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Extraordinary rendition—the air transport perspective

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Abstract Transportation from one place to another of criminals and those suspected of crimes, whether it be for adjudication or detention, frequently occurs by air, particularly where large distances are involved. The term "extraordinary rendition" is usually applied when suspects are arrested and, without judicial determination of their guilt or innocence, transported. From the perspective of individual security, this practice has many connotations such as the rights of the individual against false arrest and imprisonment and privacy. From a public security perspective the considerations are: the rights of the travelling public; the use of civil aircraft for military purposes; and the distinction between State aircraft and military aircraft. In both the private and public aspects of extraordinary rendition, there are applicable international treaties that prescribe legal norms for the guidance of States. There are also several judicial decisions at common law that have addressed the subject of false arrest and imprisonment. This article examines these considerations with a continuing focus on transportation by air.

Keywords Rendition · False imprisonment · Extraordinary rendition · False arrest · Miltary flights · ICAO · Chicago convention

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Introduction

Extraordinary rendition is the handing over of a person from one jurisdiction to another, without initial determination as to the possibility of that person's guilt.[1] A stronger definition is:

> The alleged acts of the U.S. authorities in the wake of "911" when suspected high-value terrorists were—without trial- abducted/arrested ("snatched" in the media jargon) in one territory and transported by aircraft to another territory for interrogation by US agents or delivered to security forces in other countries where they would not enjoy the protection against torture or other abuses.[2]

It is reported that the application and significance of this practice had a change of focus in the 1980s when foreign delinquents were transferred by United States authorities to be interrogated in countries with which the United States did not have extradition treaties, which in turn carried the connotation that such delinquents would be treated differently than they would have been in countries of the west.[3] From a conceptual standpoint, extraordinary rendition is diametrically at variance with principles of international law, which has certain safeguards against the transportation of a person against his will, unless a proper judicial determination has been made in favour of such a transfer. Protocol No. 7 to the *Convention for the Protection of Human Rights and Fundamental Freedoms*[4], provides that an alien lawfully resident in the territory of a State shall not be expelled therefrom except in pursuance of a decision reached in accordance with law and shall be allowed: a) to submit reasons against his expulsion, b) to have his case reviewed, and c) to be represented before the competent authority or a person or persons designated by that authority.[5] An alien may be expelled before the exercise of his rights, when such expulsion is necessary in the interests of public order or is grounded on reasons of national security.[6] Furthermore, Article 13 of the *International Covenant on Civil and Political Rights* (ICCPR)[7] provides that an alien lawfully in the territory of a State Party may be expelled therefrom only in pursuance of a decision reached in

[1] In contrast, a rendition flight is a flight which takes a felon to a place which has jurisdiction to adjudicate the crime in question. Rendition is therefore a legal measure and has its genesis in the need for the US to recapture fugitive slaves. See Article 4, Section 2, Clause 2 of the United States Constitution.

[2] Milde 2008. Consistent with this definition, Wikipedia states that some journalists have called extraordinary rendition "*torture by proxy*". See http://en.wikipedia.org/wiki/Extraordinary_rendition.

[3] Ingrid Detter Francopan, Extraordinary Rendition and the Law of War, North Carolina Journal of International Law and Commercial Regulation, Summer 2008 (33 N.C.J. Int'lL. &Com. Reg). 657 at 659.

[4] Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 1Rome, 4.XI.1950. The text of the Convention had been amended according to the provisions of Protocol No. 3 (ETS No. 45), which entered into force on 21 September 1970, of Protocol No. 5 (ETS No. 55), which entered into force on 20 December 1971 and of Protocol No. 8 (ETS No. 118), which entered into force on 1 January 1990, and comprised also the text of Protocol No. 2 (ETS No. 44) which, in accordance with Article 5, paragraph 3 thereof, had been an integral part of the Convention since its entry into force on 21 September 1970.

[5] Art. 1, Nov. 22, 1984, Eur. T.S. No. 117. Article 1, titled *"Procedural safeguards relating to expulsion of aliens.*

[6] *Ibid.*

[7] International Covenant on Civil and Political Rights, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, (*entered into force* on 23 March 1976, in accordance with Article 49).

accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented before the competent authority or a person or persons especially designated by the competent authority.[8]

The *Third Geneva Convention on Prisoners of War of 1949*[9] stipulates that, in the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, that persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end the Convention prohibits: violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; taking of hostages; outrages upon personal dignity, in particular, humiliating and degrading treatment; the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples. The Convention also provides that the wounded and sick shall be collected and cared for. It also provides that an impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict. In the case of *Hamdan* v. *Rumsfeld*[10] the decision of the Supreme Court suggests that all activities carried out in the "war on terror" of the United States must pass the minimum standards set out in the Convention.[11]

The above notwithstanding, there are at least three controversial cases where the rendition of the victims by air have been questionable.[12] This brings to bear two areas of concern: false arrest and imprisonment ; and the significance of the role of air transport and its meaning and purpose in the backdrop of circumstances of war.

