

NOTES AND COMMENTS

CAELUM LIBERAM: AIR DEFENSE IDENTIFICATION ZONES OUTSIDE SOVEREIGN AIRSPACE

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With the heightened concerns of states about threats from the air since September 11, 2001, and the recent resurgence of major military powers, Air Defense Identification Zones (ADIZs), zones in which civil aircraft must identify themselves and may be subject to air traffic control if they intend to fly from nonsovereign airspace into sovereign airspace, have assumed a degree of prominence in national security discussions that they have not received in several decades.¹ China, for instance, in advance of the 2008 Summer Olympic Games, considered establishing an ADIZ over the East China Sea and the Strait of Taiwan to deal with potential threats to the games from the air,² and Norway and the United Kingdom have repeatedly scrambled aircraft in response to Russian military flights near their national airspaces. This level of attention to threats from the air has not been seen since the height of the Cold War in the 1950s and 1960s, when coastal states established many ADIZs in the airspace over the oceans to help protect themselves from unwanted intruders and to warn of potential nuclear strikes.³ Some Cold War ADIZs remain in place, including the North American ADIZ, created by Canada and the United States over the Arctic.⁴ At that time, however, the landscape of international law was

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¹ U.S. Federal Regulations define an Air Defense Identification Zone as “[a]irspace over land or water in which the ready identification, location, and control of all aircraft . . . is required in the interest of national security.” 14 C.F.R. §99.3 (2009).

² Xue Guifang & Xiong Xuyuan, *A Legal Analysis of the Establishment of Air Defense Identification Zones*, J. OCEAN UNIV. CHINA, June 2007, at 36–39 (soc. sci. ed.) (trans. China Maritime Studies Institute); Ni Guoan & Qi Wentao, *Establish National Air Defense Identification Zones as Quickly as Possible*, MIL. SCI. (Beijing), Apr. 2007, at 55 (trans. China Maritime Studies Institute); *PRC Military Confirms for 1st Time Deployment of Missiles for Olympic Security*, ZHONGGUO XINWEN SHE (Guangzhou), July 8, 2008 (trans. Open Source Center); Wu Zhong, *Beijing Flicks the Safety Switch*, ASIA TIMES ONLINE, July 9, 2008, at <http://www.atimes.com/atimes/China/JG09Ad01.html>; CHINA BRIEF (Jamestown Foundation), Jan. 4, 2008, at 2, at <http://www.jamestown.org>.

³ Many countries, such as Norway and the United Kingdom, still maintain their ADIZs because of concern over a possible return of tensions. Alternatively, some countries, such as India and Pakistan, have retained their ADIZs because of new regional tensions. *See, e.g.*, Agreement on Advance Notice of Military Exercises, Manoeuvres and Troop Movements, India-Pak., para. 11, Apr. 6, 1991, 1843 UNTS 71.

⁴ DAVID F. WINKLER, SEARCHING THE SKIES: THE LEGACY OF THE UNITED STATES COLD WAR DEFENSE RADAR PROGRAM (June 1997), available at http://www.fas.org/nuke/guide/usa/airdef/searching_the_skies.htm. For a description of the boundaries of the American coastal ADIZs, see FEDERAL AVIATION ADMINISTRATION [FAA], INTERNATIONAL FLIGHT INFORMATION MANUAL, available at <http://www.faa.gov/ats/aat/ifim/ifim0104.htm> [hereinafter FAA FLIGHT MANUAL].

relatively simple: airspace over sovereign territory, including a narrow 3-mile band over territorial waters, was fully sovereign.⁵ All remaining airspace reflected the status of the high seas; that is, it was a zone in which all states equally enjoyed navigation and overflight freedoms.⁶ Yet in the decades since the 1950s much has changed in the international law of the sea, raising questions as to whether these legal developments have affected the status of maritime airspace or established new authorities that allow coastal states to regulate foreign aircraft in the airspace beyond the territorial sea in derogation of the overflight freedoms of other states.

I. TREATY DEVELOPMENTS OF PUBLIC INTERNATIONAL AIR LAW

As public international air law evolved as a *lex specialis*, it began to resolve many of the jurisdiction and security concerns expressed by states by relating the status and law of airspace to the status and law of the territory beneath it. Accordingly, the drafters of the 1919 Paris Convention for the Regulation of Aerial Navigation recognized that the principle of *caelum liberam* (freedom of the skies) flowed from the principle that, above the high seas, “airspace is part of the legal regime of the subjacent territory, . . . [and therefore] the airspace is also free above the sea, as [is] the sea itself.”⁷ In 1944 the Paris Convention was replaced by the Convention on International Civil Aviation (Chicago Convention), currently the only comprehensive source of international law that sets out a detailed framework for governing airspace.⁸

Like the Paris Convention, the Chicago Convention was drafted while the oceans (hence the airspaces) were divided only between territorial waters and high seas. Thus, the Chicago Convention focuses on the sovereign authority of states to regulate both their own aircraft worldwide and international air traffic within the airspace over their territory, including territorial waters.⁹ In the airspace over the high seas, the Convention provides that its rules shall apply and further provides for detailed regulation of most civil aviation through Standards and Recommended Practices adopted by the ICAO Council.¹⁰ However, the Chicago Convention distinguishes between civil aircraft and state aircraft—which include military, customs, and police aircraft—and regulates only the activities of civil aircraft in detail.¹¹ As Professor Michael Milde notes, “The vast body of international air law deals exclusively with civil aircraft and their operations. . . . [and] [t]he status of military aircraft is not clearly determined by positive rules

⁵ Convention on International Civil Aviation, Arts. 1, 2, Dec. 7, 1944, 61 Stat. 1180, 15 UNTS 295 [hereinafter Chicago Convention]; Geneva Convention on the Territorial Sea and Contiguous Zone, Arts. 1, 2, Apr. 29, 1958, 15 UST 1606, 516 UNTS 205; Oliver J. Lissitzyn, *The Treatment of Aerial Intruders in Recent Practice and International Law*, 47 AJIL 559, 559 (1953).

⁶ The former dichotomy between sovereign territorial seas and high seas open to all states has been described as “an exceedingly blunt instrument” that insufficiently accounted for the interests of either coastal states or maritime users. Bernard H. Oxman, *An Analysis of the Exclusive Economic Zone as Formulated in the Informal Composite Negotiating Text*, in *LAW OF THE SEA: STATE PRACTICE IN ZONES OF SPECIAL JURISDICTION* 57, 61 (Thomas A. Clingan Jr. ed., 1982).

⁷ NICHOLAS GRIEF, *PUBLIC INTERNATIONAL LAW IN THE AIRSPACE OF THE HIGH SEAS* 53 (1994) (quoting J. C. COOPER, *EXPLORATIONS IN AEROSPACE LAW* 197 (1968) (in turn quoting drafters of the Paris Convention)). For the Paris Convention, see Convention on International Civil Aviation, Oct. 13, 1919, 11 LNTS 174, reprinted in 17 AJIL Supp. 195 (1923) (no longer in force) [hereinafter Paris Convention].

⁸ Chicago Convention, *supra* note 5, Arts. 1, 2.

⁹ *See id.*, Arts. 12, 38.

¹⁰ *Id.*, Arts. 12, 37, 54(l), 90.

¹¹ *Id.*, Art. 3.

of international law . . . ”¹² Indeed, he adds, “States have been openly hostile to the idea that their military aircraft—tools and symbols of their military power, sovereignty, independence and prestige—should be subject to international regulation.”¹³

That said, states have agreed since the earliest days of aviation upon some measures of international regulation of military aircraft. For example, the Paris Convention, like the Chicago Convention after it, required special authorization for military aircraft to fly in the airspace above another sovereign’s territory.¹⁴ The Chicago Convention calls for state aircraft to operate with “due regard” for the safety of flight of other aircraft,¹⁵ and, in a recent and somewhat controversial addition that entered into force in 1998, the Convention prohibits state aircraft from using weapons against civil aircraft in flight or endangering the lives and safety of persons onboard during interception.¹⁶ As this sparse set of regulations demonstrates, in comparison to the detailed rules regulating civil aviation, state aircraft remain comparatively unfettered by international regulations when flying outside the national airspace of another sovereign.

