russian military aircraft … did not enter the airspace of other countries'.[26]

B *The Threat or Use of Force Concern*

International law prohibits the threat or use of force generally, including against aircraft operating outside national airspace, regardless of whether or not an 'offshore

[20] See R. Ganan Almond, 'China's Air Defense Identification Zone and Lao Airlines Flight QV916: A Curious Case of Mistrust and Misunderstanding in the East China Sea', *The Diplomat*, 15 December 2015, available at https://thediplomat.com/2015/12/chinas-air-defense-identification-zone-and-lao-airlines-flight-qv916/.

[21] See A. Panda, 'A First: China Turns Back Commercial Flight for Violating East China Sea ADIZ Rules', *The Diplomat*, 30 July 2015, available at https://thediplomat.com/2015/07/a-first-china-turns-back-commercial-flight-for-violating-east-china-sea-adiz-rules/.

[22] See 'Laos Plane Refused Entry to China Has No Link with ADIZ', *Xinhua*, 30 July 2015, available at www.xinhuanet.com/english/2015-07/30/c_134464654.htm.

[23] 'S. Korea Scrambles Jets as Chinese, Russian Aircraft Enter Air Defence Zone', *Reuters*, 22 December 2020, available at https://uk.reuters.com/article/uk-southkorea-china-russia-idUKKBN28W13G.

[24] H. Shin, 'South Korea Summons Chinese Official after Air Zone Intrusion', *Reuters*, 27 July 2018, available at www.reuters.com/article/us-southkorea-china-airspace/south-korea-scrambles-jets-to-intercept-chinesewarplane-idUSKBN1KH0GI.

[25] 'South Korea Scrambled Jets to Warn Russian Warplanes in Air Defense Zone', *Reuters*, 22 October 2019, available at https://br.reuters.com/article/instant-article/idUSKBN1X10QQ.

[26] Ministry of Foreign Affairs of the People's Republic of China, Foreign Ministry Spokesperson Zhao Lijian's Regular Press Conference on December 23, 2020, available at https://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2511_665403/t1842271.shtml.

ADIZ' is claimed there. With respect to civil aircraft, Article 3 *bis* of the Chicago Convention provides that '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'.[27] Although the provision continues to provide that '[t]he provision shall not be interpreted as modifying in any way the rights and obligations of States set forth in the Charter of the United Nations'[28] – most notably, the inherent right of self-defence – such an extreme scenario is unlikely to occur in the identification of civil aircraft. Use of force against military aircraft, on the other hand, is likely to amount to an armed attack and can only be justified by the right of self-defence or with an authorization from the United Nations (UN) Security Council.

In many offshore ADIZs, interception procedures are stipulated for aircraft failing to identify themselves 'voluntarily' or deviating from their flight plans.[29] 'Interception', which is not clearly defined, usually involves the scrambling of military aircraft for a wide array of purposes, ranging from identification to redirection.[30] In the context of aircraft identification, the objective is only 'to complete the identification process',[31] 'to determine their identity'[32] or 'for visual confirmation'.[33] In other words, it is aimed to identify the non-compliant aircraft detected by radar through 'passive measures', such as radio communication and close visual inspection.[34] These procedures most often do not involve threat or use of force.[35] In some other ADIZs, further procedures are provided for aircraft failing to comply with identification measures or to follow instructions, with reference to the international standards and recommended practices on the interception of civil aircraft adopted by the Council of the International Civil Aviation Organization (ICAO).[36] However, there is no report of using or threatening to use force in the interception of aircraft.

Concerns of the threat or use of force may also arise out of identification rules, in some ADIZs, with respect to the disposal of non-compliant aircraft. In the ECS ADIZ, for instance, it is stated that 'China's armed forces will adopt *defensive emergency measures* to respond to aircraft that do not cooperate in the identification or

[27] Chicago Convention, *supra* note 12, Art. 3 *bis*, para. a.

[28] *Ibid.*

[29] See, e.g., AIP Argentina, Supplement no. A 28/2018, *supra* note 5, 4.1; AIP Australia, Supplement no. H62/14, *supra* note 5, 5.7; AIP Australia, Supplement no. H183/17, *supra* note 5, 1.16, 7.7; AIP Bangladesh, *supra* note 4, ENR 5.2, 3.2.1, (k); AIP India, *supra* note 4, ENR 5.2, 5.2.2.2.3; AIP Islamic Republic of Iran, *supra* note 4, ENR 1.1, 2; AIP Japan, *supra* note 4, ENR 5.2, 5.1; AIP Myanmar, *supra* note 4, ENR 1.1, 3.2.1; *Jeppesen Middle East Airway Manual* (20 June 2019), at 39 (Pakistan).

[30] Annex 2 to the Convention on International Civil Aviation, 10th edn, July 2005, Appendix 2, 1.1.

[31] AIP Argentina, Supplement no. A 28/2018, *supra* note 5, 4.1.

[32] AIP Australia, Supplement no. H62/14, *supra* note 5, 5.8; AIP Australia, Supplement no. H183/17, *supra* note 5, 7.7, 7.8.

[33] AIP Japan, *supra* note 4, ENR 5.2, 5.1.

[34] See, e.g., AIP Australia, Supplement no. H62/14, *supra* note 5, 5.8; AIP Australia, Supplement no. H183/17, *supra* note 5, 7.7, 7.8.

[35] *Cf.* Lamont, *supra* note 11, at 196, holding that 'ADIZ regimes include compliance measures and the implicit threat of the use of force in the event of non-compliance with a State's reporting restrictions'.

[36] See, e.g., AIP Myanmar, *supra* note 4, ENR 1.12; *Jeppesen Middle East Airway Manual* (20 June 2019), at 42 (Thailand).

refuse to follow the instructions'.[37] This requirement is regarded by some as a 'unilateral coercive action' likely to 'result in a tense situation in East Asia'.[38] However, China's Ministry of Defence spokesperson has clarified that 'normal international flights in the zone will not be affected'.[39] It is observed, from a linguistic perspective, that '[t]he term "defensive emergency measures" in Chinese only denotes preventive acts, such as tracking and monitoring', and it is recommended that '[the term] should be revised, in particular in the context of civil aircraft identification, given its highly provocative implications in English'.[40] Subsequent practice has shown that the safety of aviation in the ECS ADIZ, including that of non-compliant civil and military aircraft, has never been compromised. Also noteworthy in this connection are Thailand's ADIZ rules, which provide that '[a]ircraft will be intercepted by Royal Thai Air Force interceptors if they do not adhere to the identification procedures, and aircraft under interception *will be attacked* if they fail to obey any instructions given by the interceptors'.[41] However, there is no report of incidents in which this rule has been implemented by Thailand.

3 The Customary Right of Coastal States to Identify Aircraft Near Coastal Areas through 'Passive Measures'

The claim of ADIZs by a number of states and the lack of protests from others have prompted some writers to assert that the right to declare an ADIZ is now part of customary international law.[42] Such an assertion, appealing as it may be, should be based on a rigorous assessment of the two constituent elements of customary international law – that is, practice and *opinio juris sive necessitates*.[43] Before proceeding with this

[37] 'Announcement of the Aircraft Identification Rules for the East China Sea Air Defense Identification Zone of the P.R.C.', *Xinhua*, 23 November 2013, available at www.china.org.cn/china/2013-11/23/content_30683623.htm (emphasis added).

[38] Ikeshima, 'China's Air Defense Identification Zone (ADIZ) and Its Impact on the Territorial and Maritime Disputes in the East and South China Seas', 3 *Transcommunication* (2016) 151, at 152.

[39] China Exclusive: Defense Ministry Spokesman Responds to Air Defense Identification Zone Questions', *Xinhua*, 23 November 2013, available at news.xinhuanet.com/english/china/2013-11/23/c_132912145.htm.

[40] Su, 'The East China Sea Air Defense Identification Zone and International Law', 14 *CJIL* (2015) 271, at 284–285.

[41] *Jeppesen Middle East Airway Manual* (20 June 2019), at 42 (Thailand) (emphasis added).

[42] Dutton, '*Caelum Liberum*: Air Defense Identification Zones Outside Sovereign Airspace', 103 *American Journal of International Law* (2009) 691, at 706–707; J. Lee, 'China's Declaration of an Air Defense Identification Zone in the East China Sea: Implications for Public International Law', *ASIL Insights*, 19 August 2014, available at www.asil.org/insights/volume/18/issue/17/china%E2%80%99s-declaration-air-defense-identification-zone-east-china-sea#_edn8; J.A. Roach, 'Air Defence Identification Zones', *Max Planck Encyclopedia of Public International Law*, March 2017, para. 6, available at opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e237?rskey=lXb2Ta&result=1&prd=MPIL.