False arrest and imprisonment

False arrest is unlawful or unjustifiable arrest and is committed where a person unlawfully, intentionally or recklessly restrains another's freedom of movement from a particular place.[13] Physical detention is an essential ingredient for grounding an action in false imprisonment. Thus if a person agrees to go to a police station voluntarily, he has not been arrested even though the person taking him would have arrested him on refusal to go.[14]

[8] International Covenant on Civil and Political Rights Art. 13, opened for signature Dec. 16, 1966, 999 U.N.T.S. 171.
[9] Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949.
[10] 126 S.Ct.2749 (2006).
[11] *Id.* 2794-97.
[12] See Sattertwaite 2007.
[13] Smith and Hogan 1992. See also *Rahman* v. *Queen* (1985) 81 Cr App Rep 349 at 353.
[14] *Campbell* v. *Tormey* (1969) 1 All E.R. 961, cited in Smith & Hogan, *Criminal Law*, *op.cit.* at 432.

The *Fourth Amendment* to the U.S. Constitution stipulates that unless there is probable cause, a person could not be subject to a search warrant or arrest. A good example of probable cause is the 1967 case of *Terry* v. *Ohio*[15], which arose from an arrest stemming from a policeman becoming suspicious of two men when one of them walked up the street, peered into a store, walked on, started back, looked into the same store, and then conferred with his companion. The other suspect repeated this ritual, and between them the two men went through this performance about a dozen times before following a third man up the street. The officer, thinking they were preparing to commit a misdemeanour and might therefore be armed, confronted the men, asked their names and patted them down, thereby discovering pistols the plaintiff and his companion. In affirming Terry's conviction for carrying a concealed weapon, the Supreme Court concluded that where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may ensue and that the person with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him. Physical detention is an essential ingredient for grounding an action in false imprisonment. Thus if a person agrees to go to a police station voluntarily, he has not been arrested even though the person taking him would have arrested him on refusal to go.[16]

The law provides that where an arresting officer has reasonable grounds for suspecting that an arrestable offence has been committed, he may arrest without a warrant anyone whom he has reasonable grounds for suspecting to be guilty of that offence.[17] The offence of false imprisonment is one of "basic intent" and despite the paucity of authority as to whether the element of *mens rea* is necessary to constitute the offence of false imprisonment[18], at least one decision[19] has recognized the requirement.

In the early case of *Christy* v. *Leachinsky*[20] Lord Simonds, while observing that it was the right of every citizen to be free from arrest and that he should be entitled to resist arrest unless that arrest is lawful, concluded that a person cannot be arrested unless he knows why he is being arrested.[21] This principle has however, since been replaced by Section 28 of the *Police and Criminal Evidence Act* 1984 which provides that where a person is arrested, otherwise than being informed that he is under arrest, he must be so informed as soon as practicable afterwards. While this provision holds incontrovertible the fact that a person who is arrested has to be informed of the grounds for his arrest, it dispenses with the exclusive need to inform the person at the time of arrest.[22]

[15] 392 U.S. 1 (1968), argued 12 Dec. 1967, decided 10 June 1968.
[16] *Campbell* v. *Tormey* (1969) 1 All E.R. 961, cited in Smith & Hogan, *Criminal Law*, *op.cit.* at 432.
[17] *Police and Criminal Evidence Act* 1984 Section 24 (6).
[18] False imprisonment is generally considered under civil actions where the element of mens rea is not relevant.
[19] *Re Hutchins* (1988) *Crim L R* 379.
[20] (1947) 1 *All E.R.* 567.
[21] *Id.* at 575.
[22] Smith & Hogan, *Criminal Law*, *op. cit.* at 438.

In the more recent case of *Murray* v. *Ministry of Defence*[23] the plaintiff sued the Crown for false imprisonment on the ground that she had been detained and questioned by members of the armed forces for 30 min before they indicated to her that she was under arrest. She claimed that her arrest took place only when she was informed that she was under arrest and that the preceding detention was therefore unlawful. The House of Lords at appeal held that where a person was detained or restrained by a police officer and knew that he was being detained or restrained, such detention amounted to an arrest even though no formal words of arrest were spoken by the officer. Since the plaintiff had been under restraint from the moment she was identified, and must have realised that she was under restraint, she was deemed to have been under arrest from that moment, notwithstanding that the arrest took place formally, a half hour later.