Yet once the 1982 United Nations Convention on the Law of the Sea (UNCLOS)¹⁷ created the exclusive economic zone (EEZ) in waters previously regarded as high seas and provided for a blend of new coastal state rights with the traditional freedoms of the high seas, complications began to arise.¹⁸ The UNCLOS framework for EEZ rights is quite straightforward: Article 56 specifies coastal states’ rights and Article 58 specifies rights belonging to all states—including, subject to the other relevant portions of the Convention, the high seas freedoms of navigation and overflight under Article 87. The residuum is left open for allocation by Article 59, which provides that conflict over unattributed rights or jurisdiction should be “resolved on the basis of equity and in the light of all the relevant circumstances, taking into account the respective importance of the interests involved to the parties as well as to the international community as a whole.” However, one aspect of high seas freedoms that was clearly not left to Article 59’s balancing test is the right of naval forces to exercise traditional navigational freedoms in the EEZs of other states, at least as long as those activities do not impinge on the interests of the coastal states in the exploitation and preservation of natural resources.¹⁹ As Bernard Oxman has noted:

¹² MICHAEL MILDE, INTERNATIONAL AIR LAW AND ICAO 61 (2008).

¹³ *Id.*

¹⁴ Paris Convention, *supra* note 7, Art. 32; Chicago Convention, *supra* note 5, Art. 3(c). The Chicago Convention’s prohibition applies more broadly to all state aircraft.

¹⁵ Chicago Convention, *supra* note 5, Art. 3(d). This article further requires that contracting states issue regulations to ensure that state aircraft operate with due regard for the safety of civilian aircraft, which is fulfilled for U.S. military aircraft by Department of Defense Instruction 4540.01, Use of International Airspace by U.S. Military Aircraft and for Missile/Projectile Firings, para. 4.2 (Mar. 28, 2007) [hereinafter DoDI 4540.01].

¹⁶ Chicago Convention, *supra* note 5, Art. 3 *bis*.

¹⁷ United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 UNTS 397 [hereinafter UNCLOS].

¹⁸ For an excellent presentation of the debate over the legal status of the EEZ, much of it in the words of the negotiators themselves, see CONSENSUS AND CONFRONTATION: THE UNITED STATES AND THE LAW OF THE SEA CONVENTION, chs. 2, 3 (Jon M. Van Dyke ed., 1985).

¹⁹ On the UNCLOS framework protecting naval freedoms in the EEZ, see Bernard H. Oxman, *The Territorial Temptation: A Siren Song at Sea*, 100 AJIL 830, 835–46 (2006). For a discussion of the balancing decisions that various coastal states have made between their economic and preservation interests and freedom of navigation, especially for foreign military activities, see Robert Nadelson, *The Exclusive Economic Zone: State Claims and the Law of the Sea Convention*, 16 MARINE POL’Y 463, 483 (1992); see also George V. Galdorisi & Alan G. Kaufman, *Military Activities in the Exclusive Economic Zone: Preventing Uncertainty and Defusing Conflict*, 32 CAL. W. INT’L L.J. 253, 279 (2002) (referring to the authority of a coastal state to regulate the EEZ to protect its environmental and economic interests, and concluding that “[t]he ability of maritime powers to engage in naval activities is therefore

[W]arships in principle enjoy freedom to carry out their military missions under the regime of the high seas subject to three basic obligations: (1) the duty to refrain from the unlawful threat or use of force; (2) the duty to have “due regard” to the rights of others to use the sea; and (3) the duty to observe applicable obligations under other treaties or rules of international law. . . . with the addition of an obligation to have “due regard to the rights and duties of the coastal State” in the exclusive economic zone.²⁰

Nonetheless, shortly after UNCLOS was concluded, some coastal states attempted to assert that the new EEZ is a zone in which permission is required for military activities, including overflight by the military aircraft of other states. Brazil, for instance, attempted to obtain the agreement of the Legal Committee of the International Civil Aviation Organization to designate the status of the airspace over the EEZ as equivalent to national airspace. The committee, however, rejected this effort to use the Chicago Convention as an instrument for redefining the law of the sea as “flagrantly contradicting the relevant provisions [of UNCLOS] which equate the EEZ . . . with the high seas as regards freedom of overflight.”²¹

Aside from UNCLOS and the Chicago Convention, the only other sources of international law that allow coastal states to regulate the offshore activities of foreign aircraft are the widely accepted 1972 London Dumping Convention and the related, but less widely accepted, 1996 Protocol to the London Convention.²² These treaties seek to protect the marine environment from the effects of dumping, but, like UNCLOS, they place significant limits on the extent of the coastal state’s authority to achieve its antipollution aims. The Protocol prohibits “deliberate disposal at sea of wastes or other matter from . . . aircraft,” but, also like UNCLOS, exempts state aircraft from this provision.²³ Additionally, the Protocol is only applicable “at sea in areas within which [the coastal state] is entitled to exercise jurisdiction in accordance with international law.”²⁴ Accordingly, like UNCLOS, the London Convention and Protocol provide no basis for a coastal state to exercise legal jurisdiction over foreign state aircraft in the airspace above the EEZ. Thus, for military purposes, freedom of overflight in the airspace above the EEZ remains fundamentally unchanged by international treaty law developments in the second half of the twentieth century.²⁵

not unqualified. The effect upon coastal State claims and interests—that is, upon natural resources and the environment—must be considered before deciding upon the nature and scope of a naval operation in a foreign EEZ.”).

²⁰ Bernard H. Oxman, *The Regime of Warships Under the United Nations Convention on the Law of the Sea*, 24 VA. J. INT’L L. 811, 837 (1984).

²¹ BARBARA KWIATKOWSKA, *THE 200 MILE EXCLUSIVE ECONOMIC ZONE IN THE NEW LAW OF THE SEA* 203 (1989).

²² The Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, Dec. 29, 1972, 26 UST 2403, 1046 UNTS 120 [hereinafter London Convention], was replaced in March 2006 with the entry into force of the Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, Nov. 7, 1996, available at <http://www.ecolex.org/server2.php/libcat/docs/multilateral/en/TRE001268.doc> [hereinafter London Protocol]. The United States is a party to the 1972 Convention, but as of this writing has not yet ratified the Protocol.

²³ London Protocol, Arts. 1(4), 10(4).

²⁴ *Id.*, Art. 10(1.3).

²⁵ GRIEF, *supra* note 7, at 9; KWIATKOWSKA, *supra* note 21, at 203 (stating that “[a]s regards military activities, in view of the legislative history of Article 58, uses such as . . . aerial reconnaissance or collection of military intelligence . . . are clearly internationally lawful uses of the sea ‘associated with the operation of . . . aircraft’”); see also NICHOLAS M. POULANTZAS, *THE RIGHT OF HOT PURSUIT IN INTERNATIONAL LAW* 343 (2d ed. 2002); Kay Hailbronner, *Freedom of the Air and the Convention on the Law of the Sea*, 77 AJIL 490, 505 (1983).

II. STATE PRACTICE AND THE DEVELOPMENT OF PUBLIC INTERNATIONAL AIR LAW

Given the current state of treaty development, state practices and policies and scholarly opinions concerning the governance of airspace above the EEZ take on particular importance. One Nigerian scholar expressed the view that

“the EEZ . . . is a zone *sui generis* with special rights reserved for the coastal State and the traditional freedoms of the high seas . . . maintained for other States.” The sovereign rights of the coastal state within the EEZ relate only to the natural resources of the sea; the coastal state cannot interfere with the other traditional freedoms of the high seas, in particular the right of navigation and overflight. In other words, special economic rights and jurisdiction over the resources and installations are granted to the coastal state, whilst the traditional freedoms of the high seas, including in particular the right of navigation and overflight, are maintained.²⁶

Australian policy reflects a similar view of the law. Specifically, the handbook on operations law for Royal Australian Air Force commanders states that “[m]ilitary and civil aircraft are free to operate in international airspace without interference.”²⁷ The handbook defines international airspace as including the airspace over the EEZ and indicates that in it military aircraft may engage in flight operations, including surveillance, intelligence gathering, and support of naval activities.²⁸ These views accord with the American perspective.²⁹ President Ronald Reagan made this point clearly when he established the U.S. EEZ in 1983 and confirmed that in the zone all states would continue to enjoy high seas freedoms of navigation and overflight.³⁰ It remains the American position that in and above the EEZ the freedoms of navigation and overflight of all states are

qualitatively and *quantitatively* the same as the traditional high-seas freedoms recognized by international law: . . . qualitatively the same in the sense that the nature and extent of the right is the same as the traditional high-seas freedoms; . . . quantitatively the same in the sense that the included uses of the sea must embrace a range no less complete—and allow for future uses no less inclusive—than traditional high-seas freedoms.³¹

²⁶ Tare C. Brisibe, *State Sovereignty and Aeronautical Public Correspondence by Satellite*, 69 J. AIR L. & COM. 649, 667–68 (2004) (citation omitted) (quoting Michael Milde, *United Nations Convention on the Law of the Sea—Possible Implications for International Air Law*, 8 ANNALS AIR & SPACE L. 167, 191 (1983)).

