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"RENDITION FLIGHTS" AND INTERNATIONAL AIR LAW

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INTRODUCTION

The term "rendition" does not have a globally accepted legal meaning. Apart from the multiple dictionary connotations it has acquired, in some jurisdictions, it means the "delivery" of a person from one State jurisdiction to another State jurisdiction. Such a "rendition" may be made as a result of formal extradition proceedings or it may be a *de facto* physical delivery of a person to a particular jurisdiction.

This is how the term is used in Article 4, Section 2, Clause 2 of the Constitution of the United States according to which a fugitive felon is to be "delivered up, to be removed to the state having jurisdiction of the crime". This provision is usually referred to as the "interstate rendition clause". Article 9 of the 1963 Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft also authorizes the aircraft commander to "deliver" (remettre, entregar) to a State of landing any person he has reasonable grounds to believe has committed on board an aircraft a serious offence.

Current attention is focused on "extraordinary renditions". In the wake of September 11, 2001, US authorities are alleged to have transported high-value terrorists by aircraft from one territory to another without trial and without protection against torture by proxy or other abuses. The media has reported that individuals have been transported to countries such as Syria, Egypt, Uzbekistan, and Afghanistan. The aircraft used for such "rendition" have also landed in several European countries and in the UK dependent territory of Diego Garcia; they may have flown, without landing, through the sovereign airspace of several other countries.

The aircraft allegedly used for such "rendition flights" have been identified as "executive" passenger aircraft of the type Gulfstream (14 seats) and an executive version of B-737 (32 seats), not displaying the air carrier's name or logo and thus being "anonymous" (however, in some instance ostensibly hired from Premier Executive Transport Services, a private company in Massachusetts). The media assumed that the private companies were a "front" for the US security agencies. All such aircraft had the US nationality mark ("N" –'November' in aviation jargon) and their registration numbers (and thereby possibly the ownership or type of operation) were in the past changed, in the case of one aircraft several times.

At first glance, it would appear that the aircraft used for the "rendition flights" were civil aircraft and that their status and operation would therefore be subject to the Convention on International Civil Aviation (Chicago, 7 December 1944) and fall within the jurisdictional scope of the International Civil Aviation Organization (ICAO). However, such assumption requires critical analysis.

A. CIVIL AND STATE AIRCRAFT IN INTERNATIONAL LAW

It is of importance that the Chicago Convention's name stresses the words "international **civil** aviation". Since the earliest history of the development of international air law all international instruments referred strictly only to "civil" or "commercial" aircraft and expressly excluded "State" aircraft.[1]

The status of the state/military aircraft is not clearly determined by positive rules of international law and is not particularly transparent or unequivocal.[2] The issue is not addressed in international law with any specificity; could not be located in any one single international instrument; and only some fragmentary aspects can be deduced directly or indirectly from different sources of international law (international treaties). The identifiable rules are mostly "negative" in that they state what does not apply to military aircraft or what such aircraft is not permitted to do. The practice of States that could form a basis for the development of customary law is also not transparent or uniform and is often shrouded in secrecy.

The difficulty in determining whether aircraft would be considered state aircraft has been also mostly ignored in the legal research and literature and in the process of teaching. The only dedicated monograph on the legal status of military aircraft was published half a century ago in 1957 and is only available in French.[3] Much more attention has been paid in literature to the legal position of military aircraft during an armed conflict - as belligerent, neutral or on a humanitarian mission-- than to its status in the time of peace.

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[1] Sections A, B and C of this paper are substantially a reproduction of the author's views from his book "*International Air Law and ICAO*", Eleven International Publishes, Utrecht 2008 as background reference.

[2] The term "state aircraft" and "military aircraft" are often used interchangeably in international aviation law.

[3] *Peng, Ming-Min,* "Le status juridique de l'aeronef militaire", Martinus Nijhoff, The Hague, 1957. See also *Milde, Michael,* "Status of military aircraft in international law", in Luft- und Welraumrech im 21. Jahrhundert, Carl Heymans Verlag KG, 2001, pp. 152-165.

Since the inception of aviation, States have been openly hostile to the idea that their state/military aircraft - tools and symbols of their military power, sovereignty, independence and prestige - should be subject to international regulation. The concerns for national security prompted States to legally curtail the access of foreign military aircraft to their territory well before the onset of World War I when aviation was in its infancy.

