NOTE

CHINA'S STEALTHY SOVEREIGNTY: THE IMPORTANCE OF OBJECTIVE *OPINIO JURIS*

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INTRODUCTION

On July 25, 2015, Lao Airlines flight QV916 was traveling from South Korea to Laos for a scheduled flight.[1] Shortly after entering airspace that China had identified as the East China Sea Air Defense Identification Zone (ECS ADIZ), Chinese air traffic controllers required the flight to turn around and return to South Korea.[2] This is the only time China has sought to enforce the rules of the ECS ADIZ against a commercial aircraft since its creation in November 2013.[3] China's Ministry of National Defense claimed that this was not an act of enforcing the ECS ADIZ, but instead an exercise of their air traffic control regulations.[4] According to the Ministry of National Defense, flight QV916 did not have permis-

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1. *See* MICHAEL PILGER, ADIZ UPDATE: ENFORCEMENT IN THE EAST CHINA SEA, PROSPECTS FOR THE SOUTH CHINA SEA, AND IMPLICATIONS FOR THE UNITED STATES 4 (U.S.-China Econ. and Sec. Rev. Comm'n ed., 2016).

2. *See id.*

3. *See* Ankit Panda, *A First: China Turns Back Commercial Flight for Violating East China Sea ADIZ Rules*, THE DIPLOMAT (July 30, 2015), https://thediplomat.com/2015/07/a-first-china-turns-back-commercial-flight-for-violating-east-china-sea-adiz-rules/ [https://perma.cc/Q8KC-K5PM]. After China announced the East China Sea Air Defense Identification Zone (ECS ADIZ), the United States and Japan both took immediate action to indicate that they would not recognize the regulations: the United States flew several unarmed bombers through the airspace and Japan instructed its aviators to disregard the imposed rules. China took no action against either the United States or Japan to indicate its intention to actually enforce the ECS ADIZ. *See id.*

4. *See Laos Plane Refused Entry to China Has No Link with ADIZ*, XINHUA (July 30, 2015), http://news.xinhuanet.com/english/2015-07/30/c_134464654.htm [https://perma.cc/256E-3TDR]. A spokesperson for the Chinese Ministry of National Defense released the following statement regarding Lao Airlines Flight QV916:

> Lao Airlines flight QV916 on route from the Republic of Korea to Laos attempted to fly over China's airspace on [July 25] without permission from the country's aviation authority. . . . China prohibited the flight from entering Chinese airspace in accordance with its air traffic control regulations, which have nothing to do with the [East China Sea] ADIZ.

Id.

sion from their aviation authority, had only filed a vague flight plan, did not respond to requests for additional information, and therefore had to return to the point of origin.[5] China may have been taking the position that this fell within its responsibility to administer a flight information region (FIR)[6] in airspace near Shanghai.[7] However, the flight had not yet entered the Shanghai FIR when it was turned back.[8] China's denial of enforcing the ECS ADIZ means that there is no public record of China ever using its Air Defense Identification Zone (ADIZ) to interrupt commercial flights or out of concern for its national security.[9]

The incident with Lao Airlines flight QV916 suggests that China had ulterior motives in establishing this protected airspace because it has not previously used the ECS ADIZ to protect its national borders.[10] Instead, China's true motive objectively appears to be establishing sovereignty over international airspace and disputed areas in the East China Sea that are also claimed by South Korea and Japan.[11] Turning the flight around was not, as the Ministry of Defense claimed, furthering "aims of protecting its state sovereignty and territorial and airspace security,"[12] because an ADIZ established to address national security concerns would have been

5. *See* Roncevert Almond, *China's Air Defense Identification Zone and Lao Airlines Flight QV916*, The Diplomat (Dec. 15, 2015), http://thediplomat.com/2015/12/chinas-air-defense-identification-zone-and-lao-airlines-flight-qv916/ [https://perma.cc/8W5G-EA8Z]; *Laos Plane Refused Entry to China Has No Link with ADIZ*, *supra* note 4.

6. ADIZs differ from a Flight Information Region (FIR), which is an area of airspace where a State has accepted responsibility for providing Air Traffic Services (ATS). Annex 2, § 2.1.2 of the Chicago Convention authorizes States to provide ATS. FIRs were created by International Civil Aviation Organization (ICAO) for safety, so that all civil aircrafts in flight would always have a specific State controlling the airspace they were in that could ensure a safe route. *See* J. Ashley Roach, *Air Defence Identification Zones*, Max Planck Encyclopedia of Publ. Int'l L., at ¶ 2 (2015).

7. *See* Pilger, *supra* note 1, at 5.

8. *See id.*

9. *See id.* For instance:

> [T]he PLA did not respond to the two U.S. Air Force B-52 bombers that flew on November 25, 2013, from Guam through the PRC's ECS ADIZ without informing Beijing, according to a Pentagon spokesman. Following the PRC's announcement, in late November 2013, Japan and South Korea also flew military aircraft in the PRC's ECS ADIZ without notifying PRC authorities, but both countries indicated that they detected no response from the PLA.

Ian E. Rinehart & Bart Elias, Cong. Research Serv. R43894, China's Air Defense Identification Zone 11 (2015) (citations omitted).

10. *See* Pilger, *supra* note 1, at 2.

11. *See id.*

12. Eyder Peralta, *China Expands Air Defense Zone Over Disputed Islands,* NPR (Nov. 24, 2013), https://www.npr.org/sections/thetwo-way/2013/11/24/247041581/china-expands-air-defense-zone-over-disputed-islands [https://perma.cc/8YAH-CCLG].

strictly enforced since its creation.[13] China's true motives are exposed by the regular commercial and military aircrafts that have passed through this zone without prompting a response from China's military.[14] The ECS ADIZ was not established out of sincere national security concerns.[15] The compliance by Lao Airlines flight QV916 helps China set a different precedent.[16]

Turning back flight QV916 helped China fulfill two requirements to make a claim for sovereignty in the absence of a treaty or other title document: "the intention and will to act as a sovereign, and some actual exercise or display of such authority."[17] China appears to be utilizing the ECS ADIZ in an offensive, rather than defensive, way, to make claims of sovereignty over international airspace.[18] China can make this offensive move because the right to establish an ADIZ is governed by customary international law.[19] Customary international law, which governs ADIZs, is a frequently used method of identifying and establishing new international law, but there have never been formal or official rules for identifying customary international law.[20] Therefore, no explicit international laws govern a State's ADIZ creation, enforcement or underlying intent.[21]

In 2012, the International Law Commission (ILC) undertook to draft rules for identification of customary international law, indi-

13. PILGER, *supra* note 1, at 2.

14. Just two days after the ECS ADIZ was declared, the United States performed its Annual Exercise and flew two B-52 bombers through the ECS ADIZ without notifying China or following the ADIZ rules. *See* RINEHART & ELIAS, *supra* note 9, at 15. The United States has continued to fly military aircraft through the ECS ADIZ without notifying China because it "does not recognize the right of a coastal nation to apply its ADIZ procedures to foreign aircraft not intending to enter national airspace." Sherri Marie Ohr, *The People's Republic of China's Assertion of Jurisdiction Over Airspace by Means of an East China Sea Air Defense Identification Zone* 23–26 (Jan. 31, 2015) (unpublished LLM. thesis, The George Washington University Law School) (on file with Jacob Burns Law Library, The George Washington University Law School) (quoting U.S. DEP'T OF THE NAVY, THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS, para. 2.7.2.3, NWP1-14M, MCWP5-12.1, COMDTPUB 5800.7A (2007)).

15. *See infra* Section III.A.

16. *See* Panda, *supra* note 3 ("For China, the ADIZ was a way of creating facts in the air, and bolstering its claim to a disputed swathe of airspace.").

17. *Id.*

18. *See* Roncevert Almond, *Clearing the Air Above the East China Sea: The Primary Elements of Aircraft Defense Identification Zones*, 7 HARV. NAT'L SEC. J. 126, 133 (2016).

19. *See id.* at 135; Panda, *supra* note 3.

20. *See infra* Section II.A.

21. *See* Almond, *supra* note 18, at 135; Panda, *supra* note 3.

cating the seriousness of this void.[22] The ILC aims to create a set of guidelines to help States more uniformly recognize customary international law across a wide range of fields and legal systems.[23] In pursuit of this goal, the ILC has drafted a set of sixteen proposed draft conclusions indicating the factors States should consider when identifying and formally recognizing customary international law.[24] The draft conclusions went through an open comment period and will be finalized in 2018.[25] The draft conclusions, comments from participating states, and suggestions from the Special Rapporteur on how to move forward were published after the 2018 meeting.[26] However, even with this set of rules for identifying customary international law, there is still a significant void: the draft conclusions, as they are currently written, do not require an *objective* consideration of a State's intent.[27]

The proposed draft conclusions consider only a State's *subjective* intent in following customary international law. This limited consideration has the potential to result in significant negative consequences.[28] Using China's establishment of the ECS ADIZ as a case study, this Note will demonstrate how a country can abuse the rules of customary international law by hiding its true intent in the *opinio juris* analysis. This problem goes beyond the scope of ADIZs, which are discussed in this Note as an illustration of the broader concerns. This Note proposes that the ILC guidelines should require consideration of a State's objective intent, as well as the existing subjective consideration, to determine whether an action falls under customary international law. More specifically, this Note proposes that the ILC guidelines should add an *objective* determination, requiring consideration of all available evidence, rather than taking a State's words at face value. This consideration should be

22. *See Analytical Guide to the Work of the International Law Commission, Identification of Customary International Law*, Int'l Law Comm'n, http://legal.un.org/ilc/guide/1_13.shtml [https://perma.cc/V82D-M8JF] (last updated May 22, 2018).

