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In search of theoretical justification for air defence identification zones

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Abstract This article is published at a time when the world commemorates the 10th anniversary of the events of 11 September 2001, where civilian commercial aircraft were used as weapons of mass destruction. Some are of the view that Air Defence Identification Zones (ADIZ) gained prominence as a tool with which a State could control and be prepared for aircraft approaching their territory. This article discusses the role of ADIZ as a necessary precaution and addresses theoretical principles at international law that would justify the concept. It also brings to bear the nuances between war and the Rule of Law and the extent to which the social contract theory can be applied and stretched to ascribe to States justification for the imposition of an ADIZ.

Keywords ADIZ · War · Bush Doctrine · Juridification of war · Preemption · Prevention · Precautionary principle · Sovereignty

Introduction

An Air Defence Identification Zone (ADIZ) is an area in airspace over land or water which may not be over the sovereign territory of a State in which ready identification, location and control of all aircraft is required in the interest of national security.[1] ADIZ must not be

[1] A similar definition is found in the United States Federal Regulations. See 14 C.F.R. S. 99.3 (2009). The United States has four ADIZs: The Contiguous US ADIZ; Alaska ADIZ; Guam ADIZ; and Hawai ADIZ. In the United States, ADIZ applies only to commercial aircraft intending to enter United States airspace. The United States does not recognize the right of a coastal nation to apply its ADIZ procedures to foreign aircraft not intending to enter national airspace nor does the United States apply its ADIZ procedures to foreign aircraft not intending to enter U.S. airspace. Accordingly, U.S. military aircraft not intending to enter national airspace should not identify themselves or otherwise comply with ADIZ procedures established by other nations, unless the United States has specifically agreed to do so. See U.S. Navy's *Commander's Handbook on the Law of Naval Operations*. Also see (Williams 2007), at 95–96.

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confused with Flight Information Regions (FIRs) which are areas established for the facilitation of airspace and air traffic management. FIRs generally involve a subjacent State which has undertaken responsibility for providing air traffic control services.[2] The main purpose of establishing an ADIZ is to properly identify all approaching aircraft for security purposes so that they could, prior to entry into national airspace, satisfy certain local entry requirements.[3] Although there is no overwhelming evidence, either from a scholastic or legislative perspective that lends legal legitimacy to the establishment of ADIZs, such a concept has never been challenged as being inconsistent with existing law.[4]

It has been argued that ADIZs came into prominence as a security tool in air navigation as a corollary to the events of 11 September 2001 where aircraft were used as weapons of mass destruction.[5] Norway and the United Kingdom, India, Pakistan and Canada (CADIZ) are some countries which maintain ADIZs as well as the United States.[6] If an analogy from maritime law and practice were to be applied to ADIZ, one could cite the *United Nations Convention on the Law of the Sea* (UNCLOS)[7] which was signed by the Parties on December 10, 1982 and entered into force on November 16, 1994 after receiving 60 ratifications or accessions. UNCLOS divides the seas into zones over which States have varying degrees of rights and controls. The territorial sea, which is exclusively controlled by the State, is the first zone which extends 12 nautical miles from the coast or coastal baselines. The territorial sea is open to all vessels to enjoy the right of innocent passage. Beyond the territorial zone comes the contiguous zone of another 12 nautical miles followed by the exclusive economic zone of 200 nautical miles from the coastal baseline. In Article 76 titled "Definition of the Continental Shelf" UNCLOS provides that a States Party may extend its continental margin beyond the 200 nautical mile Exclusive Economic Zone (EEZ) if certain criteria are fulfilled.

It is an incontrovertible principle of international maritime law that international navigation, however founded and whatever the right of innocent passage may be, often conflicts with a State's desire to protect itself from activities that infringe its sovereignty, resource rights or more importantly, internal security. In such instances

[2] States may delegate such responsibility to another State or States without abdicating their sovereignty. See Annex 11 to the Chicago Convention (Air Traffic Services) which provides that flight information service is provided to aircraft operating in controlled airspace and to others known to the air traffic services units. The information includes significant meteorological (SIGMET) information, changes in the serviceability of navigation aids and in the condition of aerodromes and associated facilities and any other information likely to affect safety. Flights operated by Instrument Flight Rules (IFR) receive, in addition, information on weather conditions at departure, destination and alternate aerodromes, collision hazards to aircraft operating outside of control areas and control zones and, for flight over water, available information on surface vessels. Flights operated by Visual Flight Rules (VFR) receive information on weather conditions which would make visual flight impractical. Annex 11 also contains specifications for operational flight information service (OFIS) broadcasts, including automated terminal information service (ATIS) broadcasts. See (Franklin 2007).

[3] See (Petras 2010) at 62–63.

