THE LEGAL STATUS OF MILITARY AIRCRAFT IN INTERNATIONAL LAW

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ABSTRACT

Since the beginning of the history of aviation, the use of aircraft for military purposes revealed an efficient and dangerous weapon in the arsenal of a State. First it was used as observatory post, and then the aircraft took a more active role in combat until it became a destructive and deadly weapon. The definition of military aircraft in international law is not clear as States only wish to regulate international civil air navigation and not state aircraft. On the other hand, the Law of armed conflict defines the status of every aircraft with their respective duties and rights in the conduct of hostilities. The interception of civil aircraft by military aircraft shall be done in accordance with the international standards adopted by the International Civil Aviation Organization in virtue of the Chicago Convention and it's limited to determine the identity of the aircraft. The use of deadly force against civilian aircraft in flight is equivalent of pronouncing the death sentence of its occupants without the hearing of a trial. Respecting the international standards of interception of civil aircraft is a necessity.

RESUME

Dès le commencement de l'histoire de l'aviation, l'utilisation de l'aéronef a des fins militaires s'est révélée être une arme très efficace et très redoutable à posséder dans l'arsenal d'un état. Au début il était surtout utilisé à des fins d'observation et, plus tard, pris une participation beaucoup plus active au combat jusqu'à son utilisation à des fins destructrices et mortelles. La définition d'un aéronef militaire en droit international n'est pas très claire puisque les états ne veulent réglementer que le transport aérien civil international. De son côté, le droit des conflits armés établit le rôle et le statut de chaque aéronef avec les devoirs et obligations qui leur sont propres dans le cadre des hostilités. L'interception d'aéronef civil par les aéronefs militaires doit se faire selon les normes internationales adoptées par l'Organisation de l'aviation civile internationale en vertu de la convention de Chicago et son seul but est de déterminer l'identité de l'aéronef. L'utilisation de la force mortelle contre des aéronefs civils en plein vol équivaut à prononcer la peine de mort de ses occupants sans la tenue d'un procès. Le respect des normes internationales d'interception des aéronefs civils est une nécessité.

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INTRODUCTION

The first human flight marked the beginning of a new era for mankind. The technological challenges and development of aircraft saw the birth of a revolutionary means of transportation capable of carry goods and people long distances and beyond borders of countries in shorter periods of time than by land or sea. In its early stages, aviation generated many hopes and dreams driven by the courageous and adventurous spirit of the first pioneers of the air. Early in the development of aviation, States realized that there was a real benefit to be gained by including this technology in the arsenal of their armed forces. Historically, the main and most recognized duty of any armed force is the basic task of defending the state's territorial integrity and the state's ability to exercise its right of sovereignty over its land. Thus, the relation between military aircraft and State sovereignty became closely associated. The legal challenge encountered by the international community of jurists was defining the principles governing the status of airspace, its boundaries and applicable rules. Many discussions occurred among members of international legal societies and governments where two different schools of thought were vigorously argued. First, the proponents of "Freedom of the Air" doctrine were advocating free circulation in the airspace above the territory of a State by foreign aircraft under certain restrictions and, on the other hand, the proponents of "Sovereignty on airspace above the territory" doctrine were arguing for complete and exclusive sovereignty over the airspace above a state's territory. Finally, after the devastating impact of aviation and air

bombardment during the First World War, a unanimous decision among States lead to the recognition of the principle of sovereignty over the airspace above the territory of a State. The introduction of International conventions regulating civil aviation established early on that a clear difference existed between civil aircraft and state aircraft, in fact it was declared that the convention was to be applicable only to civil aircraft and not to state aircraft, *e.g.*, aircraft used in military, customs and police services. States were jealously seeking to prevent any international organizations dedicated to the regulation of air navigation from regulating state aircraft and especially military aircraft. However, States undertook in the operation of state aircraft to have due regard for the safety of navigation of civil aircraft and engaged to reflect this undertaking in their national regulations applicable to state aircraft. On the other hand, the development of the laws applicable to armed conflicts and International humanitarian law take into consideration the use of aircraft in the conduct of hostilities and elaborate a set of rules in different treaties governing the status of aircraft in the vicinity of, or in the operational theatre. Without reviewing all of the literature on the law of armed conflict, the most relevant treaties and conventions concerning the use of military aircraft will be discussed together with the different definition of military aircraft given from time to time and from one document to another. As its predecessors, the Chicago Convention on international civil aviation does not apply to state aircraft, only to civil aircraft. While the Convention recognizes the right of every State to regulate air navigation within its territory, it specifies that over the high seas the rules in force are those established under the convention. In case of war, the freedom of action of belligerents or neutrals is not affected by

the provisions of the Chicago Convention. Probably one of the most controversial uses of military aircraft is the use of force against civilian aircraft. The International Civil Aviation Organization adopted an international standard on interception of civil aircraft prescribing the rules to be followed by an intercepting and intercepted aircraft even over the high seas.

1. THE EARLY FLIGHTS

1.1. LIGHTER-THAN-AIR MILITARY AIRCRAFT

On September 19, 1783, at Versailles, Louis XVI opposed the idea of having a human being as the first living creature in airspace and for safety reason decreed that the first flight should be flown with animals. Therefore, a cock, a duck, and a sheep were the first aerial travellers and flew at a height estimated at 1,700 feet on board a balloon built by the Montgolfiers brothers.[1] The next obvious step was for a human being to make an ascent.

> The king at first was strongly opposed to any of his subjects taking the risk, but he ordained eventually that a couple of convicts should be experienced with,-and pardoned, if they came down alive! The honour of being the first human being to go up in a balloon was, however, too great to be cheapened in this way, and an enthusiastic young Frenchman, François Pilâtre de Rozier volunteered for the enterprise, and succeeded in obtaining the King's permission.[2]

Louis XVI has the honour of being the first authority to have regulated the first flight of humans beings, or at least having created the first delay in aviation history and probably creating great sorrows among the convicts. Two months later, on November 21, 1783, François Pilâtre de Rozier and the Marquis d'Arlandes conducted the first human flight from the *Château de la Muette* near Paris on board a hot air balloon.[3] They travelled five miles over Paris in

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[1] W.E. John, *Some Milestone of Aviation,* (London: John Hamilton Ltd., 1935) at 25.
[2] Archibald Wiliams, *ConqueringThe Air,* (New York: Thomas Nelson and sons, 1930) at 5.
[3] Albert Roper, *La Convention Internationale du 13 octobre 1919, portant sur la Réglementation de la Navigation Aérienne*, (Paris: Sirey, 1930) at 8.

twenty minutes.[4] It was the beginning of a new era. A year later, the first air law was promulgated, in a form of an ordinance made by Lieutenant of Police Lenoir prohibiting hot air balloon flights over Paris without special permits as from April 23,1784.[5]

Hot air balloons were the first aircraft to be used for aerial transport, and for military purpose such as reconnaissance and bombing. Not long after the first manned flight, Géroud de Villette, while accompanying Pilâtre de Rozier in an ascent realized how useful an aerostat would be in assisting an army to identify the enemy positions and movements. He proposed the use of hot air balloons for military reconnaissance.[6] In 1793, Gaspard Monge, a mathematician and strong supporter of the French Revolution, then Minister of the Navy, proposed in the *Convention nationale*, the French National Assembly at that time, that hot air balloons be used by the military. On 2 April, 1794, Captain Jean-Marie-Joseph Coutelle was promoted Commanding Officer of the first company of aerostats at the castle of Meudon where the balloons were fabricated for the army of the Republic.[7] Aerostats tethered to the ground with ropes were used as mobile observatories and proved to be successful in the war against the Austrians. During the wars of the French Revolution, in 1794, the first military company of aerostats successfully carried out with success its first mission with the army of Sambre-et-Meuse at

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[4] F.H. Sykes, *Aviation in Peace and War,* (London: Edward Arnold & Co.,1922) at 11.
[5] Peter H. Sand, *An Historical Survey of the Law of Flight,* (Montreal: Institute of Air and Space Law McGill, 1961) at 5.
[6] F. Alexander Magoun & Eric Hodgins, *A History of Aircraft,* (New York: Whittlesey House, McGraw – Hill Book Company, Inc., 1931) at 35.
[7] Coutelle(Jean-Marie-Joseph), online: histoire-généalogie.com,<http://www.histoire-genealogie.com/themes_detude/portraits/c/c.htm>. (date accessed: 15 october 2003).

Maubeuge, Charleroi, and Fleurus; faced with these mobile observatory posts, the enemy was completely disoriented. Captain Coutelle of the French army on board the aerostat *Entreprenant* "...made a reconnaissance ascent during the battle of Fleurus in Belgium to the great disturbance of the Austrian morale."[8] "Every day Coutelle went up, and every day he reported something new – earthworks, gun emplacements, and the like."[9] He found that when he was at the end of the cables, he could clearly make out details as much as 29 kilometres away through his telescope. The members of *Comité de salut public*, the equivalent of a defence ministry, were so impressed that they recommended the formation of an air force, the world's first, called the *Compagnie d'Aérotiers.* They created a national school of aerostats at Meudon and for many years the French government continued to rely on the aerostat to support its troops in battle. This reliance on the aerostat came to an end when Captain Coutelle was ordered to Egypt by Napoleon in 1899. During the battle of Aboukir all of the aerostat company's equipment was destroyed leading to the decision of the *Directoire* to dismiss the company and subsequently to Napoleon's, less than enthusiastic about the use of aerostat, disbanded France's aerostats units.[10] Finally, the aerostatic school of Meudon was closed "...and nothing further to note occurred in military aeronautics in France for 50 years.[11]

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[8] *Supra* note 6, at 61.
[9] *Supra* note 1, at 40.
[10] E. Nys, "Régime juridique des aerostats, 2. Rapport de M. Nys, second rapporteur sur le régime juridique des aérostats ", (1902) 19, Institut de Droit International Annuaire 97.
[11] *Supra* note 6.

It was not until the middle of 19th century that hot air balloons were again employed in military campaigns, this time as true machines of war as opposed to the mobile observation platforms employed by the French in the previous century. The first airborne bombs were used at the siege of Venice, Italy in 1849. The Austrians launched two hundreds aerostats loaded with explosives bombs towards the city; however, wind conditions caused the hot air balloons to drift back to the Austrian camp, creating a dangerous situation.[12] Then Henri Giffard built the first man-carrying airship, commonly known as the dirigible in 1852. This airship was 144 feet, a 3 horsepower, and a speed of 6 miles per hour.[13]

During the American Civil War, the United States used also hot air balloons for military purposes. This was the first large scale military conflict to employ this new technology. Thaddeus S. C. Lowe was chief aeronaut with the Union forces which used two balloons. In 1861, Lowe made a free ascent after the Union defeat near Manassas and succeeded in discovering the position of the Confederate forces. At the battle of Richmond, balloons were used to keep Washington informed of the status of the battle:

> During the first two days of fighting before Richmond, a telegraphic key, connected by cable to ground wires, was taken up in the balloon for some military purpose now difficult to understand, for the receiving instrument was placed, not in the headquarters of the commanding general, but in the Capitol at Washington

[12] Remote Pilots Aerial Vehicles: An Anthology – "The first air raid-by balloons!", online: Hardgrave, <http://www.ctie.monash.edu.au/hargrave/rpav_home.html>. (date accessed:15 October 2003).
[13] *Supra* note 4, at 15.