[43] Statute of the International Court of Justice 1945, 33 UNTS 933, Art. 38(1)(b); see also *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, Judgment, 20 February 1969, ICJ Reports (1969) 3, at 44, para. 77; *Continental Shelf (Libya/Malta)*, Judgment, 3 June 1985, ICJ Reports (1985) 13, at 29–30, para. 27; *Military Activities in Nicaragua*, *supra* note 12, at 97–98, para. 184; *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, ICJ Reports (1996) 226, at 253, para. 64.

assessment, two preliminary questions merit special attention. First, this section of the article examines the customary status of the right of coastal states to identify aircraft near coastal areas – that is, aircraft operating in the open airspace in close vicinity to their national airspace, rather than the right to establish an ADIZ in the general sense. On the one hand, as mentioned above, the legal controversy surrounding ADIZs pertains more to offshore ADIZs than to territorial ADIZs. On the other hand, there are only about 17 states or regions claiming offshore ADIZs, which is unlikely to fulfil the generality requirement of customary international law. However, there may be a broader right, enjoyed by coastal states, to identify aircraft near coastal areas, which can be exercised with or without setting up an offshore ADIZ. This right, once established as customary, would conversely justify the claim of offshore ADIZs for this purpose. Why then argue for the legality of offshore ADIZs beyond customary international law? As will be demonstrated below, this established customary rule only extends to 'passive identification', and there are other aspects of offshore ADIZs that can be justified on alternative grounds. In particular, there are questions whether offshore ADIZs, which are based on a zonal concept, amount to an illegal claim of sovereignty over the open airspace outside national jurisdiction and whether the application of voluntary identification measures to civil aircraft is legal.

Second, in contrast to what is taken for granted in some diplomatic statements and scholarly writings, an empirical study shows that, in most offshore ADIZs, the identification measures are applied to aircraft that do not intend to enter national airspace (hereinafter transiting aircraft), just as to those with such an intention (hereinafter entering aircraft).[44] This distinction is helpful for the following legal analysis: whereas the right to identify entering aircraft derives from territorial sovereignty, the identification of transiting aircraft may infringe upon the freedom of overflight. This does not mean, however, that transiting aircraft should not be covered by the material scope of ADIZs, as without identification it is impossible to verify the intention, hence to know which is threatening and which is not. With respect to state practice, most states claiming offshore ADIZs do not exempt transiting aircraft from the application of voluntary identification measures,[45] except for the USA and Japan.[46] Nevertheless, these two states identify transiting military aircraft near coastal areas through 'passive

[44] Su, *supra* note 2, at 820–825.

[45] Bangladesh, Canada, China, India, Iran, the ROK, Myanmar, Pakistan, Taiwan region and Thailand. See Su, *supra* note 2, at 820–823, citing AIP Bangladesh, *supra* note 4, ENR 5.2, 3.2; Canadian Aviation Regulations, *supra* note 4, 602.145(1); 'Announcement of the Aircraft Identification Rules' (China), *supra* note 37; AIP Taipei FIR, 9 May 2019, ENR 1.1, 1.1.2(3); AIP India, *supra* note 4, ENR 5.2, 5.2.2.2.1; AIP Islamic Republic of Iran, *supra* note 4, ENR 1.1, 2; AIP Republic of Korea, *supra* note 4, ENR 5.2, 2.1.1, 2.1.3, 2.2.1; AIP Myanmar, *supra* note 4, ENR 1.1, 3.1.3; *Jeppesen Middle East Airway Manual* (20 June 2019), at 39 (Pakistan); *Jeppesen Middle East Airway Manual* (20 June 2019), at 41 (Thailand). Similarly, no exemption is made for transiting aircraft in some temporary ADIZs. See AIP Argentina, Supplement no. A 28/2018, *supra* note 5, 4.1; AIP Australia, Supplement no. H62/14, *supra* note 5, 5.5.1; AIP Australia, Supplement no. H183/17, *supra* note 5, 7.5.1. It is unclear whether an exemption is made for transiting aircraft in the 'offshore ADIZs' of Cuba, Iceland, Indonesia, Panama and the Philippines, due to the lack of publicly available information.

[46] See Su, *supra* note 2, at 823–824, citing 14 C.F.R. § 99.1(a) (USA); AIP Japan, *supra* note 4, ENR 5.2, 5.2.

measures', if necessary.[47] Transiting civil aircraft are mostly identifiable through their ATS mechanisms, which are discussed further below.

A *State Practice*

The existing offshore ADIZs are maintained by 17 states or regions (Bangladesh, Canada, China, Cuba, Iceland, India, Indonesia, Iran, Japan, the ROK, Myanmar, Pakistan, Panama, the Philippines, Taiwan region, Thailand and the USA). They account for a significant portion of coastal states or regions in North America, Northeast Asia and South Asia as well as a small part in Southeast Asia, the Middle East and Europe. Yet this figure of claiming states or regions and the geographical scope of their offshore ADIZs does not reflect the whole picture of state practice regarding the identification of aircraft near coastal areas.

First, some states and intergovernmental organizations explicitly require aircraft operating near coastal areas to identify themselves 'voluntarily', without establishing an offshore ADIZ. A novel example is the North Atlantic Treaty Organization's (NATO) Air Policing Mission, a peacetime collective defence mission safeguarding the integrity of its alliance members' airspace. Measures adopted in this mission are almost identical to those of ADIZs – for example, the requirement that military and civilian aircraft should 'follow international flight regulations' and the interception of those failing to 'properly identify themselves', 'communicate with Air Traffic Control' or 'file flight plans'.[48] Thus, the airspace above the Baltic and the Norwegian seas, the two regions where the mission is conducted primarily,[49] has arguably become NATO's de facto ADIZs.[50] Though not a state, the importance of NATO's practice shall not be underestimated in the identification of customary international law. As the International Law Commission (ILC) has concluded, '[i]n certain cases, the practice of international organizations also contributes to the formation, or expression, of rules of customary international law'.[51]

ADIZ-like measures have also been imposed upon aircraft operating in some flight information regions (FIRs), which cover the open airspace near coastal areas. FIRs are 'airspace of defined dimensions within which flight information service and alerting service are provided'.[52] The role of managing states in FIRs is purely for the provision

[47] Su, *supra* note 2, at 823–824.

[48] North Atlantic Treaty Organization (NATO) Allied Air Command, NATO Air Policing, available at https://ac.nato.int/page5931922/-nato-air-policing.

[49] See, e.g., NATO, German NATO Jets Intercept Four Russian Aircraft over the Baltic Sea, 22 November 2018, available at https://shape.nato.int/news-archive/2018/german-nato-jets-intercept-four-russian-aircraft-over-the-baltic-sea; NATO, Belgian Jets Conduct First Baltic Air Policing Intercept of Their Deployment, 6 September 2017, available at https://shape.nato.int/news-archive/2017/belgian-jets-conduct-first-baltic-air-policing-intercept-of-their-deployment.

[50] Su, *supra* note 2, at 818.

[51] International Law Commission (ILC), 'Identification of Customary International Law', in *Report of the International Law Commission, Seventieth Session* (30 April–1 June and 2 July–10 August 2018) 117, at 119, Conclusion 4, para. 2.

[52] Annex 2 to the Convention on International Civil Aviation, *supra* note 30, ch. 1, at 1–4.

of ATS – that is, 'flight information service, alerting service, air traffic advisory service, air traffic control service (area control service, approach control service or aerodrome control service)'.[53] Within FIRs, only civil aircraft bear the obligation to identify themselves to the appropriate ATS authority, although military aircraft may also follow the ICAO's flight procedures to utilize FIR services.[54] While it is one thing for military aircraft to identify themselves voluntarily, it is another thing altogether to impose the legal obligation of voluntary identification on them.[55] Greece, for example, requires military aircraft entering FIR Athens, which covers part of the open airspace above the Mediterranean Sea, to submit a flight plan.[56] There have been reports of Greece's identification and interception of Turkish military aircraft that have failed to comply with this requirement when operating in this region.[57] Similarly, Venezuela claims that 'any aircraft that travels through international airspace must report the reason, route and technical characteristics of the flight to the authorities of the corresponding flight information region'.[58] In a letter to the UN, Venezuela accused US military aircraft of 'refus[ing] to comply with these regulations, deliberately jeopardizing free and safe air traffic, thus hampering Venezuela's ability to exercise effective and safe control of its flight information region' and 'refus[ing] to have contact with the authorities of the flight information region of Venezuela'.[59] The Venezuelan practice was challenged by the USA as '[p]rior permission for overflight of the EEZ and Flight Information Region (FIR)'[60] and '[p]rior permission required for military operations in … the Flight Information [*sic*] Region'.[61] The application of these measures, which resemble voluntary identification measures of ADIZs, to military aircraft, may stem from a too broad interpretation of FIR responsibilities or some new claim external to the FIR regime. Either way, the areas that coincide with the FIRs have become the managing states' de facto ADIZs.