Lord Griffiths, quoting an earlier decision[24], endorsed the principle that arrest did not depend merely on the legality of the act but on the fact whether the person arrested had been deprived of his liberty. His Lordship went on address the decision in *Christy* v. *Leachinsky*[25] and noted:

> There can be no doubt that in ordinary circumstances, police should tell a person the reason for his arrest at the time they make the arrest. If a person's liberty is being restrained he is entitled to know the reason. If the police fail to inform him, the arrest will be unlawful with the consequence that if police are assaulted as the suspect resists arrest, he commits no offence. Therefore, if he is taken to custody, he will have action for wrongful imprisonment.

However, *Christy* v. *Leachinsky* made it clear that there are exceptions to this rule.[26]

The exceptions that Lord Griffiths referred to were those expressed by Viscount Simon where, when circumstances were such, that the person detained knew the general nature of the alleged offence, the requirement for informing him of the fact and grounds for his arrest did not arise. Viscount Simon held that technical or precise language need not be used and since any person is entitled to his freedom, if restraint was used and he knew the reason for such restraint, that was enough.[27]

There is however, no need anymore to rely on this aspect of the *Christy* decision since, as discussed earlier in this paper, statute has now explicitly laid down the law, leaving no room for ambivalence on the subject.

The air transport perspective

A. The Use of Air Transport for Peaceful Purposes

The attacks of 11 September 2001 inevitably highlighted the strategic position of civil aviation both as an industry vulnerable to attack and as an integral tool in ensuring peace and security in the world. The modernist view of civil aviation, as it

[23] (1988) 2 *All E.R.* 521.
[24] *Spicer* v. *Holt* (1976) 3 *All E. R.* 71 at 79.
[25] *Supra*, note 21.
[26] *Id*. 526.
[27] *Christy* v. *Leachinsky, supra*, note 21, at 572–573.

prevailed when the Convention on International Civil Aviation[28] was signed at Chicago on 7 December 1944, was centred on State sovereignty[29] and the widely accepted post-war view that the development of international civil aviation can greatly help to create and preserve friendship and understanding among the nations and peoples of the world, yet its abuse can become a threat to general security.[30] This essentially modernist philosophy focussed on the importance of the State as the ultimate sovereign authority which can overrule considerations of international community welfare if they clashed with the domestic interests of the State. It gave way, in the 60's and 70's to a post-modernist era of recognition of the individual as a global citizen whose interests at public international law were considered paramount over considerations of individual State interests.

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

The Chicago Convention[31] was signed at the height of the modernist era of social justice and commercial interaction. As *Milde* says: "It is in the first place a comprehensive codification/unification of public international law, and, in the second, a constitutional instrument of an international inter-governmental organization of universal character" (Milde 1994). Be that as it may, the real significance of the Convention, particularly as a tool for ensuring political will of individual States, lies in the fundamental philosophy contained in its Preamble. In its Preamble, the Convention enunciates a message of peace through aviation. It makes mention of the future development of international civil aviation being able to help preserve friendship and understanding among the nations of the world, while its abuse (i.e. abuse of future development of international civil aviation) can become a threat to "the general security". By "general security" the Chicago Conference meant the prevention of threats to peace. These words have been interpreted in the widest possible sense by the Assembly of the International Civil Aviation Organization (ICAO)[32] at its various sessions to cover instances of social injustice such as racial discrimination as well as threats to commercial expediency achieved through civil aviation. The 15th session of the ICAO Assembly adopted Resolution A15-7 (Condemnation of the Policies of Apartheid and Racial Discrimination of South Africa) where the Resolution urged South Africa to comply with the aims and objectives of the Chicago Convention, on the basis that the apartheid policies constitute a permanent source of conflict between the nations and peoples of the

[28] Convention on International Civil Aviation, Ninth Edition 2006, Doc 7300/9. Also known as the Chicago Convention. The Convention came into force only on 4 April 1947.

[29] Article 1 of the Chicago Convention provides that the Contracting States recognize that every State has complete and exclusive sovereignty over airspace above its territory.

[30] Preamble to the Chicago Convention, *supra* note 29.

[31] *Supra*. note 29. The Conference on International Civil Aviation, which was held in Chicago from 1 November to 7 December 1944 was the forum which drafted the provisions of the Chicago Convention. See United States Department of State 1948.

