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# ■ Defending Territorial Integrity in case of Aerial Incursions



■ Disclaimer : This briefing does not necessarily reflect the opinion of Belgian Defence or DG Jur

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# ■ Territorial sovereignty and airspace

## Article 1

### *Sovereignty*

The contracting States recognize that every State has complete and exclusive sovereignty over the airspace above its territory.

## Article 2

### *Territory*

For the purposes of this Convention the territory of a State shall be deemed to be the land areas and territorial waters adjacent thereto under the sovereignty, suzerainty, protection or mandate of such State.

Territorial sovereignty  
extends to the national  
airspace

Chicago Convention, 1944  
Customary law  
ICJ Nicaragua  
UNCLOS



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## Article 3

### *Civil and state aircraft*

(a) This Convention shall be applicable only to civil aircraft, and shall not be applicable to state aircraft.

(b) Aircraft used in military, customs and police services shall be deemed to be state aircraft.

(c) No state aircraft of a contracting State shall fly over the territory of another State or land thereon without authorization by special agreement or otherwise, and in accordance with the terms thereof.

(d) The contracting States undertake, when issuing regulations for their state aircraft, that they will have due regard for the safety of navigation of civil aircraft.

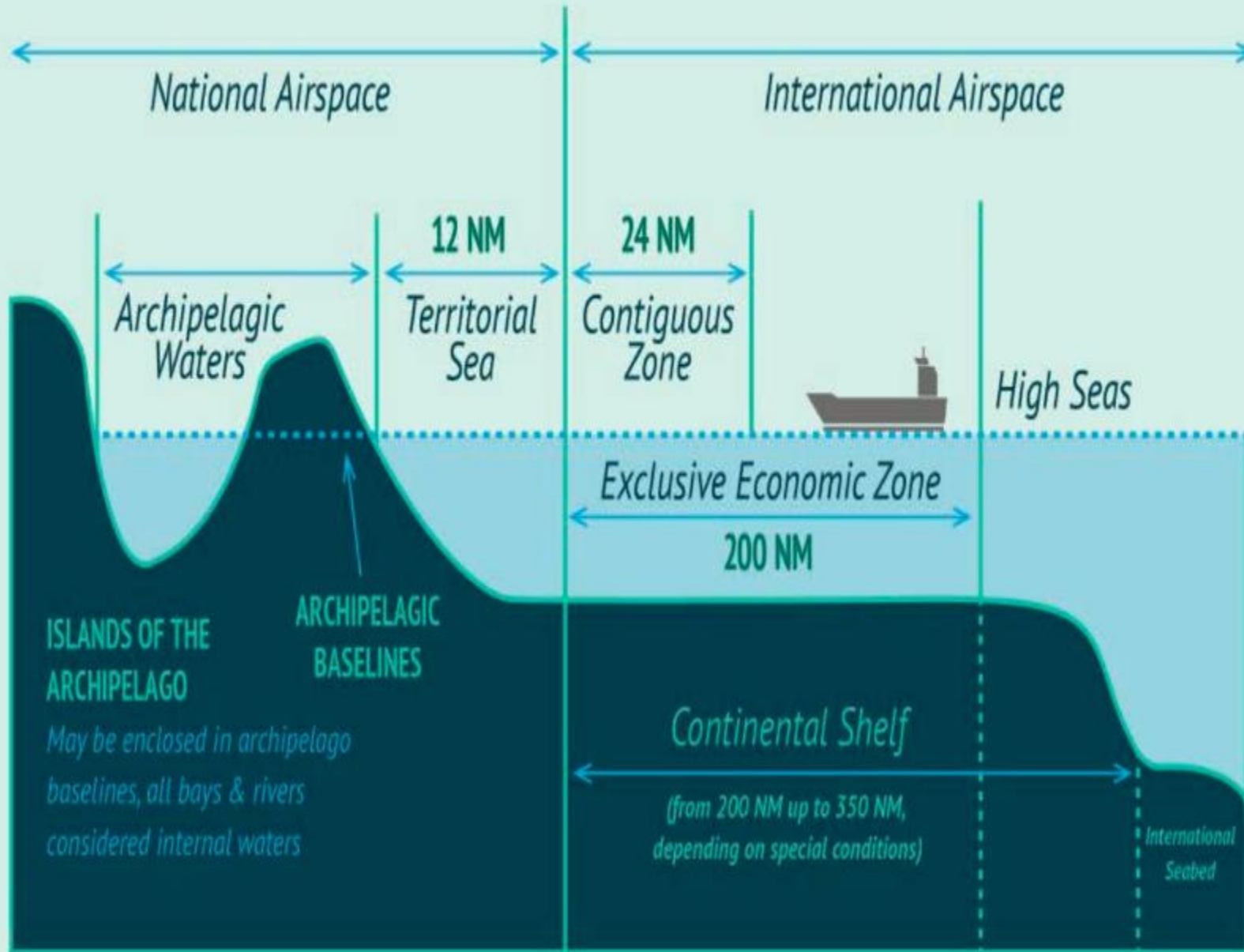
Territorial sovereignty  
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# UNCLOS Maritime and Airspace Zones