Second, some coastal states identify aircraft near coastal areas through 'passive measures', without explicitly requiring them to identify themselves 'voluntarily', not to say maintaining an offshore ADIZ. Russia, which does not maintain an ADIZ officially, intercepts NATO aircraft on a routine basis. General Tod D. Wolters, commander

53 Annex 11 to the Convention on International Civil Aviation, 13th edn, July 2001, ch. 1, at 1–2.

54 *The Commander's Handbook on the Law of Naval Operations*, August 2017, at 2.7.2.2.

55 *Ibid.*

56 R. Abeyratne, *Convention on International Civil Aviation: A Commentary* (2014), at 60–61.

57 See, e.g., 'Turkish Aircraft Infringes Athens FIR', *The Greek Observer*, 9 January 2018, available at http://thegreekobserver.com/greece/article/32848/turkish-aircraft-infringes-athens-fir/; K. Filippeos, 'Six Turkish Fighter Jets Enter Athens FIR without Submitting Flight Plan', *Greek Reporter*, 14 June 2017, available at https://greece.greekreporter.com/2017/06/14/six-turkish-fighter-jets-enter-athens-fir-without-submitting-flight-plan/; 'Seven Turkish Military Aircraft Violate Athens' FIR', *The Greek Observer*, 16 May 2017, available at http://thegreekobserver.com/greece/article/1640/seven-turkish-military-aircraft-violate-athens-fir/.

58 Letter dated 8 August 2019 from the Permanent Representative of the Bolivarian Republic of Venezuela to the United Nations addressed to the Secretary-General, UN Doc. A/73/983, 15 August 2019, at 2.

59 *Ibid.*

60 US Department of Defense, Annual Freedom of Navigation Report, Fiscal Years 2014, 2016, 2017.

61 US Department of Defense, Annual Freedom of Navigation Report, Fiscal Years 2018, 2019.

of US European Command and NATO's supreme allied commander for Europe, once revealed that, 'for every one intercept that a Russian aviator commits against a NATO aircraft, we actually have three NATO intercepts that are committed against a Russian aircraft'.[62] Such interceptions, as mentioned above, include identification, although they may also involve other actions such as redirection.

Third, temporary offshore ADIZs have been set up for special events. While maintaining no permanent ADIZ, Australia has adopted general procedures for aircraft operating in the temporary ADIZs that it establishes from time to time.[63] It established two temporary ADIZs for the G-20 Leader's Summit in 2014 in Brisbane and another two for the 21st Commonwealth Games in 2018 in the Gold Coast area. Argentina also established a temporary ADIZ for the G-20 Summit in 2018 in Buenos Aires. These ADIZs all extended beyond national airspace[64] and required flights therein to comply with identification procedures.[65]

In sum, state practice regarding the identification of aircraft near coastal areas is more extensive than the claim of offshore ADIZs, which is merely one of the means by which the former is managed. The question that follows is whether the practice fulfils the material element of customary international law. While it is commonly held that state practice must be general, there exists no consensus on the degree of uniformity required. The International Court of Justice (ICJ), while adhering to the 'constant and uniform' test in its early jurisprudence,[66] recognized in the *Nicaragua* case that the corresponding practice does not have to be 'in absolutely rigorous conformity with the rule' and that it would be sufficient that 'the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule'.[67] Indeed, on some matters, not all states have an opportunity to participate in the practice. Such is the case for the very small number of spacefaring countries with respect to the exploration and use of outer space and for coastal states with respect to the claim of maritime entitlements. For this reason, the ICJ has given special weight to the practice of 'States whose interests are specially affected' in the *North Sea Continental Shelf* case.[68] The ILC likewise concluded that the practice must be 'sufficiently widespread and representative'.[69] It

[62] Shawn Snow, 'Unsafe Intercepts Involving NATO Aircraft Have Decreased, and Often Are the Result of a "Hot-Dogging" Pilot, Top General Says', *Military Times*, 24 September 2019, available at www.militarytimes.com/flashpoints/2019/09/24/unsafe-intercepts-involving-nato-aircraft-have-decreased-and-often-are-the-result-of-a-hot-dogging-pilot-top-general-says/.

[63] AIP Australia, 28 February 2019, ENR 1.12, 2.1.3.

[64] See note 5 above.

[65] AIP Australia, Supplement no. H62/14, *supra* note 5, 5.5.1; AIP Australia, Supplement no. H183/17, *supra* note 5, 7.5.1; AIP Argentina, Supplement no. A 28/2018, *supra* note 5, 4.1.

[66] *Colombian-Peruvian Asylum Case*, Judgment, 20 November 1950, ICJ Reports (1950) 266, at 276; *Case Concerning Right of Passage over Indian Territory (Merits)*, Judgment, 12 April 1960, ICJ Reports (1960) 6, at 40.

[67] *Military Activities in Nicaragua*, *supra* note 12, at 98.

[68] *North Sea Continental Shelf*, *supra* note 43, at 43.

[69] ILC, *supra* note 51, at 120, Conclusion 8, para. 1.

further observed that 'a relatively small number of States engaging in a certain practice might suffice if indeed such practice, as well as other States' inaction in response, is generally accepted as law'.[70] Thus, what is important is that the participation of 'specially affected states' in the practice must be taken into account.[71]

The above practice with respect to the identification of aircraft near coastal areas should be regarded as fulfilling the criterion of being 'sufficiently widespread and representative', taking into account the participation of specially affected states. As the primary objective of identification is to provide early warning of aerial intrusions from above the sea, specially affected states of the practice are coastal states that have such concerns. It is no coincidence that the existing offshore ADIZs are mostly found where major wars have been fought in history and where special precautions continue to be taken, such as Northeast Asia, Europe and the Pacific. Capacity should also be taken into account in the generality test. Many states may find the establishment of an ADIZ necessary for their security, but only the practice of those having the capacity not only to establish such a zone but also to maintain it is manifest. Although the term 'specially affected states' should not be taken to refer to the relative power of states,[72] those without the capacity at present may participate in the practice once they acquire the necessary capacity. This is evident from the fact that the identification of aircraft near coastal areas is practised by almost all the world's top 10 military powers, individually or collectively.[73]

The practice must also be consistent so that a pattern of behaviour can be discerned therefrom.[74] As the ICJ stated in the *Nicaragua* case, 'for a rule to be established as customary, the corresponding practice [does not have to] be in absolutely rigorous conformity with the rule'; it would be sufficient that 'the conduct of States should, in general, be consistent with such rules'.[75] State practice with respect to the identification of aircraft near coastal areas has exhibited a general pattern of behaviour. In terms of geographical scope, the identification is conducted outside national airspace, although the range varies depending on the geographical condition and the capacity of states. With respect to the object of identification, the identification is prevalently directed at all aircraft in the area regardless of their destination. As to identification measures, in most ADIZs, aircraft are required to comply with voluntary identification measures such as flight plan submission and position reports; those failing to comply with 'voluntary measures', once detected, may be identified through 'passive measures', such as radio communication and close visual check. Passive identification is the primary mode of identification if no ADIZ is established.

70 *Ibid.*, at 136, n. 715.

71 *Ibid.*, at 136–137.

72 *Ibid.*, at 137.

73 The USA, Russia, China, India, Japan, the ROK, France, United Kingdom (UK), Brazil and Pakistan in 2021, according to '2021 Military Strength Ranking', *GlobalFirepower*, available at www.globalfirepower.com/countries-listing.asp.

74 ILC, *supra* note 51, at 120, Conclusion 8, para. 1.

75 *Military Activities in Nicaragua*, *supra* note 12, at 98, para. 186.