Much of the current lack of transparency and precision concerning the status of state/military aircraft is attributable to the fact that aviation since its inception was perceived as a potential tool for belligerent activities. The military use of aviation has been a powerful primary catalyst in the rapid development of aviation technology in general and that technology was only later adapted to civilian use. The fundamental principles of codified international air law were created in the shadow of World War I and the current public international air law in World War II during which aviation proved its devastating tactical and strategic potential.

1) Evolution of the International Legal Regime to Civil and State Aircraft

The Paris Convention of 1919 drew a distinction between "*private aircraft*" and "*State aircraft*". The following provisions are relevant:

> Article 30. - The following shall be deemed to be State aircraft: -
> (a.) Military aircraft;
> (b.) Aircraft exclusively employed in State service, such as posts, customs, police.
> Every other aircraft shall be deemed to be a private aircraft.
> All State aircraft other than military, customs and police aircraft shall be treated as private aircraft and as such shall be subject to all the provisions of the present Convention.
>
> Article 31.- Every aircraft commanded by a person in military service detailed for the purpose shall be deemed to be a military aircraft.[4]

The Paris Convention was fairly liberal and each State granted, in time of peace, "freedom of innocent passage" above its territory to the aircraft of other contracting States without distinction of nationality.[5] However, Article 32 of the Convention provided that "no military aircraft of a contracting State shall fly over the territory of another contracting State nor land thereon without special authorization". Similarly, special arrangements between the States concerned were to determine in what cases police and customs aircraft could be authorized to cross the frontier. Thus, from the very inception of international air law, military aircraft was given a special status restricting their freedom of operation in foreign sovereign air space and making it subject to a "special authorization" of the State to be overflown.

[4] The term "aircraft" was not defined in the Convention itself but only in its Annex A as "all machines which can derive support in the atmosphere from the reactions of the air".

[5] Article 2.

It is noteworthy that Articles 30 and 31 of the Paris Convention do not give a definition of "military aircraft" but rather set out a presumption on what is to be "deemed" to be a State or military aircraft.

Practical problems arose shortly after the adoption of the Versailles Peace Treaty when the Allies tried to confiscate some of the German aeronautical equipment which they claimed was "military" while Germany claimed it to be "civil". The Allied Supreme Council requested the Consultative Committee on Aeronautics to draft rules authorizing the distinction between "civil" aviation and "military and naval aviation" which was prohibited by the Peace Treaty. The complex negotiations resulted in the formulation of "Nine Rules" which came into force on 5 May 1922.[6] These "Rules" made a futile attempt to define "military" aircraft strictly by the technical parameters known at the time but which by today's standards, sound not only outdated but outright ludicrous.[7]

From this, we can conclude that the civil or military character of an aircraft will never be meaningfully determined solely on the basis of its technical features. The absurdity of the technical criteria was soon proved when Germany made protests that much of the civil aviation equipment operated by the Allies over Germany in fact met the criteria of "military" aircraft. Another problem that was not dealt with or resolved in the period between the two Word Wars was the ease by which civil aircraft could be converted to military use and vice-versa.

2) Chicago Convention on Civil and State Aircraft

By its very title the International Convention on Civil Aviation deals with *civil* aircraft and *civil* aviation. Like its 1919 precursor, the Convention itself does not give a definition of "aircraft" and that definition can only in subsidiary legal sources.[8]

Article 3 of the Convention restricts the scope of applicability of the Convention to "civil" aircraft. The initial interpretation of this provision must lead to unequivocal conclusion that:

- The Chicago Convention does not apply to state aircraft (which includes but is not limited to military aircraft). Hence, even the law-making powers of the ICAO Council to adopt Standards and Recommended Practices (SARPs) and the overall mandate of the Organization is restricted civil aircraft only;

- State aircraft is not permitted to fly over or land in foreign sovereign territory without the express authorization of the State concerned; and

[6] See *J.C. Cooper,* in "Explorations in Aerospace Law, Selected Essays by John Cobb Cooper" (1968)t , p. 306.

[7] These parameters set out that any single-seated aircraft with an engine power exceeding 60 HP; aircraft which can reach an altitude beyond 4000 m with a full load or exceed the maximum speed of 170 km per hour or carry more than a 600 kg load, including the pilot, mechanic and instruments would be classified as "military aircraft".

[8] See, for example, Annex 7.