## Horizontal extension of airspace

- National airspace
- and international airspace

Chicago convention , art, 1- 2  
UNCLOS, Part II



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■ Violating national airspace

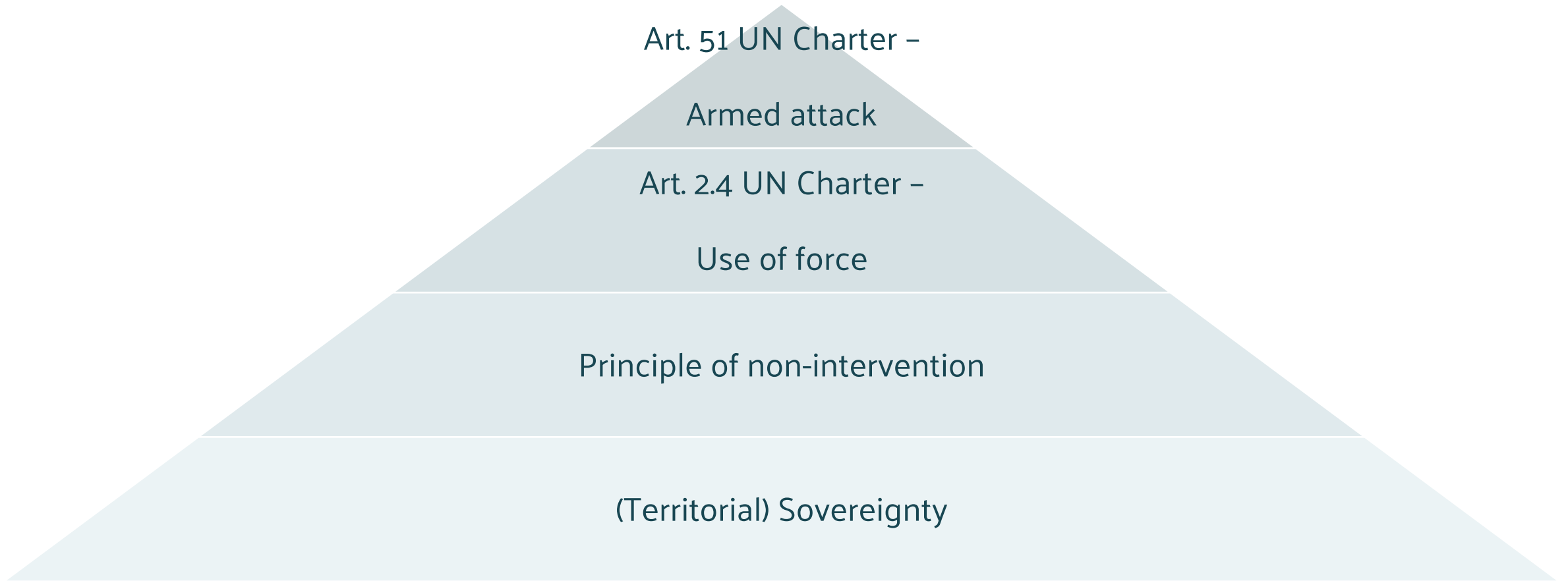


# ■ When is there no violation?

- Host nation consent
  - (Ad hoc) diplomatic clearance for State aircraft
  - Adherence to Chicago Convention for civil aircraft
  - Agreement that allows for the presence and overflight
  - Hot pursuit agreement
- Circumstances precluding wrongfulness
  - For example *force majeure* in case of an aircraft in distress
- During ongoing hostilities (without prejudice to any ius ad bellum questions)
  - Application of LOAC
- Unwilling or unable doctrine (?)