The next question is whether the number of years during which coastal states have been identifying aircraft near coastal areas – notably, through the establishment of offshore ADIZs – fulfils the time requirement for the uniform practice to be transformed into a customary rule of law. International law does not provide for any fixed criteria for the minimum time requirement. In the *North Sea Continental Shelf* case, the ICJ stated:

> Although the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule, an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision involved; and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved.[76]

This statement indicates the possibility of a customary rule coming into existence within a short period of time, if other necessary requirements are met. Some eminent scholars at the time also proposed the concept of 'instant customary international law' for some areas in which extensive and uniform practice of states can be accumulated within a short span of time, such as outer space.[77] As Vladimir Degan has observed, the accelerating developments in technology have created new objective situations to which the existing customary law adapted almost spontaneously, with the necessary time becoming relatively short.[78] In this regard, the ILC concluded that '[p]rovided that the practice is general, no particular duration is required'.[79]

As demonstrated above, the identification of aircraft near coastal areas is indeed 'sufficiently widespread and representative', which serves to lower the threshold of time requirement. In any case, the history of aircraft identification near coastal areas, if one includes the US establishment of ADIZs in the early 1950s, is one of decades and should be regarded as fulfilling the time requirement.

B Opinio Juris

To transform into a customary rule, state practice that is widespread and long-lasting must be accompanied by *opinio juris sive necessitatis*.[80] For our purpose, the question is whether the identification of aircraft near coastal areas is accompanied by a conviction that it follows from a legal right on the part of identifying states and a legal obligation on the part of states whose aircraft are identified. In most offshore ADIZs, the right of identification is purported as a legal one, as made clear by the frequent use of such terms as 'shall', 'must', 'have the obligation to', 'not … permitted without …' and

[76] *North Sea Continental Shelf*, *supra* note 43, at 43, para. 74.

[77] Cheng, 'United Nations Resolutions on Outer Space: "Instant" International Customary Law', 5 *Indian Journal of International Law* (1965) 23.

[78] V.D. Degan, *Sources of International Law* (1997), at 153.

[79] ILC, *supra* note 51, at 120, Conclusion 8, para. 2.

[80] *Case of the S.S. 'Lotus'*, *supra* note 8, at 28; *North Sea Continental Shelf*, *supra* note 43, at 44, para. 77.

'required to'.[81] The existence of the belief that compliance is a legal obligation, on the other hand, varies significantly between voluntary identification and passive identification and between transiting military aircraft and transiting civil aircraft.

Transiting military aircraft, even those of states that also have this requirement themselves, most often refuse to identify themselves 'voluntarily' in offshore ADIZs. This is clear or discernable from practice, at least for US military aircraft in China's ECS ADIZ,[82] Chinese military aircraft in the ADIZ of the ROK (hereinafter KADIZ),[83] Chinese and Russian military aircraft in the ADIZ of Japan (hereinafter JADIZ)[84] and Russian military aircraft in NATO's de facto ADIZs.[85] It is very clear that no *opinio juris* exists for the compliance of voluntary identification measures by transiting military aircraft.

Transiting civil aircraft, on the other hand, mostly choose to identify themselves 'voluntarily' in offshore ADIZs, if so required. However, the voluntary identification may derive from the international standards, rules and procedures of the ICAO, as many offshore ADIZs are within the claiming state's FIRs, in which the submission of flight plans before departure is a requirement under civil aviation procedures. Among the 17 states or regions maintaining offshore ADIZs, 11 limit their ADIZs within the FIRs assigned to them, with the exceptions of Canada, China, Japan, the ROK,

[81] See, e.g., AIP Argentina, Supplement no. A 28/2018, *supra* note 5, 4.1; AIP Australia, Supplement no. H62/14, *supra* note 5, 5.5.1; AIP Australia, Supplement no. H183/17, *supra* note 5, 7.5.1; AIP Bangladesh, *supra* note 4, ENR 5.2, 3.2; Canadian Aviation Regulations, *supra* note 4, 602.145; 'Announcement of the Aircraft Identification Rules' (China), *supra* note 37; AIP Taipei FIR, *supra* note 45, ENR 1.1, 1.1.2(3); AIP India, *supra* note 4, ENR 5.2, 5.2.2.2.1; AIP Islamic Republic of Iran, *supra* note 4, ENR 1.1, 2; AIP Republic of Korea, *supra* note 4, ENR 5.2, 2.1.1, 2.1.3, 2.2.1; AIP Myanmar, *supra* note 4, ENR 1.1, 3.1.3; *Jeppesen Middle East Airway Manual* (20 June 2019), at 39 (Pakistan); and *Jeppesen Middle East Airway Manual* (20 June 2019), at 41 (Thailand).

[82] See US Department of Defense, Statement by Secretary of Defense Chuck Hagel on the East China Sea Air Defense Identification Zone, 23 November 2013, available at https://archive.defense.gov/releases/release.aspx?releaseid=16392, saying that China's announcement of the East China Sea ADIZ (ECS ADIZ) 'will not in any way change how the United States conducts military operations in the region'. US Department of Defense, Remarks by Secretary Hagel at plenary session at International Institute for Strategic Studies Shangri-La Dialogue, 31 March 2014, available at https://archive.defense.gov/transcripts/transcript.aspx?transcriptid=5442, reiterating that 'the U.S. military would not abide by China's unilateral declaration of an Air Defense Identification Zone in the East China Sea'.

[83] The ROK has accused Chinese military aircraft of entering the ADIZ of the ROK (KADIZ) 'without prior notice'. See Ministry of National Defense, Republic of Korea, 2018 Defense White Paper, 31 December 2018, at 18. In 2019, a Chinese Y-9 transport aircraft was reported to share flight information ahead of entering the KADIZ. However, the Chinese military aircraft did not file a flight plan prior to entry; instead, the Chinese military provided flight information, including the route and purposes of the flight, when it was contacted by its South Korean counterpart via military hotline. See 'For the First Time, Chinese Military Aircraft Seeks Permission to Enter South Korean Airspace', *Defenseworld*, 29 October 2019, available at www.defenseworld.net/news/25733/For_the_First_Time__Chinese_Military_Aircraft_Seeks_Permission_to_Enter_South_Korean_Airspace#.Xy4UjigzY2w.

[84] In the ADIZ of Japan (JADIZ), 'aircraft unidentified by flight plan is liable to in-flight interception for visual confirmation'. See AIP Japan, *supra* note 4, ENR 5.2, 5.1. In Fiscal Year 2019, the Air Self-Defense Force of Japan scrambled 675 times in response to Chinese aircraft and 268 times in response to Russian aircraft. See Japan Ministry of Defense, Defense of Japan 2020, at 248.

[85] As mentioned above, NATO's Air Policing Mission intercepts aircraft failing to 'properly identify themselves', 'communicate with Air Traffic Control' or 'file flight plans'. Such interceptions have been routinely carried out against Russian military aircraft. See notes 48 and 49 above.

Thailand and the USA.[86] For those 11 states, the flight plans submitted to their air traffic control (ATC) can be used for air defence identification spontaneously. But, in reality, the level of civil/military cooperation varies from one region to another.[87] In some areas, transiting civil aircraft are still required to comply with ADIZ procedures, in parallel with ATC procedures. Therefore, notwithstanding the practice being widespread, one cannot draw a definite conclusion on the existence of *opinio juris* with respect to the voluntary identification of transiting civil aircraft in offshore ADIZs.

Coastal states may always identify aircraft near coastal areas through passive measures if they fail to identify themselves voluntarily. In passive identification, the identified aircraft acts in a responsive manner, resulting in a burden on them that may infringe upon their freedom of overflight. This is distinct from the monitoring of activities on the earth from outer space, which does not entail any such burden on the part of the identified object. It is foreseeable that the excessive burden of responding to passive identification measures would elicit protests from states. Under such circumstances, whether the necessary *opinio juris* is present rests upon the reaction of the states concerned. Having said that, the intensity of identification measures varies greatly. First, passive identification is more likely to be applied to military aircraft than to civil aircraft, due to the starkly different reaction to the requirement of voluntary identification. Second, the passive identification of military aircraft is more likely to entail intense measures, such as close visual checks, than civil aircraft. Civil aircraft, which usually follow predetermined flight routes, can be easily identified by radar detection and radio communication, making it unnecessary to carry out close visual identification.[88] However, these less intense measures do not suggest a lack of interest or capacity in enforcing the ADIZ for civil aircraft.