²⁷ ROYAL AUSTRALIAN AIR FORCE, AIR POWER DEVELOPMENT CENTRE, OPERATIONS LAW FOR RAAF COMMANDERS 16 (2004), available at <http://airpower.airforce.gov.au/Publications/List/36/RAAF-Doctrine.aspx>.

²⁸ *Id.* at 18. The handbook also includes the right to test and fire weapons, but this right would appear to be tempered by the Article 58 requirement to give due regard to the coastal state’s interests in the EEZ, inasmuch as live weapons testing could interfere with fishing activities, fragile species (e.g., marine mammals, coral, etc.), shipping lanes, or offshore installations.

²⁹ DoDI 4540.01, *supra* note 15 (stating that “aircraft of all nations enjoy high seas freedoms of overflight in the airspace above Exclusive Economic Zones of coastal states beyond the territorial seas”); see also U.S. DEP’T OF THE NAVY, THE COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS, para. 2.6.2 (NWP 1-14M, MCWP 5-12.1, COMDTPUB 5800.7A, 2007).

³⁰ Exclusive Economic Zone of the United States of America, Proclamation No. 5030, 3 C.F.R. pt. 22 (1983), reprinted in 77 AJIL 621 (1983).

³¹ Elliot L. Richardson, *Power, Mobility and the Law of the Sea*, FOREIGN AFF., Spring 1980, at 902, 916. For clarifying information regarding the U.S. position, see the full text of Ambassador Richardson’s speech at Bernard H. Oxman, *The Third United Nations Conference on the Law of the Sea: The 1977 New York Session*, 72 AJIL 57, 59 n.8 (1978). Oxman, a U.S. representative at the New York session of the conference, writes that Article 58 was

Nonetheless, some states retain legislation that purports to impose limits on the military activities of other states in and over the EEZ. For instance, seven states claim a 200-nautical-mile territorial sea, with full sovereignty and presumably the right to regulate all international activities within it.³² Other states, such as Brazil, that formerly made such claims officially reduced their territorial sea claim to 12 nautical miles upon accession to UNCLOS. However, many of these states, including Brazil, still have not revised national laws asserting the authority to prohibit or regulate military exercises and maneuvers in their EEZ.³³ Upon ratification of UNCLOS, Brazil declared its understanding “that the provisions of the Convention do not authorize other States to carry out military exercises or manoeuvres, in particular those involving the use of weapons or explosives, in the exclusive economic zone without the consent of the coastal State.”³⁴ The United States responded that

the Convention recognizes the interest of the coastal State in the resources of the zone and authorizes it to assert jurisdiction over resource-related activities therein. At the same time, all States continue to enjoy in the zone traditional high seas freedoms of navigation and overflight Military operations, exercises and activities have always been regarded as internationally lawful uses of the sea. The right to conduct such activities will continue to be enjoyed by all States in the exclusive economic zone.³⁵

In light of this and other objections, international support for Brazil’s claim has steadily faded. In addition to Brazil, only nine states retain laws or have made official claims that specify

intended to preserve full high seas freedoms in the EEZ, not merely passage rights, although “[t]here was no disagreement that certain new coastal state rights specified in the Convention (e.g., pollution enforcement rights) would affect these freedoms or that these freedoms must be exercised in the economic zone with due regard to the rights and duties of the coastal state under the Convention.” *Id.* at 69 n.44.

³² In 1992 thirteen states claimed a 200-nautical-mile territorial sea: Argentina, Benin, Brazil, the Republic of the Congo, Ecuador, El Salvador, Liberia, Nicaragua, Panama, Peru, Sierra Leone, Somalia, and Uruguay. By 2008, only seven states continued to retain laws claiming a 200-nautical-mile territorial sea: Benin, the Republic of the Congo, Ecuador, Liberia, Nicaragua, Peru, and Somalia. U.S. Dep’t of Defense, *Maritime Claims Reference Manual* (June 2008), available at <http://www.dtic.mil/whs/directives/corres/html/20051m.htm> [hereinafter *MCRM*]. However, since five of these states are party to UNCLOS (Benin (1997), Congo (2008), Liberia (2008), Nicaragua (2000), and Somalia (1989)), which through Article 3 explicitly limits the territorial sea to 12 nautical miles, the number of states currently claiming a 200-nautical-mile territorial sea may in fact be only two (Ecuador and Peru). A representative of the Benin Foreign Ministry, for instance, provided an informal statement to the U.S. Department of State in 1998 that Benin now recognizes a 12-nautical-mile territorial sea, although Benin’s Decree 76–92 of April 1976 claiming a 200-nautical-mile territorial sea remains listed on the UN Web site as that state’s official claim. *MCRM, supra*; United Nations, *Maritime Space: Maritime Zones and Maritime Delimitation*, available at <http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/>. Additionally, although Peru claimed “exclusive jurisdiction and sovereignty” over a 200-nautical-mile maritime zone, in practice the precise nature of its claim is unclear. Declaration on the Maritime Zone, Aug. 18, 1952, 1006 UNTS 323, available at <http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/>. Peru’s claim may be affected by its litigation with Chile pending before the International Court of Justice, in which Peru asked the court to “adjudge and declare that Peru possesses exclusive sovereign rights” in the area of dispute. *Maritime Dispute (Peru v. Chile)*, Application Instituting Proceedings, para. 13 (filed Jan. 16, 2008), available at <http://www.icj-cij.org/>.

³³ Law No. 8.617, of Jan. 4, 1993, Art. 9, *Diário Oficial*, Jan. 5, 1993, available at <http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/> (“In the exclusive economic zone, military exercises and manoeuvres, in particular those involving the use of weapons or explosives, may only be carried out by other States with the consent of the Brazilian government.”).

³⁴ Brazil, Statement upon Ratification, para. II (Dec. 22, 1988), available at UN, *Declarations and Statements*, http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm [hereinafter *Declarations and Statements*] (also including Brazil’s statement at signature).

³⁵ Note by the Secretariat, UN Doc. A/CONF.62/WS/37 (1983), in 17 THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA, OFFICIAL RECORDS 240–44, UN Sales No. E.84.V.3 (1984).

a right to regulate military activities in the EEZ,³⁶ another five states maintain laws or claims that might be interpreted as asserting such a right,³⁷ and one additional state—Guyana—claims a sovereign right to control the overflight activities of other states in the airspace above its EEZ.³⁸ Consequently, compared with the substantial majority of the 159 current states parties to UNCLOS whose views are consistent with the U.S. position, including those that claim a 200-nautical-mile territorial sea, only a minority of 21 countries worldwide, 4 of which—Ecuador, Iran, North Korea, and Peru—are not parties to UNCLOS, continue to make legal claims that might be construed as in some way infringing on the rights of the international community to undertake military activities in the airspace above the EEZ.³⁹

Nonetheless, some scholars continue to advocate changing the balance of international and coastal state rights.⁴⁰ A working group sponsored by Japan's Ocean Policy Research Foundation, for instance, attempted to achieve an Asian consensus on the EEZ's legal framework, but after four years of study and discussions the group found little agreement among Asian states on the extent of coastal state authority to regulate the activities of the international community in and above the EEZ.⁴¹ Despite this failure, the group proposed "guidelines" for international conduct imposing limitations that appear to contradict the interpretations of the majority of UNCLOS parties. For example, the guidelines proposed by EEZ Group 21 included limitations on the freedom of other states to use the EEZ for military exercises when an adjacent high seas area is available,⁴² and prohibit "sea bases" in the EEZ of another coastal state.⁴³

The study's own conclusions seem to indicate that there is no developing Asian consensus on these points. Moreover, many other maritime states have expressly rejected such limitations on the traditional freedoms of navigation. For example, upon ratification of the Convention, Germany specifically stated that "the notion of a 200-mile zone of general rights of sovereignty and jurisdiction of the coastal State cannot be sustained either in general international law or under the relevant provisions of the Convention."⁴⁴ Likewise, the Italian declaration upon signature specified that the coastal state does not enjoy residual rights in the EEZ and has no authority under the Convention to require permission or notice of foreign military exercises

³⁶ They are Bangladesh, Burma, China, India, Iran, Malaysia, North Korea, Pakistan, and Uruguay. *MCRM*, *supra* note 32.

³⁷ These states are Cape Verde, Kenya, the Maldives, Mauritius, and Portugal. *Id.*

³⁸ *Id.*

³⁹ As of July 10, 2009, 159 countries had ratified or acceded to the Convention. UN, Consolidated Table of Ratifications/Accessions, etc. (July 10, 2009), at <http://www.un.org/Depts/los/index.htm>.