# ■ Infringement of what law?



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# ■ Infringement of what law?

- ICI *Nicaragua*
  - Unauthorized overflight by another State is an infringement of territorial sovereignty
- The 1974 Definition of Aggression ( Cfr. Article 2.4 UN Charter)
  - “The mere continuing presence”
- Context dependent
  - Political context, place of incident, target of the incursion, gravity and means used, hostile intent, accumulated or repeated nature
- The pertinent question might rather be:
  - How does the victim State interpret it?





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# ■ Response against aerial incursion



## ■ Accepted on-the-spot reactions

Clearly 'armed  
attack'



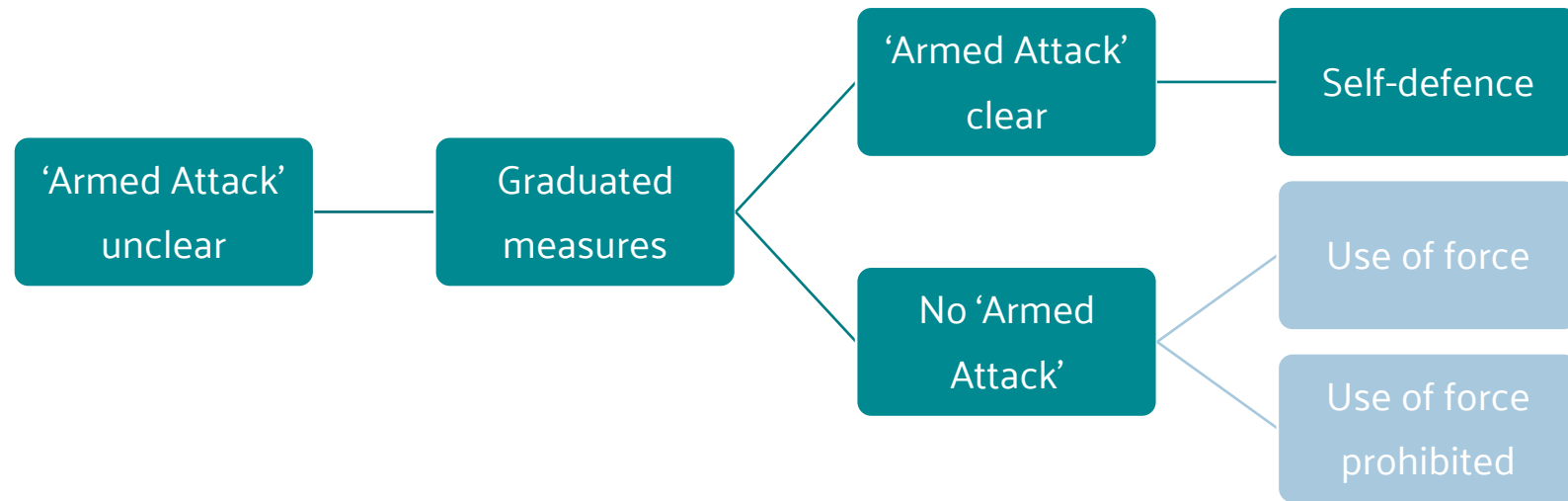
Self-Defence



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## Accepted on-the-spot reactions



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## ■ Indicators for armed attack

- Political context
- Repeated nature
- Speed and flying altitude
- Number and type of aircraft
- Opening of bomb doors / Locking of missile radars
- Proximity to sensitive targets
- Weather (indicator to the contrary)