23. *See* Int'l Law Comm'n, Rep. on the Work of Its Sixty-Eighth Session, U.N. Doc. A/71/10, at 79–80 (2016) [hereinafter U.N. Doc A/71/10].

24. *See id.*

25. *See id.*

26. *See Analytical Guide to the Work of the International Law Commission*, *supra* note 22.

27. *See infra* Section I.B.

28. As established, the ECS ADIZ:

> [O]verlaps with existing ADIZs in the area established by South Korea, Taiwan, and Japan . . . . [It] also encompasses contested territory, including the Senkaku Islands, which are administered by Japan, but claimed by China and Taiwan . . . . [and] covers airspace above a submerged rock, Ieodo, which is under South Korean administration and is the site of an ocean research center.

Almond, *supra* note 18, at 129–30.

adopted into the final draft of the ILC's rules for identifying customary international law because it is necessary to ensure that application of unwritten customary laws is consistent around the world to prevent uncertainty and global conflict.

Part II provides background on customary international law and the need for a globally-applicable set of standards for identifying customary international law. This Part also discusses the ILC's project to create a set of international guidelines for identifying customary international law. Finally, this Part gives background on ADIZs, and specifically the ECS ADIZ, which provides an example of the negative global consequences that can occur without an objective analysis.

Part III proposes that the ILC adopt an objective intent analysis in the *opinio juris* requirement of the final draft of the guidelines for identifying customary international law. It also draws upon China's actions related to the ECS ADIZ to explain why an objective consideration of a State's intent is necessary, and analogizes this intent element to other areas of international and domestic law. Part IV discusses possible counterarguments to this proposal. Part V concludes.

I. Background

Part II will first provide background on international law, focusing specifically on customary international law. It will explain how customary international law is created and issues that have been raised regarding this process. Next, this Part will provide background on the ILC's current project of creating a set of guidelines to aid the international community in identifying customary international law. Finally, Part II will supply information about ADIZs to illustrate one situation where the concerns raised in this Note is seen in the international community. This Section includes information about how China's creation and enforcement of the ECS ADIZ differs from the global custom.

A. *International Law Generally and the Delicacies of Customary International Law.*

This Section will provide information about customary international law generally. It will also identify some of the shortcomings that make this body of law susceptible to the issues underlying this proposal.

International law is a decentralized system.[29] Because of this, it is important that the policies and rules underlying its creation or enforcement are defined broadly and made universally applicable.[30] Within this decentralized system, customary international law, or customary law, is one of the most prevalent methods of establishing international law.[31] Under customary law, continued State practices may eventually become binding international law applicable to all States.[32] The practice of identifying customary international law has significant limitations because it is not clear when a practice has crossed the threshold from arbitrary State acts to binding law.[33] The statute of the International Court of Justice (ICJ), however, has defined international custom as "a general practice accepted as law."[34] Once established, customary international law is considered to be as binding as a treaty,[35] and is applicable to all States except those that satisfy the persistent objector exception.[36]

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29. There are several sources of international law, including treaties, customary international law, "general principles of law recognized by civilized nations," and certain judicial decisions. Statute of the International Court of Justice, I.C.J. Acts & Docs. No. 6, art. 38(1)(c); *see* Christopher Greenwood, *Sources of International Law: An Introduction*, U.N. Office of Legal Affairs (2008) http://legal.un.org/avl/pdf/ls/greenwood_outline.pdf [https://perma.cc/V82D-M8JF].

30. *See* Roozbeh B. Baker, *Customary International Law in the 21st Century: Old Challenges and New Debates*, 21 Eur. J. Int'l L. 173, 174 (2010) (citing Prosper Weil, *Towards Relative Normativity in International Law?*, 77 Am. J. Int'l L. 413 (1983)).

31. *See* Andre da Rocha Ferreira et al., *Formation and Evidence of Customary International Law*, 1 UFRGS Model United Nations J. 182, 182 (2013).

32. *See id.* at 186 (explaining that customary international law "does not arise from a deliberate legislative process, but rather as a collateral effect of the conduct of States in their international relations").

33. *Id.* at 183–84.

34. See Statute of the International Court of Justice, I.C.J. Acts & Docs. No. 6, art. 38(1)(b).

35. *See* Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, 66 U. Chi. L. Rev. 1113, 1116 (1998). The authors raise concerns and doubts about customary international law because it lacks a centralized judicial system, or a method of enforcement. *Id.* However, this significant topic is outside the scope of this Note and will not be addressed.

36. A State that does not want to be bound by a new emerging rule of customary international law may vocally object. It must offer a persistent objection. If its objection is not consistently reiterated, a State is viewed as no longer objecting and is thus bound. Silence when a new rule is emerging is considered implicit consent to be bound by the new customary law. States may also enter into agreements or treaties with other States and, through that, contract out of one or more customary laws. There are, however, some customary laws deemed so important they cannot be contracted out of individually. These laws are called *jus cogens* norms and they exist when the majority of states within the international system believe a law cannot fall under the persistent objector exception. *Opinio juris* is the determining factor in elevating a customary international law to a *jus cogens* norm. *See* Baker, *supra* note 30, at 176–77; David J. Bederman, *Acquiescence, Objection and the*

The ICJ's definition of international custom indicates two elements that must be satisfied before State practice becomes binding law.[37] First, there must be continued, widespread practice.[38] Second, this practice must be accompanied by *opinio juris*, or a State's belief that it has a legal right—or legal obligation—to follow the practice.[39] *Opinio juris* is crucial to the analysis of customary international law because it separates acts done under color of customary law from those done voluntarily.[40] Much of the uncertainty surrounding customary international law is a result of not having a uniform standard for determining whether *opinio juris* has been satisfied.[41]

In addition, customary international law is "created and observed by the States themselves."[42] Therefore, it is a largely "voluntarist and co-operative" system that naturally requires good faith from all parties involved.[43] The ICJ found that a requirement of good faith in customary international law means that States may make unilateral statements or take unilateral action and this will create a binding legal obligation upon other States.[44] This dependence on good faith exposes the uncertainty surrounding customary international law and highlights the significant need for a holistic consideration of a State's actions, statements, and underlying motives before recognizing them as legally binding.

Death of Customary International Law, 21 DUKE J. COMP. & INT'L L. 31, 35 (2010) ("The general presumption is that, unless a State has persistently objected during the process of crystalizing a customary norm, it will be held to that rule, even if it later regrets or denounces the norm in question.").

37. The definition provided by the International Court of Justice (ICJ) Statute "reflects the widely accepted two-element theory." Ferreira et al., *supra* note 31, at 186. Although disputes arise under this definition, it is widely accepted and will be the only definition addressed by this proposal. *See id.*

38. *See id.* at 187–90; Baker, *supra* note 30, at 176. There is much discussion and disagreement regarding the accepted forms of practice and required duration of practice to satisfy this element, which are not relevant to this proposal.

39. *See* Ferreira et al., *supra* note 31, at 190–93; Baker, *supra* note 30, at 176.

40. *See* Goldsmith & Posner, *supra* note 35, at 1116.

41. *See id.* at 1117.

42. Steven Reinhold, *Good Faith in International Law*, 2 UCL J. L. & JURIS. 40, 46 (2013).

43. *Id.* at 46, 48.

44. *See id.* at 47–48 (citing Nuclear Tests (Austl. v. Fr.), Judgment, 1974 I.C.J. Rep. 253, ¶ 46 (Dec. 20)). The context of a statement is particularly relevant to whether it is binding under customary international law because this determination involves subjective and objective elements. *See id.* at 48. Most important is the subjective consideration: whether the declaring State actually intended its statement to be binding. *See id.* The objective consideration is whether other States, hearing this statement, placed "trust and confidence" in the statement that make it "paramount to the creation of an obligation." *Id.*

B. *The International Law Commission Has Created a Set of Draft Conclusions to Address the Issues Inherent in Customary International Law.*

This Section discusses the legislative history of the ILC's draft conclusions for identifying customary international law. It also addresses the ILC's primary motivations behind this project, and the significant goals of the guidelines they have drafted. Lastly, this Section identifies several key conclusions contained in the ILC's current draft that are relevant to this proposal.

In 2012,[45] the 64th session of the ILC accepted a proposal to work on a new topic, "Identification of customary international law."[46] The goal of this project is to produce guidance for identifying customary international law by including discussions of relevant evidence whilst also retaining flexibility. The project is not creating "a series of hard-and-fast rules for the determination of rules of customary international law."[47] For this reason, the draft conclusions do not include specific examples of customary international law or how it has been identified; instead, "they are concerned only with the methodological issue of how rules of customary international law are to be identified."[48] The ILC has drafted sixteen draft conclusions over the last four years.[49] Throughout this drafting and editing process, interested States have routinely provided input, with twenty-one nations having sub-

45. Although this project was proposed to the ILC in 2011, work did not actually begin until the 2012 session. *See Analytical Guide to the Work of the International Law Commission*, *supra* note 22.