[4] See McDougal et al. (1963), where the author suggests that if for security reasons States have certain claims on those who enter their sovereign territories, such claims may not be inconsistent with the principles of international law.

[5] See (Dutton 2009) at 691.

[6] *Ibid*.

[7] Law of the Sea, Official Text of the United Nations Convention on the Law of the Sea with Indexes and Annex, Final Act of the Third United Nations Conference on the Law of the Sea, United Nations: 1983.

[0] Law of the Sea, Official Text of the United Nations Convention on the Law of the Sea with Indexes and

jurisdiction inevitably vests with the coastal State.[8] Turning to ADIZs, it must be emphasized that a State can by no means arrogate to itself territorial sovereignty over an ADIZ *ipso facto*. Neither can a State interfere with a State's exercise of legitimate rights of navigation over the high seas.[9]

This article does not go into the details of principles applicable to the various ADIZs now existing in various jurisdictions as this discussion has occurred elsewhere.[10] However, it will examine the justification for the establishment of ADIZs as a means of ensuring an individual State's security.

Justification for ADIZ

Generally under legal theory, each State is sovereign and equal[11] and the term *sovereignty* may be used as a synonym for independence (Brownlie 1990). However, in modern parlance, with the rapid growth in telecommunications and global competition and rivalries, no State can be entirely sovereign to the exclusion of others (Shaw 2003). In the ADIZ context, one must look at this concept from an aviation perspective. The Convention on International Civil Aviation (Chicago Convention)[12] in Article 1 provides that the contracting States to the Convention recognize that every State has complete and exclusive sovereignty over the airspace above its territory. This provision is clear that the exercise of sovereignty by a State extends only to the airspace over its territory which is deemed to be the land areas and territorial waters adjacent thereto under the sovereignty, suzerainty, protection and mandate of such State.[13]

Broadly speaking, ADIZ requirements are those that sovereign States require aircraft to comply with if they are to be permitted to enter sovereign airspace. Therefore ADIZs requirements act as conditions precedent that are calculated to ensure the protection of that State. The justification for ADIZ lies theoretically in the precautionary principle which asserts that the absence of empirical or scientific evidence should not preclude States from taking action to prevent a harm before it occurs.[14] The evolution of the principle in international law, particularly in the field of environmental protection, began in the early 1980s[15] although there is evidence that it was domestically popular in Europe in the 1930s in the German socio-legal tradition, centering on the concept of good household management. In German the concept is *Vorsorgeprinzip*, which translates into English as *precaution principle*.

[9] In the United States context, see Restatement 3 d, Foreign Relations Law, American Law Institute, at S. 521. The Restatement is persuasive law in the United States. See (Cardozo 1924).

[10] Dutton, *supra*, note 5.

[11] *Oppenheim's International Law*, (R.Y. Jennings and A.D. Watts ed.), 9th edition, Vol. 1 London: 1992, at 52. Also, (Verzijl 1968).

[12] Signed at Chicago on 7 December 1944. See ICAO Doc 7300 9th Edition: 2006.

[13] *Id*. Article 2.

[14] The precautionary principle (a moral and political concept) states that if an action or policy might cause severe or irreversible harm to the public, in the absence of a scientific consensus that harm would not ensue, the burden of proof falls on those who would advocate taking the action. The precautionary principle is most often applied in the context of the impact of human actions on the environment and human health where the consequences of actions may be unpredictable.

[15] For a discussion of the emergence of the precautionary principle see Scott Lafranchi, Surveying the Precautionary Principle' Ongoing Global Development 32 *B.C. ENVTL. AFF. L. REV.* 2005 at 678.

One commentator has added the thought provoking comment that in today's political sphere, the precautionary principle enjoys a wide, unprecedented recognition (Marr 2003):

> The precautionary principle has become of such tremendous importance because in many cases, the scientific establishment of cause and effect is a difficult task sometimes approaching a fruitless investigation of infinite series of events.[16]

For the precautionary principle to apply, States must take measures according to their capabilities and they must be cost effective. Also, threats that are responded to must be both serious and irreversible. The precautionary principle is usually applied through a structured approach to the analysis of risk, which comprises three elements: risk assessment; risk management; and risk communication. The principle is particularly relevant to the management of risk. It is based on the presupposition that potentially dangerous effects from a particular process or phenomenon have been identified and that scientific evaluation does not guarantee that the risk could be averted.

There are instances where a State can be defended for invoking preventive action based on the overarching principle of social contract by which the citizens charge the State with the responsibility of ensuring their security. Social Contract describes a broad class of philosophical theories whose subject is the implied agreements by which people form nations and maintain social order. Social contract theory provides the rationale behind the historically important notion that legitimate state authority must be derived from the consent of the governed, which, in other words means that a democratic State is precluded from enacting draconian laws against the civil liberty of citizens unless with the consent of the people. The first modern philosopher to articulate a detailed contract theory was Thomas Hobbes (1588–1679), who contended that people in a state of nature ceded their individual rights to create sovereignty, retained by the state, in return for their protection and a more functional society, so social contract evolves out of pragmatic self-interest. Hobbes named the state *Leviathan*, thus pointing to the artifice involved in the social contract.