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

world and that the policies of apartheid and racial discrimination are a flagrant violation of the principles enshrined in the Preamble to the Chicago Convention.[33]

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

The general discussions which took place during the Chicago Conference gives one an overall view of the perspectives of each State, particularly in terms of what they expected out of the Convention with regard to the role to be played by civil aviation in ensuring peace, security and economic development in the world in the years to come. However, in some cases of extraordinary rendition, unfortunately, the converse has happened and in the instances already mentioned[34] the attendant circumstances have even caused strife among nations. Arguably, the most dangerous risk of arrest of an innocent airline passenger suspected of terrorist activity would arise from profiling. It is an incontrovertible fact that profiling is a useful tool in the pursuit of the science of criminology. Profiling is also a key instrument in a sociological context and therefore remains a sustained social science constructed through a contrived process of accumulation of single assumptions and propositions that flow to an eventual empirical conclusion. However, profiling raises well reasoned latent fears when based on a racial platform. Jonathan Turley, Professor of Constitutional Law at George Washington University, in his testimony before a United States House of Representatives Committee on Airport Security regarding the use of racial profiling to identify potentially dangerous travellers observed:

> [R]acial profiling is to the science of profiling as forced confessions are to the art of interrogation. Like forced confessions, racial profiling achieves only the appearance of effective police work. Racial profiling uses the concept of profiling to shield or obscure a racist and unscientific bias against a particular class or group. It is the antithesis of profiling in that it elevates stereotypes over statistics in law enforcement (Turley 2002).

Notwithstanding this telling analogy, and the apprehensions one might have against racial profiling, it would be imprudent to conclude that racial profiling is *per se* undesirable and unduly discriminatory, particularly in relation to profiling at airports which should essentially include some considerations of ethnic and national criteria. This article will examine the necessary elements that would go into effective and expedient airport profiling of potential undesirable passengers. It will also discuss legal issues concerned with the rights of the individual with regard to customs and immigration procedures. The rights of such persons are increasingly relevant from the

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

[34] *Supra*, note 13.

perspective of ensuring air transport security and refusing carriage to embarking passengers who might show profiles of criminality and unruly behaviour on board.

A legitimate profiling process should be based on statistically established indicators of criminality which are identified through a contrived aggregation of reliable factors. The application of this criterion to airport profiling would immediately bring to bear the need to apply nationality and ethnic factors to passenger profiles. Although one might validly argue that racial profiling would entail considerable social and political costs for any nation, while at the same time establishing and entrenching criminal stereotypes in a society, such an argument would be destitute of effect when applied to airport security which integrally involves trans boundary travel of persons of disparate ethnic and national origins. This by no means implies that racial profiling is a desirable practice. On the contrary, it is a demeaning experience to the person subjected to the process and a *de facto* travel restriction and barrier. It is also a drain on law enforcement resources that effectively preclude the use of proven and conventional uses of enforcement.

The sensitive conflict of interests between racial profiling *per se,* which at best is undesirable in a socio-political context, and airport profiling, raises interesting legal and practical distinctions between the two. Among these the most important distinction is that airport profiling is very serious business that may concern lives of hundreds if not thousands in any given instance or event. Profiling should therefore be considered justifiable if all its aspects are used in screening passengers at airports. Nationality and ethnicity are valid baseline indicators of suspect travellers together with other indicators which may raise a 'flag' such as the type of ticket a passenger holds (one way instead of return) and a passenger who travels without any luggage.

Racial profiling, if used at airports, must not be assumptive or subjective. It must be used in an objective and non discriminatory manner alongside random examinations of non-targeted passengers. All aspects of profiling, including racial and criminal profiling, should as a matter of course be included in the Computer Assisted Passenger Screening System (CAPS)[35] without isolating one from the other. In this context the now popular system of compliance examination (COMPEX) is a non threatening, non discriminatory process which transcends the threshold debate on "profiling" by ensuring a balanced and proper use of profiling in all its aspects by examining "non targeted" passengers as well as on a random basis.

Another critical distinction to be drawn between discriminatory and subjective racial profiling on the one hand and prudent airport profiling on the other is the blatant difference between racism and racial profiling. The former is built upon the notion that there is a causal link between inherent physical traits and certain traits of personality, intellect or culture and, combined with it, the idea that some races are inherently superior to others.[36] The latter is the use of statistics and scientific reasoning that identify a set of characteristics based on historical and empirical data.

[35] The CAPS system was adopted in 1994 by Northwest Airlines to single out high risk passengers. After the TWA flight 800 disaster in July 1996, the Clinton Administration appointed the Al Gore Commission to study aviation security. The Commission recommended that all airlines use the CAPS system provided profiling did not rely on material of a constitutionally suspect nature such as race, religion or national origin of United States citizens.