46. *Id.* This programme of work was originally named "Formation and evidence of customary international law," but was renamed at the 65th session in 2013. *Id.* After accepting this topic into the program, the Commission appointed Michael Wood as Special Rapporteur. *Id.* Subsequently, during the 65th session (2013) through the 68th session (2016), the Special Rapporteur provided reports to the Commission. *Id.* From the second report of the Special Rapporteur, provided to the Commission at the 66th session in 2014, came eight draft conclusions written by the Drafting Committee. *Id.* The remaining eight draft conclusions were presented at the 67th session in 2015. *Id.*

47. Int'l Law Comm'n, Note on the Work of Its Sixty-Fourth Session, U.N. Doc. A/CN.4/653, at 6 (2012).

48. U.N. Doc. A/71/10, *supra* note 23, at 81–82.

49. From the second report of the Special Rapporteur, provided to the Commission at the 66th session in 2014, came eight draft conclusions written by the Drafting Committee. *See Analytical Guide to the Work of the International Law Commission*, *supra* note 22. The remaining eight draft conclusions were presented at the 67th session in 2015. *Id.*

mitted comments and information.[50] The final open comment period ended on January 1, 2018.[51]

The ILC's draft conclusions emphasize the importance of satisfying both elements for State practice to become customary international law: (i) widespread and consistent State practice, and (ii) acceptance as law (*opinio juris*).[52] Although customary international law requires the presence of both elements, it is important to note that the "acts forming the relevant practice are not as such evidence of acceptance of law."[53]

State practice, under the first element required for customary international law, may include both physical actions as well as verbal conduct.[54] It is important to look not only at what a State does but also at what a State says.[55] Identifying State practice should be an "exhaustive" analysis that "include[s] the relevant practice of all of the State's organs," which are "to be assessed as a whole."[56] Even if State action is inconsistent to the extent that it breaches the customary rule, general practice may still be established.[57] A statement by the offending State in support of the rule may actually strengthen the claim for widespread practice because it can indi-

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50. *See id.* Comments have been submitted by Austria, Belgium, Botswana, Cuba, the Czech Republic, El Salvador, Finland, Germany, Ireland, the Republic of Korea, the Russian Federation, Switzerland, the United Kingdom of Great Britain and Northern Ireland, and the United States of America. These comments are generally detailing how that State has identified customary international law in the past.

51. *Id.* ("At its 3340th meetings on 8 August 2016, the Commission decided, in accordance with articles 16 to 21 of its statute, to transmit the draft, through the Secretary-General, to Governments for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 1 January 2018.").

52. *See* U.N. Doc. A/71/10, *supra* note 23, at 82. The practices that become customary international law must be consistent, as to become a settled practice, and done out of a belief that there is a legal right, or a legal obligation.

53. The actions used to satisfy element one may not, on their own, also satisfy element two. *See id.* at 87. If the same facts could satisfy both elements, one of the elements would become redundant. *See* Goldsmith & Posner, *supra* note 34, at 1117–18.

54. As explained by the ILC:

> Given that States exercise their powers in various ways and do not confine themselves only to some types of acts, paragraph 1 provides that practice may take a wide range of forms. While some writers have argued that it is only what States 'do' rather than what they 'say' that may count as practice for purposes of identifying customary international law, it is now generally accepted that verbal conduct (whether written or oral) may count as practice; action may at times consist solely in statements, for example a protest by one State addressed to another.

U.N. Doc. A/71/10, *supra* note 23, at 91.

55. *See id.*

56. *Id.* at 93.

57. *Id.* at 96 ("When inconsistency takes the form of breaches of a rule, this does not necessarily prevent a general practice from being established. This is particularly so when the State concerned denies the violation and/or expresses support for the rule.").

cate a broader acknowledgement of the rules or standards generally followed.[58] However, if there is too much discrepancy in the exercise of a practice, customary international law will not exist in that context.[59]

Opinio juris is generally recognized as the subjective element of the customary international law analysis.[60] For State practice to amount to customary law, it must be motivated by a State's belief in a legal right or legal obligation.[61] This analysis should account not only for those taking the action, but also those who are in a position to react.[62] The draft conclusions distinguish proper acceptance as law from other motives "such as comity, political expediency or convenience."[63] Therefore, a State does not meet the requisite acceptance as law if it believes that it is free to follow or disregard a customary rule.[64] When a State does not feel legally bound, its practice will not contribute to the customary law of that field; it is instead just usage.[65] Only when both elements have been satisfied is it determined that customary international law exists and what rules are binding.[66]

The ILC also emphasizes the importance of careful analysis and evaluation when identifying customary international law.[67] It warns that the credibility of the process, and thus of the laws identified as customary, will be undermined if this process does not have a sufficient and thorough evaluation of the elements.[68] A thor-

58. *See id.* ("If a State acts in a way *prima facie* incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule.") (quoting Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, ¶ 186 (June 27)).

59. *See* U.N. Doc. A/71/10, *supra* note 23, at 83, 95.

60. *See id.* at 96.

61. *Id.* at 97.

62. *Id.* at 98. ("Acceptance as law (*opinio juris*) is to be sought with respect to both the States engaging in the relevant practice and those in a position to react to it; they must be shown to have understood the practice as being in accordance with customary international law.").

63. *Id.* at 97.

64. *Id.* at 98. ("[P]ractice that States consider themselves legally free either to follow or to disregard does not contribute to or reflect customary international law (unless the rule to be identified itself provides for such a choice).").

65. *Id.* ("[W]ithout acceptance as law (*opinio juris*), a general practice may not be considered as creative, or expressive, of customary international law; it is mere usage or habit.").

66. *See id.* at 82.

67. *See id.* at 79.

68. *See id.*

ough analysis of *opinio juris* must look at the overall context of the State actions and the potential law at issue.[69] This is best done by "taking into account the subject matter that the rule is said to regulate" because otherwise it is easy for States to circumvent the rules by calling actions something they are not.[70] Many national courts depend on the credibility of the process to make rulings based on customary international law since they cannot do so without a thorough evaluation of the law's existence.[71] Therefore, the process to establish and identify customary international law must be clear, thorough, and widely applicable.

C. *The Establishment of Air Defense Identification Zones.*

This Section discusses ADIZs, which serve as a useful example of the problem that can arise under the current set of draft conclusions and fail to account for objective *opinio juris*. First, this Section provides background on ADIZs, which includes the legal justification for creating an ADIZ and the customary process for establishing and enforcing an ADIZ. This Section then discusses the relevant differences between China's creation of the ECS ADIZ and the customary rules followed by other States.

1. The Customary Process for Establishing ADIZs.

There are no formal laws governing the creation or enforcement of ADIZs.[72] The closest form of ADIZ codification is a definition in the Convention on International Civil Aviation of 1944 (Chicago Convention), which states that an ADIZ is a "[s]pecial designated airspace of defined dimensions within which aircraft are required to comply with special identification and/or reporting procedures additional to those related to the provision of air traffic services (ATS)."[73]

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69. *See id.* at 85.

70. *See id.*

71. *See id.*

72. Rinehart & Elias, *supra* note 9, at 1–2 ("While many nations have established one or more ADIZs in the interest of national security, no international agreement or consensus exists regarding the establishment of or the flight operations and air traffic procedures related to such airspace.").

73. Int'l Civ. Aviation Org., Annex 15 to the Convention on International Civil Aviation: Aeronautical Information Services, at 2–1 (13th ed., July 2010). However, this is just a basic definition acknowledging the historical and continued State practice of establishing these security zones. Almond, *supra* note 18, at 135. Moreover, other international legal documents and treaties do not appear to provide any additional bases "for a coastal state to exercise legal jurisdiction over foreign state aircraft in the airspace above

ADIZs are not "prescribed, prohibited or regulated under any existing international treaty or by any international institution,"[74] but permissive rules are not required for States to create an ADIZ.[75] ADIZs find legal basis in the Chicago Convention, which allows States to establish procedures to enter and exit their national airspace.[76] Each State exercises sovereignty over its territory that extends upward to the airspace over that nation[77] within which it is entitled to "exercise its legislative, administrative, and judicial powers with its national airspace."[78] But these permissible procedures, established over time through State practice by countries like the United States and Canada, are not without limitations.[79] Based on these established limitations, "ADIZs may be reduced to six fundamental elements: (1) protecting national security; (2) regulating entry into national airspace; (3) administration through aircraft identification and control procedures; (4) application to all aircraft regardless of civil or state character; (5) enforcement through interception; and (6) extensive temporal and geographic scope."[80] These elements illustrate the continued, widespread practice that satisfies the first element for customary international law of ADIZs.[81]

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the EEZ." Peter A. Dutton, *Caelum Liberam: Air Defense Identification Zones Outside Sovereign Airspace*, 103 Am. J. Int'l L. 1, 4 (2009).

74. *See* Lowell Bautista & Julio Amador III, Complicating the Complex: China's ADIZ 1 (PacNet ed., 2013).

75. *See* Zoltán Papp, *Air Defense Identification Zone (ADIZ) in the Light of Public International Law*, 2015 Pecs J. Int'l & Eur. L. 28, 52–53 (2015). Under international law, a State may not exercise its power in any form in the territory of another State without a permissive rule. *See* Arthur Lenhoff, *International Law and Rules on International Jurisdiction*, 50 Cornell L. Rev. 5 (1964) (quoting The Case of the S.S. "Lotus" (Fr. v. Turk.), 1927 P.C.I.J. ser. A, No. 10, at 19). However, at least for ADIZs, the absence of a prohibitive rule is enough. *See* Papp, *supra* note 75, at 52–53.

76. *See* Convention on International Civil Aviation art. 13, Dec. 7, 1944, 61 Stat. 1180 [hereinafter Convention on International Civil Aviation]; Roach, *supra* note 6, ¶ 4; *see also* Almond, *supra* note 18, at 144 ("The Chicago Convention also recognizes the risk posed by civil aircraft conducting international flights and, thus, tacitly recognizes the defense basis of ADIZs.").