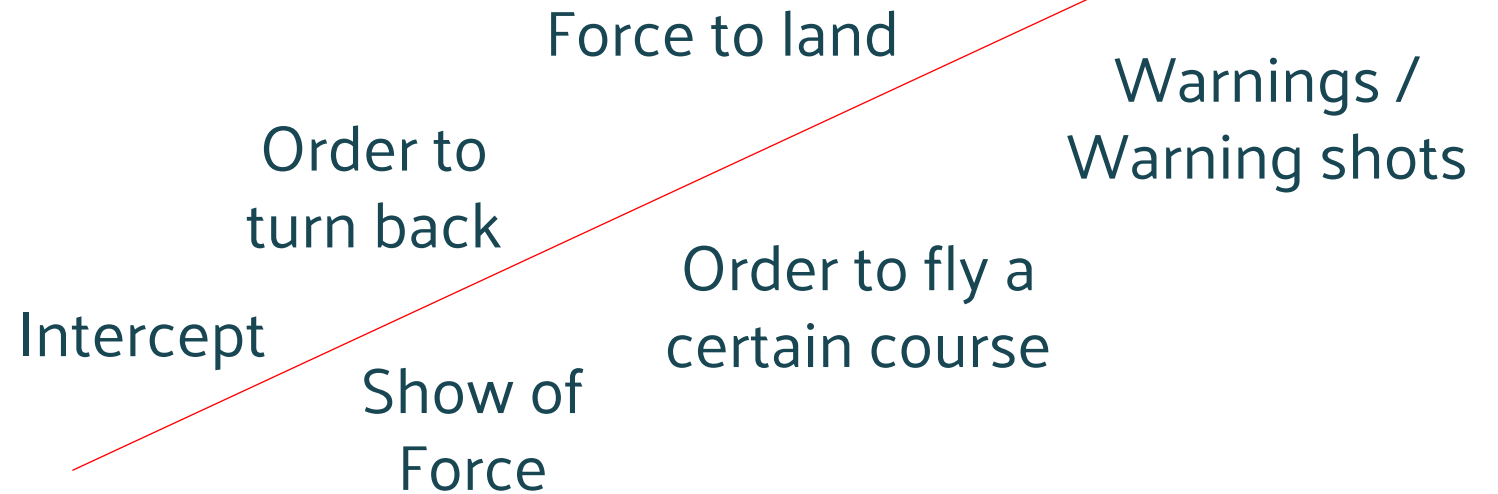


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## ■ What graduated measures?



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## ■ Use of force

- Positive identification (PID)
- Based on necessity and proportionality principle
- Any use of force should be preceded by warnings and/or warnings shots
  - Unless intruder fires first
  - Unless urgency



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# ■ Use of force based on what legal basis?

Exception to the use  
of force outside  
Article 51

Lower threshold for Armed  
Attack in case of aerial  
incursions

Article 51  
UN Charter

Prohibition of the use of  
force does not apply  
against aerial incursions

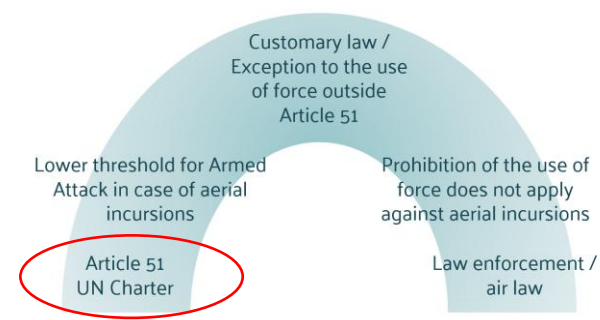
Law enforcement /  
air law

‘forcible’  
Countermeasures



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# Based only on Art. 51 UN Charter



## “All aerial incursions are armed attacks”

- Against the spirit of UN Charter
  - Escalatory

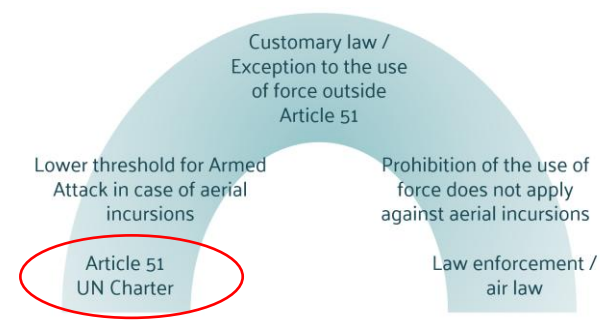
## “Use of force against an aerial incursion is only allowed in case of an armed attack: the most grave forms of the use of force”

