

## Law Construction for ADIZ Implementation beyond the Airspace Sovereignty from the Perspective of Defense Strategy

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**Abstract:** A sovereign state in international law is a political entity that is represented by one centralized government that has sovereignty over a geographic area. International law defines sovereign states as having a permanent population, defined territory, one government and the capacity to enter into relations with other sovereign states. The components of the defined area or territory of a state are the terrestrial, fluvial, maritime and aerial domains. This leads to the larger scope of defense for a nation that includes the defense of its Land, Water and Airspace. One of the system used for the Airspace Defense is Air Defense Identification Zone (ADIZ) that is developed during the 1950s. ADIZ is used in the Korean War in 1951, to aid military forces in positive identification, location, and control of civil aircraft of non-hostile civil aircraft. In the modern world it is very important to have such system as part of a defense strategy, especially for a Country like Indonesia, with its huge aerial zone. However, until now there is no regulation by any international body nor any international treaty for the use of ADIZ in the airspace over land or water, or in regards of the Airspace Sovereignty.

**Keywords:** Defense Strategy, International Regulation, Airspace, Sovereignty, International Law

### 1. Airspace Sovereignty

As stated in the ICAO Working Paper that “State Sovereignty is a fundamental principle of international law. However, the term is very often used in a political sense, with differing interpretations depending on context and intention. The notion of sovereignty is dynamic, evolving with the development of the global institutional environment”. The understanding of sovereignty in aviation is referring to the ownership of airspace to the exclusive competence of a State to exercise its legislative, administrative and judicial powers within its national airspace, as stated in the Convention on International Civil Aviation (the Chicago Convention).

A country in order for its existence to be recognized as a state legal entity in the international community requires the ability to establish relations with other countries. This ability is commonly known as sovereignty. This provision is also determined as the fourth element of state formation in the 1933 Montevideo Convention, namely the ability to conduct relations with other countries. According to the opinion of experts in international law, every country has two main rights, namely sovereignty and self-protection. The two basic rights cannot be separated from one another, because if one of these rights is lost then the other rights will not exist. In addition, if these rights are lost, the state as an international legal entity is also lost

The main characteristic of a sovereign state is that the state has the right through the government to carry out its own supervision of its territory and the people who live in it, and this must not be contrary to the rules of international law. The state as the main subject in the international law system and has the authority to determine the laws that apply in its territory has the main task of making legal rules and supervising its implementation through law enforcement efforts. State defense aims to safeguard and protect the sovereignty of the State including sovereignty over the national air space, so that the territorial integrity of the Republic of Indonesia and the safety of the entire nation from all forms of threats can be avoided. The authority and responsibility to defend sovereign territory over air space is important especially for Indonesia as an archipelagic state which is also an equatorial country and is located in a world cross-position between Pacific Ocean and Indian Ocean. This condition supports the realization of various activities and/or businesses that can be carried out in Indonesia's national airspace, both in national and international interests.

### 2. Defense Strategy in Airspace

In the interest of national defense and security, a country has the right to request foreign aircraft to land and show its documents. For the same reason, the state may even ask a foreign aircraft to notify its flight plan even though the aircraft will only pass through airspace that coincides with the territorial territory of the country. The Chicago Convention also specifically stipulates that unscheduled civilian aircraft may not operate in the territory of another country without permission. certain of the country. At the same time, although the right to self-defense is also recognized in Article 51 of the UN Charter, the military aircraft of a country in conducting interception on foreign civilian aircraft entering its territory must not endanger the safety of the aircraft and all passengers in it, and may not use force (Convention Chicago, Article 15 jo. 3bis).

The President of the Republic of Indonesia Joko Widodo signed Government Regulation (PP) Number 4 of 2018 on February 13<sup>th</sup>, 2018 regarding the Airspace Security of the Republic of Indonesia. The PP is an implementation of the provisions of Law Number 1 of 2009 concerning Aviation Article 9. With this Indonesia is defining its airspace management, including the jurisdictional coverage, the rules of engagement, to sanctions for violators. In the Article 9 the definition of ADIZ is stated as “specific air spaces above the land and/or waters established to identify aircraft for the purposes of state defense and security”. It identifies Indonesia’s “Airspace” and “Jurisdictional Airspace” as areas where the ADIZ could apply. The former refers to the “sovereign airspace” above Indonesia’s territory, while the latter is defined as the airspace above the exclusive economic zone (EEZ), continental shelf, and contiguous zone, where it has “sovereign rights” prescribed by international law.