> which thus, for whatever good it might do, was privileged to receive first-hand information direct from the battle-field.[14]

While balloonists for both the North and South successfully completed numerous military missions during the American Civil War, the use of balloons ceased in 1863 when the Union disbanded its balloon corps. The disbandment was a result of many factors, such as commanders playing down the importance of balloons, rivalries between balloonists, and a lack of materials to build balloons.[15] Balloons were also abandoned due to the difficulties encountered in transporting them.[16] The balloon corps of the United States Army in the early 1900s laid the foundation for military aviation in United States.

Despite these challenges, balloons continued to be used. During the Franco-Prussian war of 1870-71 the city of Paris was completely cut off from the outside world by the Prussian army. Sixty-six balloons were used by the Parisians to carry 155 refugees, 354 carrier pigeons and over 2.5 million letters out of Paris. The prominent test passenger was the French Minister of the Interior Leon Gambetta who flew on October 7, 1870 in the balloon "*L'Armand Barbes*". This balloon was launched at 11:10 from Place Saint-Pierre in Paris and landed after 4 hours near Epineuse, 60 km from Paris.[17]

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[14] *Supra* note 6, at 83.
[15] Charles M. Evans, "Air war over Virginia", online: Skydancer Balloons, <http://www.skydancerballoons.com/civil%20war.htm>.(date accessed: 16 September 2003).
[16] *Supra* note 12.
[17] History of Ballooning, online: Yahoo! GeoCities, <http://www.geocities.com/Colosseum/Hoop/4390/history2.htm>, (dated accessed: 15 October 2003).

In the late 19th century, militaries were still using hot-air and gas-filled balloons to enable them to observe enemy positions. Cheaper to run than aircraft, balloons were winched to various heights by a ground crew. They were organized in groups so that cross-referenced observational readings were possible. In 1900, Count Zeppelin launched his first rigid airship and in 1907 he travelled, in stages, a distance of 200 miles in 7 ½ hours. In 1912, Germany constructed the first Shutte-Lanz airship, designed expressly for naval and military purpose.[18] However, the first time dirigibles and aircraft were employed in war was in Tripolitania, ancient Libya, between Italy and Turkey in 1911, in which an Italian pilot dropped grenades on two Turkish targets.[19]

While military balloon use continued, the development of fighter aircraft made life dangerous for balloon crews, who unlike their aircraft counterpart, were permitted to use parachutes. Despite the dangers fighter aircraft presented for both balloons and their crews, balloons were not easy to destroy. Normal bullets passed straight through the fabric causing minimal damage to the balloon and aircraft had to be careful not to get too close as they were in danger of getting entangled in airborne wires, or being shot down by anti-aircraft fire. Increasing use of incendiary and explosive bullets by aircraft gunners reduced the survival chances of balloon crews. To counteract this,

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[18] *Supra* note 4, at 16.
[19] Bomber , online: Encyclopedia Britannica, <http://www.britannica.com/ebc/article?eu=382954&query=italo%20svevo&ct=gen1>. (date accessed: 4 November 2003.

balloon crews were equipped with a powered winch that helped them to bring the balloons down quickly while under attack.[20]

During World War I, all the major powers used tethered observation balloons. Once again, balloons were used to gather information on troop locations and movements, artillery spotting, and communications. These balloons were so important that they were heavily defended by antiaircraft weapons.

The Germans used rigid airships on both the Eastern and Western Fronts as bombers. The airships could approach their targets silently and at altitudes above the effective ceiling of British and French fighters. However, the airships never became effective offensive weapons. Several were lost due to bad weather and 17 were shot down because they could not climb as fast as fighters. Also, the crews suffered from cold and oxygen starvation when the airship operated above 10,000 feet.[21] Airships did excel as defensive weapons; the British used nonrigid airships to patrol their coasts and used rigid airships for convoy protection.[22]

During World War II, barrage balloons were tethered with strong cables to ships, buildings, and other structures to keep airplanes at a greater height thus making it more difficult to hit targets. If an enemy pilot did get too low, it was possible for the airplane to hit the cable which was holding the balloon down causing damage to the aircraft and in some cases causing it to crash.

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[20] Hot Air Balloons, online: Spartacus, <http://www.spartacus.schoolnet.co.uk/FWWballoons.htm>, (dated accessed: 17 September 2003).
[21] De Syon Guillaume, *Zeppelin!,* (Baltimore: The John Hopkins University Press, 2002) at 88-98.
[22] J.A. Sinclair, *Airships in Peace and War,* (London: Rich & Cowan Ltd.,1934) at 71-88.

Probably the least publicized use of balloons, but one that potentially could have caused great death and destruction, was when the Japanese used them to bomb the United States. Beginning on November 3, 1944, and ending in April 1945, Japan launched 9,300 balloons against the United States. Each balloon carried two to four incendiary bombs and one antipersonnel bomb. The objective was to start forest fires in the Western states and to cause fear and panic in the American public. The operation failed; a few small grass fires were started and six people in Oregon were killed.[23] Due to wartime censorship, a great majority of the American population never heard about, let alone saw, an enemy balloon. Of the 9,300 balloons launched, 200 confirmed landings occurred in the United States, including Hawaii and Alaska, 78 in Canada, and 1 in Northern Mexico. Most of the balloons landed in Oregon, British Columbia, Montana, California, and Washington, with two balloons reaching as far as Michigan.[24]

1.2. HEAVIER-THAN-AIR MILITARY AIRCRAFT

The first recorded flight by a manned heavier-than-air glider took place in 1853 at Bromptom, near Scarborough in Yorkshire. The craft was designed and built by Sir George Cayley and flown by his coachman who declared after the fall that his job was driving horses, not flying machines.[25]

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[23] Robert C. Mikesh, *Japan's World War II Balloon Bomb Attacks on North America,* (Washington: Smithsonian Institution Press, 1973) at 67.
[24] Balloons and Airships, online: Aeronautics Learning Laboratories for Science, Technology, and Research, < http://www.allstar.fiu.edu/aero/balloon3.htm> (date accessed: 19 September 2003).
[25] Gordon P. Olley, *A Million Miles in the Air,* (London: Hodder & Stoughton Limited, 1934) at 28.

Sir George Cayley determined the lifting effect obtained from wing surfaces moved through the air at slight inclinations to the horizontal and suggested the use of tail-planes as a means of obtainaing longitudinal stability in a heavier-than-air machine.[26] He foresaw many of the features of the flying machine with which man did ultimately conquer the air, including the necessity for employing a curved rather than a flat surface in the wing of any man-carrying machine. A few years later, Otto Lilienthal from Germany, who was a brilliant contributor to the conquest of the skies and made nearly 2,000 successful glider flights after 1891 in sixteen separate glider types. He realized that in order to fly there must be some driving power, but not necessarily mechanical. "In his case he used gravity, and then allowed the air currents to do their work and carry him along."[27] Although he was successful in pioneering the art of gliding, he died on August 9, 1896 after losing control of a glider and falling from a height of 25 feet.[28]

Sir George Cayley's work was known to the Wright brothers of the United States who extended the technology of flight to include the principles of aircraft control still used today. The Wrights made the first controlled powered heavier-than-air flight at Kitty Hawk, North Carolina on December 17, 1903.[29] "The distance over the ground was measured and found to be 852 feet; the time of the flight 59 seconds."[30] The glider they used was built using the results of experiments conducted by Otto Lilienthal in Germany. Following the

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[26] *Ibid.* at 27.
[27] G.G. Jackson, *The Book of the Air,* (London: Collins' Clear-Type Press, 1931), at 87.
[28] The Early years, online: The Aviation History Online Museum, < http://www.aviation-history.com/early/index-early.html>. (date accessed: 19 September 2003).
[29] Aviation History, online: Wikipedia, <http://www.wikipedia.org/wiki/Aviation_history>. (date accessed: 18 September 2003).
[30] Fred C. Kelly, *The Wright Brothers,* (London: George G. Harrap & Co. Ltd., 1944) at 84.

Wright brothers success, a flurry of aeronautical activity took place throughout in the world. In 1909, Europe also saw its share of aeronautical successes in the work of Santos-Dumont on dirigible balloons where he showed that it was possible to use petrol engines on hydrogen balloons, contrary to many people's ideas.[31] Louis Bleriot also conducted the first flight across the English Channel on 25 July 1909 aboard a monoplane. For the first time in history the airplane had penetrated natural and political barriers sending the clear message to Britain that she could no longer feel secure and relying only on the Royal Navy.

Until 1914, aircraft had no military use except for reconnaissance. However, with the commencement of the First World War manufacturers were pressed to equip airplanes with guns, bombs and torpedoes.[32] As a result, the most impressive advances in the field of aeronautics were made during the years of the war. When First World War began, there was no aviation forces organized enough to conduct decisive military operations by air. Air forces pilots were not trained and aircraft were not sufficiently advance:

> No fighting aeroplanes, of anything like an effective type, existed at the outbreak of war; though the courage and ingenuity of individual pilots, who went up in scouting machines and fought with rifles and revolvers, enabled them to wage a sporadic and guerrilla form of war; in which, occasionally, when they could get to sufficiently close quarters, they crippled and brought down enemy machines. There was no possibility, however, in this first and critical

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[31] Rudnei Dias da Cunha, "História da Força Aérea Brasileira", <http://www.rudnei.cunha.nom.br/FAB/eng/santos-dumont.html>. (date accessed: 15 October 2003).

[32] Early Flight History, online: Aeronautics Learning Laboratories for Science, Technology, and Research, < http://www.allstar.fiu.edu/aero/history1b.htm>. (date accessed: 20 September 2003).

> stage of the war, when the armies were mobilising and taking up their positions, of one air service being able to blind the other, and so rob the enemy headquarters of its news by air.[33]

In August 1914, Sir Wilson Churchill stated that the Royal Naval Air Service was equipped with 50 aircraft, while the recently formed British Royal Flying Corps consisted of 1,844 officers and men, seven squadrons and some 150 aircraft. During the war, Great Britain was producing 90 aircraft a day and, at the end of 1918, the Royal Air Forces had over 22,000 aircraft, with nearly 300,000 officers and men, and 201 squadrons.[34]

The First World War provided dirigibles and aircraft with the opportunity to demonstrate their strategic value and modern warfare improved their destructive forces.[35] The first military aircraft were very rudimentary and would carry only a few bombs, which were mostly hand-dropped by the pilot. However, with the advent of the First World War, the military value of aircraft was quickly recognized and production increased significantly to meet the soaring demand for planes from governments on both sides of the Atlantic. Most significant was the development of more powerful motors, enabling aircraft to reach speeds of up to 130 miles per hour, more than twice the speed of pre-war aircraft. Increased power also made larger aircraft possible

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[33] Claude Grahame-White & Harry Harper, (London: Chapman & Hall, Ltd., 1917) at 3-4.
[34] J.M. Spaight, *Air Power and War Rights,* (London: Longmans, Green and Co. Ltd., 1947) at 5.
[35] Nicolas Mateesco, *Droit aérien aéronautique,* (Paris: Éditions A. Pedone, 1954) at 114.

until the armies of the world saw the introduction of a new machine that would inflict its destruction from above: the bomber.[36]

At the same time, the war proved to be bad for commercial aviation in several respects. It focused all design and production efforts on building military aircraft. In the public's mind, flying became associated with bombing runs, surveillance and aerial dogfights.