- State aircraft may fly within the territory of its State of nationality (i.e., within the land mass and territorial waters of that State); and over the high sea and areas of undetermined sovereignty. They may fly within a foreign sovereign territory on the basis of special authorization and in harmony with the terms of such authorization. Such authorization must be given by a special agreement "or otherwise". State practice indicates that the preferred form of authorization is by bilateral or multilateral agreement between the States concerned or by obtaining "*ad hoc*" permission properly obtained through the diplomatic channels; a mere operational air traffic control (ATC) clearance for the flight would not appear sufficient to satisfy the terms of Article 3 (c).

If a "state aircraft" enters the foreign sovereign air space without a proper authorization, such an aircraft may be:

- intercepted for purposes of identification;
- directed to leave the violated air space by a determined route;
- directed to land for the purpose of further investigation/prosecution;
- forced to land for further investigation/prosecution.

The State of the violating aircraft would face international responsibility for the infraction. However, the nature and severity of such responsibility would depend on the overall relations of the States concerned and could range from the duty to apologize; to promise to penalize the individuals responsible; to promise not to repeat such infraction; to more severe sanctions, including the forfeiture of the violating aircraft and imprisonment of the crew.

The use of weapons against such an aircraft - "violator" - in time of peace would be reprehensible and contrary to all humanitarian concepts; in most cases, it would lead not only to the destruction of the aircraft but also to a death sentence and the immediate execution for all persons on board without due process of law or right to appeal. This would hardly reflect a "proportionate" use of force. Nevertheless, the codified international law (new Article 3 *bis* of the Chicago Convention[9]) recognizes the general prohibition of the use of weapons only against civil aircraft in flight. State (and in particular military) aircraft does not enjoy such general protection in international law.

The Chicago Convention contains additional restrictions, such as Article 8 on pilotless aircraft, which in practice would be applicable in particular to state/military aircraft. The arsenal of air forces in the world include aircraft capable of being flown without a pilot (for example, balloons, drones, some miniature in size). The flight of pilotless aircraft over foreign territory is expressly subject to the special authorization of the State to be overflown and in accordance with the terms of such authorization. Moreover, contracting States have accepted a legal undertaking to ensure that the flights of such pilotless aircraft in regions open to civil aircraft shall be so controlled as to obviate danger to civil aircraft.[9]

[9] Article 9 of the Convention.

Furthermore, no munitions of war or implements of war may be carried in or above the territory of a State in aircraft engaged in international navigation, except by permission of that State and each State may define by its regulations what constitutes implements of war.[10]

3) Other International Instruments relating to Civil and State Aircraft

State aircraft is also expressly excluded from the scope of applicability of many multilateral conventions unifying the international air law. The scope of applicability of such Conventions is not predetermined by Article 3(a) and (b) of the Chicago Convention; they define their scope of applicability independently.

- The Geneva Convention on the International Recognition of Rights in Aircraft (1948)[11] has a provision, in Article XIII that, "[t]his Convention shall not apply to aircraft used in military, customs or police services". This text avoids the use of the Chicago Convention's term "state aircraft" in Article 3 (a) and the presumption in Article 3 (b) as to what is "deemed" to be "state aircraft".

- Article 26 of the Rome Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface (1952)[12] stipulates that, "[t]his Convention shall not apply to damage caused by military, customs or police aircraft". This wording departs even further from Article 3 of the Chicago Convention by omitting the expression "used in" and does not provide a definition of the terms "military, customs or police aircraft". This Convention was amended by the Montreal Protocol (1978)[13] which amends Article 26 to more closely align it with Article 3 (b) of the Chicago Convention ("This Convention shall not apply to damage caused by aircraft used in military, customs or police services").

- Article 1, paragraph 4 of the Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft (1963)[14] stipulates that, "[t]his Convention shall not apply to aircraft used in military, customs or police service". Such a standardized clause is further used in The Hague Convention for the Suppression of Unlawful seizure of Aircraft (1970)[15] and the Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (1971.[16]

[10] Article 35 (a) of the Convention.

[11] ICAO Doc 7620.

[12] ICAO Doc 7364.

[13] ICAO Doc 9257.

[14] ICAO Doc 8364.

[15] ICAO Doc 8920, Article 3, paragraph 2.

[16] ICAO Doc 8966, Article 4, paragraph 1.

Less direct is the exclusion of state aircraft from the scope of applicability of the Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air (1929).[17] This Convention is applicable to carriage performed by the State or by legally constituted public bodies.[18] However, the Additional Protocol to the Convention gives parties the right to make a declaration that Article 2 (1) of the Convention that it shall not apply to carriage performed directly by the State.