After the 9/11 attacks that was conducted via the airspace, the US has noticed the importance to increase its air defense and the 9/11 Commission Report recommended that Congress regularly assess the ability of Northern Command to defend the United States against military threats. Protecting U.S. airspace may require improvements in detecting aircraft and cruise missiles, making quick operational decisions, and intercepting them.

According to US Joint Doctrine of Airspace Control, the Airspace Control increases operational effectiveness by promoting the safe, efficient, and flexible use of airspace while minimizing restraints on airspace users. Airspace control includes coordinating, integrating, and regulating airspace to increase operational effectiveness. Effective airspace control reduces the risk of unintended engagements against friendly, civil, and neutral aircraft, enhances air defense operations, and permits greater flexibility of joint operations.

### **.3. Indonesian ADIZ**

ADIZ is an air defense identification zone, defining the certain air spaces above land and/or waters designated for the purposes of identifying aircraft for the interests of national defense and security. The term ADIZ has not been clearly regulated in Indonesian Law Number 1 of 2009 concerning Aviation, but it is implied in Article 5 that: "The Unitary State of the Republic of Indonesia is fully sovereign and exclusive over the Airspace of the Republic of Indonesia". Furthermore, Article 6 explains that in the framework of exercising state sovereignty over the airspace of the Unitary State of the Republic of Indonesia, the Government exercises the authority and responsibility for regulating air space for the interests of aviation, national economy, state defense and security, socio-culture and the air environment.

The definition of ADIZ is explained in Government Regulation Number 4/2018 concerning Security of Airspace, in Article 9 paragraph (1): "The air defense identification zone (ADIZ) as referred to in Article 6 paragraph (2) is a certain air space above land and/or waters designated for the purpose of aircraft identification for the benefit of state defense and security"

In Article 6 (2) PP PAMWILUD mandates that the government can establish an air defense identification zone (ADIZ). Furthermore, Article 9 paragraph (2) states that the application of ADIZ is in Air Regime in Airspace and Airspace in jurisdictional areas. The meaning of jurisdiction in PP PAMWILUD is airspace outside the territory of the country which consists of the Exclusive Economic Zone, Continental Shelf, and Additional Zone where the state has sovereign rights and certain other authorities in accordance with the provisions of laws and regulations and international law.

In the discussion of Airspace Sovereignty in point 4.a.1. below, it is clearly stated that the air sovereignty area horizontally follows the boundaries of land and sea territorial sovereignty, so that the airspace boundary in the ocean is 12 miles. Unlike the law of the sea, the air law regime does not recognize sovereign rights, so the implementation of ADIZ in jurisdictions requires legal foundations and principles that legitimize the application of ADIZ outside the sovereign territory. In order to provide legal construction for the application of ADIZ, especially outside the airspace of sovereignty, it is necessary to analyze the aspects of international law and the practice of implementing ADIZ by countries in the world.

### **4. Legal Aspects of ADIZ Implementation**

There are no provisions of international law that explicitly regulate ADIZ up to now. According to Roncevert Almond there are four bases of international law as the basis for determining ADIZ, namely:

a. International Aviation Law contained in the 1944 Chicago Convention. The Chicago Convention is the main legal basis for regulating international aviation and establishes the principles for safe flying. The provisions relevant to the Chicago Convention include:

1) Article 1 of the Chicago Convention states that each state has full and exclusive sovereignty over the airspace over its territory. Furthermore, in Article 2, the territory of a country is deemed as the land area and the waters around it which are under the sovereignty, protection or mandate of that country. The clauses in the Chicago Convention depart from territorial jurisdiction in national airspace.

2) Article 11 of the Chicago Convention states that: "Subject to the provisions of this Convention, the laws and regulations of a contracting State relating to the admission to or departure from its territory of aircraft engaged in international air navigation, or to the operation and navigation of such aircraft of all contracting States without distinction as to nationality, and shall be complied with by such aircraft upon entering or departing from or while within the territory of that State".

Thus this article states that, the national laws and regulations of a country relating to the arrival or departure of international aircraft and/or the operation and navigation of an aircraft within the national territory of its country shall apply to aircraft of all countries which have ratified this Convention without exception. The national laws and regulations of a country must be complied with by all aircraft entering or leaving that country's airspace.

3) Article 12 of the Chicago Convention, states that: "Each contracting State undertakes to adopt measures to insure that every aircraft flying over or maneuvering within its territory and that every aircraft carrying its nationality mark, wherever such aircraft may be, shall comply with the rules and regulations relating to the flight and maneuver of aircraft there in force. Each contracting State undertakes to keep its own regulations in these respects uniform, to the greatest possible extent, with those established from time to time under this Convention. Over the high seas, the rules in force shall be those established under this Convention. Each contracting State undertakes to insure the prosecution of all persons violating the regulations applicable".