2. LEGAL REGIME OF AIRSPACE

At the turn of the 20th century, private groups and Law societies were interested by the challenge of defining the legal aspects of this new means of transportation and the first documents establishing the legal doctrine relating to airspace and aircraft started to appear.[37]

2.1. THE FIRST AIR LAW CONFERENCE

The first international conference on air law took place in Paris in 1889. It was organized by the French government on the occasion of the Universal Exhibition and a number of air law questions were discussed such as aeronaut licensing, liability of aeronauts to passengers, the public and landowners, rescue, and use of aircraft in war. At this time, the *Commission permanente internationale d'aéronautique* was charged with the task to

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[36] The Airline Airbook-Online Version, online: Air Transport Association, < http://www.air-transport.org/public/publications/display1.asp?nid=961>. (Date accessed: 20 September 2003).

[37] André Henry-Coüannier, *Éléments créateurs du droit aérien*, (Paris: Édition Per Orbem,1929) at 11.

continue the work but, at the following meetings, the Commission only put forward a number of wishes.[38]

2.2. L'INSTITUT DE DROIT INTERNATIONAL

In the early 20th century, the members of a judicial society called *Institut de droit international* engaged in many discussions on air law and held numerous meetings in a variety of European cities. The *Institut de droit international* was founded in 1873 by imminent jurists as an independent institution, free of governmental influence, with the goal of contributing to the development of international law and to promote its application. The *Institut de droit international* is still in existence today.[39]

2.3. FIRST DEFINITION OF AIRCRAFT

At the Brussels session in 1902 the first code of international air law was prepared in draft. Its first article described two categories of aerostats, namely public and private. The term aerostat was not defined anywhere in this draft, nevertheless, throughout the numerous articles of this code, one can presume that the term aerostat referred to hot balloons, the only flying object widely in use at this time. In the 1902 version, state aircraft, *e.g.*, dedicated to the service of the State, were called public aerostat and subdivided into two categories. The first category constituted of military aerostat, which included all balloons under the command of an army or navy officer commissioned by a military authority with a military crew on board. The second category

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[38] *Supra* note 3 at 21.
[39] Historique – Les origines, online: Institut de droit international, <http://www.idi-iil.org/idiF/navig_historique.html>. (date accessed: 22 September 2003).

consisted of civil aerostat and included all balloons under the command of a State public servant with a crew nominated by the State or its representative. All other aerostats constituted private balloons.[40]

However, a few years later, in 1911, a newer version of this Convention was presented at the Madrid session where the term aerostat was employed in some of the articles to include hot balloons, dirigibles, and aircraft.[41] The Convention contained 28 articles applicable in peacetime and 30 articles that would apply in time of war. The discussion that took place in support of this initiative led to the adoption of the following text:

> I. Temps de paix
>
> 1. Les aéronefs se distinguent en aéronefs publics et en aéronefs privés.
>
> 2. Tout aéronef doit avoir une nationalité, et une seule. Cette nationalité sera celle du pays où l'aéronef aura été immatriculé. Chaque aéronef doit porter des marques spéciales de reconnaissance.
>
> L'Etat auquel l'immatriculation est demandée détermine à quelles personnes et sous quelles conditions il peut l'accorder, la suspendre ou la retirer.
>
> L'Etat qui immatricule l'aéronef d'un propriétaire étranger ne saurait toutefois prétendre à la protection de cet aéronef, sur le territoire de l'Etat dont relève ce propriétaire, contre l'application des lois par lesquelles cet état aurait interdit à ses nationaux de faire immatriculer leur aéronef à l'étranger.
>
> 3. La circulation aérienne internationale est libre, sauf le droit, pour les Etats sous-jacents, de prendre certaines

[40] Paul Fauchille, "Régime juridique des aerostats", (1902) 19, Annuaire de l'Institut de Droit International 19
[41] *Supra* note 3 at 226.

mesures à déterminer, en vue de leur propre sécurité et de celle des personnes et des biens de leurs habitants.

II. Temps de guerre

La guerre aérienne est permise, mais à la condition de ne pas présenter pour les personnes ou les propriétés de la population pacifique de plus grands dangers que la guerre terrestre ou maritime.[42]

There are important points that can be extracted from this text, one of the first attempts to regulate air navigation; the differentiation between public and private aircraft, registration rules, freedom of the air doctrine conditional to defence measures taken by States, and finally an express acknowledgement that air warfare was permitted however it was not to place civilian populations and property at greater risk than land or sea warfare.

2.4. FREEDOM OF THE AIR DOCTRINE

As man could hover in the sky and cross borders, the definition of the legal regime addressing this new activity became a necessity. The legal approach identified in discussions were diametrically opposed, consisting of two schools of thoughts representing, on the one hand, the proponents of freedom of the air and, on the other hand, the supporters of the sovereignty of airspace above the territory of a State. In the resolution prepared by Mr. Paul Fauchille, the doctrine of freedom of the air prevailed over the sovereignty of the airspace. In 1902, the first version of Article 7 of the resolution stated that:

[42] Textes votés à la session de Madrid (1911) sur le régime juridique des aérostats, (1911) 24, Annuaire de l'Institut de Droit International 346.

> Article 7. - L'air est libre. Les États n'ont sur lui en temps de paix et en temps et en temps de guerre que les droits nécessaires à leur conservation. Ces droits sont relatifs à la répression de l'espionnage, à la police douanière, à la police sanitaire et aux nécessités de défense[43]

However, at the Madrid session in 1911, the wording of the principle expressed in article 7 as quoted above took a different shape. It was now articulated in the following form:

> Article 7. - La circulation aérienne est libre. Néanmoins les États sous-jacents gardent les droits nécessaires à leur conservation, c'est-à-dire à leur propre sécurité et à celle des personnes et des biens de leurs habitants.[44]

Although this version was a more refined than the original, it maintained the underlying principle free access to airspace. At this time in aviation history the concept shared among the members of the *Institut de droit international* was freedom of the air and States had, during peacetime or wartime, only the rights necessary to ensure their own preservation. These rights related to the repression of espionage, customs police, sanitary police, and defence necessity. Paul Fauchille advocated the freedom of the air doctrine, the *res communis* principle in relation to airspace, arguing that air by its very nature cannot be appropriated and cannot be occupied in a real and continuous manner; consequently, air cannot be an object of property. His rationale for asserting this idea was that States had neither property rights in nor

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[43] *Supra* note 40 at 32.
[44] Projet de convention sur le régime juridique des aérostats présenté par M. Paul Fauchille, art. 7.(1911) 24, Annuaire de l'Institut de droit international 107.

sovereignty over the atmospheric environment. To create a right of sovereignty over airspace would result in impracticable consequences: sovereignty over the air would be instable, could never be fixed and, where it did exist, it would limit the access to free passage of balloons.[45] Therefore, Fauchille affirmed that freedom of airspace should be proclaimed; the air did not belong to anyone, it was available for use by everyone. Although, he advocated freedom, he recognized that States could not accept that freedom of the air gave the right to do anything in all airspace, such an interpretation would prove dangerous and unsafe for the security and existence of States. He instead arrived at the conclusion that while States had rights with respect to airspace those rights were limited to those essential to their defence within their territorial limits. These included the rights to subject others states to the obligation of non-approach concerning only the use of firearms, espionage, custom, sanitary reasons, without limiting their right to circulate in any other part of airspace. Under his theory, a State could prohibit the flight over its territory by others States under the altitude of 1,500 meters, which represented the distance of a cannonball, for reason of defence against espionage or smuggling.

2.5. PARIS CONFERENCE OF 1910

In 1910, the French Government held the Conference on Aerial Navigation at the ministry of foreign affairs in Paris. The purpose of this conference was to develop an international convention to regulate air navigation. A series of questions to be discussed at the conference were sent by the French

[45] *Supra* note 40 at 32.

government to the invited Powers.[46] The theory of freedom of the air hung over the Conference. The Convention report prepared by the redaction Committee was not modified; however, there was opposition to a proposal to have a fixed date by which the represented governments would have to make known their position on this question. On 29 June 1910, as the representatives of the different governments could not reach agreement on the report, the Conference was adjourned on the pretext that the questions raised by the four subcommittees rendered a profound examination of the texts prepared by the respective governments necessary. It was agreed that the Conference would reconvene on 29 November 1910 but this never happened, probably due to the fact that the organizers of the conference didn't want to discuss the subject of the sovereignty of airspace above the territorial State and prefer to adhere to the doctrine of freedom of the air. The Conference did not succeed in putting in place an international convention governing air navigation. States were forced to rely on bilateral agreements to fly in another country. Nevertheless, the works of the Paris Conference of 1910 were not in vain. The texts adopted by the various delegations provided a good starting point to the drafters of the *1919 Paris Convention*.[47]

2.6. THE INTERNATIONAL LAW ASSOCIATION

The International Law Association was created in Brussels in 1873, and still exists today.[48] The function of the association "...must always be, on the one

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[46] Conférence internationale de navigation aérienne, procès-verbaux des séances et annexes, Paris ; Imprimerie nationale, 18 mai – 29 juin 1910.
[47] *Supra* note 3 at 24-26.
[48] The International Law Association, online: The International Law Association, <http://www.ila-hq.org/>. (date accessed: 23 September 2003).

hand to explore new ground and to take cognizance of all questions which changing circumstances introduce into the mutual relations of nations and their subjects, and on the other hand to concentrate special attention on reforms which are required by practical consideration."[49] The association also supported the work of the *Institut de droit international*.

2.7. SOVEREIGNTY OF AIRSPACE DOCTRINE

At its Conference of Paris in 1912, the International Law Association considered the important question of the sovereignty of airspace above the territorial State. M. Fauchille was present at that time exposing his view that free access to airspace was appropriate with states having the right to take certain measures to ensure their security, and safety of persons and property.[50] Many discussions took place where the French thesis of freedom of the air and the English thesis of sovereignty of the air were debated. [51] As no one desired to vote without a full understanding of all the implications of each position, the association agreed that a committee would look into all the aspects of the question and report at the next session. The Committee of Aviation rendered its report at the session in Madrid in 1913, putting forth and answering the following question: "Do States have absolute control over the air space above their territories, as they have over the territories themselves, or is the air space over their territories free to all, like the high seas, or free subject to some restrictions of some kind."[52] Consequently, the Committee of

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[49] Preface , (1913) 28 Intertanional Law Association X.
[50] Droit aérien, (1912) 28 International Law Association 277.
[51] H.D. Hazeltine, "State Sovereignty in the Air-Space", (1912), 27 International Law Association 261.
[52] Ley De Aviación, (1913), 28 International Law Association 523.