- Victim States may not take forcible action against incursions not amounting to an armed attack
  - Undermines territorial sovereignty



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# Case of unarmed surveillance plane



## “All aerial incursions are armed attacks”

- Immediate necessary and proportionate use of force to stop the incursion is warranted

## “Use of force against an aerial incursion is only allowed in case of an armed attack: the most grave forms of the use of force”

- No use of force is allowed against the incursion



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# Based on air law / law enforcement



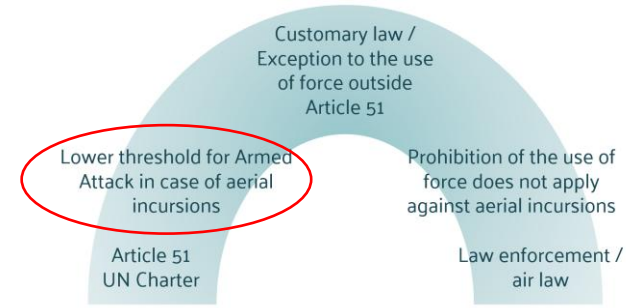
- Chicago Convention provides no legal basis for forcible action
- Inter-State use of force is regulated by the UN Charter
- Institut de droit international, 2007 Res 10A
  - *An armed attack triggering the right of self-defence must be of a certain degree of gravity. Acts involving the use of force of lesser intensity may give rise to countermeasures in conformity with international law. In case of an attack of lesser intensity the target State may also take strictly necessary police measures to repel the attack.*



# Lower threshold for Armed Attack in case of aerial incursions

Takes into account the precarity of the air domain

- High speed nature
- High destructive potential of modern aircraft
- Short timeframe to respond
- No 'innocent passage' discussions



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# Exception to the use of force outside Article 51



## Customary law

- Sufficient State practice for the discussed on-the-spot reactions with eventual use of force
- For policy reasons States often make no (clear) declarations, which creates discussion regarding general opinio iuris



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# Prohibition of the use of force does not apply against aerial incursions



It could be interpreted the prohibition in article 2.4 does not apply

- Not 'in international relations'
- Not against the 'territorial integrity' or sovereignty of another State
- Not 'inconsistent with the purposes of the United Nations'

**4. All Members shall 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.**



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# ■ Recourse without use of force

As violating the territorial integrity of another State is unlawful, victim States can utilize the doctrine of state responsibility to seek for wrongs under international law.

- Retorsion
- Countermeasures
- the Plea of Necessity





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# ■ Incursion by civil aircraft

# ■ Article 3bis Chicago Convention

## "Article 3 bis

(a) The contracting States recognize that every State must refrain from resorting to the use of weapons against civil aircraft in flight and that, in case of interception, the lives of persons on board and the safety of aircraft must not be endangered. This provision shall not be interpreted as modifying in any way the rights and obligations of States set forth in the Charter of the United Nations.

(b) The contracting States recognize that every State, in the exercise of its sovereignty, is entitled to require the landing at some designated airport of a civil aircraft flying above its territory without authority or if there are reasonable grounds to conclude that it is being used for any purpose inconsistent with the aims of this Convention; it may also give such aircraft any other instructions to put an end to such violations. For this purpose, the contracting States may resort to any appropriate means consistent with relevant rules of international law, including the relevant provisions of this Convention, specifically paragraph (a) of this Article. Each contracting State agrees to publish its regulations in force regarding the interception of civil aircraft.