[36] *Britannica Macropedia*, 15 Ed. Vol. 9. at p. 880.

This brings to bear the clear difference between "hard profiling", which uses race as the only factor in assessing criminal suspiciousness and "soft profiling" which uses race as just one factor among others in gauging criminal suspiciousness.

B. The nature of Air Transport in Extraordinary Rendition

Extraordinary rendition is an act of state and therefore the question arises as to whether aircraft used in this activity are military aircraft. Article 3 (a) of the Chicago Convention provides that the Convention will be applicable only to civil aircraft and not to state aircraft. It is an inclusionary provision which identifies military, customs and police service aircraft as being included in an undisclosed list of state aircraft. The Convention contradicts itself in Article 3 (c), where it says that no state aircraft of a contracting State shall fly over the territory of another State or land thereon without authorization by special agreement or otherwise, and in accordance with the terms thereof. The question arises as to how an international treaty, which on the one hand prescribes that it applies only to civil aircraft, turns around and prescribes a rule for state aircraft. Article 3 (c) effectively precludes relief flights over the territory of a State by state aircraft if the State flown over or landed upon does not give authorization for the aircraft to do so. *Milde* cites several instances of different types of aircraft being used in rendition flights[37] and concludes that a State aircraft may be identified by the design of the aircraft and its technical characteristics; registration marks; ownership; and type of operation.[38]

The distinction between civil and state aircraft is unclear as the Chicago Convention does not go to any length in defining or specifying as to how the two categories have to be distinguished. The ICAO Assembly, at its 14th Session held in Rome from 21 August to 15 September 1962, adopted Resolution A14-25 (Coordination of Civil and Military Air Traffic) which was on the subject addressed in Article 3(d)—that the Contracting States undertake, when issuing regulations for their state aircraft, that they will have due regard to the safety of navigation of civil aircraft. In A14-25, the Assembly directed the Council to develop guidance material for the joint civil and military use of airspace, taking into account the various policies, practices and means already employed by States to promote the satisfactory coordination or integration of their civil and military air traffic services.

At its 21st Session of the Assembly, Held in Montreal from 21 September to 15 October 1974, ICAO saw the adoption of Resolution A21-21 (Consolidated Statement of Continuing Policies and Associated Practices Related Specifically to Air Navigation) where, at Appendix O, on the subject of coordination of civil and military air traffic, the Assembly resolved that the common use by civil and military aviation of airspace and of certain facilities and services shall be arranged so as to ensure safety, regularity and efficiency of international civil air traffic, and that States would ensure that procedures and regulations pertaining to their state aircraft will not adversely affect or compromise the regularity and efficiency of international civil air traffic. In order to effectively implement the proposals of the Resolution, Contracting States were requested to initiate and improve the coordination between their civil and military air traffic services and the ICAO Council was required to

[37] Milde. *supra* note 3 at 478.
[38] *Id.* 481–482.

ensure that the matter of civil and military coordination in the use of airspace is included, when appropriate, in the agenda of divisional and regional meetings.[39]

The ICAO Assembly, at its 36th Session (Montreal, 18–27 September, 2007) adopted Resolution A36-13 (Consolidated statement of continuing ICAO policies and associated practices related specifically to air navigation), Appendix O of which reiterates for the most part the text of Appendix O of Resolution A21-21, adding that the ICAO Council should endeavour to support States in the establishment of civil/military agreements by providing advice and guidance.[40]

One of the fundamental issues in the determination of aircraft category under Article 3 of the Chicago Convention is the use of civil aircraft in some instances for military purposes.[41] In emergency situations, States may acquire or in any other manner use civil aircraft for the transport of military personnel or goods meant for official use. In such circumstances any determination of the category of the aircraft concerned must be made taking into account all pertinent circumstances of the flight. Perhaps the most fundamental difference between the operation of civil and military aircraft lay in the fact that, although they were expected to share the same skies, the procedures by which they did this varied greatly. Civil aircraft depended entirely on predetermined flight paths and codes of commercial conduct which varied depending on aircraft type and types of traffic carried, whereas military aircraft operated in line with the exigency of a situation and were not necessarily always guided by predetermined flight paths. This dichotomy led to the adoption of Resolution A10-19 by the Tenth Session of the ICAO Assembly in 1956. The Assembly Resolution, while recognizing that the skies (airspace) as well as many other facilities and services are commonly shared between civil and military aviation, focused on ICAO's mandate to promote safety of flight[42] and reinforced the thrust of Article 3 (d) of the Chicago Convention. The Resolution called for all Contracting States to co-ordinate between their various aeronautical activities in order that the common use of airspace *inter alia* be so arranged that safety, regularity and efficiency of international civil air navigation be safeguarded.