Throughout the decades-long history, the claim of offshore ADIZs seldom encountered protests from other states, until China's claim of ECS ADIZ on 23 November 2013. In a statement made on the same day, then US Secretary of State John Kerry took China's claim as 'an attempt to change the status quo in the East China Sea', declaring that the USA does not 'support efforts by any State to apply its ADIZ procedures to foreign aircraft not intending to enter its national airspace' and urging China 'not to implement its threat to take action against aircraft that do not identify themselves or obey orders from Beijing'.[89] The next day, the Japanese minister of foreign affairs stated that '[t]he announced measures [of the ECS ADIZ] have no validity whatsoever on Japan and Japan demands China to revoke any measures that could infringe upon the freedom of flight in international airspace'.[90] He also expressed

[86] Su, *supra* note 2, at 827–828.

[87] Secretariat, Civil/Military Cooperation Update, The Sixth Meeting of the APANPIRG ATM Sub-Group, Doc. ATMSG/6-WP26 (30 July – 3 August 2018).

[88] Su, *supra* note 2, at 831.

[89] US Department of State, Secretary Kerry's Statement on the East China Sea Air Defense Identification Zone, 23 November 2013, available at 2009-2017.state.gov/secretary/remarks/2013/11/218013.htm.

[90] Ministry of Foreign Affairs of Japan, Statement by the Minister for Foreign Affairs on the announcement on the 'East China Sea Air Defense Identification Zone' by the Ministry of National Defense of the People's Republic of China, 24 November 2013, available at www.mofa.go.jp/press/release/press4e_000098.html.

concerns over China's description of the airspace above the Diaoyu Islands, a group of islands over which both China and Japan claim sovereignty, 'as if it were a part of China's territorial airspace'.[91] At the ROK-China Defense Strategic Dialogue, held in the same month, the ROK took the position that it was unacceptable that 'prior consultations did not take place regarding China's ADIZ, which even overlaps with the KADIZ in some parts and includes Ieodo'.[92]

The above protests centred on several alleged peculiarities of the ECS ADIZ: (i) the application of identification measures to transiting aircraft; (ii) the coverage of disputed islands and/or waters; and (iii) the overlap with pre-existing ADIZs. But they do not constitute effective protests against the right of coastal states to identify aircraft near coastal areas. The latter two 'peculiarities' result from the compact geographical condition of Northeast Asia and the territorial and maritime disputes between the three powers in this region – hence, their applicability to the ADIZs of Japan and the ROK, as well as to that of China. Although ADIZs beyond the territory of a state do not extend sovereignty claims, there are concerns that the claim of an ADIZ over disputed territory and maritime zones may help to augment control of them, making it a political tool to legitimize one's claim incrementally. This observation could be valid for all of the disputing states. To blame the latter claiming state of an ADIZ would not only unjustly put it at a disadvantageous position in the territorial and/or maritime dispute but also incentivize other disputing states to scramble to claim an ADIZ. Therefore, protests on these two grounds are not opposable for the purpose of this article. In other words, none of the three states are protesting against the right of coastal states to identify aircraft near coastal areas.

Having said that, China, Japan and the ROK should be encouraged to negotiate in good faith with an aim of resolving issues arising from the overlap of their ADIZs and their coverage of disputed islands and waters.[93] Similar problems would arise if the littoral states rush to claim ADIZs in the South China Sea, although it seems to not be widely known that the Philippines did claim one early in the 1950s. If this were to happen, the situation in the South China Sea could escalate, making the already complex disputes even more difficult to resolve. It is thus important for littoral states and some others from outside this region – in particular, the USA, which conducts freedom of navigation operations routinely in this region – to manage their disagreements and risks properly so as to avoid escalations.

Protests raised based on the first 'peculiarity' of the ECS ADIZ, on the other hand, seem to indicate the existence of a situation that 'instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule', as the ICJ cautioned in the *Nicaragua* case.[94] However, as shown at the outset of Section 3, the predominant state practice is that transiting aircraft are prevalently subject to identification in offshore ADIZs. For other states claiming an offshore ADIZ to protest China's ECS ADIZ on this ground would be tantamount to a violation of the principle of estoppel.

[91] *Ibid.*

[92] Ministry of National Defense, Republic of Korea, 2014 Defense White Paper, 31 December 2014, at 244.

[93] See Su, *supra* note 40, at 298–302.

[94] *Military Activities in Nicaragua*, *supra* note 12, at 98, para. 186.

To sum up, the disagreement between states with respect to the identification rules of offshore ADIZs centres on the obligation to comply with voluntary measures for transiting aircraft, never on their passive identification. On the latter, state practice is indeed 'sufficiently widespread and representative', and the *opinio juris* can be discerned from the absence of protest. Thus, it can be concluded that the passive identification of aircraft near coastal areas is part of customary international law. This customary rule conversely justifies the establishment of offshore ADIZs, but only to the extent of passive identification.

4 Due Regard to the Freedom of Overflight in the Open Airspace outside National Airspace

As demonstrated in the preceding sections, the establishment of offshore ADIZs does not amount to sovereignty claims over the open airspace outside national airspace or involve the threat or use of force; in addition, the right of coastal states to identify aircraft in the open airspace near coastal areas by passive measures has become part of customary international law and may justify the establishment of offshore ADIZs for this purpose. It remains unresolved whether it is legal to apply voluntary measures to aircraft in offshore ADIZs. This section argues that the identification of aircraft in offshore ADIZs, through either voluntary or passive measures, is within the parameters of the obligation of paying due regard to the freedom of overflight. This would explain why passive identification is permissible under customary international law and why voluntary identification is at least tolerated, albeit in the absence of such a permissive customary rule.

The principle of due regard is applicable in the open airspace outside national airspace, just like other open spaces where rights are held by different entities and no hierarchy is predetermined between them, and one's exercise of its right may cause interference upon others. The principle is stipulated in conventional law of the sea and outer space for the reconciliation of concurrent rights.[95] As a matter of fact, this duty emerged prior to the conclusion of these treaties, spontaneously as the conflict of rights arose and accelerated in these two open domains.[96] The *raison d'etre* is

[95] See, e.g., UNCLOS, *supra* note 14, Arts 56(2), 58(3), 60(3), 79(5), 87(2), 234. 'Due regard' is now regarded as 'one of the great organizing principles of the law of the sea'. See Oxman, 'The Principle of Due Regard', in International Tribunal on the Law of the Sea, *The Contribution of the International Tribunal for the Law of the Sea to the Rule of Law: 1996–2016* (2018) 108, at 108; see also Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies 1967, 610 UNTS 205, Art. IX.

[96] See, e.g., *Fisheries Jurisdiction (United Kingdom v. Iceland)*, Merits, Judgment, 25 July 1974, ICJ Reports (1974) 3, at 31, para. 72; *Fisheries Jurisdiction (Federal Republic of Germany v. Iceland)*, Merits, Judgment, 25 July 1974, ICJ Reports (1974) 175, at 200, para. 64, in which the Court said '[i]t is one of the advances in maritime international law, resulting from the intensification of fishing, that the former laissez-faire treatment of the living resources of the sea in the high seas has been replaced by a recognition of a duty to have due regard to the rights of other States and the needs of conservation for the benefit of all'. See also GA Res. 1962 (XVIII), 13 December 1963, para. 6. This resolution is regarded as reflecting rules of customary international law on the exploration and use of outer space at the time of adoption.

that only by exercising self-constraint can the users all enjoy their rights, albeit in a limited fashion. The airspace outside national territory, which is also open in nature, shall be no exception to the applicability of this mutual duty,[97] although the Chicago Convention only explicitly requires the contracting states to 'have due regard for the safety of navigation of civil aircraft' when issuing regulations for their state aircraft.[98] This duty is of particular relevance in the open airspace just outside national airspace, where conflicts may arise between the right of coastal states to maintain situational awareness of aerial activities therein and the freedom of overflight enjoyed by all states.