- Refrain from use of force against civil aircraft
- UN Charter, and its article 51, prevail
- Order to land
- More towards the law enforcement paradigm



# Procedures

- Procedures, signals, etc for interception by ICAO
  - Ann 2, Rules of the Air, Chicago Convention
  - Manual concerning Interception of Civil Aircraft, Doc 9433-AN/926

## 2. SIGNALS FOR USE IN THE EVENT OF INTERCEPTION

### 2.1 Signals initiated by intercepting aircraft and responses by intercepted aircraft

<i>Series</i>	<i>INTERCEPTING Aircraft Signals</i>	<i>Meaning</i>	<i>INTERCEPTED Aircraft Responds</i>	<i>Meaning</i>
1	DAY or NIGHT — Rocking aircraft and flashing navigational lights at irregular intervals (and landing lights in the case of a helicopter) from a position slightly above and ahead of, and normally to the left of, the	You have been intercepted. Follow me.	DAY or NIGHT — Rocking aircraft, flashing navigational lights at irregular intervals and following.  <i>Note.— Additional action required to be</i>	Understood, will comply.

### 2.2 Signals initiated by intercepted aircraft and responses by intercepting aircraft

<i>Series</i>	<i>INTERCEPTED Aircraft Signals</i>	<i>Meaning</i>	<i>INTERCEPTING Aircraft Responds</i>	<i>Meaning</i>
4	DAY or NIGHT — Raising landing gear (if fitted) and flashing landing lights while passing over runway in use or helicopter landing area at a height exceeding 300 m (1 000 ft) but not exceeding 600 m (2 000 ft) (in the case of a helicopter, at a height exceeding 50 m (170 ft) but not exceeding 100 m (330 ft)) above the	Aerodrome you have designated is inadequate.	DAY or NIGHT — If it is desired that the intercepted aircraft follow the intercepting aircraft to an alternate aerodrome, the intercepting aircraft raises its landing gear (if fitted) and uses the Series 1 signals prescribed for intercepting aircraft.	Understood, follow me.



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# ■ Neutrality law

# Obligations by neutral States

- Neutral States must take appropriate measures to prevent belligerent aircraft from using neutral airspace, if necessary, by using force.
  - Exceptions: civil aircraft, medical aircraft, aircraft in distress, and transit archipelagic sea lanes passage
- Belligerents are allowed to land in order to surrender
- The relation between the UN Charter and neutrality remains contentious
  - Exception to the prohibition to the use of force?
  - What if the aircraft is not hostile towards the neutral State?







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# ■ “Air policing” in practice