⁴⁰ EAST-WEST CENTER & INSTITUTE FOR OCEAN POLICY, THE REGIME OF THE EEZ: ISSUES AND RESPONSES, A REPORT OF THE TOKYO MEETING 1 (2003), available at <http://www.eastwestcenter.org/fileadmin/stored/pdfs/EEZTokyoMeeting.pdf>.

⁴¹ EEZ GROUP 21, GUIDELINES FOR NAVIGATION AND OVERFLIGHT IN THE EXCLUSIVE ECONOMIC ZONE: A COMMENTARY 3–8 (Ocean Policy Research Foundation, 2006), available at <http://www.sof.or.jp/en/report/index.php>.

⁴² *Id.* at 65.

⁴³ *Id.* at 55.

⁴⁴ Federal Republic of Germany, Declaration upon Ratification (Oct. 14, 1994), available at *Declarations and Statements*, *supra* note 34.

or maneuvers in the EEZ.⁴⁵ The Netherlands and the United Kingdom made similar statements.⁴⁶ The United States, too, though not yet a party to UNCLOS, has also persistently resisted attempts by coastal states to undermine those overflight and other freedoms in and above the EEZ that the Convention preserves.⁴⁷ A review of the practice of major maritime user states provides further evidence of resistance to attempts by some coastal states to encroach on navigational freedoms in airspace beyond the limits of the legitimate territorial sea.

The United States ADIZ System

The United States maintains perhaps the most comprehensive ADIZ system of any coastal state. The five ADIZs beyond the U.S. territorial sea were initially established in response to heightened tensions between the United States and the Soviet Union caused by the outbreak of the Korean War in 1950.⁴⁸ The two U.S. continental ADIZs extend seaward of American coastlines by more than 300 nautical miles in some Atlantic areas and more than 400 nautical miles in southern California.⁴⁹ Additionally, the United States maintains an irregularly shaped ADIZ off the coast of Alaska that extends from the nearest land out at least 350 nautical miles into the airspace above the Bering Sea and a similar distance into the Arctic Sea along Alaska's northern coast. The ADIZ surrounding Guam extends a radius of 250 nautical miles from the island, and the Hawaiian ADIZ forms an irregular octagon around the island chain that extends at one point more than 250 nautical miles north of the island of Kauai.

Title 14, section 99.9 of the U.S. federal regulations states that "a person who operates a *civil* aircraft into an ADIZ must have a functioning two-way radio, and the pilot must maintain a continuous listening watch on the appropriate aeronautical facility's frequency."⁵⁰ The section continues, but, perhaps intentionally, perhaps inartfully, drops the distinction between civil and other aircraft, stating that "[n]o person may operate *an aircraft* into, [or] within . . . an

⁴⁵ Italy, Declaration upon Signature (Dec. 7, 1984), confirmed upon ratification (Jan. 13, 1995), *available at id.*

⁴⁶ United Kingdom, Declaration upon Accession (July 25, 1997); Netherlands, Declaration upon Ratification (June 28, 1996), both *available at id.*

⁴⁷ The United States routinely protests coastal state assertions of authority that are inconsistent with UNCLOS through the Freedom of Navigation Program, which involves diplomatic representations, operational assertions, and bilateral and multilateral consultations with other governments to promote consistency of state practice regarding international law of the sea. J. ASHLEY ROACH & ROBERT W. SMITH, *EXCESSIVE MARITIME CLAIMS* 3–6 (66 U.S. Naval War C. Int'l L. Stud., 1994); *see also* Patrick J. Neher, Raul A. Pedrozo, & J. Ashley Roach, *In Defense of High Seas Freedoms*, RSIS COMMENTARIES 31/2009 (Nanyang Technological Univ., Singapore), Mar. 24, 2009, *available at* <http://www.rsis.edu.sg/publications/Perspective/RSIS0312009.pdf>.

⁴⁸ R. P. ANAND, *ORIGIN AND DEVELOPMENT OF THE LAW OF THE SEA* 171 (1983); WINKLER, *supra* note 4, at 22. As early as 1940, the United States established zones in the airspace over the Atlantic out of concern for the possible spread of European conflict. On September 5, 1939, President Roosevelt issued a Neutrality Proclamation that ordered the U.S. Navy to begin neutrality patrols in the Atlantic to report and track any belligerent air, surface, or subsurface contacts approaching the Atlantic coast of the United States or the West Indies. The patrols operated between north latitude 42°30' and 19°, east to longitude 65°. William E. Scarborough, *To Keep Us out of World War II?* DEP'T OF THE NAVY, NAVAL AVIATION NEWS, Mar.–Apr. 1990, at 18; *see also* Richard B. Bilder, *The Canadian Arctic Waters Pollution Prevention Act: New Stresses on the Law of the Sea*, 69 MICH. L. REV. 1, 27 n.105 (1970).

⁴⁹ The FAA FLIGHT MANUAL, *supra* note 4, includes large-scale chart depictions of each ADIZ. For the geographic coordinates of each ADIZ, see 14 C.F.R. §§99.41–49 (2009). Canada and Iceland established similar air defense identification zones. POULANTZAS, *supra* note 25, at 342–44.

⁵⁰ 14 C.F.R. §99.9(a) (emphasis added).

ADIZ unless—(1) The person files a DVFR [Defense Visual Flight Rules] flight plan containing the time and point of ADIZ penetration.” The section further provides that “if the pilot operating an aircraft under DVFR in an ADIZ cannot maintain two-way radio communications, the pilot may proceed in accordance with the original DVFR flight plan or land as soon as practicable.”⁵¹ Moreover, according to a related regulation, “[n]o person may operate *an aircraft* into, [or] within . . . an ADIZ, unless the person files, activates, and closes a flight plan with the appropriate aeronautical facility, or is otherwise authorized by air traffic control.”⁵² The section later states:

No pilot may operate *an aircraft* penetrating an ADIZ under DVFR unless—

- (1) The pilot reports to an appropriate aeronautical facility before penetration: the time, position, and altitude at which the aircraft passed the last reporting point before penetration and the estimated time of arrival over the next appropriate reporting point along the flight route.⁵³

The stated purpose for these regulations is to ensure that “[a]ll aircraft entering domestic U.S. airspace from points outside . . . provide for identification prior to entry [and] [t]o facilitate early aircraft identification of all aircraft in the vicinity of U.S. international airspace boundaries.”⁵⁴

The U.S. government bases its justification for these requirements on the need to ensure national security, to control illicit drug activities, to minimize unnecessary intercept and search-and-rescue operations, and to decrease the risk of midair collisions and other public hazards.⁵⁵ Although each of these bases reflects an important interest of any sovereign state, inasmuch as many U.S. ADIZ regulations do not explicitly exempt state aircraft, their application appears to be overbroad.⁵⁶ Indeed, at least some international law scholars have concluded that these regulations reflect an American attempt to extend jurisdictional reach beyond national airspace.⁵⁷ However, U.S. practice, to the extent that it is publicly available, rather strongly suggests that, although the nation views compliance with ADIZ regulations as helpful, it does not apply its ADIZ regulations to foreign state aircraft not bound for the U.S. territorial airspace as a matter of regulatory interpretation and interpretation of relevant international law.

For instance, beginning in about July 2007, Russian long-range bombers began relatively frequent military surveillance and training operations in the Alaskan ADIZ without filing a

⁵¹ 14 C.F.R. §99.9(b). The FAA *Aeronautical Information Manual* further states that either an Instrument Flight Rules or a Defense Visual Flight Rules flight plan must be filed “for all [aircraft] operations that enter an ADIZ.” FAA, AERONAUTICAL INFORMATION MANUAL, paras. 5-6-1.c.1(a) (Aug. 22, 2009), available at http://www.faa.gov/airports_airtraffic/air_traffic/publications/.

⁵² 14 C.F.R. §99.11(a)

⁵³ 14 C.F.R. §99.15(b).

⁵⁴ FAA FLIGHT MANUAL, *supra* note 4, National Security, para. b.

⁵⁵ Security Control of Air Traffic, 66 Fed. Reg. 49,819 (Sept. 28, 2001).

⁵⁶ In addition to the clarification in 14 C.F.R. §99.9(a) that the paragraph applies only to civil aircraft, some additional hints exist within FAA guidance that the U.S. government does accept that state aircraft are exempt from the regulations. For instance, the *International Flight Information Manual*, after specifying the requirements for air traffic control of aircraft within an ADIZ, states that aircraft flying outside such control are “subject to interception for positive identification when entering an ADIZ.” FAA FLIGHT MANUAL, *supra* note 4, National Security, para. f. Moreover, detailed interception procedures are published, implying a recognition that certain aircraft will not comply with FAA regulations. FAA, AERONAUTICAL INFORMATION MANUAL, *supra* note 51, para. 5-6-2.