The substance of due regard, while not defined in treaties, has been clarified in scholarly writings and judicial decisions. As a general rule, it 'does not contemplate priority for one activity over another'[99] but, rather, is based on the assumption that they all need to be respected, and, as a result, there is a need to balance them in order to find the best possible protection for each interest involved.[100] In the *Chagos Marine Protected Area* arbitration, Mauritius challenged the legality of the United Kingdom's (UK) establishment of a marine protected area around the Chagos Archipelago, a group of islands that the UK detached from Mauritius before granting it independence in the era of decolonization. On the obligation of due regard under Article 56(2) of UNCLOS, the Tribunal held:

> In the Tribunal's view, the ordinary meaning of 'due regard' calls for the United Kingdom to have regard for the rights of Mauritius as is called for by the circumstances and by the nature of those rights. The Tribunal declines to find in this formulation any universal rule of conduct. The Convention does not impose a uniform obligation to avoid any impairment of Mauritius' rights; nor does it uniformly permit the United Kingdom to proceed as it wishes, merely noting such rights. Rather, the extent of the regard required by the Convention will depend upon the nature of the rights held by Mauritius, their importance, the extent of the anticipated impairment, the nature and importance of the activities contemplated by the [UK], and the availability of alternative approaches. In the majority of cases, this assessment will necessarily involve at least some consultation with the rights-holding State.[101]

The Tribunal then considered that the UK's obligation to act in good faith and to have 'due regard' to Mauritius' rights and interests 'entails, at least, both consultation and a balancing exercise with its own rights and interests'.[102] It is thus observed that the obligation of due regard entails the balancing of rights at the substantive level and consultation at the procedural level.[103] In the recent *'Enrica Lexie' Incident*, the

[97] For state practice, see, e.g., *Commander's Handbook*, *supra* note 54, at 2.6.3, 2.7.2.

[98] Chicago Convention, *supra* note 12, Art. 3, para. d.

[99] *'Enrica Lexie' Incident (Italy v. India)*, Award, 21 May 2020, PCA Case no. 2015-28, at 274, para. 973.

[100] Forteau, 'The Legal Nature and Content of "Due Regard" Obligation in Recent International Case Law', 34 *International Journal of Marine and Coastal Law* (*IJMCL*) (2019) 25, at 25–26; see also *'Enrica Lexie' Incident*, *supra* note 99, at 274, para. 975.

[101] *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Final Award, 18 March 2015, reprinted in UNRIAA, vol. 31, 359, at 571–572, para. 519.

[102] *Ibid.*, at 578–579, para. 534.

[103] Prezas, 'Foreign Military Activities in the Exclusive Economic Zone: Remarks on the Application and Scope of the Reciprocal "Due Regard" Duties of Coastal and Third States', 34 *IJMCL* (2019) 97, at 106; Scovazzi, '"Due Regard" Obligations, with Particular Emphasis on Fisheries in the Exclusive Economic Zone', 34 *IJMCL* (2019) 56, at 63.

Tribunal, while reiterating the importance of balancing rights, took the avoidance of 'unreasonable interference' as a substantive requirement of due regard.[104] These observations with respect to the substance of 'due regard' are helpful in its application to the identification of aircraft in offshore ADIZs.

A *Due Regard to the Freedom of Overflight Enjoyed by Military Aircraft*

Positive international law contains very few rules on the operation of military aircraft outside national airspace. This lacuna, like others in positive law, can be filled by reference to 'reasonableness'.[105] Where conflicts occur between concurrent rights, to exercise one's right with due regard to that of others is a natural requirement of 'reasonableness'. The identification of military aircraft near coastal areas would inevitably engender interference on their freedom of overflight. Whether the interference is within the parameters of due regard is contingent on the modality of identification. As the ICJ has stated, 'what is reasonable and equitable in any given case must depend on its particular circumstances'.[106]

As demonstrated earlier in this article, transiting military aircraft are primarily identified through passive measures. They entail far less extra burden than voluntary measures. While radar detection can be done without any action being taken by the identified aircraft, radio communication and close visual checks usually only involve dialogues with the pilots on board intercepting aircraft or persons on the ground.[107] A balancing exercise between the conflicting interest, security for coastal states and the freedom of overflight for identified aircraft may not always speak for the superiority of the former. But it is clear that the extra burden is light and does not amount to 'unreasonable interference', in the words of the Tribunal of the *'Enrica Lexie' Incident*. The identification should thus be considered as falling within the parameters of the substantive limits of due regard.

Identification shall not be confused with other measures taken in response to sensitive military activities near coastal areas, such as aerial or marine intelligence gathering and surveillance operations. Other responsive measures, taking such forms as monitoring and escorting, can be more intensive than identification.[108] Disputes surrounding such measures are intricately related to the lack of consensus on the legality

[104] *'Enrica Lexie' Incident*, *supra* note 99, at 275, para. 978.

[105] Olivier Corten, 'Reasonableness in International Law', in *Max Planck Encyclopedia of Public International Law*, March 2013, available at https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1679?prd=EPIL.

[106] *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion, 20 December 1980, ICJ Reports (1980) 73, at 96, para. 49; *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, Judgment, 24 February 1982, ICJ Reports (1982) 18, at 60, para. 72.

[107] Su, *supra* note 2, at 826, para. 23.

[108] See, e.g., S. Lotto Persio, 'Chinese Warplanes Enter Korean Air Defense Zone, Prompting South Korea to Scramble Fighter Jets', *Newsweek*, 18 December 2017, available at www.newsweek.com/chinese-warplanes-enter-korea-air-defense-zone-south-korea-scramble-fighter-750918.

of sensitive military activities near coastal areas in the first place.[109] Whereas neither such sensitive activities nor the responsive measures seem to amount to a threat of force, which must be accompanied by certain political demands,[110] whether they overstep the threshold of due regard demands further exploration. But they are beyond the scope of air defence identification.

At the procedural level, consultation was taken in the *Chagos Marine Protected Area* arbitration as a requirement of the UK's obligation of paying due regard to Mauritius' rights and interests. Without doubt, consultation is conducive to reaching a proper balance of conflicting rights. In the case where the substantive limitations of due regard have been breached, the failure to fulfil the procedural obligation of prior consultation would reinforce the argument that there has been a violation of the obligation of due regard overall, substantively and procedurally. But it would be absurd to find a state in violation of the obligation overall simply by virtue of its failure to consult others in exercising its right that is manifestly in conformity with the substantive limitations. Even in the *Chagos Marine Protected Area* arbitration, the Tribunal only went as far as making consultation necessary '[i]n the majority of cases'[111] rather than compulsory in any circumstances. In the *'Enrica Lexie' Incident*, the obligation of consultation was not examined at all in the assessment of a possible breach of the obligation of due regard.

In the context of ADIZs, to make consultation a compulsory element of due regard in any circumstance would also contradict general state practice. Prior consultation is rare at best when a state establishes or adjusts its offshore ADIZs, an example being the ROK's consultation with the USA, China and Japan before expanding its ADIZ in 2014.[112] Consultation has been carried out between military allies. For instance, the Philippines consulted the USA when establishing its ADIZ in the 1950s. But the purpose was more for seeking advice than avoiding interference.[113] This is unlikely to happen between strategic competitors, especially when the establishment of an ADIZ constitutes one part of the low-intensity measures responding to sensitive military activities near coastal areas, as there exists a disagreement on the lawfulness of these military activities in the first place.[114] To expect the claiming state to initiate consultation is unrealistic and absurd.

[109] See, e.g., Pedrozo, 'Preserving Navigational Rights and Freedoms: The Right to Conduct Military Activities in China's Exclusive Economic Zone', 9 *CJIL* (2010) 9; Zhang, 'Is It Safeguarding the Freedom of Navigation or Maritime Hegemony of the United States? – Comments on Raul (Pete) Pedrezo's Article on Military Activities in the EEZ', 9 *CJIL* (2010) 31.

[110] *Military Activities in Nicaragua*, *supra* note 12, at 118, para. 227; see also Hayashi, 'Military and Intelligence Gathering Activities in the EEZ: Definition of Key Terms', 29 *Marine Policy* (2005) 123, at 126; Williams, 'Aerial Reconnaissance by Military Aircraft in the Exclusive Economic Zone', in P. Dutton (ed.), *Military Activities in the EEZ: A U.S.-China Dialogue on Security and International Law in the Maritime Commons* (2010) 49, at 58.

[111] *Chagos Marine Protected Area Arbitration*, *supra* note 101, at 571–572, para. 519.

[112] K. Hsu, Air Defense Identification Zone Intended to Provide China Greater Flexibility to Enforce East China Sea Claims, 14 January 2014, at 3.

[113] Administrative no. 222 by the President of the Philippines, Establishing the Philippine Air Defense Identification Zone (PADIZ), 21 November 1953.

[114] Prezas, *supra* note 103, at 109.

As demonstrated above, the passive identification of military aircraft near coastal areas is manifestly within the substantive limits of due regard. Therefore, in the establishment of offshore ADIZs for this purpose, the lack of consultation *per se* does not amount to a violation of due regard.