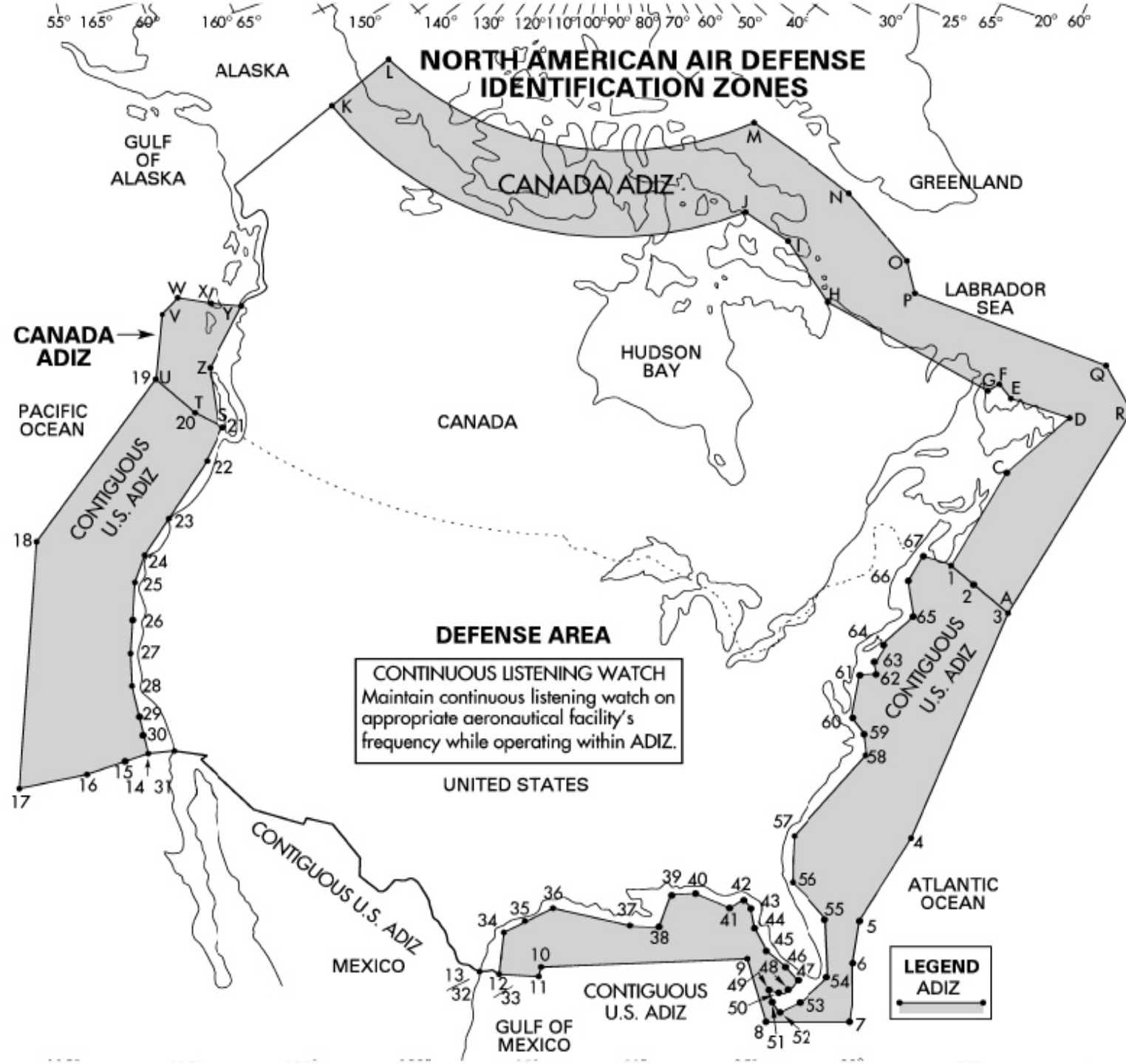


- NATO IAMD (Integrated Air and Missile Defence)
- One set of ROE for NATO
- BENELUX QRA agreements
- Control and Reporting Centre (CRC)
- Combined Air Operations Centre (CAOC)



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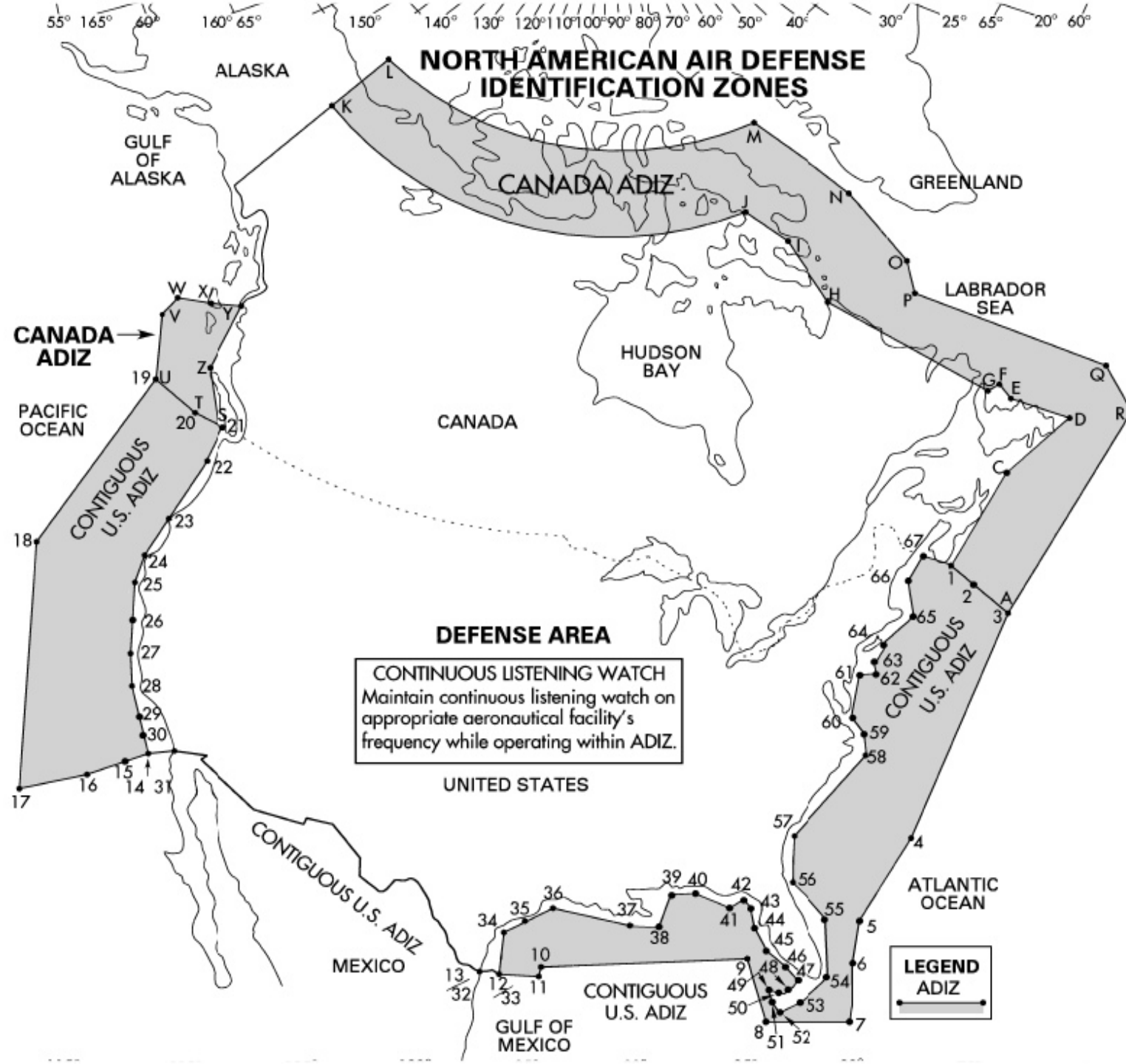
## ADIZ: Air Defence Identification Zone