77. *See id.* at 148. This is necessary to preserve the exclusive sovereignty of the State. *Id.* at 148; *see* Elizabeth Cuadra, *Air Defense Identification Zone: Creeping Jurisdiction in the Airspace*, 18 VA. J. Int'l L. 485, 488 (1978) (quoting Convention on International Civil Aviation, *supra* note 76, at art. 1) (finding "*every* State, whether or not a party to the [Chicago] Convention, has exclusive sovereignty in the airspace above its territory").

78. Roach, *supra* note 6, at 148.

79. *See* discussion *infra* Section I.C.

80. Almond, *supra* note 18, at 134.

81. *Id.* at 135. The origin of these elements is the practice of the United States, although they are now widely-accepted characteristics of ADIZs. *Id.*

ADIZs were originally created to serve defensive purposes of national security.[82] The belief is that the earlier a State can identify and control foreign aircraft that will be entering its airspace, the better it can prepare for potential air attacks.[83] Thus, it is "the nexus *to sovereign territory* [which] provides the justification for a coastal state's interruption of high seas freedoms, including freedoms of navigation and overflight, in the contiguous zone."[84] The location of ADIZs—adjacent to a State's sovereign airspace—indicates its primary justification: protection of national security.[85] National security purposes are "consistent with the right to self-defense under customary international law, as well as the right to self-defense set forth in the UN Charter."[86] States may not, however, establish ADIZs as a means of exercising sovereignty of international airspace or disputed territory[87] and they may not unlawfully interfere with rights of aerial navigation of the freedom of overflight.[88]

The authority to establish an ADIZ is now presumptively recognized as a right of States under customary international law because many unilateral claims by States establishing ADIZs have not faced objection.[89] Since the creation of the first ADIZ by the United States, certain customs have emerged that States follow

82. For example, the U.S. ADIZ is justified by a need to protect national security, control illegal drug activity, decrease possibility of mid-air collisions or other safety hazards, and minimize search-and-rescue missions. *See* Dutton, *supra* note 73, at 9; *see also* Papp, *supra* note 75, at 45 (suggesting in the 1950s ADIZ was justified under the necessity for self-defense).

83. *See* Kay Hailbronner, *Freedom of the Air and the Convention on the Law of the Sea*, 77 Am. J. Int'l L. 490, 516 (1983).

84. *See* Almond, *supra* note 18, at 146 (emphasis added). For example, Japan's Ministry of Defense asserts that it will utilize "airspace anti-intrusion measures" which are a "series of actions taken in relation to a foreign aircraft that poses a risk of invading Japan's territorial airspace or that has actually invaded it. These actions include scrambling interceptors warning the aircraft to withdraw from Japan's territorial airspace or forcing it to land on a neighboring airport." Ministry of Defense (Japan), Defense of Japan 2013, at 177 (2013), http://www.mod.go.jp/e/publ/w_paper/pdf/2013/35_Part3_Chapter1_Sec1.pdf [https://perma.cc/A2Q3-9YS2].

85. ADIZs permit early identification and control of foreign aircrafts, which may be necessary to protect a nation's security interests, and to promote safer international air traffic. *See* Hailbronner, *supra* note 83, at 516. For example, the United States requires that aircrafts intending to enter U.S. airspace provide notice one hour before entering. *See id.* at 515–16.

86. Almond, *supra* note 18, at 138–39.

87. *See id.* at 146–47.

88. *See* Bautista & Amador, *supra* note 74.

89. *See* Roach, *supra* note 6, ¶ 6.

when establishing their own ADIZ.[90] Before officially declaring an ADIZ, a State should give prior notice to the international community and coordinate with other relevant countries.[91] Moreover, ADIZs may not be created or enforced in a way that will unduly interfere with the freedom of the high seas.[92] Nor should a State enforce its ADIZ against aircrafts not bound for territorial or national airspace.[93] The ADIZ regulations should apply only to foreign civil aircrafts and not to State aircrafts such as those used in military, customs or police services.[94] Finally, for safety reasons, civil aircrafts that fail to follow the requirements imposed may not be addressed with force.[95] These important limitations and procedures are not codified, but are generally followed.

2. China's Establishment of the ECS ADIZ Did Not Follow Established Practices.

China failed to follow many of the norms adhered to by other States when establishing ADIZs by announcing the creation of the

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90. *See* Sherri Marie Ohr, *The People's Republic of China's Assertion of Jurisdiction over Airspace by Means of an East China Sea Air Defense Identification Zone* 23–26 (Jan. 31, 2015) (unpublished L.L.M. thesis, The George Washington University Law School) (on file with Jacob Burns Law Library, The George Washington University Law School) (discussing key characteristics of AIDZs in different countries).

91. ICAO provides specific requirements for notice and coordination when establishing an ADIZ. For example:

> States must provide advance notice of at least seven (7) days through a Notice to Airmen (NOTAM) when establishing a restricted area where the possibility of interception exists, such as an ADIZ. Annex 15 requires a greater lead-time of at least twenty-eight days regarding the establishment and withdrawal of, and premeditated significant changes to an ADIZ or danger area.

Almond, *supra* note 18, at 156–57 (citing Int'l Civil Aviation Org., Annex 15 to the Convention on International Civil Aviation: Aeronautical Information Services (14th ed., July 2013)).

92. *See* Hailbronner, *supra* note 85, at 490 (classifying "the area above the high seas as an aerial highway open to all nations and not subject to the sovereignty of any state").

93. This is a critical limitation because to apply ADIZ regulations to aircrafts not intending to enter (nor showing intent to enter) national airspace, a State infringes upon the freedom of overflight guaranteed under UNCLOS Art. 87. Almond, *supra* note 18, at 151; *see also* Roach, *supra* note 6, ¶ 7 ("The coastal State has no right to require a foreign aircraft to identify itself or otherwise to apply its ADIZ procedures if it does not intend to enter national airspace.").

94. *But see* Almond, *supra* note 18, at 161–63 (discussing inconsistencies in interpreting what constitutes civil and state aircrafts).

95. The appropriate response for civil aircrafts that fail to identify themselves or file thorough flight plans should be interception. This is governed by the Chicago Convention which prohibits the use of weapons in flight and requires interception be a last resort. Moreover, any use of force that is justified must be governed by the elements of necessity and proportionality. Convention on International Civil Aviation, *supra* note 76, at art. 3 *bis*.

ECS ADIZ.[96] On November 23, 2013, China announced the establishment of a new ADIZ in the East China Sea.[97] It did so unilaterally and did not discuss the proposed ADIZ with any other surrounding or affected States beforehand.[98] China's failure to follow accepted practices with its announcement received open opposition from several countries, including the United States, Australia, and Japan.[99] The European Union and the Association of Southeast Asian Nations (ASEAN) also criticized China's acts.[100] The ECS ADIZ covers areas of the East China Sea that are claimed by other countries, causing disputes,[101] and also overlaps with ADIZs of Japan, South Korea, and Taiwan.[102]

The vague, broad language of the ECS ADIZ Air Identification Rules has led many to believe that the ECS ADIZ is not meant to identify aircrafts in support of national security, but is instead an imposition of sovereignty over international airspace.[103] The language of the ECS ADIZ Air Identification Rules, when compared to

96. *See* Ohr, *supra* note 90, at 102–03. Despite the reactions from other States and the generally-followed practices that China ignored when creating the ECS ADIZ, there is no clear indication that China's actions were illegal under customary international law. *Id.* However, other authors disagree and find that China's actions regarding the ECS ADIZ are inconsistent with accepted State practice and international law. *See, e.g.*, Almond, *supra* note 18, at 181–82.

97. *Defense Ministry Spokesman on China's Air Defense Identification Zone*, Embassy China U.S. (Dec. 4, 2013), http://www.china-embassy.org/eng/zt/dhfksbq2/ [https://perma.cc/VK6Y-734Y].

98. *See* Almond, *supra* note 18, at 130. In response to the ECS ADIZ, South Korea expanded its preexisting Korean ADIZ (KADIZ). But South Korea consulted with other States and allies, like the United States, so the response to the expanded KADIZ has been positive. *Id.* at 132.

99. *See* Ohr, *supra* note 90, at 91–96 (discussing the reactions of Japan, Philippines, Republic of Korea, Taiwan, and the United States to China's creation of the ECS ADIZ); Almond, *supra* note 18, at 130–31 ("The United States has . . . rejected the ECS ADIZ as being inconsistent with international norms."); Raul ("Pete") Pedrozo, *The Bull in the China Shop: Raising Tensions in the Asia-Pacific Region*, 90 Int'l L. Stud. 66, 73–74 (2014) ("Prior to Beijing's unprecedented declaration, no other ADIZ has crossed over into that of another nation. The Chinese ADIZ also encompasses the airspace over Socotra Rock and the Senkakus, both of which are in dispute with South Korea and Japan, respectively. Normally, States do not establish ADIZs over contested territory.").

100. *See* Almond, *supra* note 18, at 130–31.

101. *See* Pedrozo, *supra* note 99, at 66. In contrast, when South Korea expanded the KADIZ, see *supra* note 98, the updated boundaries aligned with the Korean Flight Information Region (FIR). *See* Roach, *supra* note 6. Therefore, South Korea was careful not to extend its control of international airspace outside of this preexisting FIR where it already administers air traffic control. *See* Almond, *supra* note 18, at 132.

102. *See* Almond, *supra* note 18, at 129.