Under The Hague Protocol of 1955 amending the Warsaw Convention of 1929[19] States are entitled to make a declaration that the Convention as amended by the Protocol shall not apply to the carriage of persons, cargo and baggage for its military authorities on aircraft, registered in that State, the whole capacity of which has been reserved by or on behalf of such authorities. Similar provisions can be found in further attempts at a revision of the "Warsaw system" - the Guatemala City Protocol (1971)[20] the Additional Protocol of Montreal No. 2 (1975)[21], Additional Protocol of Montreal No. 3 (1975)[22] and the Montreal Protocol No. 4 (1975).[23]

On 28 May 1999 a Diplomatic Conference convened under the auspices of ICAO in Montreal adopted and opened for signature a new Convention for the Unification of certain Rules for International Carriage by Air[24] which is intended to replace the "Warsaw system" of instruments. Under Article 2, paragraph 1 the Convention applies to carriage performed by the state or by legally constituted public bodies. However, under Article 57 a State may at any time make reservations permitted by the Convention to declare that the Convention shall not apply to:

> (a) international carriage by air performed and operated directly by that State Party for non-commercial purposes in respect to its functions and duties as a sovereign State; and/or
>
> (b) the carriage of persons, cargo and baggage for its military authorities on aircraft registered in or leased by that State Party, the whole capacity of which has been reserved by or on behalf of such authorities.

It may be concluded that the unification of private air law in the "Warsaw system" and its successor of 1999 does not exclude carriage by state/military aircraft but permits States to

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[17] II Conference Internationale de droit prive aerien, 4-12 October 1929, Varsovie (Warszawa 1930), pp. 220- 233. [Note: the text of the Convention is authentic only in the French language].

[18] Article 2; in 1929 there were in fact no "private" airlines and , except in the USA and possibly Japan., the airlines were government owned and government controlled.

[19] ICAO Doc 7632, Article XXVI.

[20] ICAO Doc 8932; this document did not come into force and is now obsolete.

[21] ICAO Doc 9146, Article XXVI.

[22] ICAO Doc 9147, Article XI, paragraph 1 (b); this document did not come into force and is now obsolete.

[23] ICAO Doc 9148, Article XXI, paragraph 1 (b).

[24] ICAO Doc 9740.

exclude by an explicit reservation any such carriage performed "*iure imperii*", i.e., in the exercise of the sovereign functions of the state.

B. DEFINITION OF "STATE" AND "CIVIL AIRCRAFT" UNDER ARTICLE 3(b) OF THE CHICAGO CONVENTION

Article 3 of the Chicago Convention singles out the concept of "state aircraft" for a special legal regime outside the scope of the Convention but does not give a definition of the term. Article 3 (b) of the Convention only states that, "Aircraft used in military, customs and police services shall be deemed to be state aircraft".

This is not a definition but only a rebuttable presumption *(presumptio iuris)*. Many other types of aircraft may be involved in activities of the State *iure imperii* (in the State function), such as coastguards, search and rescue, medical services, mapping or geological survey services, disaster relief, VIP and Government transport, etc. Consequently, the examples given in article 3 (b) cannot be taken as comprehensive or exclusive.

In the context of this study the definition of "military" aircraft is of critical importance. However, the Convention does not give any definition of "military…services" and any effort at interpretation has to start with the "ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".[25]

The ordinary meaning of the terms "military . . . services" may seem to be a matter of "common sense" and probably was so treated by the drafters of the Convention at the Chicago Conference since the Proceedings of the Chicago Conference of 1944 fail to clarify in any manner the meaning of the expression. The original proposal of the US Delegation consisted of one single sentence stating that the Convention should be applicable only to civil aircraft (without defining the term). In later discussions (which are not recorded), it was suggested that the Article be expanded to give a definition of military and state aircraft and defining their status with respect to the Convention. "After considerable consultations with the military authorities of the United States and United Kingdom", the text was adopted as it appears in Article 3.[26] Thus the drafting history does not assist in any manner in the interpretation. While the Vienna Convention provides that, "[a] special meaning shall be given to a term if it is established that the parties so intended"[27], there is no indication of any special intention of the parties with respect to the words "military . . . services".