Alan Dershowitz, Professor of Law at Harvard University, asserts that "There is a desperate need in the world for a coherent and widely accepted jurisprudence of preemption and prevention, in the context of both self-defence and defense of others[17]" . Of course, here Dershowitz is referring to the international scene, but it would not be wrong to ascribe this principle to the national level when there is a dire need to control anarchy and insecurity of a nation. However, the bottom line for any preventive jurisprudence in the domestic context is the social contract theory where State authority must be derived from the people. There must be a preventive jurisprudence in place governing the acts of the executive and law enforcement officers. Preventive acts must never be *ad hoc*, or decided at the whim of the law enforcer.

Preemption[18] and prevention[19] are necessary elements in today's political and military fabric, where legal legitimacy is ascribed to actions of States which act

[16] *Id.* At 6.

[17] *Preemption—A Sword that Cuts Both Ways,* Norton: New York, 2006, at 11.

[18] Preemption is when an act, which is potentially harmful to a State and is imminent, is effectively precluded by military or other action.

[19] Prevention is when an act, which is potentially harmful to a State and is inevitable, is effectively precluded by military or other action.

swiftly to avoid harm and protect its citizenry. This is often accomplished bypassing rigid dogma and entrenched rules based on the precautionary principle and on the maxim *necessitat non habet legem* (necessity has no law or rules). Another is *Inter arma enim silent leges* which is a maxim attributed to Cicero, which translates as "In times of war, the laws are silent". In the 21st century, this maxim, which was originally purported to address the growing mob violence and thuggery of Cicero's time, has taken on a different and a more complex dimension, extending from the idealistic synergy between the executive and the judiciary in instances of civil strife, to the overall power, called "prerogative" or "discretion" of the sovereign, to act for the public good and the role of the judiciary as the guardian of the rule of law.

The enduring conflict between executive power and the rule of law is at the heart of this maxim. In modern usage it has become a watchword for the erosion of civil liberties during internal and external strife. The implication of Cicero's aphorism is that freedoms, such as the right of free passage through a territory of a State, are subservient to a nation's self-defense from enemies within or without.

The "state of exception" or "abnormal times" is considered by some political scientists to call for legal justification for a State to be uncontrolled (Schmitt 1988). This theory justifies the sovereign, as guardian of the Constitution, in its extra judicial response to all exceptions to dangers within the political and legal spectrum, on the basis of the sovereign's exclusive capability of identifying the enemy and the threat it poses to the State. However, in common law States, this extremist view is blended harmoniously with the essential philosophy of the Rule of Law, which is the foundation of civil liberty and order, and the underlying constitutional principle requiring government to be conducted according to law, thus making all public officers answerable for their acts in the ordinary courts. Common law jurisdictions such as the United States, Canada and the United Kingdom take pride in their long tradition of parliamentary democracy which would effectively preclude arbitrary acts of the Executive in curbing civil liberties guaranteed by the law. This principle is embodied in the dissenting judgment of Lord Atkin in *Liversidge* v. *Anderson,* to which courts pay frequent lip service, that:

> "amidst the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace". [20]

Another issue is the judicial interpretation of the extent to which a State is justified in suspending an existing legal order to protect its citizens. Against the backdrop of the *Bush Doctrine*[21] which followed the events of 11 September 2001 and the justification of the invasion of Afghanistan, in spite of Article 2.4 of the Charter of the United Nations.[22] Of special relevance in this regard is the judicial examination by the United States Supreme Court of the imprisonment of an Arab-

[20] *Liversidge* v. *Anderson* [1942] A.C. 206 at 244.

[21] The Bush Doctrine is attributed to the modern notion of preventive war and the justification that the United States had the right to secure itself against countries that harbor or give aid to terrorist groups, which was used to justify the 2001invasion of Afghanistan.

[22] Article 2.4 provides: "All members of the United Nations must refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations. See *Charter of the United Nations and Statute of the International Court of Justice*, United Nations: New York.

American immigrant, 3 months after the terrorist attacks of 9/11. Justice Scalia stated:

> Many think it not only inevitable but entirely proper that liberty give way to security in times of national crisis that, at the extremes of military exigency, *inter arma silent leges*. Whatever the general merits of the view that war silences law or modulates its voice, that view has no place in the interpretation and application of a Constitution designed precisely to confront war and, in a manner that accords with democratic principles, to accommodate it.[23]

This statement, which strongly supports the Cicero maxim, reinforces the legal legitimacy of a statement made earlier by Chief Justice Rehnquist who opined:

> It is neither desirable nor is it remotely likely that civil liberty will occupy as favored a position in wartime as it does in peacetime. But it is both desirable and likely that more careful attention will be paid by the courts to the basis for the government's claims of necessity as a basis for curtailing civil liberty…the laws will thus not be silent in time of war, but they will speak with a somewhat different voice (Rehnquist 1998).