Aviation reported that on the general question, an examination of recent discussions had convinced them that the opinion of statesmen and jurists was more and more coming to accept the view of full sovereignty of airspace above the territory of States. The Committee therefore submit the following resolutions:

> 1. It is the right of every State to enact such prohibitions, restrictions, and regulations as it may think proper in regard to the passage of aircraft through the air space above its territories and territorial waters.
>
> 2. Subject to this right of subjacent States liberty of passage of aircraft ought to be accorded freely to the aircraft of every nation.[53]

However, certain members of the Committee of Aviation, notably Mr. Fauchille and Mr. Henry-Coüannier, stated that they were unable to agree with this Report or the Resolutions. They preferred to adhere to the suggestion of "aerial circulation" on the lines of the Resolutions presented by the *Institut de droit international* advocating freedom of the air.[54]

At the end, the Committee of Aviation had not proceeded further with the adoption of an International code and recommended that a further Report should be submitted at the next meeting of the Association. Unfortunately, World War 1 began a year later and for the next few years the International Law Association could not hold meetings. When the Association recommenced its sessions at the end of the war in 1920, it recognized the fact that international agreement and practice, before, during, and since the war

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[53] *Ibid* at 533.
[54] *Ibid.*

had confirmed the correctness of the resolutions of their Conference in Madrid in 1913, adopting the principle of territorial air sovereignty as opposed to that of the freedom of the air.[55]

2.8. PARIS CONVENTION OF 1919

At the end of the First World War, a Peace Conference was called in Paris where the plenipotentiaries of 32 Allied Powers and associated gathered to elaborate a Peace Treaty that would not only settled the outcome of the war, but also to establish a new organization of the community of States that would include a Society of Nations, an International Court of Justice, an International Labour Office and finally to prepare a series of complex conventions to regulate the close relationship between governments. The aeronautic experts attach to each delegation at the Conference were convinced of the absolute necessity of an international agreement to ensure the development and the future of air navigation. They were eager to continue the work in 1910 and bring it to conclusion with an agreement. The organized actions of these persons resulted in the preparation of the *Convention relating to the regulation of aerial navigation*, signed at Paris on 13 October 1919. *La Direction de L'Aéronautique militaire* of the French War Department appreciated the services rendered at the end of the hostilities by an organization called *Comité interallié d'Aviation*, and believed that such organization, adapted during the transition period of the Peace Conference, could be organized in order to

[55] Preface, (1920), 29 International Law Association at V.

function as a postwar international organization essential to assure the development of civil air navigation and the unification of air law.[56]

The *Comité interralié d'Aviation* established in 1917 was composed of two persons from each of the four main powers: France, Great Britain, United States and Italy. It had the mandate to accomplish three tasks. First, to jointly study the fabrication programs of aircraft, secondly, to divide available raw material between the allied aeronautics industries and, thirdly, to study measures to be taken toward adopting standard types of aircraft, engines and aeronautics equipment in general. Considering such an organization as vital, the *Direction de l'aéronautique* wished to transform this committee into a permanent organization in charge of preparing a convention relating to air navigation and having the power to oversee its application and also to propose amendments dictated by experience. The Peace Conference could use the *Comité interallié d'Aviation* as a consultative organization for all aeronautic questions, and maintain it on a permanent basis giving it the responsibility of dealing with all questions related to aeronautic matters of international interest.

Following the proposed British amendment, it was decided to replace the *Comité interallié d'Aviation* with an interallied commission composed of two persons from each of USA, British Empire, France, Italy and Japan, and five persons elected between the others States participating in the Peace Conference, assisted by qualified technical experts in charge of studying all

[56] *Supra* note 3 at 32-33.

questions relating to air navigation raised at the Conference, to prepare an international convention and to follow in a permanent manner its regulation work. The Commission was created on 6 March 1919, and was composed of three subcommittees: a technical subcommittee, a military subcommittee and a commercial, legal and financial subcommittee.

The composition of the Commission, which primarily represented the governments of ex-Allied Powers and associated States, was criticized. As experts, the Commission needed personalities who possessed the knowledge and had mastered the aviation questions. Since they were the ones who directed, during the years of the war, the destiny of national aviation in their own country, military personnel from different States were the majority of experts of the Commission. However, a large number of technicians, professors and scientists also assumed positions as members of the Commission. The Commission drafted the underlying principles in one day, the backbone of the Convention in few weeks and completed it in four months.

2.9. ADOPTION OF SOVEREIGNTY OF AIRSPACE DOCTRINE

At the first meeting on 17 March 1919, the Commission decided to study the fundamental principles that would regulate air navigation and gave them to the subcommittees in order to draft the text of the Convention. The first question that the Aeronautic Commission of the Peace Conference had to resolve in the preparation and elaboration of the Convention was the choice between the principle of freedom of the air and the principle of the sovereignty of States

over the atmosphere above its own territory. Therefore, the first principle on the agenda was a proposition brought by the American delegation and was entitled "The Principle of the Sovereignty of States above its Territory." This principle was adopted unanimously as the first article of the Convention in the following terms:

> Article 1. - The High contracting Parties recognise that every Power has complete and exclusive sovereignty over the airspace above its territory.
>
> For the purpose of the present Convention the territory of a State shall be understood as including the national territory, both that of the mother country and of the colonies, and the territorial waters adjacent thereto.[57]

The legal subcommittee in charge of dealing with this principle presented the text of the first Article and explained its rationale. The *Paris Convention of 1910* did not reach a decision in respect of the competing principles of freedom of the air versus sovereignty of the air. The principle voted by the Aeronautic Commission proposed a solution.

Another important point adopted during the first meeting of the Commission was the regime of state aircraft in which the principle of special treatment for the army, navy and State aircraft in the service of the government was recognized. This principle was incorporated in the *Convention* in the following articles:

STATE AIRCRAFT

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[57] *Convention Relating to the Regulation of Aerial Navigation, 13th October 1919.*

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.

Article 32.- No military aircraft of a contracting State shall fly over the territory of another contracting State nor land thereon without special authorisation. In case of such authorisation the military aircraft shall enjoy, in principle, in the absence of special stipulation the privileges which are customarily accorded to foreign ships of war.

A military aircraft which is forced to land or which is requested or summoned to land shall by reason thereof acquire no right to the privileges referred to in the above paragraph.

Article 33.- Special arrangements between the States concerned will determine in what cases police and customs aircraft may be authorised to cross the frontier. They shall in no case be entitled to the privileges referred to in article 32.[58]

In regards to state aircraft, the Legal subcommittee declared that the *Convention* was preoccupied in assuring the development of pacific and commercial air navigation; therefore its work was restricted to the movement of private aircraft. Nevertheless, they had to determine the legal status of

[58] *Supra* note 57.

private aircraft as compared to state aircraft. States can use aircraft for different purposes; exploit commercial aircraft as a national air carrier, military aircraft, and those allocated to state services such as mail services, customs, and police. Therefore, the Convention maintained a definition of state aircraft in regard to a state public power and, as a result, created a special regime for military aircraft and aircraft exclusively employed in State service. This is a special regime for state aircraft in which, within the State, prohibited area can be flown over by military, postal, custom, and police aircraft but not by aircraft of other States. However, if a state aircraft possess this privilege in its own motherland such is not the case in a foreign country. While state police and custom aircraft may be authorized to cross the frontier with special State to State arrangements, military aircraft cannot fly over the territory of another State or land without special authorization.[59] If the rule is stricter for military aircraft, this is due to its military character and the fact that it presents a greater danger, menace or threat to the sovereignty of other States. It represents the power of the State itself more than do police or custom aircraft.

The definition of a military did not satisfy all the contracting parties. Article 31 of the Convention stated that "...Every aircraft commanded by a person in military service detailed for the purpose shall be deemed to be a military aircraft." Articles 30 to 33 of the Convention related to the status of State aircraft were not the object of observation until the Conference in1929 where the German Delegation considered that the expression "commissioned" used in Article 31 created doubt and proposed to replace it. Their proposition for

[59] *Supra* note 57, art. 32-33

the definition of a military aircraft contained three inclusive essential elements. First, an aircraft should be deemed to be a military aircraft when it bears a distinctive military identification mark. Secondly, an armoured aircraft or whatever other protection system an aircraft might have, equipped with apparatus to receive war material, such as canons, machine guns, torpedoes, bombs, or aim devices. And thirdly, aircraft in which pilots or crew are nationals and commissioned to fly. Although the Conference of 1929 recognized that it would have been extremely useful to have a clear definition of "military aircraft", the German proposal triggered many critics and the Conference decided to invite the International Commission for Air Navigation to study the question. At its December 1929 session, the Commission approached the subject however the discussion did not result in a more satisfying definition.[60]

Another fundamental principle raised at the first meeting of the Commission on 17 March, 1919, was the acknowledgement of the principle that the Convention should not affect the duties and the rights of belligerents and neutrals in wartime. This principle was transposed in Article 38 of the Convention in the following terms:

> Article 38. - In case of war, the provisions of the present convention shall not affect the freedom of action of the contracting States either as belligerents or as neutrals.[61]

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[60] *Supra* note 3 at 162-163.
[61] *Supra* note 57 art.38.

Criticism was directed at the authors of the *Convention* based on the lack of rules to apply to air navigation in a wartime scenario. While the Hague Conferences, held before the war, attached a lot of importance to this question and tried to limit, , to the extent possible, the damage and danger caused by aircraft in wartime, the *Convention* of 1919, not only did not impose any restriction to this effect, but seemed to imply that in case or war everything is permitted.[62]

3. LAW OF ARMED CONFLICTS

The terms "Law of war", "Law of armed conflict", and "International Humanitarian Law" have been used in the recent years to describe the set of rules, treaties, conventions, etc, that specifically regulate the conduct of hostilities and the treatment of persons, whether combatant or civilian, where parties resort to hostilities in order to resolve their differences after discussions and negotiations have failed. The application of the law of war does not depend upon the recognition of the existence of a formal state of "war", but encompass situations of armed conflict, military occupation, even United Nations peacekeeping missions, whether formally recognized as war or not. It also applies to all cases of armed conflict whether the commencement of the conflict is lawful or unlawful. Therefore, in this document the term law of armed conflict would be used to identify the set of documents, laws, treaties, conventions, declarations, customs, and chivalry regulating the conduct of hostilities.

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[62] André Henry-Coüannier, *Examen de principe de la Convention internationale portant réglementation de la navigation aérienne du 13 Octobre 1919*, (Paris: Édition Aérienne,1921) at 10.

3.1. AIR WARFARE

There is no single international agreement in force that exclusively addresses either air warfare in general or bombing in particular, except for the 1907 Declaration on balloons (of limited value). Despite the absence of specific treaties regulating the conduct of armed conflicts in the air, it would be misleading to infer that there is no legal regulation at all. Indeed, several aspects of the regulation of the use of military aircraft can be found in a number of international legal instruments, either explicitly or implicitly.[63] However, the fact remains that unlike land warfare, there is no formally binding agreement that exclusively addresses air warfare. The law of war was initially entirely customary and it was based on established practice and custom. It has become the object of international treaties adopted in international conferences. Historically, there were two major collections of law of war treaties: the Hague Conventions and the Geneva Conventions. The Hague Conventions regulate the hostilities and principally the conduct of combat, the concept of occupation and the concept of neutrality. The Geneva Conventions are concerned with protective provisions relating to the victims of armed conflict such as civilian personnel, prisoners of war, wounded, sick or shipwrecked and the medical personnel.[64] There are also historical figures who have written on the subject of the law of war and their contribution over

[63] Marco Sassòli & Antoine A. Bouvier, *How Does Law Protect In War?* (Geneva: International Committee of the Red Cross, 1999) at 198.
[64] Frederic de Mulinen, *Handbook on the Law of War for Armed Forces,* (Geneva: International Committee of the Red Cross, 1987) at 2.

the years have help to shape the fundamental basis of the law of armed conflict. During the history of mankind, many people have contributed to the law of war, humanitarian law, and the law of armed conflicts.