⁵⁷ See, e.g., Xue & Xiong, *supra* note 2, at 36 (concluding that U.S. ADIZ regulations apply to *all* aircraft, including foreign military aircraft).

flight plan as the regulations of the Federal Aviation Administration seem to require.⁵⁸ Predictably, these Russian aircraft have been routinely intercepted by U.S. fighter aircraft and escorted until their departure from the U.S. ADIZ.⁵⁹ The commander of the Northern Command, however, stated with regard to these flights in June 2008 that if the intercepting aircraft determines that “it is a Russian aircraft on a training mission, we allow them to continue to do their job.”⁶⁰ Furthermore, the U.S. Department of Defense clearly asserts the right of U.S. military aircraft abroad to fly through ADIZs without complying with coastal state regulations as long as the U.S. aircraft does not intend to enter the coastal state’s national airspace and is not otherwise operating under controlled flight.⁶¹

In sum, although U.S. regulations appear to reflect ambiguity about the sovereign immunity of foreign state aircraft operating in an American ADIZ, U.S. practice reflects respect for the right of foreign military aircraft to exercise traditional high seas freedoms in the airspace above the EEZ. This policy is hardly surprising, given the great lengths to which the United States has gone to preserve overflight freedoms in areas of traditional high seas freedoms despite the various attempts of coastal states to regulate this airspace.

Gulf of Sidra

Although not specifically ADIZ related, the incidents in the Gulf of Sidra in the 1970s and 1980s clearly illustrate the lengths to which the United States will go to prevent coastal states from encroaching on the navigational freedoms of all states in the airspace beyond the coastal states’ legitimate territorial sea.⁶² In 1973 Libya unilaterally asserted full sovereignty over the waters of the Gulf of Sidra in the central Mediterranean Sea north of latitude 32°30’ north.⁶³ Libya claimed that the waters of the Gulf of Sidra were internal waters and that the airspace above the gulf was part of Libyan national airspace, subject to its complete sovereignty.⁶⁴ The

⁵⁸ *Pentagon Says Russian Bombers Are Expected off Alaskan Coast*, N.Y. TIMES, Dec. 1, 2000, at A5; Erik Holmes, *More Russian Bombers Flying off Alaska Coast*, A.F. TIMES, Apr. 8, 2008, available at http://www.airforcetimes.com/news/2008/04/airforce_pacaf_040608/; Christian Neef, *Why Is Moscow Risking a New Cold War?* SPIEGEL ONLINE, June 25, 2008, available at <http://www.spiegel.de/international/world/0,1518,druck-562073,00.html>.

⁵⁹ For a thorough treatment of international law related to interception of foreign aircraft over the high seas, see Andrew S. Williams, *The Interception of Civil Aircraft over the High Seas in the Global War on Terror*, 59 A.F. L. REV. 73 (2007).

⁶⁰ Rowan Scarborough, *Russian Flights Smack of Cold War*, WASH. TIMES, June 26, 2008, available at <http://www.washingtontimes.com/news/2008/jun/26/russian-flights-smack-of-cold-war/> (quoting Gen. Victor E. Renuart Jr.).

⁶¹ DoDI 4540.01, *supra* note 15, para. 6.4, instructing U.S. military pilots on the proper procedures for operations in another country’s ADIZ, states: “U.S. military aircraft penetrating a foreign ADIZ on a flight plan or intending to penetrate the sovereign airspace of the ADIZ country [must follow specified procedures]. Military aircraft transiting through a foreign ADIZ without intending to penetrate foreign sovereign airspace are not required to follow these procedures.” See also U.S. AIR FORCE, JUDGE ADVOCATE GENERAL’S DEP’T, AIR FORCE OPERATIONS AND THE LAW: A GUIDE FOR AIR AND SPACE FORCES 13 (2002); POULANTZAS, *supra* note 25, at 345.

⁶² France declared an exclusion zone in the airspace over the high seas off the coast of Algeria in the 1950s and 1960s, which also provoked a strong international reaction when French interceptors forced a Moroccan aircraft to land and attempted to interfere with a Soviet aircraft carrying President Leonid Brezhnev. POULANTZAS, *supra* note 25, at 344–46.

⁶³ Yehuda Z. Blum, *The Gulf of Sidra Incident*, 80 AJIL 668 (1986).

⁶⁴ GRIEF, *supra* note 8, at 18; Warren Weaver Jr., *International Dispute Is Centered on Status of Mediterranean Gulf*, N.Y. TIMES, Aug. 20, 1981, at A8.

United States and other countries protested the claim as “lacking any historic or legal justification.”⁶⁵

From the U.S. perspective, Libya’s claim was excessive because it impermissibly infringed the rights of other states to use the waters of the Gulf of Sidra and the airspace above them.⁶⁶ In 1981 Libyan jets attacked U.S. naval aircraft operating in the region for “trespassing over Libyan territory.”⁶⁷ By 1982, after UNCLOS was signed, there was general international agreement that the waters of the Gulf of Sidra constitute a portion of Libya’s EEZ and that, while Libya had the right to make and enforce resource-related laws in the water space, all other international freedoms obtained in the superjacent airspace.⁶⁸ Accordingly, the United States maintained its objection that Libya’s claim of sovereignty was excessive, which led to friction and further conflict.

In March 1986, during exercises in the Mediterranean Sea involving thirty U.S. naval warships, including three aircraft carriers, the United States sent three vessels into the Gulf of Sidra as a Freedom of Navigation Operation to assert the right of all states to navigate in and above these waters.⁶⁹ Libya launched several salvos of surface-to-air missiles against the U.S. naval aircraft operating in the airspace over the gulf, and the United States responded with air-to-surface and surface-to-surface fire, destroying or damaging four Libyan naval vessels and two missile sites.⁷⁰

These unfortunate losses occurred as a result of the determination of the United States to protect the prerogatives of all states to use the waters and airspace beyond the territorial sea for all purposes not specifically allocated by international law to coastal states. The incidents also demonstrated that by making excessive claims of sovereign authority that infringe on the rights of the rest of the community of sovereign states, coastal states, like Libya, tend to heighten tensions and contribute to international instability because they force maritime user states to defend what international law has long recognized as theirs.

Cold War and Recent Incidents Involving the USSR/Russia

Prior to the UNCLOS period, during the early years of the Cold War between about 1950 and 1962, in several incidents force was used by a coastal state against aircraft in the airspace beyond the territorial sea. In one such incident, on July 1, 1960, Soviet aircraft shot down an American RB-47 reconnaissance plane that was flying more than thirty nautical miles off the Soviet coastline.⁷¹ The RB-47 incident followed on the heels of the famous attack on May 1 of that year against the U-2 piloted by U.S. airman Francis Gary Powers, which the United

⁶⁵ *Navigation Rights and the Gulf of Sidra*, DEP’T ST. BULL., Feb. 1987, at 69, 69.

⁶⁶ ROACH & SMITH, *supra* note 47, at 27–28.

⁶⁷ *Libya’s Gulf Claim: 13-Year Dispute with U.S.*, N.Y. TIMES, Mar. 25, 1986, at A11.

⁶⁸ See generally UNCLOS, *supra* note 17, Arts. 55–59; Blum, *supra* note 63, at 668.

⁶⁹ Bernard Weinraub, *U.S., Citing Libyan Fire, Reports Attacking a Missile Site and Setting 2 Ships Ablaze*, N.Y. TIMES, Mar. 25, 1986, at A1.

⁷⁰ Michael R. Gordon, *Combat with Libya: The How and the Why; U.S. Says One Vessel It Hit Had Come Within 10 Miles*, N.Y. TIMES, Mar. 26, 1986, at A8.

⁷¹ Oliver J. Lissitzyn, *Some Legal Implications of the U-2 and RB-47 Incidents*, 56 AJIL 135, 139 (1962). It should be noted that the Soviets attempted to claim that the aircraft was within Soviet territorial airspace at the time it was attacked, but the assertion apparently lacked much credibility, since a U.S.-proposed resolution in the UN Security Council calling for a fact-finding investigation had to be vetoed by the USSR to keep it from passing.