B *Due Regard to the Freedom of Overflight Enjoyed by Civil Aircraft*

In usual cases, civil aircraft near coastal areas do not pose a threat to the security of coastal states. However, as civil aviation and military aviation operate in the common airspace, only by identification can the former be distinguished from the latter. In addition, the possibility of civil aircraft being hijacked to launch a terrorist attack has long been a concern and was heightened by the '9/11 attacks' and, more recently, by the 'MH 370 incident'. Recently, US Air Force planes were reported to have disguised themselves as civil aircraft when conducting reconnaissance missions near China's coastal areas by changing their aircraft identification codes.[115] Possible risks like these may explain the reference to 'aircraft' in general, sometimes even 'civil and military aircraft' explicitly, in most ADIZ regulations.[116] The identification of civil aircraft near coastal areas would also inevitably engender interference on their freedom of overflight. The question is whether the extra burden is within the parameters of due regard and how it can be minimized for the sake of safe and efficient international civil aviation.

International civil aviation is regulated extensively by the ICAO. To this end, the organization has divided the airspace around the globe into a number of FIRs, each assigned to a managing state. As mentioned above, among the 17 states or regions maintaining offshore ADIZs, 11 limit their ADIZs within the FIRs assigned to them. For them, the flight plans that civil aircraft submit to their ATC authority can be used spontaneously for air defence identification. In this way, the extra burden incurred upon transiting civil aircraft can be minimized or even avoided. All that is required is the regime integration of air defence identification and civil ATC on the part of identifying states. However, as mentioned earlier in the article, the level of civil/military cooperation varies significantly from one region to another. In some offshore ADIZs – in particular, those in South Asia – transiting civil aircraft are required to obtain air defence clearance, in parallel to ATC procedures.[117] Therefore, even in offshore ADIZs within the claiming state's FIR, transiting civil aircraft may not be free from the extra burden if the claiming state's civil/military cooperation is poor. This situation has prompted the Asia/Pacific Seamless ATM Planning Group to recommend '[t]he provision of ATS surveillance data from civil surveillance systems to military units to

[115] L. Zhen, 'US-China Tensions: USAF Spy Plane Disguises Itself as a Philippine Aircraft over Yellow Sea, Monitor Says', *South China Morning Post*, 24 September 2020, available at www.scmp.com/news/china/military/article/3102925/us-china-tensions-usaf-spy-plane-disguises-itself-philippine.

[116] See, e.g., AIP Bangladesh, *supra* note 4, ENR 5.2, 3.2; AIP India, *supra* note 4, ENR 5.2, 5.2.2.2.1; *Jeppesen Middle East Airway Manual* (20 June 2019), at 39 (Pakistan).

[117] See e.g. AIP Bangladesh, *supra* note 4, ENR 5.2, 3.2; AIP India, *supra* note 4, ENR 5.2, 5.2.2.2, 5.2.2.3; AIP Myanmar, *supra* note 4, ENR 1.1, 3.1.3.

improve monitoring (thereby minimising the need for individual defence identification authorisation), trust and confidence'.[118]

Among the five states whose ADIZs extend into the FIRs of other states, Japan and the USA exempt transiting aircraft from the application of identification measures in their rules. For those that do not make such an exemption – currently including Canada, China, the ROK and Thailand – incurring the extra burden on transiting civil aircraft is inevitable. While the ADIZs of Canada, the ROK and Thailand cut into the FIRs of other states only slightly, a significant portion of China's ECS ADIZ overlaps with the FIRs managed by the ROK and Japan. China's FIR of Shanghai only covers a small portion of the airspace above the East China Sea, which happens to be one of the busiest corridors of civil aviation. This is perhaps why there was little discussion on the issue of due regard to civil aviation before China's declaration of the ECS ADIZ, although the issue also exists in the ADIZs of Canada, the ROK and Thailand. Despite the extra burden, most civil aircraft flying in the ECS ADIZ have chosen to submit a flight plan to China, with Japan Airlines and All Nippon Airways being the only known exceptions.[119]

In the identification of transiting civil aircraft, conflict would arise between their freedom of overflight and the security interest of coastal states. A balancing exercise between them, again, may not always speak for the superiority of the latter. Due account should be taken of the amount of extra burden imposed on civil aircraft and the implications for the safe and efficient operation of international civil aviation. As the submission of a flight plan is already an obligation for civil aircraft under civil aviation management, to submit it to another authority does not incur an excessive burden. The two Japanese airlines reversed their position on flight plan submissions in the ECS ADIZ not because they deemed the extra burden excessive but, rather, due to the pressure from the Japanese government.[120] In fact, the extra burden seems acceptable to the International Air Transport Association (IATA), which represents the airline industry around the world. It 'recognizes the right of each State to ensure the integrity of its national security' and 'maintains that the implementation of an ADIZ, should be properly coordinated and together with accurate charting and very clear instructions, clearly promulgated to ensure airlines and international civil aviation is able to comply'.[121]

[118] Asia/Pacific Seamless ATM Planning Group, Asia/Pacific Seamless ANS Plan, version 3.0, November 2019, at 22.

[119] Su, *supra* note 2, at 829–830, para. 28.

[120] See H. Kachi, 'Yoshio Takahashi, Japan Asks Airlines to Ignore China Flight-Plan Rule', *Wall Street Journal*, 26 November 2013, available at online.wsj.com/news/articles/SB10001424052702304281004579221681641322204; Ikeshima, *supra* note 38, at 157.

[121] International Air Transport Association (IATA), 'Imposition of Military Requirements and Restrictions on International Civil Aviation', working paper submitted to the combined eighth Meeting of the South Asia/Indian Ocean ATM Coordination Group (SAIOACG/8) and Twenty-Fifth Meeting of the South East Asia ATS Coordination Group (SEACG/25), Doc. SAIOACG/8 and SEACG/25-WP/22, 26–30 March 2018, at 1.2.

In any event, flight plan submission is not the only means of identification. Civil aircraft failing to submit a flight plan may be identified through 'passive measures', just like military aircraft. The passive identification of transiting civil aircraft, as mentioned above, can be conducted by radar detection and sometimes radio communication, making it unnecessary to carry out close visual identification. Therefore, the identification of transiting civil aircraft does not incur 'unreasonable interference', in the words of the Tribunal in the *'Enrica Lexie' Incident*, with their freedom of overflight. It can be concluded that the identification of civil aircraft, voluntarily or passively, is within the substantive parameters of due regard. There is even a good case to be made that compliance with 'voluntary measures' should be encouraged, as it would reduce the possibility of civil aircraft being subject to passive identification, which is ultimately beneficial for their safety.

A good case can also be made for the need to consult stakeholders in the formulation of plans to identify civil aircraft outside one's FIR. For instance, the IATA and the International Federation of Air Line Pilots' Associations (IFALPA) have expressed concern over the issues faced by airlines and international civil aviation with regard to the claim of ADIZs and have called for consultation with adjacent states, airspace users and the ICAO prior to publication.[122] The ICAO, however, seems reluctant to take up this highly sensitive issue, although it apparently relates to the safe and efficient operation of international civil aviation. After China's establishment of the ECS ADIZ, an attempt was made by Japan and the USA in the ICAO to discuss 'the authority of a State to direct or restrict the operation of the flight of civil aircraft outside of that State's FIR'.[123] The initiative was not carried forward. So far, talks between states on civil aviation safety in ADIZs have taken place primarily at regional air navigation planning (ANP) meetings.[124] While it appears unlikely that states would initiate public-private consultation with airlines, industrial groups, such as the IATA and IFALPA, have an opportunity to participate in regional ANP meetings and express their concerns there.

The above analysis shows that the delineation of FIRs, albeit a regime distinct from ADIZs, has bearing on the legitimacy of the latter. Simply put, states assigned larger FIRs offshore are able to identify civil aircraft 'unconsciously' in the corresponding larger airspace, while those assigned smaller ones cannot do so without inflicting extra burden on transiting civil aircraft. This has a backlash on the delineation of FIRs, which was done in the first two decades of the ICAO's history. The limits of ATS airspace, including FIRs, shall be established 'on the basis of technical and operational considerations with the aim of ensuring safety and optimizing efficiency and

[122] *Ibid.*; IATA and International Federation of Air Line Pilots' Associations (IFALPA), 'Establishment of Military Requirements and Restrictions on International Civil Aviation', working paper submitted to the thirteenth Air Navigation Conference, Doc. AN-Conf/13-WP/295, 9–19 October 2018.