3.2. HUGO GROTIUS

In 1625, a Dutch lawyer named Hugo Grotius served in many official positions in the Dutch government as Attorney-Generalship of Holland and at the office of Magistracy of Rotterdam. He escaped to France after a political quarrel in which he was sentenced to life-imprisonment and wrote his three-volume masterpiece *On the Law of War and Peace.*[65] It was the most systematic and comprehensive attempt to bring together both classical and medieval thought on war, and to reconcile Christian dogma and the actual practice of war. The first book examined the question of whether war is ever lawful and Grotius arrived at the conclusion that it was. The second book determined the causes of war. Finally, in the third book he explored the actual conduct of war. He saw nothing wrong in inflicting injury on prisoners under certain circumstances and in making all captors slaves.[66] Grotius also emphasized moderation in war. He wrote that useless fighting should be avoided. Many of his suggested restraints were later written into international law as part of the Hague and Geneva Conventions.

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[65] Leon Friedman, *The Law of war,* vol. 1(New York: Random House, 1972) at 14-15.
[66] Hugues Grotius, *Le droit de la guerre et de la paix,* vol. I,II,III, trans. Jean Barbeyrac, (Caen: Publications de l'Université de Caen, Centre de Philosophie politique et juridique, 1984).

3.3. FRANCIS LIEBER

Francis Lieber was a German-born professor of history at Columbia College in New York. He had important friends in the Union government during the American Civil War. He suggested the preparation of a book on the law and usages of war to be used as a guide by military commanders in their treatment of prisoners of war, irregular combatant forces, captured enemy property, and other problems arising from the conflict. It was the first attempt to codify the law of war. He prepared his code in the early 1863 and it was officially promulgated as General Orders No. 100 and entitled "*Instructions for the Government of Armies of the United States in the Field.*"[67] The Lieber Code was complete, humane and easily comprehensible to commanders in the field. It became the subject of intense interest in Europe and it formed the origin of an international convention on the laws of war presented to the Brussels Conference in 1874 and was also behind the initiative to adopt the Hague Conventions on land warfare of 1899 and 1907.[68]

3.4. INTERNATIONAL HUMANITARIAN LAW

Humanitarian law is the body of rules which, in wartime, protects people who are not or are no longer participating in the hostilities. Its central purpose is to limit and prevent human suffering in time of armed conflict. The rules are to be observed not only by governments and their armed forces, but also by armed opposition groups and any other parties to a conflict. The four Geneva

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[67] *Supra* note 63 at 151-152.
[68] Dietrich Schindler and Jiří Toman, *The Laws of armed conflicts,* (Dordrecht: Martinus Nijhoff, 1988) at 3.

Conventions of 1949 and their two Additional Protocols of 1977 are the principal instruments of humanitarian law.

3.5. JEAN-HENRI DUNANT

The Franco-Austrian War of 1859 produced a series of bloody battles, especially at Magenta and Solferino, in which the sick and wounded were not properly cared for. A young Swiss, Henri Dunant, arriving in the nearby town of Castiglione shortly after the battle, was seized with horror and pity at the sight of the wounded, dying of infection and suffering atrocious pain. Dunant did everything he could for the wounded and organized a first aid movement with the women of the region. Nearly 22,000 Austrian and 17,000 French soldiers lost their lives at Solferino.[69] In his book *A Memory of Solferino,* Henri Dunant expressed the following wish: "Would it not be possible, in time of peace and quiet, to form relief societies for the purpose of having care given to the wounded in wartime by zealous, devoted and thoroughly qualified volunteers?"[70] The aim of Dunant's proposals was twofold: on the one hand, to create in all countries voluntary "relief societies for the purpose of having care given to the wounded in wartime" and, on the other hand, to formulate an "international principle, sanctioned by a Convention inviolate in character," which would serve as the basis and support for the relief societies.[71] The Red Cross as an organization translated the first of these aspirations into reality;

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[69] Jean Pictet, *Development and Principles of International Humanitarian Law,* (Dorrecht: Martinus Nijhoff, 1985) at 25.
[70] Henry Dunant, "A memory of Solferino", online: International Committee of the Red Cross,<http://www.icrc.org>. (date accessed: 25 September 2003)
[71] *Ibid.*

the second led to the Geneva Convention.[72] A Committee was nominated by the Geneva Public Utility Society to study Dunant's proposals. This Committee was the founding agency of the Red Cross and promoted the Geneva Convention and in 1880 adopted the title "International Committee of the Red Cross", which remains unchanged.[73] The 1864 Convention embodies the great principle that members of the armed forces who are wounded or sick, and thus harmless and defenceless, must be respected and cared for without distinction of nationality. Medical personnel, ambulances and military hospitals are to be protected against hostile acts. The Convention was the point of departure for the great movement in international law for the protection of war victims represented by the Geneva Convention as a whole. Its principle, first limited in application to wounded soldiers, was extended gradually to other categories of war victims: the shipwrecked, prisoners of war, and finally, civilians. The Geneva Conference of 1864 also established protective principles for Red Cross personnel and others engaged in helping the wounded.[74] With the signature of the four 1949 Conventions it can be said that the movement has achieved all it set out to do. In 1901, Henri Dunant was awarded the first Nobel Prize for Peace for his efforts to mitigate the severity of war.[75]

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[72] Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, 11 August 1864.
[73] Jean S. Pictet, *Commentary - 1 Geneva Convention,* (Geneva: International Committee of the Red Cross, 1952) at 10.
[74]. *Supra* note 70.
[75] Nobel Peace Prize Winners, online: The Nobel Prize Internet archive, <http://www.almaz.com/nobel/ online>. (date accessed: 16 October 2003).

4. THE HAGUE PEACE CONFERENCES

4.1. THE HAGUE CONFERENCES OF 1899 AND 1907

Before 1870, the legal status of aeronauts had not been studied in regard of the law of armed conflict. In the Franco-German war of 1870/71, during the siege of Paris, a letter was sent by the German Count of Bismarck to the French government through the American ambassador in Paris in which he declared that persons on board balloons and captured behind the battle lines would be treated as prisoners of war without discrimination. This created some concerns within the legal community relating to the real status of these peoples, particularly as Germany recognized as *ipso facto* its sovereignty over the airspace of occupied land.[76]

The first systematic efforts to limit armaments on an international scale, in either a quantitative or a qualitative sense, occurred at the Hague Conferences of 1899 and 1907. The first Hague Conference was initiated by the Tsar Nicolas II, Emperor of Russia when, on 12 of August 1898, his Minister of Foreign Affairs, Count Mouravieff, handed to the diplomatic representatives at Petrograd a circular note proposing a conference of States to consider "...a possible reduction of the excessive armaments which weigh upon all nations."[77] The Imperial government believed that the time was right to seek, "...by means of international discussion, the most effective means of ensuring to all peoples the benefits of a real and lasting peace, and above all

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[76] *Supra* note 10 at 109.
[77] James Scott Brown, *The Hague Conventions and Declarations of 1899 and 1907,* (New York: Oxford University Press, 1915), at xvi.

of limiting the progressive development of existing armaments."[78] In a second Russian circular note dated 30 of December 1898, the Imperial government proposed a program for the first conference with the object of putting a limit to the progressive increase of military and naval armament, and preventing armed conflicts by the pacific means at the disposal of international diplomacy. Many subjects were submitted for international discussion at the conference and one concerned the prohibition of the discharge of any kind of projectile or explosive from balloons or by similar means. The Russian Government felt that it would not be desirable that this take place in the capital of one of the Great Powers, and it therefore addressed the Cabinet of The Hague with a view of obtaining its consent to the choice of that capital as the seat of the conference in question. The Netherlands accepted this request.

The conference assembled on the Tsar's birthday, May 18, 1899, and adjourned on July 29, 1899. Twenty-six Governments were represented at the conference where three Conventions and three Declarations were signed. One of the three Declarations signed was *The Hague Declaration of 1899 Prohibiting the Discharge of Projectiles and Explosives from Balloons*, which prohibited, for a period of five years the launching of projectiles and explosives from balloons, and other new methods of a similar nature. The prohibition for five years was put forward by the United States in, what they called, a humanitarian argument by which the technology and the quality of arms, as it stood at that time, were not perfected so as to avoid collateral damage on

[78] *Ibid.*

non-combatants.[79] Twenty-five of the twenty-six States which attended The Hague Conference ratified the Declaration, only Turkey which signed it did not ratify it.

It was expected that a new round of negotiations would take place the following year. But two terrible wars, the Anglo-Boer and the Russo-Japanese, burst upon the world and shattered for a time all hope of another Peace Conference between the nations. This explained why the five years term of the Declaration was not revisited when it expired on 4 September 1905.[80] Nevertheless, the termination of the Russo-Japanese war in 1905 revived the interest of Russia in a future conference. Thus, the Russian government issued its invitation to the nations for another conference with its program of topics. The Powers accepted the invitation hosted again by the Netherlands government, and The Hague Conference started on June 15, 1907 and lasted until October 18, 1907. At that time the Powers renewed the Declaration prohibiting the discharge of projectiles and explosives from balloons and agreed to prohibit it for a period extended to the close of the Third Peace Conference.[81] The Belgian proposal was to renew the Declaration for a period of five years, but the delegation of Great Britain offered the amendment that the prohibition be extended until the end of the third Peace Conference. The prohibition was adopted by a vote of twenty-

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[79] Wiliam I. Hull, *The Two Hague Conferences and their Contributions to International Law,* (New York: Kraus Reprint Co., 1970) at 77-78.
[80] *Supra* note 66 at 201.
[81] *The Hague Declaration of 1907 Prohibiting the Discharge of Projectiles and Explosives from Balloons, 18 October 1907.*

nine to eight, with seven abstentions.[82] The Declaration of 1907 is still formally in force today. Many of the important States, however, such as France, Germany, Italy, Japan and Russia, did not sign or ratify it. Of the great Powers only Great Britain and the United States ratified the Declaration.

4.2. THE HAGUE CONFERENCE OF 1923

First World War demonstrated the necessity of a minimal regulation of the law of air warfare. On 4 February 1922, United States, the British Empire, France, Italy, the Netherlands, and Japan held the Washington Conference on the Limitation of Armaments and adopted a resolution for the establishment of a Commission of Jurists to consider amendment of the Law of war and to prepare rules relating to aerial warfare. This Commission composed of not more than two members representing each of the above-mentioned Powers was constituted to consider the following questions:

> (a) Do existing rules of international law adequately cover new methods of attack or defense resulting from the introduction or development, since the Hague Conference of 1907, of new agencies of warfare?
>
> (b) If not so, what changes in the existing rules ought to be adopted in consequence thereof as a part of the laws of nations?"[83]

The Commission met from December 1922 to February 1923 at The Hague and prepared rules for the control of radio in time of war and rules of air warfare. Although these rules were never adopted in legally binding form they

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[82] Supra note 77 at 80.
[83] Conference Establishing a Commission of Jurists to consider Laws of War, Washington, Feburay 4, 1922, art.I.

are of importance as an authoritative attempt to clarify and formulate rules of law governing the use of aircraft in war.[84] To a great extent, they correspond to the customary rules and general principles underlying the conventions on the law of war on land and at sea.[85] The rules were drawn up by a Commission of jurists from six countries to prepare a draft code of air warfare for the consideration of their respective governments. It has therefore no binding force but has, nevertheless, the authority and "...has had its influence upon the practice of belligerent and neutral governments since the date when it was formulated.[86]

4.2.1. DEFINITION OF AIRCRAFT

The Draft Hague Rules of Air Warfare contain sixty-two articles.[87] The definition of the term "military" refers to all branches of the forces, *e.g.*, the land forces, the naval forces, and the air forces.[88] The first article specifies that the rules of aerial warfare "...apply to all aircraft, whether lighter or heavier than air, irrespective of whether they are, or are not, capable of floating on water."[89] An analysis of this article will leave no doubt that the words "all types of aircraft" are broad enough to include balloons, dirigibles, airplanes, seaplanes, helicopters, jets, gliders, etc, but would probably exclude spacecraft. However, the status of the space shuttle might fall into this category, particularly when re-entering into airspace it becomes a glider.