States admitted was flying over Soviet territory for the purpose of reconnaissance, a practice it suspended after the Soviet attack.⁷² The difference between the two incidents is that the first clearly occurred in territorial airspace, whereas the second took place in an area of high seas freedoms. The United States did not protest the use of force by the Soviets against the U-2, given the circumstances of the Cold War and the presence of the aircraft in national airspace, but actively protested the use of force against the RB-47. In assessing the legality of the Soviet actions not long after the events, one scholar wrote:

From the legal point of view, the most striking feature of the RB-47 incident is that none of the nations involved—the U.S.S.R., the United States, and the members of the U.N. Security Council which discussed the incident—either claimed or admitted the right of a state to shoot down a foreign aircraft over the high seas, even if it flies within close proximity of the state's territory and even if it is a military aircraft which may be engaged in military reconnaissance.⁷³

In fact, at least one state—the United Kingdom—specifically stated that it viewed flights in the airspace above the high seas for the purpose of reconnaissance of a coastal state as within the realm of rights that belong to all states.⁷⁴

More recently, in a reprise of activity characteristic of the Cold War, as mentioned above, Russia has picked up where the Soviet Union left off in flying military flights close to the airspace above the territorial sea of certain other states. Since 2005, Norway's Regional Airspace Surveillance System has detected a trend of increasing Russian military flights in the airspace just off Norway's western coastline.⁷⁵ Echoes of Cold War intercept activity occurred in July 2007, when Norway scrambled several of its fighter aircraft to intercept Russian Tupolev-95 Bear long-range bomber/reconnaissance planes in the airspace over the Norwegian EEZ and demanded an explanation from the Russian government. The response, which Norway accepted, was that such Russian flights are part of "routine planned military exercises over neutral waters." Russian pilots appeared careful to remain out of Norwegian national airspace, and expected to be intercepted as a matter of course by Norwegian fighter aircraft.⁷⁶

Similarly, in September 2007, UK Royal Air Force fighters intercepted eight Russian Tu-95s in the airspace off the northern coast of Great Britain near Scotland.⁷⁷ Russian reconnaissance aircraft had already flown close to British national airspace several times over the

⁷² *Id.* at 136–39; see also UN, [Charter] Article 2(4), at http://untreaty.un.org/cod/repertory/art2/english/rep_supp3_vol1-art2_4_e.pdf (documents on U-2 and RB-47 incidents); The U-2 Spy Plane Incident, at <http://www.eisenhower.utexas.edu/dl/U2Incident/u2documents.html> (presidential documents).

⁷³ Lissitzyn, *supra* note 71, at 140. The author notes that, in addition to the United States and the Soviet Union, these states included Argentina, Ceylon, Ecuador, France, Italy, Poland, the Republic of China, Tunisia, and the United Kingdom, citing the minutes of the Security Council, UN Docs. S/PV.858–61, & 63 (May 24–27, 1960), and S/PV.880–88 (July 22–26, 1960).

⁷⁴ Lissitzyn, *supra* note 71, at 140. Although the United Kingdom expressly supported the right to conduct such reconnaissance flights, other states simply upheld the right to fly unhindered over the high seas.

⁷⁵ Nabi Abdullaev, *Emerging Russia Rattles Global Community*, DEFENSE NEWS, Aug. 20, 2007, at 1.

⁷⁶ *Id.* at 10.

⁷⁷ Mark Tran, *Q&A: Russian Reconnaissance*, GUARDIAN UNLIMITED, Sept. 6, 2007; *RAF Fighters Scramble to Intercept Russian Aircraft*, INDEPENDENT (London), Sept. 7, 2007, at 6. Reportedly, this was the second occurrence in as many weeks in a summer of frequent UK interceptions of Russian reconnaissance aircraft in the airspace near Great Britain.

course of the summer, but remained over the British EEZ on each occasion.⁷⁸ In addition, Canadian fighter jets intercepted Russian military aircraft near Canadian national airspace off Newfoundland in August 2007.⁷⁹ A Russian military spokesman asserted the lawfulness of such flights, explaining that “[t]he flights by long-range aviation were made according to international rules of the use of air space, over neutral waters, without violating the borders of other states.”⁸⁰ Then-president Vladimir Putin stated that Russia’s reconnaissance patrols are flown to protect shipping lanes and other vital Russian interests, and Russian aircraft have been intercepted while monitoring American, British, and Norwegian military exercises in their EEZs without diplomatic objection.⁸¹

The inevitable conclusion of this pattern of activity—both past and recent—is that Canada, Norway, Russia, the United Kingdom, and the United States all see such activity as falling within the historical freedoms of navigation for military purposes in the airspace over a coastal state’s EEZ. More specifically, these state practices demonstrate support for the proposition that it comports with international law for foreign military aircraft to fly nonthreatening reconnaissance and surveillance missions in the airspace beyond twelve nautical miles from a coastal state’s accepted baselines.

East Asian Incidents

Another relatively recent, but more contentious, event in the airspace above the EEZ occurred on April 1, 2001, when an American EP-3 naval reconnaissance aircraft and a Chinese F-8 fighter-interceptor collided over the South China Sea, approximately seventy nautical miles south of Hainan Island.⁸² Similarly to the Russian government’s response to Norway’s demand for an explanation, discussed above, the United States responded to the Chinese demand for an apology by reporting to the Chinese that at the time of the collision, the EP-3 was on a routine, overt reconnaissance mission in “international airspace,”⁸³ and stated that

⁷⁸ David Blair, *RAF Jets Intercept Eight Russian Bombers*, DAILY TELEGRAPH (London), Sept. 7, 2007, at 17; *Britain Ready to Intercept Russia’s Aircraft on Border*, KOMMERSANT, July 18, 2007, at http://www.kommersant.com/p-11032/r_500/Tu-95_intercept_/; Vladimir Solovyov & Mikhail Zygar, *Britain Sounds Air Raid Warning*, KOMMERSANT, July 19, 2007, at http://www.kommersant.com/p783711/r_1/Britain,_Russia,_Berezovsky,_bombers,_Lugovoi/.

⁷⁹ *Canadian Forces Keep Eye on Russian Exercise, Deny Airspace Incident*, CANWEST NEWS SERV., Oct. 24, 2007, at <http://www.canada.com/edmontonjournal/story.html?id=917cc620-6a9a-48b0-824c-baa9a13d8f42>; see also *Cold War Shivers: Two Russian Strategic Bombers Fly Along Alaska, Canada Coasts*, ITAR-TASS, Sept. 20, 2007. In this case, the Russian planes may in fact have strayed into Canadian national airspace.

⁸⁰ ITAR-TASS, *supra* note 79.

⁸¹ Michael Evans, *Russian ‘Spy’ Planes Put RAF on Cold War Alert*, TIMES (London), May 10, 2007, at 22; *Russian Bombers Force U.S. Jets to Scramble*, MILITARY.COM, Aug. 10, 2007, at <http://www.military.com/NewsContent/0,13319,145423,00.html>.

⁸² SHIRLEY A. KAN, ET AL., CHINA-U.S. AIRCRAFT COLLISION INCIDENT OF APRIL 2001: ASSESSMENTS AND POLICY IMPLICATIONS 1 (CRS Report, Oct. 10, 2001) [hereinafter KAN ET AL.], available at <http://www.fas.org/spp/crs/row/RL30946.pdf>; see also Sean D. Murphy, *Contemporary Practice of the United States*, 95 AJIL 630–33 (2001). For an insightful perspective on the diplomatic aspects of this event, see the account by the special assistant to Ambassador Joseph W. Prueher at the time, JOHN KEEFE, ANATOMY OF THE EP-3 INCIDENT, APRIL 2001 (Center for Naval Analysis, Jan. 2002).

⁸³ KAN ET AL., *supra* note 82, at 7. The U.S. military often uses the term “international airspace” to describe zones in which high seas freedoms of overflight apply.

such flights by U.S. aircraft and their interception by the Chinese were regular events.⁸⁴ Although China has not publicly established an ADIZ off its coast, it has historically treated the airspace above its EEZ as a special security interest, and in the months preceding the collision U.S. officials noted that Chinese intercepts of American aircraft had become “increasingly aggressive,” especially in the airspace over the South China Sea.⁸⁵ After the collision, a Chinese Foreign Ministry spokesman expressed the view that foreign aircraft on reconnaissance missions in the airspace above China’s EEZ threaten China’s security,⁸⁶ and the foreign minister demanded that reconnaissance missions stop.⁸⁷ The spokesman stated that

it was proper and in accordance with international law for Chinese military fighters to follow and monitor the U.S. military surveillance plane within airspace over China’s exclusive economic waters

. . . .