103. *See* Matthew Hipple, *The Language, Intention and Impact of China's ADIZ: Theft in Broad Daylight*, War On The Rocks (Dec. 1, 2013), https://warontherocks.com/2013/12/the-language-intention-and-impact-of-chinas-adiz-theft-in-broad-daylight/ [https://perma.cc/4FV8-TY4L].

the customary practice, illustrates the differences in China's rules and its motives.[104] Notably, the ECS ADIZ applies to all aircrafts—State and civil—that enter the identified airspace regardless of whether they are bound for Chinese national airspace.[105] Aircrafts that fail to comply with China's rules are subject to military response.[106]

China has yet to enforce the ECS ADIZ despite several situations where the rules were violated or ignored.[107] There is only one instance of China requiring a civilian aircraft to turn around for lack of a filed flight plan,[108] and China remains adamant that it was not enforcing the ECS ADIZ.[109] China's actions regarding Lao Airlines flight QV916 have led other States to view the ECS ADIZ as offensive.[110] Furthermore, China has significantly increased its military presence in the East China Sea since announcing the ECS ADIZ and much of this activity is not related to administration of the ADIZ.[111] Many view China's increased military presence as an offensive maneuver to display authority over disputed airspace rather than as enforcement of the ECS ADIZ for defense of established Chinese airspace borders.[112] "For China, successfully administering ADIZ rules is a coup for its sovereignty claims in the East China Sea" because it indicates that other States have acknowl-

104. *See id.*

105. *See* Almond, *supra* note 18, at 130. ADIZs should only legally be applied to aircrafts intending, or indicating intent, to enter national airspace. Pedrozo, *supra* note 99, at 74–75 (discussing practices of other States with ADIZs and State reactions to general applicability of ECS ADIZ).

106. States have an obligation under Article 3 *bis* of the Chicago Convention to "refrain from resorting to the use of weapons against civil aircraft in flight." Convention on International Civil Aviation, *supra* note 76, at art. 3 *bis*.

107. *See* discussion of Lao Airlines flight QV916, *supra* Part I; *see also* discussion of continued American military exercises in the East China Sea, *supra* note 14. Japan and South Korea also conducted exercises within the newly established ECS ADIZ within days of the announcement. Despite the intentional violations of the ADIZ AIR, China has not sought enforcement. *See* Pedrozo, *supra* note 99, at 70–71 (discussing Japanese and South Korean acts of defiance taken shortly after ECS ADIZ was established).

108. *See Laos Plane Refused Entry to China Has No Link with ADIZ*, *supra* note 4 and accompanying text; Almond *supra* note 5.

109. *See Laos Plane Refused Entry to China Has No Link with ADIZ*, *supra* note 4.

110. *See* Pilger, *supra* note 1, at 6 (viewing China's actions not as enforcement of the ADIZ, but as "demonstrate[ion of] China's claim to authority over airspace in the area, as well as—in some cases—China's claim to sovereignty over the Senkaku Islands").

111. *See id.*

112. *See id.* The airspace in the East China Sea is the subject of disputes between Japan and China. This dispute also includes the Senkaku Islands, which Japan's government purchased before the ECS ADIZ was established but which China seeks to exercise sovereignty over. *See id.*

edged China's regulation of these disputed areas.[113] Since ADIZs are justified by national security and the right to self-defense, a State's motivations for creating an ADIZ is of vital importance and cannot be overlooked simply because this area is only governed by customary international law.

D. *An Objective Standard Is Appropriate Here Because Many Other Areas of Law Implement It.*

This Section provides a sample of some other areas of law, domestic and international, that utilize an objective standard either alongside or in place of a subjective standard. First, this Section addresses the requirement of "good faith" in treaty formation. Next, this Section discusses the use of an objective analysis in criminal and contract law. These comparisons illustrate the general preference for an objective analysis throughout the legal community.

1. The Use of Objective and Subjective Analyses to Determine "Good Faith" in Binding State Actions.

Treaty formation is governed by the maxim *pacta sunt servanda*, which holds that all promises are binding.[114] *Pacta sunt servanda* is a form of good faith that applies specifically to treaty formation.[115] This maxim is necessary for the formation of binding international legal obligations because it stresses the importance of reliability when establishing treaties and international agreements.[116]

The ICJ has found that the binding nature of this good faith principle applies when a State takes unilateral action—such as making a public statement—that indicates an intent to be bound and which other States may reasonably rely on.[117] The unilateral action of a State thus becomes as binding as a treaty.[118] However,

113. Panda, *supra* note 3.

114. *See* Reinhold, *supra* note 42, at 47; Richard Hyland, *Pacta Sunt Servanda: A Meditation*, 34 VA. J. INT'L L. 405, 406 (1994).

115. *See* Reinhold, *supra* note 42, at 47.

116. *See id.* at 47–48.

117. *See id.* In 2006, the International Law Commission produced guiding principles regarding unilateral actions which may impose binding obligations on other States. Specifically, in regard to unilateral formal declarations with the intent to produce binding obligations, "[n]o obligation may result for other States from the unilateral declaration of a State. However, the other State or States concerned may incur obligations in relation to such a unilateral declaration to the extent that they clearly accepted such a declaration." Int'l Law Comm'n, Rep. on the Work of Its Fifty-Eighth Session, U.N. Doc. A/61/10, at 368–69 (2006).

118. *See* Reinhold, *supra* note 42, at 47.

imposing the good faith requirement is only effective when courts can "assess the conduct of the State concerned, and apply the principle accordingly."[119] ICJ and other international courts are in ideal positions to apply this principle when identifying and analyzing customary international law.[120]

Unilateral assertions by a State, and the good faith associated with them, involve both subjective and objective aspects.[121] A unilateral statement may be binding as determined by the subjective analysis—the "intention of the declaring State."[122] But other States will not validate the unilateral assertion unless there is an objective "trust and confidence . . . by the receiving State."[123] The objective standard evaluates the individual intent by analyzing all available evidence rather than taking a State's words at face value. Ultimately, it is the notion of good faith that imposes the binding legal effect of a State's unilateral statement of action.[124] In this way, a subjective and objective analysis of good faith for customary international law is comparable to *pacta sunt servanda* as it is applied in treaty formation.[125]

2. The Objective Standard Is Utilized in Criminal Law and Contract Law.

The objective standard is often used in other areas of law because it offers uniformity as well as reliable and universally applicable standards to analyze actions of various actors. The objective analysis in U.S. criminal law determines a suspect's state of mind by "proof by facts and data which are external in the sense that they are physically observable to the trier of fact."[126] For example, a defendant may be found guilty of a crime with the *mens rea* of negli-

119. *Id.* at 42.

120. By imposing this requirement in the form of an objective *opinio juris* analysis in the ILC rules for identifying customary international law, international courts will be able to apply the principle when analyzing customary law in various settings. *See id.* at 46 ("The ICJ's case law is defined enough to act as a central source of guidance in applying the principle of good faith.").

121. *See id.* at 48.

122. *Id.*

123. *Id.*

124. *See id.*

125. *See id.* at 48–49.

126. Edward W. Hautamaki, *The Element of Mens Rea in Recklessness and "Criminal Negligence"*, 2 DUKE B.J. 55, 64 (1951). It is only because of this use of external sources of proof that this analysis is deemed objective, because it is illogical to say that a subjective state of mind is proved by objective means. *Id.* at 64–65.

gence when "a court decides it suffices that a reasonable man would have known the danger."[127]

In addition, the Canadian Supreme Court has made clear that certain criminal statutes should use an objective test for the intent element.[128] Under the objective test, the decision regarding an accused's *mens rea* is not what the accused himself believed, but whether the accused's conduct was reasonable based on the facts.[129] *Mens rea* is measured using an objective standard when showing proof of negligence.[130] In these cases, "the conduct of the accused is measured . . . without establishing the subjective mental state of the particular accused."[131] It is essential to this test that determination of objective intent "not be made in a vacuum" but analyzed in context.[132]

Relatedly, the United States criminal law system authorizes substitution of willful blindness doctrine for traditional *mens rea* in certain crimes.[133] Willful blindness, as used in American criminal law, is "a valuable means to convict those accused of committing offenses requiring a mens rea of knowledge who deliberately act to avoid inculpatory knowledge."[134] Although historically willful blindness was only evaluated from a subjective viewpoint,[135] the U.S. Supreme Court has held that a subjective analysis should be supplemented "by allowing juries to rely upon 'reasonable inferences' from the evidence."[136]

Contract law also utilizes an objective analysis.[137] During the early nineteenth century in France, contract formation utilized a subjective "meeting of the minds" approach to intent.[138] However, there were significant weaknesses in relying solely on this subjective approach.[139] Most significantly, the parties were not permitted to

127. *Id.* at 56.

128. *See* R. v. Hundal, [1993] S.C.R. 867, 886 (Can.).

129. *See* R. v. Tutton, [1989] S.C.R. 1392, 1432 (Can.).

130. *See* Hundal, S.C.R. 867, at 882.

131. *Id.*

132. *See* Tutton, S.C.R. 1392, at 1432.

133. *See* Shawn D. Rodriguez, *Caging Careless Birds: Examining Dangers Posed by the Willful Blindness Doctrine in the War on Terror*, 30 U. PA. J. INT'L L. 691, 713–14 (2008) ("[W]illful blindness is a way of convicting those accused of offenses requiring a mens rea of knowledge.").

134. *Id.* at 693.

135. *See id.* at 717 n.96 (collecting cases).

136. *Id.* at 718 (quoting Ratzlaf v. United States, 510 U.S. 135, 149 n.19 (1994)).