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[84] L. Oppenheim & H Lauterpatch, *International Law,* 7th ed., vol.2 (London: Longmans, Green and Co., 1948) at 519.
[85] *Supra* note 75 at 207.
[86] .M. Spaight, *Air Power and War Rights,* (London: Longmans, Green and Co. Ltd., 1947) at 42-43.
[87] Hague Rules of Air Warfare, Drafted by a Commission of Jurists at The Hague, December 1922 - February 1923.
[88] *Ibid.* art. 61.
[89] *Ibid.* art.1.

The definition of the term "public aircraft" used instead of "state aircraft", which is commonly used today, is of no significance and included military aircraft as well as non-military aircraft exclusively employed in the public service. Nevertheless, the drafters of the rules did not restrict the definition of public service to post, custom, and police services as provided in the *Convention Relating to the Regulation of Aerial Navigation, 13th October 1919,* and article 3 of the *Chicago Convention*.

The Rules recognize only three different parties in an air warfare scenario: two opposite belligerents and neutral states. The aircraft are classified into four different categories: military aircraft, public non-military aircraft, private aircraft, and flying ambulances. These categories of aircraft may belong to the belligerents, a neutral state or no nationality in case of insufficient or irregular papers.

In order to be identified visually, a military aircraft shall bear an external mark indicating its nationality and military character.[90] Flying ambulances must bear the distinctive emblem of the Red Cross in addition to the usual distinguishing marks. These marks have to be fixed such that they cannot be altered in flight and be large enough to be visible from above, from below and from each side.[91] Perfidy through the use of false external markings on the aircraft is forbidden.[92] The Draft Rules permit belligerents to convert their non-military aircraft into a military aircraft, without specifying if the conversion

[90] *Ibid.* art. 3.
[91] *Ibid.* art. 7.
[92] *Ibid.* art. 19.

referred to public non-military aircraft or to private aircraft, provided such conversion is restricted to state registered aircraft and undertaken within the territory of the state, not on the high seas,[93] and not from a neutral state.[94] In the General Principles Chapter of the Draft Hague Rules, outside the jurisdiction of any State, belligerent or neutral, the full freedom of passage in the airspace over the high seas is recognized for all aircraft.[95]

Concerning crew members, a military aircraft shall be under the command of a person commissioned or enlisted in the military service of the state and its crew must be exclusively military.[96] "Operations of war involve the responsibility of the State. Units of the fighting forces must, therefore, be under the direct control of persons responsible to the State. For the same reason the crew must be exclusively military in order that they may be subject to military discipline."[97] They have to wear a fixed distinctive emblem to be recognizable in case they become separated from their aircraft.[98] So long as the officers or the crew of a military aircraft are on board the aircraft there is no risk of any doubt as to their combatant status, but if they are forced to land they may become separated from their aircraft. In that event it is necessary for their own protection that their combatant status should be easily recognized. In order to remove any doubts as how to treat the aircraft personnel on board, the Rules state that they "...come under the laws of wars

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[93] *Ibid.* art. 9.
[94] *Ibid.* art 46.
[95] *Ibid.* art. 11.
[96] *Ibid.* art. 14.
[97] Lord Thompson, *Air Facts & Problems,* (New York: George H. Doran Company, 1927) at 205.
[98] *Supra* note 87 art. 15.

and neutrality applicable to land troops in virtue of the custom and practice of international law and of the various declarations and conventions to which the States concerned are parties."[99] They can claim the status of a lawful combatant under the Geneva Convention regime.

4.2.2. THE HOSTILITIES

During hostilities, only military aircraft are entitled to exercise belligerent rights, e.g., rights attached to a State taking part in an armed conflict,[100] and only military aircraft of belligerents are entitled to transmit military intelligence during flight for their immediate use.[101] The Draft Rules permitted the use of tracer, incendiary or explosive projectiles against aircraft no matter if the state is a party or not to the Declaration of St-Petersburg renouncing the employment of any projectile of less than four hundred grammes,[102] which would have been forbidden in land warfare. It is interesting to note that the application to air warfare of the Hague Declaration of 1899 against the use of asphyxiating and poisonous gases has generally been respected and insisted upon while the"...clear prohibition of the Declaration of St-Petersburg 1864 against the use of explosive projectiles has not inhibited the use in the air of ammunition clearly falling within that description."[103] Are new methods and means of warfare are to be regarded as permissible unless a rule prohibits them? Occupants escaping from a disabled aircraft cannot be attacked in the

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[99] *Supra* note 87 art. 62.
[100] *Supra* note 87 art. 13.
[101] *Supra* note 87 art. 16.
[102] *Declaration Renouncing the use in war of Certain Explosive Projectiles, St-Petersburg December 1868.*
[103] Julius Stone, *Legal Controls of International Conflicts,* (Sydney: Maitland Publications Pty. Ltd.,1959) at 608.

course of their descent.[104] The use of aircraft for disseminating propaganda is considered a legitimate means of warfare and the crew of such aircraft must not be deprived of their privileges as prisoners of war.[105]

In the conduct of military air operations, aerial bombardment is legitimate only when directed at a military objective, the destruction of which would constitute a distinct military advantage to the belligerent.[106] The bombardment of a civilian population for the purpose of terrorizing them is prohibited as well as damaging private property not of a military character.[107] Thus, the bombardment of "...cities, towns, villages, dwellings, or buildings not in the immediate neighbourhood of the operations of land forces is prohibited."[108] Consequently, only military objectives are legitimate target and subject to aerial bombardment such as "military forces; military works; military establishments or depots; factories constituting important and well-known centres engaged in the manufacture of arms, ammunition, or distinctively military supplies; lines of communication or transportation used for military purposes."[109] Nevertheless, the Rules make an exception in the case where it can be reasonably presumed that the military concentration is sufficiently important to justify such bombardment when cities, towns, villages, dwellings, or buildings, are in the immediate neighbourhood of the operations of land forces.[110] Special dispositions were also drafted to spare as far as possible

[104] *Supra* note 87, art. 20.
[105] *Supra* note 87, art. 21.
[106] *Supra* note 87, art. 24. para 1.
[107] *Supra* note 87, art. 22.
[108] *Supra* note 87, art. 24. para.3.
[109] *Supra* note 87, art. 24. para.2.
[110] *Supra* note 87, art. 24. para.4.

buildings dedicated to public worship, hospital, art, science, and cultural structures if they were not at the time being used for military purposes. "Such buildings, objects and places must by day be indicated by marks visible to aircraft."[111] Using marks for other purposes than mentioned above is deemed to be an act of perfidy. A state may also marks important historic monument sites for protection against aerial bombardment in establishing a zone of protection around such historic monuments. "The zone of protection may include, in addition to the area actually occupied by the monument or group of monuments, an outer zone, not exceeding 500 meters in width, measured from the circumference of the said area."[112] A state may employ a mark to indicate the surrounding zone and, in such a circumstance, cannot use the historic monument for any military purpose.[113]

4.2.3. BELLIGERENT AIRCRAFT, CREW AND PASSENGERS

According to the Draft Rules, belligerents will confiscate enemy public aircraft without prize proceedings.[114] Nevertheless, public or private belligerent non-military aircraft flying within their territory may be fired upon by the enemy unless they land at the nearest landing site,[115] they are also subject to being fired upon if they fly within the jurisdiction of the enemy, or in the immediate vicinity and outside the jurisdiction of their state or in the immediate theatre of military operations of the enemy.[116]

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[111] *Supra* note 87, art. 25.
[112] *Supra* note 87, art. 26.
[113] *Supra* note 82, art. 26 para.7.
[114] *Supra* note 87, art. 32.
[115] *Supra* note 87, art. 31,
[116] *Supra* note 87, art. 33-34.

If captured, crew members of an enemy military aircraft can be made prisoners of war. The same treatment applies to an enemy public non-military aircraft crew members and passengers unless the aircraft is devoted to the transport of passengers. In such a case, only the enemy nationals fit for military service or those who are in the service of the enemy or have been of a special and active assistance to the enemy will be made prisoners of war.[117]

Belligerent military aircraft have the right to direct the landing and then proceed to visit and search public non-military and private aircraft, however, the Rules do not specify if this applies in the case of a belligerent or neutral aircraft. If, after a warning, the aircraft refuse to obey such orders to land or to proceed to a locality for examination, the aircraft exposes itself to the risk of being fired upon.[118] Neutral public non-military aircraft, other than private aircraft, are subject to visit for the verification of papers,[119] while enemy private aircraft are liable to capture in all circumstances.[120]

4.2.4. NEUTRAL AIRCRAFT, CREW AND PASSENGERS

In a war scenario, belligerents should respect the rights of neutral states and are forbidden to enter into their territorial jurisdiction.[121] Chapter V of the Draft Hague Rules specified in which circumstances actions can be taken by a military aircraft over enemy and neutral aircraft and persons on board. In

[117] *Supra* note 87, art. 35, 36, 37, 38.
[118] *Supra* note 87 art. 50.
[119] *Supra* note 87 art. 51.
[120] *Supra* note 87 art. 52.
[121] *Supra* note 87 art. 39-40.

consequence, a belligerent commanding officer may prohibit the passing of neutral aircraft in the immediate vicinity of his forces. If the neutral aircraft does not conform to such direction after having been duly noticed by the belligerent commanding officer, it may be fired upon.[122] The same thing applies to a neutral aircraft entering the jurisdiction of a belligerent, when intercepted; it must land at the nearest available site otherwise it risks to be fired upon.[123] A neutral private aircraft entering the enemy zone controlled by belligerent occupying forces may have its aircraft confiscated after payment of full compensation.[124] Public non-military aircraft and private aircraft, both from belligerent or neutral States, are subject to visit and search by belligerent military aircraft. "Refusal, after warning, to obey an order to alight or to proceed to such a locality for examination exposes an aircraft to the risk of being fired upon."[125] On the other side, Neutral public non-military aircraft are only subject to visit for the verification of their papers.[126]

The fate of neutral private aircraft is somewhat different than the one reserved to enemy private aircraft. For example, a neutral private aircraft may be captured if it resists the legitimate exercise of belligerents rights, does not conform to flying directions given by a commanding officer, is engaged in non-neutral service, is armed in time of war when outside the jurisdiction of its own country, has no external marks or used false marks, and has no papers or insufficient or irregular papers. A neutral private aircraft may also be captured

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[122] *Supra* note 87, art. 30.
[123] *Supra* note 87, art. 35.
[124] *Supra* note 87, art. 31.
[125] *Supra* note 87, art. 50.
[126] *Supra* note 87, art. 51.

on the basis of its actions, for example when there is no justification to explain a deviation in its flight plan, is engaged in contraband of war, or is in breach of a blockade duly established and maintained. All these circumstances must have taken place in a circumstance where a neutral aircraft in flight is intercepted by a belligerent.[127]

"Members of the crew of a neutral aircraft which has been detained by a belligerent shall be released immediately, if they are neutral nationals and not in the service of the enemy."[128] The passengers of the neutral aircraft will be entitled to be released if they are neutral nationals and not in the service of the enemy.