What characteristics could distinguish an aircraft to characterize it as a "military aircraft"? The following elements could be considered - not in isolation but in their mutual combination and may assist in the determination of the military nature of the aircraft:

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[25] Vienna Convention on the Law of Treaties, 1969, Article 31, 1.

[26] Proceedings, Vol. II, p.1381.

[27] Vienna Convention on the Law of Treaties, 1969, Article 31, 4.

- *Design of the aircraft and its technical characteristics*: some aircraft by their design and characteristics (including their weaponry) are constructed exclusively for military combat, while other types may be readily converted for other purposes. As mentioned above, it does not appear reliable to define the nature of the aircraft solely on the basis of its technical characteristics;

- *Registration marks*: the nationality and registration marks of an aircraft may designate the aircraft as "military" but that fact by itself is not a proof that the aircraft is "used in military services" in a particular situation;

- *Ownership*: the fact that the aircraft is owned by the State or specifically by a military arm of the State is a valid indication of its status but in itself does not prove that it is "used in military services" in a particular situation;

- *Type of operation*: the nature of the flight, documents carried on board, flight plan, communications procedures, composition of the crew (military or civilian?), secrecy or open nature of the flight, etc. could assist in the qualification of an aircraft as "military".

In the absence of any other guidance, it is proposed that the interpretation should focus on the expressions "used" and "services" in Article 3 (b) of the Chicago Convention - aircraft used in military, customs and police services. This wording, in the absence of any other guidance, suggests that the drafters had in mind a functional approach to the determination of the status of the aircraft as civil and military: regardless of the design, technical characteristics, registration, ownership etc.; the status of the aircraft is determined by the function it actually performs at a given time.

Thus it is conceivable that the same aircraft may be "state/military aircraft" in one situation and "civil aircraft" in another. There is, for example, an undocumented story of an unarmed fighter plane F-18 piloted by a military officer cleared under a civil flight plan for a flight to another country's civil airport to deliver a rare serum for a critically ill person - this would be an example of a humanitarian "mercy flight" and the aircraft could claim civil status.

Conversely, there is a well-documented case of a civil aircraft (B-737, MisrAir flight 2843 from Cairo to Tunis) carrying, on the basis of charter by the Government, suspected terrorists out of the country under Military Police escort; that aircraft was intercepted by US fighter planes, forced to land in Italy but no protest was raised in ICAO. The US Government in a letter to IFALPA stated: "It is our view that the aircraft was operating as a state aircraft at the time of interception. The relevant factors - including exclusive State purpose and function of the mission, the presence of armed military personnel on board and the secrecy under which the mission was attempted - compel this conclusion".[28]

[28] Quoted in ICAO document LC/29-WP/2-1, pp 11-12.

Another illustration of the possibly complicated status of the same aircraft is the case of USAF CT-43A (a military version of B-737-200), registration 31149 which crashed, on 3 April 1996, at Dubrovnik, Croatia; it carried VIP passengers and the Croatian accident investigation report expressly recognized the aircraft as "civil aircraft in accordance with Article 3 of the Convention" and not "as a flight for military purposes".[29]

In practice, the definition of "military aircraft" should be very narrow and should reflect the true military mission of the particular flight. A possible analogy could be found in the UN Convention on the Law of the Sea (1982), Article 29 of which gives the following definition of a warship:

> For the purpose of this Convention, "warship" means a ship belonging to the armed forces of a state bearing the external marks distinguishing such ship of its nationality, under the command of an officer duly commissioned by the government of the State and whose name appears in the appropriate service list or its equivalent, and manned by a crew which is under regular armed forces discipline.

A definition of a military aircraft along these lines would represent progress compared with the vague stipulation of Article 3 (b) of the Chicago Convention. However, even such wording would not be sufficient for all situations, because even a military aircraft covered by such a definition could perform, in a specific situation, functions which are not part of "military service" and could be qualified as civil aircraft under the terms of Article 3 of the Chicago Convention.

Any confusion in the actual legal status of an aircraft in a particular situation would have serious consequences and would raise doubts about the law applicable to such aircraft - e.g., the Chicago Convention and its Annexes, other international air law instruments, bilateral agreements on air services, validity of the hull and liability insurance policies and the life insurance policies of the crew if the aircraft is deemed to be military, etc.

Another controversial issue may be whether aircraft deemed to be military is liable to pay the charges for route air navigation services, airport charges, ATC, etc., although it is mostly recognized, as a matter of natural justice, that even military aircraft cannot be exempted from payment for services made available or actually rendered, unless there is an express agreement between the States concerned to the contrary.