The surveillance flight conducted by the U.S. aircraft overran the scope of “free over-flight” according to international law [in that] any flight in airspace above another nation’s exclusive economic zone should respect the rights of the country concerned Thus, the U.S. plane’s actions posed a serious threat to the national security of China⁸⁸

Although he recognized that “all countries enjoy the freedom of overflight in the exclusive economic waters of a nation,” the Foreign Ministry spokesman further observed that the EP-3’s “reconnaissance acts were targeted at China in the airspace over China’s coastal area . . . and thus abused the principle of overflight freedom.”⁸⁹

Soon thereafter, the official PRC news agency Xinhua published an analysis of the international law aspects of the collision by Chinese scholar Li Qin claiming that reconnaissance flights over the EEZ of another country are threats to “its national security and . . . peaceful order as stipulated in international law” in violation of UNCLOS and customary international law.⁹⁰ Li’s assertion that reconnaissance flights are threats per se reflects the Chinese government’s unusually narrow interpretation of international law, but his assessment that states may

⁸⁴ *Id.* at 2. On April 13, 2001, Secretary of Defense Donald Rumsfeld stated that the EP-3 was on a “well-known flight path that we have used for decades.” Defense Department Special Briefing Re: U.S. Navy EP-3 Aircraft and Chinese F-8 Fighter Collision (Apr. 13, 2001), available at <http://www.fas.org/news/china/2001/china-010413zdb.htm>. Indeed, as recently as September 19, 2007, Chinese television reported that a Chinese Jian-8 fighter aircraft had intercepted a U.S. EP-3 reconnaissance plane flying approximately five hundred feet above the South China Sea, and that increased Chinese intercepts of EP-3 flights over the East China Sea had occurred in advance of a major military exercise in China’s Fujian Province across the strait from Taiwan. A Chinese military commentator on the program noted that such “encounters” between U.S. and PLA aircraft are “very common.” *Observation Post of Military Situation: Phoenix TV Views PLA Military Moves in Taiwan Strait; US, PLA Aircraft ‘Encounter’* (Phoenix television broadcast, Hong Kong, Sept. 19, 2007) (trans. Open Source Center).

⁸⁵ KAN ET AL., *supra* note 82, at 2. The aggressive intercepts were the subject of a diplomatic protest by the Clinton administration on December 28, 2000. *Id.* at 10.

⁸⁶ *Chinese FM Spokesman Gives Full Account of Air Collision*, XINHUA GENERAL NEWS SERV., Apr. 3, 2001, available in LEXIS, News Library, Wire Service Stories File.

⁸⁷ *US Side Must Take Full Responsibility for Incident: Chinese Foreign Minister*, XINHUA GENERAL NEWS SERV., Apr. 11, 2001, available in LEXIS, News Library, Individual Publications File.

⁸⁸ *Chinese FM Spokesman Gives Full Account of Air Collision*, *supra* note 86.

⁸⁹ *Chinese FM Spokesman Gives Full Account of Plane Collision Incident*, XINHUA GENERAL NEWS SERV., Apr. 4, 2001, available in LEXIS, News Library, Wire Service Stories File.

⁹⁰ *U.S. Seriously Violates International Law: Signed Article*, XINHUA GENERAL NEWS SERV., Apr. 16, 2001, available in LEXIS, News Library, Wire Service Stories File, available at <http://www.china-embassy.org/eng/zt/zjsj/t36383.htm> (in slightly different form).

lawfully intercept and observe aircraft in the airspace over the EEZ corresponds with prevailing international practice.⁹¹ Li stated:

According to international practice and law, when a foreign military plane is engaged in activities which could threaten a state's national security in the airspace over coastal waters of a coastal country, it has the right to take relevant defense measures, including sending planes to track and monitor the foreign plane.

. . . [T]he purposes of the activities of the coastal country are: firstly, to exercise the right of sovereignty authorized by international law, prevent foreign planes from entering the airspace of its own country and safeguard its territorial airspace and waters; secondly, to [alert] foreign planes not to conduct any activities threatening the territorial integrity and national security of the coastal country.⁹²

While acknowledging the routine nature of the U.S. reconnaissance flights—which reportedly occurred four to five times a week during the second half of 2000 and about two hundred times a year between 1997 and 1999⁹³—then-U.S. secretary of defense Donald H. Rumsfeld also stated that between December 2000 and April 2001 there were forty-four aerial interceptions of U.S. reconnaissance flights off Chinese coasts by the People's Liberation Army Air Force.⁹⁴ Thus, notwithstanding the stated Chinese view on the law of airspace over the EEZ, the longstanding and frequent nature of American reconnaissance flights in that airspace and China's routine acceptance of them rather strongly suggest that the Chinese government accepts, perhaps reluctantly, that current international law recognizes the right of all states to carry out military activities in the airspace above the EEZ and that coastal states have no more authority than to intercept such flights safely and inspect them to ensure their nonthreatening character.

It is also conceivable, in light of growing Chinese interest in conducting and monitoring activities off foreign coasts, that authorities in Beijing are reconsidering the wisdom of maintaining perspectives on international law that limit such activities. This possibility would be bolstered if the U.S. government is correct in asserting that China has engaged in reconnaissance flights in the airspace above the EEZ of other Asian states and possesses at least one platform specifically designed for that purpose, the Yun 8 reconnaissance aircraft.⁹⁵

Notably, in their statements concerning the EP-3 incident, no other governments in the region openly supported the Chinese position that military reconnaissance flights in the airspace above the EEZ in themselves constitute a threat to security and a violation of freedom of aerial navigation.⁹⁶ The senior vice-minister of the Japan Defense Agency stated that his personal view of the incident was that it took place in "international airspace" and that he "[could not] fathom some aspects of China's assertions."⁹⁷ The Philippines officially adopted a "neutral" position on the matter,⁹⁸ and Russia and South Korea had little to say publicly, though

⁹¹ For a more detailed discussion on state practice and international law related to aerial intercepts, see POULANTZAS, *supra* note 25, at 343–45.

⁹² *U.S. Seriously Violates International Law: Signed Article*, *supra* note 90.

⁹³ Thomas E. Ricks, *Anger over Flights Grew in Past Year*, WASH. POST, Apr. 7, 2001, at A1.

⁹⁴ KAN ET AL., *supra* note 82, at 14.

⁹⁵ *Id.* at 7; KEEFE, *supra* note 82, at 14.

⁹⁶ KAN ET AL., *supra* note 82, at 35–38.

⁹⁷ *Id.* at 35 (citing NIHON KEIZAI SHIMBUN, Apr. 6, 2001, at 2).

⁹⁸ *Id.* at 36–37.

it was surprising to some observers that Russia had refrained from criticizing the United States, given their assessment that relations between the two countries were tense at the time.⁹⁹ Perhaps Russia's soon-to-be-rejuvenated reconnaissance flight program explains the Russian silence.

These encouraging signs aside, Chinese academic discussion of coastal state authority to control foreign state military activities in the EEZ has hardened in recent years.¹⁰⁰ Several military scholars, for instance, have argued that the EEZ is an area of Chinese national sovereignty and a zone that serves as “an important strategic protective screen.”¹⁰¹ In a clear reference to U.S. views, these scholars argue that traditional freedoms of all states at sea developed on the basis of an approach to law that links maritime interests with national power and the ability to dominate the oceans. In their view, the sovereignty of the coastal state—including its national self-defense interests—should be the overarching interpretive principle of the law of the sea. In keeping with this approach, a few years after the EP-3 incident, two senior Chinese scholars—one a military officer and the other a civilian academic—published a paper that resurrected the position that *any* foreign military activities in the airspace above a coastal state's EEZ constitutes a threat to that state's security.¹⁰² To provide an example of the conduct they deemed unacceptable, they wrote:

“[F]reedoms of navigation and overflight” in the EEZ does not include the freedom to conduct military and reconnaissance activities in the EEZ and its superjacent airspace. Such activities encroach or infringe on the national security interests of the coastal State, and can be considered a use of force or a threat to use force . . . inconsistent with the principles of international law embodied in the Charter of the United Nations.¹⁰³

The military activities of Russia, the United Kingdom, and the United States demonstrate, to the contrary, that a majority of the permanent members of the Security Council consider the airspace above the EEZ to be available for use by all states for military activities that do not pose a direct threat to the security of the coastal state. Likewise, the activities of China, Libya, Norway, the United Kingdom, and the United States support the perspective that coastal states may lawfully use the airspace above the EEZ as a zone of identification and inspection to protect the national airspace over land and the territorial sea from unwanted intrusion or directly

⁹⁹ *Id.* at 36, 37–38 (citing S. CHINA MORNING POST (Hong Kong), Apr. 20, 2001; JAMESTOWN MONITOR, Apr. 11, 2001).