The Draft Hague Rules of Air Warfare contain provisions which impose duties on neutral States in case of hostilities between belligerents. For example, a neutral State is bound to prevent the departure from its jurisdiction of an aircraft in a condition that would allow it to conduct a hostile attack against a belligerent, or carrying combatant forces of belligerent Power. A neutral State must prevent work upon an aircraft designed to prepare it to depart from the neutral state for use against a belligerent.[129] It should also prevent the observation of movements, operations and defence by one belligerent to be used against the other belligerent.[130]

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[127] *Supra* note 87 art. 53.
[128] *Supra* note 87, art. 37.
[129] *Supra* note 87 art. 46.
[130] *Supra* note 87 art. 47.

A neutral state must also prevent the entry of belligerent aircraft in its territory, compel them to alight if they have entered such jurisdiction and intern any belligerent military aircraft, together with its crew and the passengers.[131] Crew members of a belligerent military aircraft rescued outside neutral waters by a Neutral state will be interned on landing.[132]. A neutral state is prohibited from supplying the belligerents, directly or indirectly, with aircraft and any parts or munitions required for aircraft,[133] but is not bound to prevent the export or transit on behalf of a belligerent of such aircraft, parts or munitions.[134] Finally, any actions taken by a neutral state to comply with the provision of the Rules cannot be perceived as a hostile act.[135]

The last articles of the Draft Hague Rules of Air Warfare indicate the actions to be taken by the belligerents following the capture of an aircraft or goods on board. They may be made the subject of proceedings before a prize court,[136] be liable to condemnation[137] or be destroyed.[138] Nevertheless, a prize court might determine that the destruction was not justified and the remedies may be restitution or compensation.[139]

4.3. 1925 GENEVA PROTOCOL

[131] *Supra* note 87 art. 42.
[132] *Supra* note 87 art. 43.
[133] *Supra* note 87 art. 44.
[134] *Supra* note 87 art. 45.
[135] *Supra* note 87 art. 48.
[136] *Supra* note 87 art. 55, 56, 59.
[137] *Supra* note 87 art. 56, 58.
[138] *Supra* note 87 art. 57, 58, 59.60.
[139] *Supra* note 87 art. 62.

The *1925 Geneva Protocol*[140] was adopted by an International Conference on the Control of the International Trade in Arms, Munitions, and Implements of War convened by the Leagues of Nations which met in Geneva in May and June 1925. The Protocol applies to the air warfare. Under the Protocol, the States parties prohibit the use in war of asphyxiating, poisonous or other gases, and all analogous liquids materials or devices. This prohibition is extended to the use of bacteriological methods of warfare. The 1925 Geneva Protocol was derived from the general principles of customary international law prohibiting the use of poison and materials causing unnecessary suffering. As customary international law, the Protocol would be applicable to all States and not merely those which have formally ratified or adhered to the instrument.[141]

The 1936 London Procès-verbal Relating to the Rules of Submarine Warfare Set Forth in Part IV of the *Treaty of London of 22 April 1930* concerned the action by belligerents with regard to merchant ships. In this agreement, a warship, whether surface vessel or submarine, may not sink or render incapable of navigation a merchant vessel without having first placed passengers, crew and ship's papers in a place of safety.[142] These provisions

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[140] *1925 Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases, and of Bacteriological Methods of Warfare.*
[141] *1925 Geneva Protocol for the prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare.*
[142] *Procès-Verbal Relating To the Rules of Submarine Warfare Set Forth in Part IV of the Treaty of London of April 22,1930.*

were regarded by various states as also applicable to military aircraft in operations against enemy merchant shipping.[143]

5. THE GENEVA CONVENTIONS

5.1. THE FOUR 1949 GENEVA CONVENTIONS

On 12 August 1949 a diplomatic conference in Geneva approved the text of four conventions on the law of armed conflict. They deal respectively with (I) wounded and sick in armed forces in the field;[144] (II) wounded, sick and ship-wrecked in armed forces at sea;[145] (III) prisoners of war;[146] and (IV) civilians.[147] More states have adhered to the Geneva Conventions than any other agreements on the law of armed conflict.[148] The central concern of all four Conventions is the protection of victims of war. They represent the efforts to draft new conventions before the Second World War and are also the product of the experience of the war itself. In many areas the law was neither clear nor precise enough.

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[143] Adam Robert & Richard Guelff, *Documents on the Laws of War,* (Oxford: Clarendon Press, 1989) at 148.
[144] *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in armed Forces in the Field of August 12, 1949.*
[145] *Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members or Armed Forces at Sea of August 12, 1949.*
[146] *Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949.*
[147] *Geneva Convention Relative to the Protection of Civilians Persons in Time of War of August 12, 1949.*
[148] Humanitarian Law, online: International Committee of Red Cross, <http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/party_gc#a5>.(date accessed: 26 September 2003).

Number of States Parties to the Geneva Conventions of 1949	191
Number of States Parties to the Additional Protocol I	161
Number of States having made the declaration under Article 90	65
Number of States Parties to the Additional Protocol II	156
Number of States Members of the United Nations	191.

The Diplomatic Conference held in Geneva was attended by representatives of sixty-four States from 21 April to 12 August 1949, convened by the Swiss government, as Depository of the Geneva Conventions, for the purpose of revising a number of out-to-date Conventions. "In view of the large number of States parties to the 1949 Geneva Conventions and the status which the Conventions have acquired in the international community, it is reasonable to assume that the conventions are, at least in large part, declaratory of customary international law."[149]

6. PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTIONS

The developments of warfare led to the growing realization that the law of armed conflict required further adaptation to the conditions of contemporary hostilities. Many armed conflicts occurring since the Second World War have been regarded as non-international in character. Moreover, the widespread resort to guerrilla warfare raised questions concerning the application of the law, because in most cases the activities of guerrillas challenged the existing legal conditions for combatant status. Also, events in armed conflicts and occupations demonstrated the need for further protection to be given to the victims.

6.1. PROTOCOLS I & II

In 1974, the Swiss government convened the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable

[149] Adam Roberts at 170.

in Armed Conflicts, in Geneva. The Conference held four sessions where 124 States were represented at the first session, and 109 at the final one. On 8 June1977, the Conference formally adopted the two Additional Protocols to the Geneva Conventions of 12 August 1949. Protocol I relates to the protection of victims of international armed conflicts and supplements rather than replaces the 1949 Geneva Conventions. The Protocol provides that armed conflicts in which peoples are fighting against colonial domination, alien occupation or racist regimes are to be considered international conflicts.[150] Part II (Articles 8-34) develops the rules of the First and the Second Geneva Conventions on wounded, sick and shipwrecked. It extends the protection of the Conventions to civilian medical personnel, equipment and supplies and to civilian units and transports and contains detailed provisions on medical transportation including a regime for the protection of medical aircraft.

Part III and several chapters of Part IV (Articles 35-60) deal with the conduct of hostilities, i.e. questions which hitherto were regulated by the Hague Conventions of 1899 and 1907 and by customary international law. Articles 43 and 44 give a new definition of armed forces and combatants. Among the most important Articles are those relating to the protection of the civilian population from the effects of hostilities. They contain a definition of military objectives and prohibitions of attack on civilian persons and objects. Further Articles (61-79) deal with the protection of civil defence organizations, relief actions and the treatment of persons in the power of a party to a conflict.

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[150] *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977*, art. 1(4).

Protocol II relates to the protection of victims of internal or civil wars with the aim of extending the essential rules of the law of armed conflict to internal wars. The only provision applicable to non-international armed conflicts before the adoption of the present Protocol was common Article 3 to all four Geneva Conventions of 1949. This Article proved to be inadequate in view of the facts that about 80% of the victims of armed conflicts since 1945 have been victims of non-international conflicts and are often fought with more cruelty than international conflicts.[151] The fear that the Protocol might affect State sovereignty, prevent governments from effectively maintaining law and order within their borders and that it might be invoked to justify outside intervention led to the decision of the Diplomatic Conference at its fourth session to shorten and simplify the Protocol. Instead of the 47 Articles proposed by the International Committee of the Red Cross the Conference adopted only 28. The essential substance of the draft was, however, maintained. The portion that dealt with methods and means of combat was deleted, but its basic principles are to be found in Article 4 (fundamental guarantees). The provisions on the activity of impartial humanitarian organizations were adopted in a less binding form than originally foreseen. The restrictive definition of the material field of application in Article 1 has the effect of ensuring Protocol II is applicable to a smaller range of internal conflicts than common Article 3 of the Conventions of 1949.

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[151] 1949 Conventions and 1977 Protocols, online: International Committee of Red Cross,<http://www.icrc.org/ihl.nsf/WebCONVPRES?OpenView>. (date accessed: 27 September 2003).

6.2. PROTECTION OF MEDICAL AIRCRAFT

Protocol I extends the protection of the Conventions to civilian medical personnel, equipment and supplies and to civilian units and transports and contains detailed provisions on medical transportation. It provides that medical vehicles shall be respected and protected in the same way as mobile medical units under the Convention and this Protocol,[152] and that medical aircraft shall be respected and protected.[153]

In time of peace, tension, or armed conflicts, parties to a conflict might rely on military aircraft to be used as medical service units so long as the aircraft is exclusively employed for the removal of the wounded, sick and shipwrecked, and for the transport of medical personnel and equipment.[154] Medical aircraft have to be clearly marked with their national colour and the emblem of the Red Cross on a white background or the Red Crescent or the red lion and sun on a white background.[155] They will be protected by the use of the emblem and this protection can only be effective if they can be identified and recognized as medical aircraft.[156] They may not be the object of attack while flying at heights, at time and on routes specifically agreed by the parties. They shall not fly over enemy or enemy-occupied territory without agreement; and shall obey every summons to alight and be permitted to continue its flight

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[152] *Supra* note 150 art. 21.
[153] *Supra* note 150 art. 24.
[154] *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977,* art. 39.
[155] *Ibid.* art. 41.
[156] *Supra* note 150 art. 23.

after examination.[157] Medical aircraft of Parties to the conflict may fly over the territory of Neutral States, with prior notice, land in case of necessity, or use it as a port of call. As in the case of a medical aircraft flying over the enemy territory, they must obey every summons to alight, on land or water. Neutral States may place conditions or restrictions, applicable equally to all parties to the conflict, on the passage or landing of medical aircraft on their territory.[158] The parties to a conflict are prohibited from using their medical aircraft to attempt to acquire any military advantage over the adverse party; to use medical aircraft to render military objectives immune from attack; to collect or transmit intelligence data; and not carry "...any armament except small arms and ammunitions taken from the wounded, sick and shipwrecked and such light individual weapons as may be necessary to enable the medical personal on board to defend themselves and the wounded, sick and shipwrecked in their charge."[159] Except by prior agreement with the adverse party, a medical aircraft can not be used to search for the wounded, sick and shipwrecked.[160]