The background information on the previous pages (2-10) would lead to the following conclusions:

- while the aircraft allegedly used for the "rendition flights" was by their design, markings, ownership and operating crew typical for **civil** aircraft, they were **used** for police/security services in a clandestine manner and that clearly puts them in the category of **state aircraft;**

[29] Accident Investigation Board Report, August 1996, p. 4.

- since such "rendition flights" were performed by state aircraft, their flight over a foreign territory or landing in such territory without a special authorization and in accordance with the terms thereof was in violation of an international legal obligation (Article 3 (c) of the Chicago Convention); the states overflown and the states of landing may protest and invoke international responsibility of the state of registry of the aircraft;
- the operators of such "rendition flights" misrepresented the nature of the flight and the nature of the aircraft when filing their "flight plan" as provided in Annexes 2 and 6 to the Chicago Convention and could be penalized in accordance with the applicable national legislation;
- the aircraft was supposed to carry documents prescribed by Article 29 of the Chicago Convention – among them journey log book and a list of passengers with their names and places of embarkation and destination; this may have been misrepresented by the operators involved and could be penalized.

C. APPLICABILITY OF ICAO STANDARDS, RECOMMENDED PRACTICES AND PROCEDURES

In view of Article 3 (a) of the Chicago Convention, it could be argued that the extensive spectrum of "ICAO rules" - i.e., the Standards and Recommended Practices *(SARPs)* adopted by the ICAO Council under Articles 37, 38, 54 (l) and 90 of the Chicago Convention and designated as *Annexes* to the Convention - are not applicable to state/military aircraft. The same must apply to guidance materials contained in the Procedures for Air Navigation Services (*PANS*) or regional Supplementary Procedures (*SUPPs).*

However, the history of ICAO records a striking cleavage of opinions as to whether the Council of ICAO is entitled to "legislate" in the form of Standards and Recommended Practices on any issues relating to military aircraft. The issue arose in 1983-1986 in the wake of the 007 Korean Air disaster. The Extraordinary session of the ICAO Council on 16 September 1983 decided "to review the provisions of the Convention, its Annexes and other related documents and consider possible amendments to prevent recurrence of such a tragic incident."[30] In 1984, the ICAO Air Navigation Commission initiated studies to amend Annex 2 to the Convention to include Standards governing the interception of civil aircraft by military aircraft and the related activities of the interception control. There were strong objections from several States that the adoption of such rules would exceed the mandate of ICAO which is restricted to civil aircraft. However, the majority of States were of the view that such regulation of interception was aimed at safeguarding the safety of civil aviation - the primary aim and purpose of ICAO - and did not purport to regulate the conduct of military aircraft but the conduct of States with respect to the safety of civil aviation foreseen in Article 3 (d) of the Convention. Consultation with States through a State Letter[31] resulted in 54 responses, of which 46 supported the

[30] C-Min Extraordinary (1983), 4, paragraph 24.

[31] A 13/38-84/72 dated 26 October 1984.

proposal or had no objections, while 8 expressed disagreement on the constitutional grounds.[32]

In the Council discussions the strongest opposition to the proposal came from the USA, USSR, Egypt and Pakistan who argued that the adoption of Standards on interception were aimed at military aircraft and as such were not within the purview of ICAO.[33] On 10 March 1986 a vote on the entire proposal resulted in 22 votes for, 4 opposed and 6 abstentions.[34] After the vote the US Representative stated that his Government continued to hold that the adoption of the Standards relating to interception was *ultra vires* and would treat them accordingly; this view was vigorously echoed by the representative of the USSR.[35]

The ICAO experience in this matter indicates that the amendment to Annex 2 with respect to interception was adopted in a highly emotionally charged atmosphere following the destruction of KAL 007 and that there is a strong opinion - in particular among the States with powerful air forces - that ICAO has no jurisdiction whatsoever to deal with state/military aircraft.