What's in a name?

- Air defence regions,
  - Air policing areas,
  - Zone of national defense,
  - ...
- 
- A buffer zone
  - No extension of sovereignty



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In ADIZ / international airspace

Actions without specific prescriptive or enforcement jurisdiction

- *Scramble*
- *Identification*
- *Interrogation*
- *Shadow*
- *Record/report*
- *Show of presence*
- ....

Or in case of (imminent) armed attack

- Self-Defence



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# ■ Drones



## Using drones: Escalation or de-escalation?

Policy makers show growing preference for using drones when executing (unlawful) aerial incursions

- Lower risk for personnel
- Showing less 'commitment'
- Less 'skin in the game' for the responses

The general idea is that drones lower political and escalatory risks

But is that true?



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## *Article 8*

### *Pilotless aircraft*

No aircraft capable of being flown without a pilot shall be flown without a pilot over the territory of a contracting State without special authorization by that State and in accordance with the terms of such authorization. Each contracting State undertakes to insure that the flight of such aircraft without a pilot in regions open to civil aircraft shall be so controlled as to obviate danger to civil aircraft.

- (x) “Military aircraft” means any aircraft (i) operated by the armed forces of a State; (ii) bearing the military markings of that State; (iii) commanded by a member of the armed forces; and (iv) controlled, manned or preprogrammed by a crew subject to regular armed forces discipline.

Aerial drones logically fit within the definition of qualifying military aircraft established in the Chicago Convention and the 1923 Hague Rules of Air Warfare.

The same law as with manned aircraft should apply

Cfr Ann 7 Chicago Convention  
Cfr. Cir 328 AN/ 190 UAS ICAO



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# ■ *“Shoot the f\*\*\*ing drone”*

- Use of drones lowers the incentive to comply with international law
  - Ambiguity of applying a body of law designed to protect humans to a technology that removed the human from the equation
- State practice of lowering the bar for use of force compared to manned aircraft
- Difficulties in communicating / giving warnings
- Emerging customary law in responding to intrusive drones?
  - Destructive force as an exercise of State police powers?







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# ■ Balloons



(Manned or unmanned)  
balloons are aircraft as well.

Cfr Ann 7 Chicago Convention

When acting against incursing  
balloons the same laws apply  
as with any other aircraft.



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■ Thank you