There is also the issue of military aircraft being used in some circumstances for civil aviation purposes. At the time of writing, there were no clear international rules, generally accepted, whether conventional or customary, as to what constitutes state aircraft and what constitutes civil aircraft in the field of air law.[43] Often, particular

[39] It will be recalled that the ICAO Council, at the Sixth Meeting of its Thirty Seventh Session, held on 15 May 1959, noted the need for the Secretary General to pursue as effectively as possible the problem of accommodation of civil and military traffic in the available airspace. The efforts of the Secretary General were primarily meant to focus on the prevention of mid air collisions by the proper coordination of civil and military air traffic.

[40] See Assembly Resolutions in Force (as of 28 September 2007) Doc. 9902, at II-I7 to II-18.

[41] See Abeyratne 1997.

[42] As per Article 44 of the Chicago Convention.

[43] In the earliest days of this century, jurists divided aircraft into two categories, public and private, with differing applicable legal regimes. The majority of European powers which replied to a questionnaire submitted by the French Government in 1909 agreed that public and private aircraft should be distinguished. The first diplomatic conference on air navigation, which met in Paris in 1910, defined public aircraft as "aircraft employed in the service of a contracting State, and placed under the orders of a duly commissioned official of that State." More particularly, a very specific regime to govern military aircraft was outlined. The Conference did not formally adopt a convention, but provisions drafted heavily influenced the Paris Convention of 1919.

international air law instruments will in some way make reference to these or similar concepts, either without defining them, or at the most providing very broad general definitions which sometimes vary from one instrument to another. The situation also appears to be the same in the domestic legislation of States, with the meaning of terms such as "public aircraft', "state aircraft', "civil aircraft" or "private aircraft" varying according to the State in question and the object and purpose of the legislation.

Military aircraft, more than any other kind of aircraft including customs and police aircraft, personifies the public or sovereign power of a State, and several attempts have been made to arrive at an internationally acceptable definition thereof. The Treaty of Versailles of 1919 ending World War I, provided that the armed forces of Germany must not include any military or naval air forces, and several attempts were made to distinguish between military and commercial (or civil) aeronautical material. Between 1919 and 1922, the relationship between civil and military aviation was debated at length by three international committees of air experts which met, respectively, in Paris, Geneva and Washington. They concluded independently that no means could be devised to prevent the conversion of civil aviation to military purposes, which would not at the same time prejudice the development of civil aviation. In 1920, the Supreme War Council of the Paris Peace Conference asked one of these committees, the Aeronautical Advisory Commission to the Peace Conference, which had given its opinion in 1919, to draw up rules to distinguish between civil aviation and the military and naval aviation forbidden by the Peace Treaties. The Commission, referring to its 1919 report, replied that the task was impossible. The Supreme Council insisted that the rules be drawn up; after several months of debates, the Commission submitted what is known as "The Nine Rules" of 1922, for differentiating between military and civil aircraft. The distinction was based on technical criteria such as engine size, speed, "useful load" etc. It soon became clear that many civil aircraft fulfilled these criteria and the Rules were later abandoned.

At the Chicago Conference of 1944, which paved the way for the adoption of the Chicago Convention, a United States proposal of a Convention on Air Navigation provided that the Convention 'shall be applicable only to civil aircraft.' 'Civil aircraft" was defined as "any aircraft other than military, naval, customs and police aircraft of any State or any political subdivision thereof." A Canadian draft repeated, *mutatis mutandis,* the provisions of Chapter VII of the Paris Convention. Air Navigation principles were allocated to Subcommittee 2 of Committee I. The United States draft was used as the primary basis for discussion in Subcommittee 2. On 10 November 1944, the following suggestions were referred to the drafting Committee of Subcommittee 2. chaired by Mr. J.C. Cooper (United States): "(a) that the term 'civil aircraft' be used as suggested. in place of 'private aircraft' as used in the Paris Convention; (b) that a definition of 'military aircraft' be drafted which would cover military, naval, and air forces; (c) that the Status of military and state (customs and police) aircraft in relation to the requirements of the Convention be defined in a separate section." On that day, Sweden proposed an amendment which later emerged as Article 3 (d). The drafting Committee examined the issue and responded with what became Article 3 of the Chicago Convention in its final form. The metamorphosis of the relevant provisions of the United States draft into Article *3*

(a) to (c) took place entirely in the drafting Committee, and no official record exists of the reasons behind the shift from the Paris Convention or even the U.S. draft. It should be noted that no definition of military aircraft was provided.