In other words, each country shall ensure that: all aircraft flying over its territory and all aircraft bearing the mark of its nationality are obliged to comply with the regulations relating to the flight in which it is located; that the existing regulations be as uniform as possible with the Chicago Convention and its annexes; and that violators of the rules will be penalized. Regarding ADIZ, Article 12 states that the regulations that apply to the high seas are in accordance with those in the Chicago Convention implying that the regulations related to the high sea should be adopted jointly by the states under the auspices of the Chicago Convention.

4) Annex 15 on the Aeronautical Information Service defines ADIZ as a special, dimensionally defined airspace where aircraft flying in the area are required to comply with additional identification or reporting procedures related to air traffic services (ATS).

b. Article 51 of the UN Charter states that "Each country will always strive to carry out defense / Self Defense and supervision of security conditions in its airspace from various forms of threats". The concept of self-defense is regulated in Article 51 of the UN Charter which reads: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security".

In fact, Article 51 does not state the means that can be used to exercise the right to defend oneself. This article is often linked to the right to use limited armed force. In the development of the practices applied by the State, it is indicated that they have interpreted the right to defend themselves by expanding the meaning and application of the right to protect themselves (self-preservation) because to defend oneself does not then limit the country to protect itself from the threats it faces, but demands active action to protect oneself in various ways. Thus implementing ADIZ is basically an act of prevention / prevention of threats from outside against its own country. On that basis, the international community will not take issue with a country that implements ADIZ in its national airspace, as long as it does not cause conflicts with other countries. The legal basis for the establishment of ADIZ is the principle of self-defense which is recognized in Article 51 of the UN Charter. The right of the state to use weapons to defend itself from forces from outside (other countries) is based on customary international law. The right to defend itself is meant.

c. Customary International Law. The basis for customary law which is used as a reference for countries in implementing ADIZ, includes:

1) Article 38 (1) of the Statute of the International Court of Justice states that customary international law is one of the sources of law that is recognized by states in general. Customary law originates from the practice of states through attitudes and actions taken on an issue. When a country takes a policy and the policy is followed by other countries and carried out repeatedly and without any protests or challenges from other parties, gradually a habit forms.

2) Document 9426-AN/924 First Edition 1984 ICAO (International Civil Aviation Organization). In addition, ADIZ is also regulated in Document 9426- AN / 924 First Edition 1984 ICAO (International Civil Aviation Organization), in chapter 3 concerning Airspace Organization Paragraph 3.3.4 Special Designated Airspace which recognizes the existence of a State ADIZ: "In a number of cases. State have found it necessary to establish special parties designated airspace where aircraft, when operating therein, are required to employ with procedures additional to those resulting from normal provision of ATS (mainly special identification and/or reporting procedures). Such areas are designated by a variety name i.e. Air Defence Identification Zona (ADIZ) being one of more common area but they all have in common the understanding that non-compliance by aircraft with imposed provisions generally result in prompt retaliatory action (interception , force landing, etc)."

The provisions of international law in Article 38 paragraph (1) of the Statute of the International Court of Justice as well as in Document 9426-AN / 924 First Edition 1984 ICAO (International Civil Aviation Organization) whose position as customary international law is used as a source of law and as the basis / foundation of the state in implementing ADIZ and even for other interests for the country, it does not become a legal issue in the international community.

d. International Sea Law which has been regulated in the 1982 International Maritime Law Convention (UNCLOS). In regards with ADIZ according to NCLOS 1982 is the principle of freedom of flight and navigation on the high seas.

## 5. ADIZ Implementation in Several Countries

### 1. People's Republic of China

On November 23<sup>th</sup>, 2013, through the People's Republic of China Government Statement issued by the Ministry of National Defense, China declared an ADIZ over large parts of the East China Sea. The ADIZ covers airspace over the disputed territory, including the Senkaku Islands contested by China and Japan. The East China Sea ADIZ, covering a large swath of airspace over the East China Sea, including over small islands that are the subject of a territorial dispute among Japan, the PRC, and Taiwan.