137. *See* Joseph M. Perillo, *The Origins of the Objective Theory of Contract Formation and Interpretation*, 69 FORDHAM L. REV. 427, 427 (2000).

138. *See id.* at 429–30.

139. *See id.* at 430.

testify to their subjective understanding of the "common understanding," or how that differed from the other party's understanding.[140] Ultimately, an objective approach prevailed because it emphasizes the significant reliance of one party on the serious promise of another.[141] If the subjective intent of one party is the only relevant inquiry, any promise or agreement made without the intent to be bound would not be binding.[142] The objective approach solves this problem by focusing only on "the reasonable expectations of the promisor, *or* the promisee."[143] The widespread use of an objective analysis further indicates the benefits it would have on identifying customary international law.

II. Analysis

Part III proposes improvement to the ILC draft conclusions, in light of concerns illustrated by the ECS ADIZ: when analyzing *opinio juris*, there must be both an objective and subjective determination of a State's belief that it is acting under customary international law and with possible ulterior motives. Specifically, this Note proposes the explicit addition of an objective analysis to be added to the commentary for Conclusion 9—Requirement of acceptance as law (*opinio juris*).[144]

Next, this Part analyzes China's actions surrounding the ECS ADIZ to show the importance of this objective analysis and how necessary it is to maintain the delicate balance of customary international law. Finally, Part III analogizes the objective *opinio juris* consideration to other areas of law to show its widespread use. These comparisons will also indicate the importance of employing an objective test to ensure uniformity and reliability in the difficult field of customary international law.

A. *The International Law Commission's Draft Conclusions Should Be Updated to Include an Objective Analysis.*

The ILC draft conclusions are incomplete.[145] When looking to determine whether there is acceptance as law (*opinio juris*), a State's objective motives and beliefs concerning legality should be

140. *Id.*
141. *See id.*
142. *See id.* at 431.
143. *Id.* (emphasis in original).
144. U.N. Doc. A/71/10, *supra* note 23, at 95.
145. *See infra* Section II.B.

considered, rather than simply the motives it publicly declares.[146] This Note proposes the following addition to Commentary (2) for Conclusion 9:

> Paragraph 1 explains that acceptance as law (*opinio juris*), as a constituent element of customary international law, refers to the requirement that the relevant practice must be undertaken with a sense of legal right or obligation, that is, it must be accompanied by a conviction that it is permitted, required or prohibited by customary international law. It is thus crucial to establish, in each case, that States have acted in a certain way because they felt or believed themselves legally compelled or entitled to do so by reason of a rule of customary international law: they must have pursued the practice as a matter of right, or submitted to it as a matter of obligation.[147] **. . . In addition to the subjective inquiry into a State's belief of its legal rights or obligations, acceptance as law must be identified as objectively reasonable behavior consistent with current customary international law.**

This analysis of objective intent is particularly relevant for actions which are only justified by a specific purpose. For example, ADIZs infringe on the freedom of overflight, which is justified only under concerns for national security and the right to self-defense.[148] Therefore, an objective analysis is key to ensuring appropriate establishment of ADIZs. The concerns raised in this Note are not limited to ADIZs; this is an issue that may arise in many different areas of customary international law.

By imposing an objective *opinio juris* requirement within the ILC draft conclusions, the field of customary international law will be strengthened. The objective element indicates that, like many other areas of law, what the State believes about its own actions is not determinative. If a State's actions do violate customary international law, the objective element allows other interested and affected States to challenge those actions.[149]

146. *See id.*

147. U.N. Doc. A/71/10, *supra* note 23, at 97.

148. *See* Almond, *supra* note 5 (permission denied when "Lao Airlines submitted an 'interim and vague' flight entry request and did not respond to requests for further information . . . .").

149. This would raise enforcement issues, but that is a substantial topic outside of the scope of this Note. *See* discussion *supra* note 35.

B. *China's Actions Revealed a Void in the Current Draft Rules for Identifying Customary International Law That Are Best Addressed by Including an Objective Analysis of Opinio Juris.*

This Section first looks at China's procedures in establishing the ECS ADIZ. Next, this Section analogizes the proposed objective *opinio juris* consideration to other areas of domestic and international law to show support for objective determinations throughout the legal community.

The ECS ADIZ has revealed a gap in the rules proposed for identifying customary international law. The draft conclusions do not impose an objective analysis of a State's intent and whether it has ulterior motives when it asserts compliance with customary international law.[150] Rather than considering both the subjective and objective prongs of good faith, the ILC draft conclusions permit a unilateral State action to create binding international law when only a subjective analysis is satisfied.[151] Looking more closely at a State's objective intent will appropriately limit the ability of a State to exercise its complete authority or sovereignty.[152]

This is the ideal place in the draft conclusions for the ILC to include an additional consideration of ulterior motives because the subjective nature of *opinio juris* already requires analysis of State's beliefs about its practice.[153] *Opinio juris* requires a State's belief that the practice it engages in is permissible as either a legal right or a legal obligation.[154] This belief in legal practice sets a continued State practice apart from an arbitrary one and places it in the realm of customary international law.[155] Although the draft con-

150. General practice, which is the first element of customary international law, is considered the objective element of the analysis. *See* U.N. Doc. A/71/10, *supra* note 23, at 87.

151. *See id.* at 99 (providing an example of unilateral state action to collect awards with no good faith effort to allocate properly).

152. *See* Reinhold, *supra* note 42, at 58.

153. This proposed consideration is aligned with the *opinio juris* element for purposes of clarity. However, it is also possible to make a similar consideration under the State practice element. And it is not particularly important where in the analysis possible ulterior motives are considered, since both elements are essential to recognizing customary international law. If considered as part of the State practice analysis, one may take a holistic view of the State's physical and verbal acts to determine if its practice aligns with that of other relevant States. It may be more difficult to impose this consideration in that context, however, because consistency through practice is defined on a case-by-case basis. *See* U.N. Doc. A/71/10, *supra* note 23, at 93.

154. *See* U.N. Doc. A/71/10, *supra* note 23, at 96–97.

155. *See id.* at 98 ("[W]ithout acceptance as law (*opinio juris*), a general practice may not be considered as creative, or expressive, of customary international law; it is mere usage or habit.").

clusions indicate at various points throughout the commentary some of the elements and considerations discussed in this Note, they do not explicitly indicate a need for objective *opinio juris* analysis.[156]

1. An Objective Analysis of *Opinio Juris* Would Remedy the Weakness of Current Customary International Law that China's Creation of the ECS ADIZ Exposes.

Although the second required element of customary international law, *opinio juris*, is characterized as the subjective element,[157] China's actions in the East China Sea expose the exploitable nature of a purely subjective analysis of *opinio juris*. There is a need to consider not only subjective intent but also objective intent.

Considering only the subjective view of a State's acceptance as law provides an incomplete analysis. By the nature of customary international law, generally-accepted rules for establishing ADIZs are not codified anywhere.[158] Therefore, China may incorrectly believe that it is abiding by the customs for establishing its ECS ADIZ and would satisfy the subjective inquiry.[159] China may truly believe it is acting within the color of customary international law because the rules promulgated for its ADIZ are, in its opinion, similar enough to rules established by other States.[160] Or China may repeatedly assert the belief that it is conforming to customary law, which would also satisfy the requirements as they are currently written.[161] On the other hand, an objective analysis would enable the international community to better prevent abuses of customary international law, like China's improper creation of the ECS ADIZ.[162]

However, under an objective analysis, it becomes clear that the ECS ADIZ does not align with customary international law. Situa-

156. *See* relevant conclusions and commentary discussed *supra* Section II.B.

157. *See* U.N. Doc. A/71/10, *supra* note 23, at 96.

158. *See* Bautista & Amador, *supra* note 74 and accompanying text.

159. *See* U.N. Doc. A/71/10, *supra* note 23, at 97 ("The States concerned must therefore feel that they are conforming to what amounts to a legal obligation.") (quoting North Sea Continental Shelf (Ger./Den.; Ger./Neth.), Judgment, 1969 I.C.J. 3, ¶ 77 (Feb. 20)).

160. *See* Hipple, *supra* note 103 (comparing the exact language of the ECS ADIZ AIR to practices of other States).

161. Some recent ADIZs have been established in airspace where a State has no sovereignty, or where sovereignty is disputed amongst several nations. This has "led to an interpretation that ADIZ may also be used to substantiate territorial claims over disputed areas." Papp, *supra* note 75, at 30 (citing Christopher K. Lamont, *Conflict in the Skies: The Law of Air Defence Identification Zones*, 39 Air & Space L. 187, 202 (2014)).

162. *See supra* Section I.C.2.

tions may arise where a State exercises consistent practice throughout all areas of the government, but the underlying motives are ignored because only a subjective analysis is relevant. For example, utilizing a subjective analysis, China appears to be following customary international law. China has issued statements supporting ADIZs and claiming to have followed the customary law of ADIZs supports the rule.[163] But under the objective *opinio juris* approach, China's actions clearly indicate that the ECS ADIZ is not a measure of protection for national security.[164] For example, China has not enforced the ECS ADIZ since its creation, so it cannot be justified by the principles of national security and thus violates customary laws.[165] If the ECS ADIZ truly was established out of national security concerns, China would have been enforcing the rules since its creation because it would have had legitimate concerns about the safety of its territorial airspace.