With regard to Conventions other than the Chicago Convention, one can see some provisions which are relevant to the discussion on the distinction between civil and military aircraft. The Convention on the International Recognition of Rights in Aircraft (Geneva 1948), the Convention on Offences and Certain Other Acts Committed on Board Aircraft (Tokyo 1963), the Convention for the Suppression of Unlawful Seizure of Aircraft (The Hague 1970) and the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Montreal 1971), all contain a provision that "this Convention shall not apply to aircraft used in military, customs or police services." This appears to be a more simple way to indicate the scope of applicability of these Conventions than the provisions of Article 3 (a) and (b) of the Chicago Convention, although the end result seems to be the same. Furthermore. the clear implication is that all aircraft not so used would be subject to the provisions of the respective Conventions (paragraph 1.4 above refers).

The Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface (Rome 1952) states in Article 26 that, "this Convention shall not apply to damage caused by military, customs or police aircraft." It should be noted that a "military, customs or police aircraft" is not necessarily the same thing as an "aircraft used in military, customs and police services" although again the expression "military, customs or police aircraft" was left undefined. Similarly, other "state" aircraft fall within the scope of the Convention. However, the 1978 Protocol to amend this Convention reverts to more familiar language; it would amend Article 26 by replacing it with, "this Convention shall not apply to damage caused by aircraft used in military, customs and police services."

The Convention for the Unification of Certain Rules Relating to the Precautionary Attachment of Aircraft (Rome 1933) provides that certain categories of aircraft are exempt from precautionary attachment, including aircraft assigned exclusively to a government service, including postal services, but not commercial aircraft. On the other hand, the Convention for the Unification of Certain Rules Relating to Assistance and Salvage of Aircraft or by Aircraft at Sea (Brussels, l938 "apply to government vessels and aircraft, with the exception of military, customs and police vessels or aircraft …"

The Convention for the Unification of Certain Rules Relating to International Carriage By Air Warsaw 1929) applies, *inter alia.* to all international carriage of persons. luggage or goods performed by aircraft for reward, regardless of the classification of the aircraft. Article 2 specifically provides that the Convention applies to carriage performed by the State or by legally constituted public bodies, but by virtue of the Additional Protocol, Parties may make a declaration at the time of ratification or accession that Article 2 (1) shall not apply to international carriage performed directly by the State. The Hague Protocol of 1955 to amend this Convention, in Article XXVI allows a State to declare 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. Identical provisions are contained, *mutatis mutandis,* in the Guatemala City Protocol of 1971

(Article XXIII) the *1975* Additional Protocol No. 2 (Montreal), the *1975* Additional Protocol No. 3 (Montreal) and in Montreal Protocol No. 4 of 1975. It is submitted that Article 3 (b) of the Chicago Convention has no bearing on the applicability of these instruments of the "Warsaw System" which specify their own scope of applicability.

This analysis of some international air law instruments illustrates that many post-Chicago air law instruments (Geneva 1948, Tokyo 1963, The Hague 1970, Montreal 1971 and Rome 1952 and as amended in 1978) all have broadly similar provisions to Article 3 (a) and (b) of the Chicago Convention. The private air law instruments of the Warsaw System on the other hand, because of their nature, have adopted different formulae.

The provisions of the Chicago Convention and Annexes would not apply in a case where a state aircraft is (mistakenly or otherwise) operated on the basis that it is a civil aircraft. Similarly, the Geneva Convention of 1948, the Tokyo Convention of 1963, The Hague Convention of 1970, the Montreal Convention of 1971 and the Rome Convention *(1952)* as amended in 1978, will also not be applicable where it is determined that the aircraft was "used in military, customs or police services". The converse, of a civil aircraft being operated on the basis that it is a state aircraft, would theoretically raise the same problems (i.e. legal regimes thought to be inapplicable are in fact applicable). Concern is not often expressed in this regard.