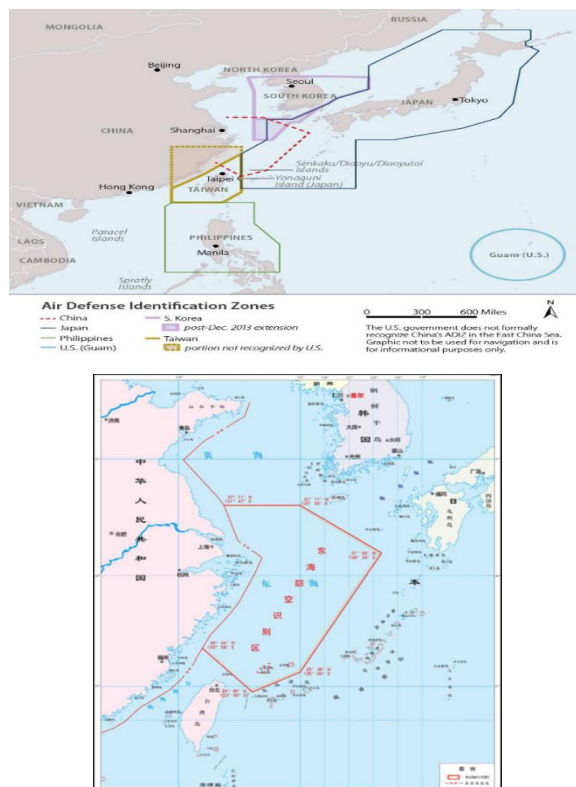


Fig 1 - ADIZ Map in East China Sea (Rinehart & Elias, 2015)

### 2. United States of America

The United States of America first declared ADIZ in 1950 to reduce the risk of air strikes from the Soviet Union. As of August 28<sup>th</sup>, 2020, America had Contiguous ADIZ operated in collaboration with Canada, ADIZ Alaska, ADIZ Guam, and ADIZ Hawaii (Code of Federal Regulations (“C.F.R.”) Part 99). Formerly known as the ADIZ area in Washington DC, but since February 17<sup>th</sup>, 2009 the name has been changed to Washington DC Special Flight Rules Area to avoid confusion (NOTAM Advisory, 2009 & 2010).

Contiguous ADIZ stretches around the American coastline for more than 300 nautical miles in parts of the Atlantic and more than 400 nautical miles in southern California. ADIZ Alaska stretches 350 nautical miles over the Bering Sea and Arctic Ocean. The ADIZ that surrounds Guam extends 250 nautical miles from the island, and the Hawaiian ADIZ is an irregular octagon with its farthest point reaching more than 250 nautical miles north of Kauai Island (Dutton, 2009, p.8)

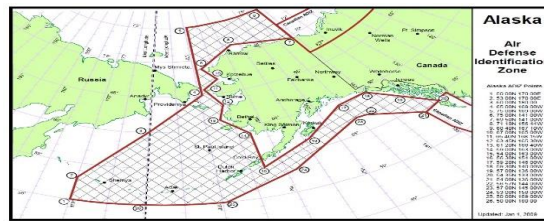


Fig 2 – Map of ADIZ Alaska (FAA, 2009)

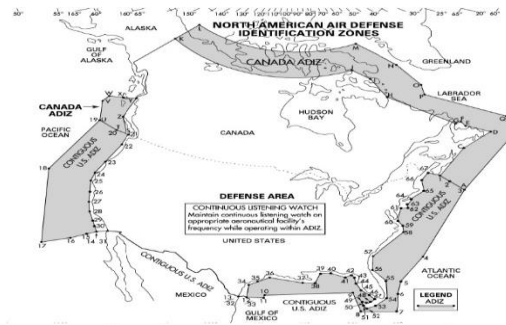


Fig 3 – Map of Contiguous ADIZ and ADIZ Canada (Rinehart & Elias, 2015, p.3)

### 3. Japan

Japan consists of approximately 6,800 islands and has the sixth largest EEZ in the world. Initially the United States military established ADIZ in Japanese territory in the aftermath of World War II, where the Japanese ADIZ Territory was established at coordinates 123°E and divided the authority to manage the airspace in the area into two: two-thirds to Japan, and the rest to Taiwan (Manyin, 2013, pp. 4 - 5). Airspace management was only transferred back to Japan in 1969 and since then Tokyo has expanded ADIZ twice: the first to include the Senkaku Islands, and the second to include the entirety of Yonaguni Island, the densest populated point in western Japan, located about 110 km from Taiwan (Mahbubani, 2013, pp. 4-5)

The first ADIZ expansion was carried out in 1972 - in the same year when the United States returned the Ryuku and Daito Islands to Japan through the U.S.-Japan Okinawa Reversion Treaty. The Japanese interpreted that the territory returned included the Senkaku Islands as well. Then in June 2010 there was a change over Yonaguni Island. This change caused an overlap between the new areas of ADIZ Japan and the existing ADIZ Taiwan.