As it stands, the purely subjective determination of customary international law would render China's unilateral belief[166] in the legality of its actions as customary international law. Although China's statements are only part of the analysis when viewed with the general practice element, there is still no opportunity to make an objective consideration of the State's intent. An objective consideration is necessary within the *opinio juris* framework because customary international law is based on States agreeing to be bound by rules and policies.[167] The automatic binding nature of customary international law makes it imperative that each State continues to act within the bounds of customary laws and not utilize them for ulterior motives.[168]

Despite the discrepancy between China's statements and actions, the ECS ADIZ has not been significantly challenged by other States.[169] Even though the majority of states believe that these

163. *See* U.N. Doc. A/71/10, *supra* note 23, at 96; Michael. P Scharf, *Accelerated Formation of Customary International Law*, 20 ILSA J. Int'l & Comp. L. 305, 322 (2014).

164. The way China has used the ECS ADIZ—for instance, the increased military presence around disputed areas in the East China Sea—does not align with the usual State practice for ADIZs and strongly indicates the use of the ECS ADIZ for offensive (sovereignty), not defensive (national security) purposes. *See* Almond, *supra* note 18, at 181–83.

165. *See* Hailbronner, *supra* note 83, at 515–17 and accompanying text; *supra* note 86 and accompanying text.

166. *See Statement by the Government of the People's Republic of China on Establishing the East China Sea Air Defense Identification Zone*, *supra* note 97.

167. *See* Reinhold, *supra* note 42, at 46–48.

168. *Id.*

169. *See, e.g.*, Almond, *supra* note 18, at 186 ("The United States, for example, instructed its commercial carriers operating internationally to follow Chinese NOTAMs related to the ECS ADIZ for the safety and security of passengers, but noted that this action

rules do not align with the customary law,[170] the dangers of not submitting flight plans are greater than the benefits of taking a stand against China's ADIZ.[171] Unfortunately, looking at the general adherence to the ADIZ rules by affected States and the statements produced by China's defense ministry, the ECS ADIZ appears to fall within the current bounds of customary law.[172] These are the situations that make the purely subjective analysis dangerous. There is a need within the international community to hold States like China accountable for violations of customary international law without risking international security.

Opinio juris, as addressed in the current draft conclusions, requires consideration of not only the State that is taking action, but also those States in a position to react. This is still a subjective analysis, however, and does not address the concerns raised here.[173] Therefore, this additional consideration of objective *opinio juris* is not a significant change for the identification of customary international law. Including an objective analysis will, however, take this one step further and utilize the reactions of other States to consider the intent and *opinio juris* of the State taking action. Under a subjective analysis, China's statements receive significant weight. China stated that it is acting to protect national security and that it has mobilized its military to enforce the ECS ADIZ if necessary.[174] But under an objective analysis, identification of customary international law also considers what other States believe regarding China's actions, regardless of the latter's statements. The reactions from interested States have been significant, continuous, and mostly negative.[175]

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does not indicate the U.S. government's acceptance of the ECS ADIZ."); RINEHART & ELIAS, *supra* note 9, at 22 ("Taiwan instructed its commercial airlines to submit flight plans to the PRC's authorities, arguing that the general directive is in accordance with international regulations rather than in recognition of the PRC's ECS ADIZ.").

170. This adherence to the rules may be used to justify why China has never needed to enforce the ECS ADIZ, but there have been repeated violations of the rules where China should have taken enforcement action if it was serious about national security concerns. *See* PILGER, *supra* note 1, at *4; RINEHART & ELIAS, *supra* note 9, at 16–17.

171. *See* Ohr, *supra* note 90, at 3. Despite initially taking actions to express its disapproval of the ECS ADIZ, the United States then issued a notice to airmen that it shall abide by China's published rules because "the United States had to weigh its diplomatic concerns against the safety and protection of U.S. civil aviation, and elected to protect the latter." *Id.* at 96.

172. *See id.* at 3.

173. U.N. Doc. A/71/10, *supra* note 23, at 87.

174. *See* Almond, *supra* note 18, at 129–30.

175. *See id.* at 130–32.

An objective *opinio juris* analysis of the present issue illustrates the problems with an analysis that utilizes only subjective elements: a State may simply assert that it has followed customary international law with no check on its actions. When China unilaterally established the ECS ADIZ in November 2013, it received immediate backlash around the world.[176] The United States, in particular, protested and criticized the ECS ADIZ by illustrating how it failed to follow the widely-accepted practices for establishing and enforcing ADIZs.[177] But despite the existence of widely-accepted practices, there are no codified rules regarding ADIZ enforcement.[178] The inconsistencies inherent in customary international law—a generally unwritten, uncodified area—allow China to assert that any differences between its actions and the actions of any other State are normal for customary international law.[179] Without an objective intent analysis, customary international law leaves room for States to act outside the scope of the law, but claim they are acting within the limits.[180] This inherent uncertainty within the international community creates different interpretations of a State's intent under subjective and objective analyses.

The opposition from other States signals that China's actions are not within the normal boundaries of customary international law.[181] With the final version of ILC's draft conclusions for identi-

176. *See id.*

177. "The United States has also rejected the ECS ADIZ as being inconsistent with international norms. The Obama Administration claims that China's failure to distinguish between aircraft intending to enter national airspace and aircraft merely overflying the East China Sea gives the ECS ADIZ broader reach than is permitted under international law." Almond, *supra* note 18, at 131. "Four members of the Senate Foreign Relations Committee wrote to the PRC Ambassador in Washington that the unilateral declaration of an ECS ADIZ was 'provocative' because it extends over territories 'recognized by the United States as under the administrative control of Japan,' overlaps with other ADIZs, and has procedures that are potentially dangerous." RINEHART & ELIAS, *supra* note 9, at 17.

178. Almond, *supra* note 18, at 132–33 ("The problem with ADIZs is that there is no express basis in international law for establishing such zones in international airspace. International regimes governing international airspace and waters neither prescribe nor prohibit ADIZs. Instead, ADIZs arise from state practice and are consequently subject to development and variances associated with customary international law.").

179. *See id.* at 133.

180. *See id.* For example, States may not validly exercise sovereignty over international airspace because this infringes on the freedom of overflight guaranteed by UNCLOS Article 89.

See id. But "[d]espite this limitation, states may attempt to couple ADIZs with accepted forms of coastal state jurisdiction associated with subjacent maritime zones in an effort to bolster controversial sovereignty claims." *Id.*

181. The ECS ADIZ triggered significant concerns, particularly from South Korea, Taiwan, and Japan, regarding the location boundaries established by Beijing. *See id.* at 129. The United States has also voiced opposition to the rules promulgated that make the ECS

fying customary international law forthcoming, China's actions illustrate the need for clearer and more thorough *opinio juris* considerations.

2. Consideration of Objective *Opinio Juris* Is Necessary in Customary International Law and This Analysis Correctly Follows Other Areas of Law That Require an Objective Analysis for Increased Accuracy and Consistency.

This Section compares other areas of law that utilize on objective considerations similar to that proposed in this Note. First, requiring both a subjective and objective analysis is in line with the principles of treaty formation. Second, the objective analysis is compared to *mens rea* in the United States and Canadian criminal law. Finally, this Section compares the objective intent analysis to that utilized in contract law.

a. Creation of International Treaties Imposes a Requirement of Objective and Subjective "Good Faith" on All Parties.

Customary international law, like treaties, can be established by unilateral actions of a State,[182] and good faith is of exceptional importance.[183] Good faith in other areas of international law requires both subjective and objective elements, and customary international law should not be different.[184] While the subjective element makes unilateral action binding on the State, it is the objective element that gives other States "trust and confidence" in the intent to be bound.[185] Thus, the presence of both elements acts to distinguish statements that create binding obligations from those that do not.[186]

Currently, the ILC draft rules explicitly require only a subjective *opinio juris* analysis.[187] But just like *pacta sunt servanda* requires sub-

ADIZ applicable to *all* aircrafts—civil and State—whether passing through or intending to enter Chinese national airspace. *Id.* at 130.

182. *See supra* note 44 and accompanying text.

183. *See* Reinhold, *supra* note 42, at 47. Although the first element of customary international law requires widespread, consistent practice of States, unilateral State action may be used to establish customary international law because there is no requirement that States reach an agreement prior to identification as law. *See* U.N. Doc. A/71/10, *supra* note 23, at 91. Therefore, while it may require action of several States to rise to the level of customary international law, this action may be unilateral in nature. *See id.*

184. *See* Reinhold, *supra* note 42, at 48–49.

185. *See id.*

186. *See id.*

187. U.N. Doc. A/71/10, *supra* note 23, at 96.

jective and objective good faith for treaties,[188] there must also be a dual consideration in the analysis of *opinio juris* for identification of customary international law. By imposing only a subjective analysis in customary international law, there is no trust placed in the statements or actions of the declaring State.[189] If there is not enough trust, the international community will be increasingly hesitant to rely on customary law. The ILC needs to clearly impose an objective determination of *opinio juris* to ensure trust in the actions of other States and therefore in the customary international law system. This is best done by imposing an objective analysis within the *opinio juris* framework because trust will then be present and considered from the inception of customary laws. With this additional consideration, States will be confident in unilateral declarations and will be more likely to respect them.[190]

b. Both Criminal Law and Contract Law Utilize an Objective Analysis Instead of a Subjective One Because It Is More Applicable and Reliable.