Another frequently mentioned difficulty is claimed to be the loss of insurance coverage in respect of the aircraft (hull), operator, crew and passengers or other parties where the aircraft is in fact state aircraft. The question whether a particular insurance coverage is rendered invalid in such situations is primarily a private law matter of the construction and interpretation of the insurance contract. Unless the contract has an exclusion clause which specifically makes reference to the classification in Article 3 of the Chicago Convention (e.g. loss of coverage where the operation is of a state (or civil) aircraft as defined in the Chicago Convention), where the Convention will have no bearing on the contract, and the issue of the loss of insurance coverage becomes moot, the Chicago Convention's application to the insurance contract would prevail. Frequently, the policy will exclude usage of the aircraft for any purpose other than those stated" in a Schedule; among the exclusions would be any use involving abnormal hazards. Nearly every aviation hull and liability policy now excludes losses due to war, invasion, hostilities, rebellion. etc., although insurance to cover such losses can usually be obtained by the payment of a higher premium. However, the instances mentioned do not require a determination of whether the aircraft is considered to be state or civil under the Chicago Convention.

A question sometimes asked is whether national civil laws and regulations would apply to civilian flight crews operating what is a state aircraft under the Chicago Convention. Would civil or military investigative and judicial processes be applied, for example. in the case of an accident? The answer would depend largely on the domestic laws of the State concerned. The fundamental principle is stated in Article 1 of the Convention: every State has complete and exclusive sovereignty over the airspace above its territory. Furthermore, subject to the provisions of the Convention, the laws and regulations of a contracting State relating to the admission to or departure from its territory of aircraft engaged in international air navigation, or the operation and navigation of such aircraft within its territory, shall be complied with

by (civil) aircraft of other contracting States, upon entering or departing from or while in the territory of that *A fortiori*, state aircraft are also subject to the laws of the subjacent State.

In the case of an accident involving state aircraft, States are not bound by Article 26 of the Chicago Convention and Annex 13. They can voluntarily (through their legislation) so apply' these provisions. Sometimes, the legislation specifies a different procedure in relation to military aircraft only; all other aircraft, including those used in customs or police services, are treated as civilian in this regard. In the case of other incidents, where for example the requisite over-flight permission has not been obtained by a state aircraft, which is then forced to land and charges brought against the crew, again the answer would depend on the domestic laws of the over-flown State and the factual circumstances. It is impossible to give a definitive answer in a vacuum. but it is the view of the Secretariat that the classification of an aircraft as "state" aircraft under the Convention does not necessarily mean that military laws and procedures of a State would apply to that aircraft or its crew. The current or any different classification of aircraft under the Convention would not be determinative whether a particular State, in the exercise of its sovereignty, would make that aircraft and/or its crew subject to civil or military laws and regulations. As a matter of practice States usually apply military rules and processes to military aircraft and personnel only. Paragraph 2.1.3 above shows that at the international level, attempts to arrive at a common, acceptable definition of military aircraft have met with a singular lack of success.

The question may arise as to the status of airline pilots and other crew under the Geneva Conventions of August 12, 1949 for the protection of war victims (the Red Cross Conventions) which apply, *inter alia,* in all cases of declared war or armed conflict between two parties, even if the state of war is not recognized by one of them. The Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (No. I) applies to 'persons who accompany the armed forces without actually being members thereof, such as civil members of military aircraft crews ... provided they have received authorization from the armed forces which they accompany" and to "... the crews of civil aircraft of the Parties to the conflict ..." The same provisions are found in Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea (No. 2) and the Convention relative to the Treatment of Prisoners of War (No. 3). The Geneva Conventions, and in particular the provisions quoted above, do not link their own scopes of applicability to the determination under the Chicago Convention of the status of an aircraft. The Conventions of 1949 refer to civil and military aircraft, but not to these terms as "defined" under Chicago. Consequently, the provisions of the Chicago Convention does not, and cannot, determine whether and to what extent the flight crew of an aircraft is given protection by these Conventions.

Conclusion

Apart from the significance of aviation in its role in transporting suspected delinquents under extraordinary rendition, particularly in the face of its intended

role in securing world peace, avition could act as a useful evidentiary tool in tracing rendition flights. For example, flight logs, which are kept by aviation authorities for years have been used to trace the transportation of particular prisoners from one jurisdiction to another (Solomon 2007). The most significant role played by aviation, however, is in assisting the world community in realizing that current political and diplomatic problems mostly emerge as a result of the inability of the world to veer from its self serving concentration on individual perspectives to collective societal focus. This distorted approach gives rise to undue emphasis being placed on rights rather than duties; on short-term benefits rather than long-term progress and advantage and on purely mercantile perspectives and values rather than higher human values.

Against this backdrop, the fundamental principle and the overriding theme of international civil aviation has been, and continues to be, the need to foster friendship and understanding among the people of the world with the ultimate objective of ensuring global peace. Toward this end both the principles of air navigation and aviation economics have to ensure that aviation is developed in a manner that would make sure the world has a safe, reliable, economical and efficient civil aviation system.

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