However, it would be incorrect to believe that ICAO does not pay any attention to matters related to military aircraft. There is a solid tradition that at each regular session of the ICAO Assembly adopts (without exception unanimously) an extensive Resolution entitled "Consolidated Statement of ICAO Continuing Policies and Associated Practices Related Specifically to Air Navigation". An integral part of such a Resolution is APPENDIX P - "Co-ordination of civil and military air traffic". That part of the resolution explicitly recognizes that the airspace as well as many facilities and services should be used in common by civil and military aviation and that full integration of the control of civil and military air traffic may be regarded as the ultimate goal. Most revealing is the second operative clause of the Resolution which states:

> 2. The regulation and procedures established by Contracting States to govern the operation of their state aircraft over the high seas shall ensure that these operations do not compromise the safety, regularity and efficiency of international civil air traffic and that, to the extent practicable, these operations comply with the rules of the air in Annex 2.

[32] AN-WP/5736.

[33] C-Min 116/5

[34] It should be noted that 22 votes in favour represented just the bare two-thirds majority of the Council required under Article 90 of the Convention. Such a divided vote is unprecedented in the annals of ICAO – the adoption of new Standards is usually supported by a full consensus.

[35] C-Min 117/12. It should be also noted that the USA so far did not ratify the Protocol introducing the new Article 3*bis* ; while the US never explicitly explained its hesitations on Article 3*bis* and its rejection of amendment 27 to Annex 2, it is apparent that the real cause is the fact that the interpretation of the Chicago Convention and of the Annexes may, on appeal from the ICAO Council decision under Article 84 of the Convention, become the subject of compulsory jurisdiction of the International Court of Justice – a serious policy matter for the US government

This wording in fact, although in a cautious tone ("to the extent practicable"), asserts the need for state aircraft to comply with the rules of the air over the high seas in conformity with Annex 2 to the Convention.

The rules of the air represent the basic "highway code" in the air, safeguarding safe and orderly flight, rules for collision avoidance, etc. Over the high seas no State can exercise jurisdiction to stipulate the rules of the air in a manner harmonized for all users. Annex 2 to the Chicago Convention has a very special status: it contains only Standards and no Recommended Practices. Hence, in case of non-compliance States would have the legal duty to notify a "difference" under Article 38 of the Convention; moreover, in view of the third sentence of Article 12 of the Convention "over the high seas the rules in force shall be those established under this Convention". When adopting Annex 2, the Council of ICAO decided that the Annex constitutes "rules relating to flight and maneuver of aircraft" within the meaning of Article 12 of the Convention and that "over the high seas, therefore, these rules apply without exception".[36] This means that no State can file a difference to Annex 2 with respect to the high seas and it gives a unique status to the Council of ICAO that it "legislates" rules of the air for some 72% of the surface of the earth!

ICAO Assembly Resolution A36-13, Appendix O goes in the right direction when it calls for the compliance with the ICAO rules of the air over the high seas by military aircraft. The "Associated Practice" attached to Appendix P further exhorts States to coordinate with all States responsible for the provision of air traffic services over the high seas in the area in question.

There are many other fields where the ICAO Standards and Recommended Practices contained in the 18 Annexes to the Convention should be made applicable to "state aircraft" in the interests of safety, standardization and uniformity of the legal regulation. However, this cannot be achieved without a profound amendment of the Chicago Convention to make it applicable also to "state aircraft" - a step that is most unlikely to marshal the political will and consensus of States.

On the other hand, nothing prevents the States themselves from accepting or approximating the ICAO Standards and Recommended Practices into their national legislation applicable to their "state aircraft" and thus achieving a better harmony and coordination between their civil and state aviation activities. Such a course of action seems to be imperative also because the distinction between a "civil" and "state" aircraft is in practice frequently obliterated, the same aircraft may be either "civil" or "state" aircraft and there is no reliable and generally accepted legal definition of what is "civil" and what is "state" aircraft.

[36] Annex 2-Rules of the Air, 2.1.1 Note.

D. THE ROLE OF ICAO IN RELATION TO "RENDITIONS"

The history of ICAO indicates that it was not intended as a forum for dealing with issues of a controversial political nature or for issues of human rights and related problems. However, there are individual examples of ICAO dealing with more controversial political and human rights issues, such as the KAL 007 which launched a sharp attack against the USSR; Israel has been frequently "castigated" by ICAO for aviation incidents in the Middle East and the South African policy of apartheid was frequently discussed in ICAO, with the effective "blacklisting" of South Africa within the organization. However, beyond these specific examples, whether or not ICAO would address the issue of "rendition" depends on the political will of States. Some States may believe that the United Nations may be the more appropriate body to make pronouncements on "extraordinary renditions".

If it is accepted that the "rendition flights" have been performed by state aircraft, the Chicago Convention and the international standards and recommended practices adopted there under would not, as a general rule, be applicable.