Customary international law is binding law, regardless of its uncodified nature, and violations must be enforced even if a State asserts subjective acceptance as law. When identifying and enforcing customary international law, "there should be a clear distinction in the law between one who was aware (pure subjective intent) and one who should have taken care irrespective of awareness (pure objective intent)."[191]

The additional objective consideration proposed in this Note is similar to determining an individual's *mens rea* in certain criminal trials.[192] In criminal trials, the totality of the evidence is used to determine an individual's *mens rea*, not only the statements the individual makes.[193] Conclusions regarding the accused's state of mind are based on an *objective* determination: there is consideration of all available evidence, rather than taking an individual's words at face value.[194] Moreover, Canadian courts require a holis-

188. Reinhold, *supra* note 42, at 47.
189. *See id.* at 47–48.
190. *See id.* at 48.
191. R. v. Hundal, [1993] S.C.R. 867, 883 (Can.).
192. *See, e.g., id.* at 886; Hautamaki, *supra* note 126, at 64.
193. *See* Baker, *supra* note 30, at 193. Although *mens rea* in the traditional sense is determined by a jury in a criminal trial, the concept can be applied to other situations where those observing have drawn conclusions about an individual or a country's state of mind. *Id.*
194. *Id.*

tic view of the facts to determine if the accused's actions were reasonable in the circumstances.[195]

The objective test applied in criminal cases is akin to the consideration that should be required for customary international law and determinations of *opinio juris* because it accounts for the totality of the evidence, not just blind acceptance of a State's unilateral assertion by one party. This is particularly important in customary international law because it is binding on all States.[196] Under an objective analysis, identification and enforcement of customary international law would involve analysis of reactions from other States. Here, the negative responses to the ECS ADIZ indicate that China did not follow established customs.[197]

The conflict between China's statements and actions further demonstrate the importance of looking at objective intent.[198] China has expressed support for the customary law of ADIZs by repeatedly asserting that its actions in the East China Sea follow customary law.[199] By making such assertions, China agreed to a set of standards.[200] After agreeing to these standards, China subsequently circumvented or disregarded them by establishing the ECS ADIZ.[201] China's actions—establishing the ECS ADIZ notwithstanding its statements in support of ADIZ rules—is analogous to willful blindness.[202] The totality of China's actions indicates it was aware of the standards and rules prescribed by the continued practice of other States, but chose to turn a blind eye and recklessly disregard the rules. Utilizing the totality of its actions to analyze customary international law, an objective analysis would expose

195. *See* R. v. Tutton, [1989] S.C.R. 1392, 1432 (Can.); Hundal, S.C.R. 867 at 886–88.

196. *See* Baker, *supra* note 30, at 178. *But see* discussion of persistent objector principle, *supra* note 36.

197. *See supra* Section I.C.2.

198. *See id.*

199. *See China Exclusive*, *supra* note 12.

200. *See* Ohr, *supra* note 90, at 23–26 (explaining the standards utilizing internationally for ADIZs).

201. *See* U.N. Doc. A/71/10, *supra* note 23, at 96 (quoting Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, ¶ 186 (June 27)) ("If a State acts in a way prima facie incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule.").

202. This example is used on a very basic level to indicate possible ways to characterize China's ECS ADIZ actions. In-depth discussion of the similarities of China's actions and possible criminal *mens rea* goes beyond the scope of this Note and would require further research.

China's deliberate ignorance of the customary international law for establishing ADIZs.

Furthermore, if only a subjective analysis is applied, customary international law will face similar difficulties found in contract law, because customary international law is essentially an oral contract between States. Under an analysis that examines only subjective elements, States that are willing to be bound by the new customary laws will be bound, and those that object, will not be.[203] Therefore, those States that object can assert a different state of mind and claim that they cannot be bound. States like China can assert that they did not have the requisite state of mind and belief in law necessary for *opinio juris* and thus their actions fall outside the scope of the developed customary law. It is particularly important to look at objective intent because, like contract terms, customary international law may be subject to shifting interpretations.

III. Counterarguments

This Part addresses possible counterarguments to this proposal. The first counterargument is that an objective test will unnecessarily involve the considerations of other States, which may be influenced by their own bias. The second argument is that obtaining a truly objective analysis is impossible in an area like international law because of the inherent cultural biases.

A. *An Objective Test Will Unnecessarily Involve the Considerations of Other States, Which May Be Biased in Their Own Favor.*

Incorporating an objective analysis will unnecessarily involve the opinions of other States in trying to identify *opinio juris*.[204] *Opinio juris* is meant to be an analysis of the relevant State's belief about the legality of its actions;[205] *opinio juris* is not meant to consider other States' beliefs because this consideration would necessarily "reflect the immediate self-interest" of the States involved.[206] Customary international law is already an unsettled vague area of law and incorporating biased opinions of other interested States will

203. *See* discussion of persistent objector principle, *supra* note 36.

204. *See* J. Patrick Kelly, *The Twilight of Customary International Law*, 40 Va. J. Int'l L. 449, 466 (2000).

205. U.N. Doc. A/71/10, *supra* note 23, at 97 ("It is thus crucial to establish, in each case, that States have acted in a certain way because they felt or believed themselves legally compelled or entitled to do so by reason of a rule of customary international law: they must have pursued the practice as a matter of right, or submitted to it as a matter of obligation.").

206. Kelly, *supra* note 204, at 466.

only complicate this more. If a State has indicated its agreement with the relevant customary law and expressly intends to be bound by that law, this should be sufficient to find that it has satisfied both required elements.[207]

In response, it is important to note that the opinions and reactions of other States are already a relevant factor in the ILC's rules.[208] The rules currently require consideration of other States' reactions when identifying *opinio juris*.[209] Therefore, this proposed element does not step outside the established bounds of identifying customary international law; it merely adds to the analysis to ensure that there is clarity in such an uncertain area of law.[210] Furthermore, this proposed approach increases the legitimacy of customary international law because it helps equalize cultural biases of various States.[211] Such a consideration is necessary for other States to feel confident relying on customary law as binding.[212]

B. *There Is No Way to Obtain a Truly Objective Analysis of a State's Actions.*

In stating that customary international law should be eliminated entirely as a source of binding international law and replaced by a new process, one author argues that an objective analysis is impossible.[213] The argument states that the objective moment when State actions have become binding law cannot be accurately identified because there are too many factors within the international context to be considered.[214] Even using general State practice, the first element of customary international law, will not lead to definitive, objective assessments of *opinio juris* because States will disagree

207. *See* U.N. Doc. A/71/10, *supra* note 23, at 97.

208. *Id.* at 87.

209. "Moreover, acceptance as law (*opinio juris*) is to be sought with respect not only to those taking part in the practice but also to those in a position to react to it." *Id.*

210. *See supra* Section II.A.1.

211. One author indicates that one should be wary when analyzing customary international law because the "habitual practice of some states or even that of a majority of states within their own jurisdiction may only reflect a domestic policy preference, not a sense of international legal obligation." Kelly, *supra* note 204, at 467. Thus, by considering an objective analysis that accounts for other affected and interested States, the cultural biases of States will offset each other and the process will become consistently more balanced.

212. *See supra* Section II.B.2.a.

213. Kelly, *supra* note 204, at 498 ("In a decentralized world of many cultures and interests, it is impossible to objectively determine the *opinio juris* of states.").

214. *Id.* at 492. An objective determination still must take into account "culturally-based domestic court decisions and international treaties signed by a portion of the world community" and thus require more than just an analysis of the actions relevant to this potential customary international law. *See id.*

on what counts as State practice under the first element.[215] Furthermore, an objective analysis is impossible because States cannot ignore their own cultural biases.[216] Any conclusions regarding *opinio juris* that may be drawn will be "inherently affected by the observer's normative perspective."[217]

An objective analysis is possible when identifying customary international law because it will account for the views of many States, not just the view of one. A subjective analysis focuses on the beliefs of the one particular State taking the action such as China's beliefs regarding the ECS ADIZ. But under an objective analysis, the ILC rules will consider a totality of the evidence—including the views of the rest of the international community—to determine if customary international law has been created or appropriately followed.[218] The ILC draft conclusions emphasize the need for an all-encompassing, thorough analysis.[219] This proposal expands that analysis to allow the international community to weigh in on *opinio juris* because customary international law affects the entire international community.

Conclusion

This Note began by discussing the uncertainty of customary international law and the need to create consistent, thorough guidelines.[220] The weaknesses were illustrated by China's actions in the East China Sea.[221] China has stated its intention to create more ADIZs,[222] likely in the South China Sea,[223] and thus the concerns voiced by other States may become increasingly significant.

This Note then discussed the significant steps the ILC has taken to remedy the uncertainty surrounding customary international law.[224] The guidelines compile relevant considerations into one comprehensive document. Over twenty countries throughout the drafting process have provided comments and the ILC has incorporated a variety of practices into the draft rules. This Note, however, argued that a consideration is missing from the draft

215. *See id.* at 516.
216. *See id.* at 495.
217. *Id.*
218. *See supra* Section I.B.
219. *See* U.N. Doc. A/71/10, *supra* note 23, at 76.
220. *See supra* Section I.A.
221. *See supra* Section II.B.
222. *China Exclusive*, *supra* note 12.
223. *See* Pilger, *supra* note 1, at 11.
224. *See supra* Section I.B.

conclusion that is essential to maintaining peaceful application of customary international law: the consideration of objective intent when analyzing *opinio juris* to identify customary international law.

Based on China's actions in the East China Sea, this Note argued that the ILC should include a consideration of objective *opinio juris* in the final version of its rules on identifying customary international law.[225] This proposal is rooted in other areas of law, both international and domestic, and serves an important purpose when applied to a customary law analysis. An objective test of acceptance as law will ensure States from taking advantage of the unwritten, interpretation-based aspects of customary international law.

225. *See supra* Part II.