Japan's ADIZ is located outside of its EEZ territory, and the Japan Air Self-Defense Force (“JASDF”) deployed warplanes to intercept unidentified aircraft intending to enter Japanese airspace.



Fig 4 – Map of Japan ADIZ

### 4. Taiwan

Taiwan has an ADIZ covering most of the Taiwan Strait and part of the East China Sea and the surrounding airspace. Most of the ADIZ Taiwan area is in its EEZ. After China announced the new ADIZ territory on November 23<sup>rd</sup>, 2013 the Taiwanese government issued a statement confirming that: (1) there is no change to Taiwan's sovereignty over the Diaoyutai Islands (Senkaku) and Taiwan will continue to maintain sovereignty over the islands and protect local fishermen; (2) each party must conduct a peaceful dialogue to resolve the disputes in accordance with the East China Sea Peace Initiative initiated by President Ma Ying-jeou in August 2012; (3) Taiwan will mobilize its military in accordance with the principle of peace initiated by Ma, while at the same time adopting appropriate actions related to the overlap between ADIZ China and ADIZ Taiwan; and (4) that Taiwan is "very concerned", and will establish contacts with all parties to maintain peace and stability



Fig 5 – Map of Taiwan ADIZ

**5. South Korea**

ADIZ Korea was founded on March 22, 1951, at the height of the Korean War, by the Fifth American Air Force, which at that time was still the main air power for the United States stationed in South Korea and Japan. ADIZ was established to anticipate the Soviet’s MIG-15 aircraft and other Chinese aircraft (Gil, 2013)

Based on Jeppesen data (2020, pp. 113 - 114), prior to any take offs for aircraft entering ADIZ Korea must first submit their flight plans to the South Korean Minister of Defense. If submission of flight plans is not possible due to time constraints (e.g. urgent missions approved by the Minister of Defense) then flight plans can be submitted while flying. Non-military aircraft can deliver flight plans to the Minister of Land Affairs, Infrastructure and Transportation. All Aircraft must comply with the following conditions (unless there are certain procedures as authorized by the Minister of Defense):

- a. Aircraft shall establish two-way radio communications and monitor voice communications on an ongoing basis with the relevant air traffic control or military units;
- b. The aircraft must operate the Secondary Surveillance Radar (“SSR”) transponder and set the SSR code as directed by the air traffic controller or the relevant military authority.

During their stay within ADIZ Korea, the aircraft must report its position to the Minister of Defense. In the event that the flight is carried out in controlled airspace in accordance with the proposed flight plan as specified in the above paragraph, the position reports contained in items a and b may be omitted.

- a. If flying in controlled airspace, the estimated arrival time at the ADIZ boundary point is given at the time the position report was generated at the last reporting point prior to entering ADIZ.
- b. If not flying in controlled airspace, the aircraft must report the estimated time of arrival at the point of penetration and the ADIZ limit altitude of 15 to 30 minutes before entering ADIZ.
- c. While in ADIZ territory, a position report must be submitted every 30 minutes.



Fig 6 – Map of Korean ADIZ

**6. Indonesia**

Indonesia has started to determine its ADIZ in the 1960s. As the first step, the Indonesian ADIZ Area covered is within the territory of the national airspace, in the airspace of a part of South Sumatra, Java, Madura, Bali, Lombok and a part of the western part of Sumbawa Island.



Fig 7 – Map of Indonesian ADIZ

## 7. Conclusion

Based on the discussion and analysis described, the following conclusions are met:

- a. Sovereign states' defined territory are the terrestrial, fluvial, maritime and aerial domains.
- b. Indonesia has the Government Regulation (PP) Number 4 of 2018 concerning the Airspace Security of the Republic of Indonesia and defining its airspace management, including the jurisdictional coverage, the rules of engagement, to sanctions for violators. And also the definition of ADIZ is stated as "specific air spaces above the land and/or waters established to identify aircraft for the purposes of state defense and security"
- c. There is no formal and express international legal basis that can be used by the state to implement ADIZ in the country's airspace.
- d. Countries can define and implement ADIZ in their country's airspace on the basis of international practices and are justified by international law and customary international law.

Countries in implementing ADIZ in the airspace of their countries besides on the basis of the principle of state defense in Article 51 of the UN Charter and Article 38 paragraph (1) of the international statute, also apply a legal theoretical basis that has the same soul and basis of ADIZ in their national law

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