It would be a matter of political thought of the contracting states whether they would wish to involve the ICAO machinery in the consideration of the incidents of the "rendition flights"; in general ICAO has no jurisdiction with respect to state/military aircraft but the subject may be raised by any State as complaint against the violation of Article 3 (c) of the Convention and it would be a mandatory function of the ICAO Council to "consider" the matter under Article 54 (n) of the Convention. (However, note the precedent of MisrAir flight 2803 above; the matter was not raised in ICAO by Egypt, recognizing that the incident involved a "state aircraft".)

The violation of Article 3 (c) of the Convention could be classified as an "infraction" of the Convention which the Council would be obliged to report to contracting States under Article 54 (j) of the Convention. A political initiative by a group of states would be required to propose such an action to the Council – in view of ICAO practice an unlikely scenario.

For general publicity the Council or the Assembly of ICAO could be requested to adopt a declaration deploring the use of aircraft for "extraordinary rendition" and calling on states to refrain from such practices.

1) "Misuse of Civil Aviation"

Invoking Article 4 of the Chicago Convention would not appear justifiable. This provision has never been applied in the history of ICAO and there is no experience with its relevance. The only ICAO document (C-WP/8217) referring to Article 4 was drafted by the author of this opinion in 1986 and confirmed the following conclusion:

It should be noted that the term "misuse" is used only in the heading of the Article 4 and not in the body of the text; the first paragraph of the Preamble of the Convention refers to

"abuse" of international civil aviation and no attempt has ever been made to define these terms. The drafting history of Article 4 indicates that the intention was to prevent the use of civil aviation as a threat to the safety and security of nations; the wording was based on the Treaty for the Renunciation of War of 27 August 1928 (commonly known as the Briand-Kellog Pact). This historic background would make the application of Article 4 to "rendition flights" very far-fetched; nevertheless, the member states of ICAO are free to give the Article any agreed interpretation. [The interpretation accepted by the European Parliament and the Council of Europe may not be shared by all ICAO States]

2) Action by States

Non-scheduled flights for non-traffic purposes in general do not require prior permission. However, a flight plan must be prepared for each flight and filed with the appropriate authorities of the state overflown and the state of landing. States can prevent the "rendition flights" from entering their territory by insisting on a clear flight plan assuring the civil nature of the flight and possibly a statement that it does not carry persons traveling against their will. Article 29 of the Convention requires civil aircraft to maintain a journey log book with a list of passengers. An elementary issue is that the state of landing should see the travel documents/identities of all persons on board and can intervene if a person is held unlawfully on board.

In order for ICAO to remind states formally of this duty, a proposal would have to be made in the Council, duly seconded and adopted by vote. Before such a discussion and vote, the subject would have to be placed on the agenda of the session - frequently a procedural bloc of any further discussion. However, such a call on the states could also come from the media, from any NGO, UN, etc.

Under Article 3 *bis* (b) a State may require landing of the aircraft if it has reasonable grounds to conclude that it is being used for any purpose inconsistent with the Convention. No precedent from the ICAO practice can be quoted and it is the personal experience of this author that the alleged violation of human rights was not contemplated during the drafting of this provision.

It may be also argued that under Article 4 of the 1963 Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft a state may "interfere" with a foreign aircraft in flight in order to exercise its criminal jurisdiction if the offence (e.g., state aircraft entering its space without authorization – para a)), if the rules of the air have been violated (para d)) or the exercise of jurisdiction is necessary to ensure the observance of any obligation of such state under a multilateral international agreement (para e) – e.g., human rights instruments).

On landing and departure of a foreign aircraft the state of landing has an absolute right to search the aircraft (Article 16 of the Convention), including the list of passengers and their travel documents; the national laws would then determine any action to be taken against aircraft misrepresenting their status or carrying persons contrary to the principles of human rights and public order.

3) Accountability/Responsibility

The state of landing of the aircraft concealing its status as state aircraft and/or carrying passengers for the purpose of "extraordinary rendition" may invoke provisions on responsibility. It may request apology from the state of registration of the aircraft, assurance that the act will not be repeated and that the persons directly responsible will be duly punished. The operator of the aircraft and its crew may be fined for the violation of aeronautical regulations or even detained and arrested pending judicial consideration of the case; some national legislation provide for the confiscation of the aircraft violating the territorial airspace or involved in other offence.