¹⁰⁰ See, e.g., Xue & Xiong *supra* note 2, at 38 (opining that a Chinese ADIZ is necessary to prevent attempts by the United States “to pilfer Chinese military intelligence in the service of its shameful objectives of interfering in Chinese domestic politics and undermining Chinese territorial sovereignty”).

¹⁰¹ Wang Shumei, Shi Jiazhu, & Xu Mingshun, *Carry out the Historic Mission of the Army and Establish the Scientific Concept of Sea Rights*, BEIJING ZHONGGUO JUNSHI KEXUE [Quarterly Journal of the People's Liberation Army (PLA) Academy of Military Science and the China Military Science Association], Feb. 1, 2007, at 139, para. 1(1) (trans. Open Source Center). Indeed, even before China joined the Law of the Sea Convention, it saw development of the EEZ as a strategy to end the “superpowers' maritime hegemonism” and imperialism.” Yann-huei Billy Song, *China's Ocean Policy: EEZ and Marine Fisheries*, 29 ASIAN SURV. 983, 984 (1989).

¹⁰² In their private capacity, PLA law of the sea experts concede that an international right to “maneuver” through another state's EEZ might be permitted in a manner reflective of the “innocent passage” regime in territorial waters, “but even this must not be abused.” *E.g.*, Sr. Col. Li Yu, Remarks at U.S. Pacific Command, Conference on Military Operations and International Law, Singapore (Apr. 15, 2008) (based on author's notes). Presumably, from this perspective any international military activities other than mere passage would be prohibited in and above the EEZ. Such restrictions, of course, were never intended by the UNCLOS negotiators. Oxman, *supra* note 20, at 810.

¹⁰³ Ren Xiaofeng & Cheng Xizhong, *A Chinese Perspective*, 29 MARINE POL'Y 139, 142 (2005).

threatening behavior.¹⁰⁴ These state practices build on historical practice—neither UNCLOS nor the Chicago Convention—on the legitimacy of offshore ADIZs.¹⁰⁵

III. CONCLUSION

Turning to the future, the resurgence of concern about threats to national security from the air—stemming from, among other causes, the recent violent air attacks on the United States by international terrorists, the reemergence of Russia as a global power, and continuing tensions over sovereignty claims in East Asia—suggests that coastal states will continue to look to international law to support measures to gain improved awareness of the presence of offshore threats. To accomplish this objective, some coastal states apparently see it as in their interest to persist in pursuing changes in the historical balance of rights and obligations between the coastal state and all states in the airspace over the EEZ. Several factors suggest that such a trend would not be in the best long-term interests of international stability.

First, if preventing international instability is in the interest of all states, then states with the capacity to provide stability and security need the corresponding legal authority to do so. In short, to be effective, naval and air power rely on access. Nearly three decades ago, Elliot Richardson presciently stated:

Clearly the classical uses of sea power have assumed fresh importance. . . . To back up friends, to warn potential enemies, to neutralize similar deployments by other naval powers, to exert influence in ambiguous situations, to demonstrate resolve through a deployment of palpable force—all these are tasks that naval power is uniquely able to perform.¹⁰⁶

Additionally, Richardson noted that “[s]ince one of the great attributes of air power is speed, any factor that works to delay flight time, such as rerouting or the need to ask permission to overfly, would naturally downgrade its value.”¹⁰⁷

Second, naval powers cannot protect the security of the maritime commons from pirates and other disruptive nonstate actors without proper authority under international law. This is a lesson that is being learned anew by the current generation of leaders who must secure the air and the seas from pirates in the Horn of Africa, international terrorists in many regions, and other nontraditional threats wherever they challenge the security of the global system. Naval and air forces provide the flexibility, visibility, and pervasiveness necessary to achieve such security. Furthermore, ensuring that naval power retains the authority for unimpeded access to the global commons will help prevent the emergence of ungoverned zones on and above the oceans. Absent international authority to employ naval and air power to provide security and order in the EEZ, broad areas of the oceans would become sanctuaries for disruptive nonstate actors in the many regions of the world where coastal states have insufficient maritime capacity

¹⁰⁴ Italy established and patrolled an ADIZ off its Adriatic Coast during the 1990s and early 2000s because of the potential spread of the conflict in the former Yugoslavia. *See, e.g.*, STEVE DAVIES, F-15C EAGLE UNITS IN COMBAT 80 (2005). ADIZs are also currently maintained by Japan, South Korea, and Taiwan. U.S. National Ocean Service, Operational Navigation Chart, G-10 (12th ed. 1994).

¹⁰⁵ L. C. GREEN, THE CONTEMPORARY LAW OF ARMED CONFLICT 175 (1993).

¹⁰⁶ Richardson, *supra* note 31, at 906.

¹⁰⁷ *Id.* at 908 (quoting Prof. Geoffrey Kemp, U.S. Naval Power and the Changing Maritime Environment 4, paper presented at the fourth Annual Seminar of the Center for Oceans Law and Policy, University of Virginia (Jan. 1980)).

to maintain order without the assistance of other states. This is what happened on land with disastrous consequences in Afghanistan and Somalia. It would have equally disastrous consequences if it occurred at sea.

Third, information is often stabilizing. States need access to information about other states, within limits prescribed by national airspace and territorial waters, to promote international stability. Just as routine interaction between citizens of states builds familiarity, trust, and confidence, so does the respectful gathering of information between sovereign states—as Russia openly did off the coasts of Canada, Norway, the United Kingdom, and the United States, and as the United States did off the coast of China. The existing framework of international law, which provides for full sovereignty within national airspace and extends that protective zone to 12 nautical miles off a coastal state's shore, strikes the most efficient balance between the right of coastal states to defend their interests and the interest of other states in gaining information. Norway and the United Kingdom each had sufficient time to launch a flight of aircraft to intercept, identify, and safely escort the Russian reconnaissance aircraft, as is regularly done by the Chinese with U.S. military aircraft. Nonthreatening reconnaissance and surveillance flights represent the least intrusive form of information gathering, while respecting coastal state sovereignty. The alternative to such open information gathering may be covert spying programs, which of course are inherently destabilizing.

Fourth, unfettered freedom of oceanic navigation and overflight promotes the global communication—Oxman refers to this as the sovereign right of communication—on which the economic future of the international community rests.¹⁰⁸ Roughly 36 percent of the world's oceans lies within 200 nautical miles of a coastline, and currently the vast majority of international trade flows as a matter of right on and over the EEZs of coastal states.¹⁰⁹ Implicit in this concept is the idea that sovereign states are free to act peacefully in international spheres, including for the purpose of maintaining the security on which global stability relies. In today's globally integrated world, all states have a keen interest in the maintenance of an efficient system of navigation that will keep the transaction costs involved in exercising maritime communication to a minimum.¹¹⁰ Thus, freedom to move about in the global commons—in the waters and in the airspace—represents an important supportive activity for international commerce. Wider claims of maritime control infringe on this sovereign right and tend to weaken it, which in turn weakens the strength of the global economic order.

Finally, there is something to be said for the routine interaction of members of the international community in the global commons under a general framework of liberty, subject to the requirements of due regard in the Chicago Convention and to the specific requirements in UNCLOS to exercise rights and obligations with “due regard” for the rights of others. As noted in the preamble to the Chicago Convention, the parties agreed to principles and arrangements for international aviation “to avoid friction and to promote that cooperation between nations and peoples upon which the peace of the world depends.”¹¹¹

¹⁰⁸ Bernard H. Oxman, *Transit of Straits and Archipelagic Waters by Military Aircraft*, 4 SINGAPORE J. INT'L & COMP. L. 377, 377–79, 386 (2000).

¹⁰⁹ See, e.g., R. R. CHURCHILL & A. V. LOWE, *THE LAW OF THE SEA* 162 (3d ed. 1999).

¹¹⁰ DAVID JOSEPH ATTARD, *THE EXCLUSIVE ECONOMIC ZONE* 78 (1987).

¹¹¹ Chicago Convention, *supra* note 5, pmb1.

This habit of mutual respect assists in building stable expectations. In the best of circumstances it can even build trust. Ships and aircraft operating near each other have a mutual interest in the personal safety that such respect and trust can engender. The habit of peaceful interaction would be lost were states to wall themselves behind legal edifices in zones of increasing separation. Accordingly, trends in international law that chip away at the international character of the airspace above the EEZ should be discouraged as fundamentally destabilizing. The international law framework that allows coastal states to declare and manage ADIZs without infringing on the free overflight of the EEZ by state aircraft promotes the ability of coastal states to protect their security by making an early determination of the nonhostile character of such flights while properly balancing the military interests of all states, and thus tends to promote stability and respect within the international community.