[123] Ministry of Foreign Affairs of Japan, Press Release: 201st Session of the Council of the International Civil Aviation Organization (ICAO), 11 March 2014, available at www.mofa.go.jp/press/release/press4e_000225.html.

[124] See, e.g., Secretariat, *supra* note 87, at 2–5.

economy for both providers and users of the services'.[125] On land, the boundaries of FIRs may deviate from land borders, for one reason or another. First, some states were lacking ATS capacity at the time of the FIR's delineation so civil aviation in part of their national airspace could only be managed by other states. It is for this reason that Indonesia's Natuna Islands and Tanjung Pinang and the Riau Archipelago are covered by the Singapore FIR. Indonesia took it as an encroachment upon its sovereignty when its aircraft had to seek permission from Singapore air traffic for flight operations in these areas and when foreign aircraft could enter these areas without its approval but only from the Singapore FIR.[126] In some occasions, Indonesia had to intercept third-state aircraft in its national airspace covered by the Singapore FIR.[127] Indonesia's appeal for taking over civil aviation in its airspace can be traced back to 1993. Recently, it has increased its investment in acquiring the necessary capacity to take over the ATS in the region.[128]

Second, new states may come into existence, creating new national borders within a pre-existing FIR. This is the case with the Bahrain FIR, a relic of British rule that continues to cover both Qatar and Bahrain after they became independent. This issue is closely related to the recent cases arising from Bahrain, Egypt, Saudi Arabia and the United Arab Emirates' adoption of measures barring Qatar-registered aircraft from landing at, or departing from, their airports and denying them the right to overfly their respective territories, including the territorial seas within the relevant FIRs.[129] While the parties have asked the ICAO Council to suspend consideration of the merits, a competence upheld by the ICJ in the above cases, Qatar has endeavoured to establish a separate FIR over its territory. The request was supported by the ICAO's Air Navigation Commission and is pending before the ICAO Council.[130]

[125] ICAO Assembly Resolution A40-4, Consolidated Statement of Continuing ICAO Policies and Associated Practices Related Specifically to Air Navigation, Appendix G, para.1; see also Annex 11 to the Convention on International Civil Aviation, *supra* note 53, at 2.9.1.

[126] C. 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. For Singapore's response, see 'Singapore Responds to Comments by Ex-Indonesia Air Force Officers over Flight Information Region', *The Strait Times*, 12 December 2017, available at www.straitstimes.com/asia/se-asia/spore-responds-to-comments-by-ex-indonesia-air-force-officers-over-flight-information.

[127] See K. Kaur, 'Indonesia Fighter Jets Intercept Singapore Plane', *The Strait Times*, 29 October 2014, available at www.straitstimes.com/singapore/indonesian-fighter-jets-intercept-singapore-plane.

[128] See I. Parlina and N. Afrida, 'Jokowi Wants Airspace Taken over in Three Years', *Jakarta Post*, 9 September 2015, available at www.thejakartapost.com/news/2015/09/09/jokowi-wants-airspace-taken-over-three-years.html.

[129] *Appeal Relating to the Jurisdiction of the ICAO Council under Article 84 of the Convention on International Civil Aviation (Bahrain, Egypt, Saudi Arabia and United Arab Emirates v. Qatar)*, Judgment, 14 July 2020, available at www.icj-cij.org/public/files/case-related/173/173-20200714-JUD-01-00-EN.pdf; *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, 14 July 2020, available at www.icj-cij.org/public/files/case-related/174/174-20200714-JUD-01-00-EN.pdf.

[130] See 'Proposal for Amendment of the Air Navigation Plan – Middle East Region, Doc. 9708, vol. 1, concerning the Establishment of a Doha Flight Information Region (FIR) and Search and Rescue Region (SRR)', ICAO Working Paper no. C-WP/15198, 6 June 2021.

The airspace over the seas and oceans, which is more relevant to the subject matter of this article, is divided into several FIRs and delegated to coastal states. In the delineation, ATS capacity appears to be the primary consideration. The last few decades have witnessed a significant improvement of ATS capacity in some coastal states, which has enabled them to manage broader FIRs off their coastlines. Some may volunteer to manage larger FIRs offshore, as the management is not only a matter of responsibility but also one of interest. Managing authorities are allowed to collect aviation charges on civil flights. With the current delineation legally binding, any proposed change thereto would require consultation between the states at stake and a decision by the regional air navigation meeting or a decision by the ICAO Council. A successful attempt is the expansion of the Sanya FIR in 2001, with the Hong Kong FIR and the Ho Chi Minh FIR shrinking, after years of negotiations between China, Vietnam and the ICAO.[131]

5 Conclusions

This article has drawn a distinction between territorial ADIZs and offshore ADIZs, emphasizing the latter due to the legal controversies surrounding it. A survey of state practice reveals that the claim of offshore ADIZs is not one of sovereignty nor are the identification rules implemented to this effect. In the identification of aircraft outside national airspace, the threat or use of force against the aircraft, even those failing to comply with identification measures, is illegal in law and unnecessary in practice. Having said that, this article does not equate the absence of a prohibition to accordance with international law. Rather, it seeks a fuller treatment of the issue by differentiating what rules of offshore ADIZs are 'permissible' and what rules are 'tolerated', in the words of Judge Simma in the *Kosovo* advisory opinion.

For permissive rules, this article has resorted to the broader right of coastal states to identify aircraft near coastal areas. The claim of offshore ADIZs is practised by a significant number of coastal states and regions in North America, Northeast Asia and South Asia as well as some in Southeast Asia, the Middle East and Europe. Yet the practice of coastal states identifying aircraft near coastal areas is far more extensive than the claim of offshore ADIZs, which is one, but not the only, means of identification. The practice should be regarded as 'sufficiently widespread and representative' and long-lasting, which fulfils the material element of customary international law. *Opinio juris*, however, only extends to passive identification by radar detection, radio communication or close visual checks, which is indeed common practice and seldom protested. Having said that, it is observed that transiting civil aircraft in offshore ADIZs are primarily identified through voluntary measures in practice. But since the practice may flow from ATC responsibilities, no customary right can be established in this regard. Therefore, the customary right of coastal

[131] N. Ionides, 'ICAO Helps Rearrange South China Sea Airspace', *Flight Global*, 13 November 2001, available at www.flightglobal.com/news/articles/icao-helps-rearrange-south-china-sea-airspace-138819/.

states to identify aircraft near coastal areas only extends to 'passive identification' and can only justify the establishment of offshore ADIZs for this purpose.

While passive identification in offshore ADIZs is permissible under customary international law, voluntary identification is at least tolerated, if not permissible, by civil aircraft given the wide compliance. This is due to the fact that such identification, either through voluntary or passive measures, is within the parameters of the obligation of paying due regard to the freedom of overflight enjoyed by the identified aircraft. This obligation essentially entails the balancing of rights at the substantive level and, if necessary, consultation at the procedural level. The passive identification of transiting military aircraft, which usually involves radio communication and close visual checks, does not incur unreasonable interference with their freedom of overflight and thus is within the parameters of due regard. But it should be carefully conducted so as to avoid miscalculation and escalation. The voluntary identification of transiting civil aircraft, on the other hand, can be done 'unconsciously' in most offshore ADIZs as they are within the claiming state's FIRs where flight plan submission is already an obligation for ATC. In these offshore ADIZs, civil/military cooperation should be enhanced, so as to minimize or even eliminate the extra burden and potential interference with international civil aviation.

In offshore ADIZs extending into the FIRs managed by other states, such extra burden and potential interference seem inevitable, unless an exemption is made for transiting aircraft. But as the extra burden is light and does not engender unreasonable interference, the voluntary identification of transiting civil aircraft in offshore ADIZs is also within the parameters of the obligation of paying due regard to the freedom of overflight. This explains the widespread compliance of voluntary measures by most transiting civil aircraft, when no such customary obligation can be established. It is also noteworthy that the claiming coastal state may decide to identify transiting civil aircraft through passive measures if they fail to comply with voluntary measures, although intense measures such as close visual checks are usually unnecessary. This action also fulfils the 'due regard' obligation, just like the passive identification of military aircraft. Having said that, relevant states and other stakeholders should be encouraged to carry out consultation, now primarily in regional air navigation meetings where industrial groups such as the IATA and IFALPA also have an opportunity to participate, with an aim to safeguard and promote the safe and efficient operation of international civil aviation.