Modern perspectives of the sovereign prerogative and conflicting principles of juridification of war bring to bear the important distinction between the ultimate question as to whether the judiciary is able in every circumstance, to impose the rule of law or whether, under the state of exception and the principles of guardianship, a sovereign can suspend the legal order in order to protect its citizens. This dilemma was well expounded by Lord Shaw in 1917 when His Lordship stated:

> The basic danger is found in an especial degree whenever the law is not same for all, but the selection of the victim is left to the plenary discretion whether of a tyrant, a committee, a bureaucracy or any other depository of despotic power…it is a poison to the commonwealth.[24]

Conclusion

The attacks of 11 September 2001 inevitably highlighted the strategic position of civil aviation both as an industry vulnerable to attack and as an integral tool in ensuring peace and security in the world. The modernist view of civil aviation, as it prevailed when the Chicago Convention[25] was signed at Chicago on 7 December 1944, was centred on State sovereignty and the widely accepted post-war view that the development of international civil aviation can greatly help to create and preserve friendship and understanding among the nations and peoples of the world, yet its abuse can become a threat to general security.[26] This essentially modernist philosophy focussed on the importance of the State as the ultimate sovereign

[23] *Hamdi* v. *Rumsfeld*, 542 US 5047 (2004).
[24] *R.* v. *Halliday*, [1917] A.C. at 292.
[25] *Supra* note 12.
[26] Preamble to the Chicago Convention, *Id*.

authority which can overrule considerations of international community welfare if they clashed with the domestic interests of the State. It gave way, in the 60's and 70's to a post-modernist era of recognition of the individual as a global citizen whose interests at public international law were considered paramount over considerations of individual State interests.

The 11 September 2001 events led to a new era that now calls for a neo-post modernist approach which admits of social elements and corporate interests being involved with States in an overall effort at securing world peace and security. The role of civil aviation in this process is critical, since it is an integral element of commercial and social interactivity and a tool that could be used by the world community to forge closer interactivity between the people of the world.

The requirements of ADIZ serve well the defence of a sovereign State against attacks and accord with neo post modernist views that aviation should first serve the safety and security of a society and that any damage posed by the misuse of aviation should be effectively precluded. The real significance of the Convention, particularly as a tool for ensuring the political will of individual States, lies in the fundamental philosophy contained in its Preamble. In its Preamble, the Convention enunciates a message of peace through aviation. It makes mention of the future development of international civil aviation being able to help preserve friendship and understanding among the nations of the world, while its abuse (i.e. abuse of future development of international civil aviation) can become a threat to "the general security". By "general security" the Chicago Conference meant the prevention of threats to peace. These words have been interpreted in the widest possible sense by the Assembly of the International Civil Aviation Organization (ICAO)[27] at its various sessions to cover instances of social injustice such as racial discrimination as well as threats to commercial expediency achieved through civil aviation. The 15th session of the ICAO Assembly adopted Resolution A15-7 (Condemnation of the Policies of Apartheid and Racial Discrimination of South Africa) where the Resolution urged South Africa to comply with the aims and objectives of the Chicago Convention, on the basis that the apartheid policies constitute a permanent source of conflict between the nations and peoples of the world and that the policies of apartheid and racial discrimination are a flagrant violation of the principles enshrined in the Preamble to the Chicago Convention.[28]

The Preamble was also quoted in Resolution A17-1 (Declaration by the Assembly) which requested concerted action on the part of States towards suppressing all acts which jeopardize safety and orderly development of international civil aviation. In Resolution A20-2 (Acts of Unlawful Interference with Civil Aviation) the Assembly reiterated its confidence that the development of international civil aviation can be an effective tool in bringing about friendship and understanding among the peoples of the world.

[27] ICAO is the specialized agency of the United Nations dealing with international civil aviation. It has 190 member States, all of whom have signed or ratified the Chicago Convention.

[28] See *Repertory Guide to the Convention on International Civil Aviation,* Second Edition, 1977, Preamble —1.This subject was also addressed at a later session of the Assembly when the Assembly, at its 18th Session adopted Resolution A18-4 (Measures to be taken in pursuance of Resolutions 2555 and 2704 of the United Nations General Assembly in Relation to South Africa).

As was stated at the outset of this article, there has been no recorded instance of protest against the establishment of ADIZs. This might well be because the message of aviation resonates peace and security of society at whatever cost. This is as it should be.

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