6.3. MEDICAL AIRCRAFT OCCUPANTS

Occupants of a medical aircraft which has been seized may be treated differently depending on their status when the aircraft landed. While flying specific zones, like adverse party zone or not-controlled zone, a medical aircraft can be ordered to land for inspection. If the inspection discloses that it is a medical aircraft which has not flown without or is in no breach of any agreements, the aircraft and its occupants who belong to the adverse Party, a

[157] *Supra* note 154 art. 39.
[158] *Supra* note 154 art. 40.
[159] *Supra* note 150 art. 28 para.3.
[160] *Supra* note 150 art. 28 para.4.

neutral or other state not party to the conflict, are authorized to continue the flight. However, if the inspection reveals that it is not a medical aircraft or violates any agreements, the aircraft may be sized and its occupants treated according to their status under the Geneva Conventions and this Protocol. "Any aircraft seized which as been assigned as a permanent medical aircraft may be used thereafter only as a medical aircraft."[161]

Medical personnel exclusively engaged in medical task shall be respected and protected in all circumstances.[162] If they fall into the enemy hands, they "...shall be retained only in so far as the state of health, the spiritual needs and the number of prisoners of war require."[163] Medical personnel retained shall not be deemed prisoners of war and they shall be returned to the Party to the conflict to whom they belong if their retention is not indispensable.[164] If the medical aircraft lands or alight on water in the territory of a neutral State or other State not Party to the conflict and if the inspection discloses that the aircraft is in fact a medical aircraft, the aircraft with its occupants shall be allowed to resume is flight, other than those who must be detained in accordance with the rules of international law applicable in armed conflict.[165] If the inspection discloses that it was not a medical aircraft, the aircraft should be seized and the wounded, sick and shipwrecked disembarked should be

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[161] *Supra* note 150 art. 30.
[162] *Supra* note 144 art. 24.
[163] *Supra* note 144 28.
[164] *Supra* note 144 art. 30.
[165] *Supra* note 144 art. 31. para.3.

detained by that State where so required by the rules of international law applicable in armed conflict, so they cannot again take part in the hostilities.[166] A person who is recognized to be *hors de combat* shall not be made the object of attack.[167] This is a general principle in the law of armed conflict that an enemy who surrenders shall not be the object of an attack. This protection was also given to occupants of aircraft. Therefore, a person parachuting from an aircraft in distress shall not be made the object of attack during his descent. Upon reaching the ground, this person shall be given an opportunity to surrender before being made the object of attack, unless it is apparent that he is engaging in a hostile act. However, airborne troops are not protected and are the object of attack even in their descent.[168]

7. SAN REMO MANUAL

The International Institute of Humanitarian Law is a private, independent and non-profit organization created in 1970 and located in San Remo Italy. Its fundamental objective is to promote the development, application, dissemination and teaching of international humanitarian law in all its dimensions, thus contributing to the safeguard and respect of human rights and fundamental freedom throughout the world.

> The Institute is a forum that favours reflection, dialogue, exchange of views and experiences in the humanitarian field, and aims at the promotion and research of new approaches and means to alleviate human suffering in particularly difficult

[166] *Supra* note 144 art. 31. para.4.
[167] *Supra* note 150 art. 41 para.1.
[168] *Supra* note 150 art. 42.

> situations, such as armed conflicts and those involving refugees and displaced persons.[169]

The main activity of the Institute is teaching international humanitarian law, human rights and refugee law, with a developed training system for military people and government and NGO's officials. The Institute also engages in research work and publishing.

The *San Remo Manual*[170] was prepared during the period of 1988-1994 by a group of legal and naval experts in a series of round tables convened by the International Institute of Humanitarian Law. The *Manual* is not a legally binding document but presents a contemporary restatement of international law applicable to armed conflict at sea and most of its provisions state the law presently applicable with some progressive development. It is viewed as a modern equivalent to the *Oxford Manual on the Laws of Naval War Governing the Relations Between Belligerents* adopted by the Institute of International Law in 1913. A review was necessary due to the development of the law of armed conflict since 1913.[171]

"In addition to its extensive coverage of maritime issues, the *Manual* contains numerous provisions relating to aircraft, some directly connected with naval

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[169] Institute Profile, online: International Institute of Humanitarian Law, <http://www.iihl.org/>.(date accessed: 28 September 2003).
[170] *San Reno Manual on International Law Applicable to Armed Conflicts at Sea, 12 June 1994.*
[171] Introduction, San Remo Manual on International Law Applicable to Armed Conflicts at Sea, 12 June 1994, online: International Committee of Red Cross, <http://www.icrc.org/ihl.nsf/73cb71d18dc4372741256739003e6372/5b310cc97f166be3c12563f6005e3e09?OpenDocument>.(date accessed: 30 September 2003).

warfare but some relating to aircraft in armed conflict generally. This is, therefore also an important supplement to the 1923 Hague Air Rules." [172]

The *Manual* takes into account State practice, technological developments and the effect of related areas of the law, in particular, the United Nations Charter, the 1982 Law of the Sea Convention, air law and environmental law.

The 26th International Conference of the Red Cross, held in Geneva in 1995, urged States to draw up manuals on international humanitarian law applicable to armed conflicts at sea, and encouraged them to take into account, whenever possible, the provisions of the *San Remo Manual.*[173]

7.1. DEFINITION OF TYPE OF AIRCRAFT

The *San Remo Manual* gives definitions of the different categories of aircraft which can be found in a middle of an armed conflict. There are five definitions of aircraft used in the *Manual*: medical aircraft, military aircraft, auxiliary aircraft, civil aircraft and civil airliner. According to the *San Remo* Manual, a "...medical aircraft means an aircraft that is protected under the Geneva Conventions of 1949 and Additional Protocol I of 1977."[174] Protocol I states that "medical aircraft means any medical transports by air,"[175] a very laconic definition indeed. On the other hand, the definition of a military aircraft is more complete and stipulates that a "...military aircraft means an aircraft operated

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[172] Adam Roberts & Richard Guelff, *Documents on the Laws of War*, 3rd ed. (Oxford: Oxford University Press, 2001) at 573.
[173] *Ibid.*
[174] *Supra* note 170 art. 13 (f).
[175] *Supra* note 150 art. 8 (j).

by commissioned units of the armed forces of a State having the military marks of that State, commanded by a member of the armed forces and manned by a crew subject to regular armed forces discipline."[176] This definition is similar to other definitions provided in other documents of armed conflict. However, this definition adds that the crew of the military aircraft must be subject to regular armed forces discipline. This article is comparable to the definition of armed forces in article 43 of the *1977 Geneva Protocol I* which states that "...armed forces shall be subject to an internal disciplinary system which, *inter alia*, shall enforce compliance with the rules of international law applicable in armed conflict."[177] The *San Remo Manual* introduces a new category of aircraft, called auxiliary aircraft, never seen before in the definition of aircraft within the law of armed conflict. An "auxiliary aircraft means an aircraft, other than a military aircraft, that is owned by or under the exclusive control of the armed forces of a State and used for the time being on government non-commercial service.[178] What would happen if an auxiliary aircraft is commanded by a member of the armed forces and manned by a crew subject to regular armed forces discipline? Would it become a military aircraft? The article did not give a specific purpose for such aircraft, but we know that it is owned by or under the exclusive control of the armed forces. Can an auxiliary aircraft be a lawful military objective if its destruction would constitute a distinct military advantage to the belligerent? According to article 65, military aircraft and auxiliary aircraft are military objectives if they make an effective contribution to military action and whose

[176] *Supra* note 170 art. 13 (j).
[177] *Supra* note 150 art. 43.
[178] *Supra* note 170 art. 13 (k).

total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.[179]

The definition of the terms civil aircraft is more precise than auxiliary aircraft in that a "...civil aircraft means an aircraft other than a military, auxiliary, or State aircraft such as a customs or police aircraft, that is engaged in commercial or private service."[180] Finally, a "...civil airliner means a civil aircraft that is clearly marked and engaged in carrying civilian passengers in scheduled or non-scheduled services along Air Traffic Service routes."[181] The definition of civil airliner encompasses both scheduled and non-scheduled services in order to avoid any doubt as to the protection that should be granted to a non regular flight such as charter aircraft.

7.2. NEUTRAL STATE, WATER AND AIRSPACE

The *San Remo Manual* defines neutral waters and neutral airspace by stating that "...[n]eutral waters consist of the internal waters, territorial sea, and, where applicable, the archipelagic waters, of neutral States. Neutral airspace consists of the airspace over neutral waters and the land territory of neutral States."[182] However, military and auxiliary aircraft may exercise passage rights over neutral international straits and of archipelagic sea lanes passage provided by general international law.[183] During an armed conflict, belligerent aircraft, either military or auxiliary aircraft, cannot enter neutral airspace.

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[179] *Supra* note 170 art. 65, 40.
[180] *Supra* note 170 art.13 (l).
[181] *Supra* note 170 art.13 (m).
[182] *Supra* note 170 art. 14.
[183] *Supra* note 170 art. 23.

Where a belligerent does enter neutral airspace, the neutral State shall take all required measures to force the aircraft to land, and its crew must be interned for the rest of the hostilities, otherwise the aircraft may be attacked if it refuses to land unless it is a medical aircraft.[184] The neutrality of a State bordering an international strait is not jeopardized by the passage or the transit of a belligerent military or auxiliary aircraft,[185] nor is the neutrality of an archipelagic State jeopardized by the exercise of archipelagic sea lanes passage by belligerent military or auxiliary aircraft.[186] On the other hand, neutral military and auxiliary aircraft may exercise the rights of passage provided by general international law through, under and over belligerent international straits and archipelagic waters.[187] "The rights of transit passage and archipelagic sea lanes passage applicable to international straits and archipelagic waters in peacetime continue to apply in times of armed conflict."[188] Thus belligerent and neutral aircraft have rights of passage over all straits and archipelagic waters.[189]

A belligerent in transit passage is required to proceed without delay and to refrain from any hostile actions against the neutral State. They are however permitted to take defensive measures consistent with their security but may not conduct offensives operations against enemy forces or other activities not incident to their transit.[190]

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[184] *Supra* note 170 art. 18.
[185] *Supra* note 170 art. 24.7
[186] *Supra* note 170 art. 25.
[187] *Supra* note 170 art. 26.
[188] *Supra* note 170 art. 27.
[189] *Supra* note 170 art. 28.
[190] *Supra* note 170 art. 30.

If the actions of belligerents take part in the exclusive economic zone of a neutral State, they shall have due regard for the rights of the coastal State and respect and protect the marine environment and any structures established by a neutral State in its exclusive economic zone.[191]

7.3. CONDUCT OF HOSTILITIES

Aircraft are bound by the same principles and rules as surface ships and submarines.[192] Attacks by aircraft shall be limited to military objectives and collateral damage shall be avoided or minimized. If the collateral casualties or damages would be excessive compared with the direct military advantage anticipated from the attack, then the attack shall be cancelled or suspended.[193] Small aircraft used for coastal rescue operations and other medical transports are exempt from attack when employed in their normal role, they should identify themselves and submit to inspection when required. They should also not intentionally hamper the movement of combatants and obey orders to stop or move out of the way when required.[194]

The *San Remo Manual* establishes three classes of enemy aircraft exempt from attack: medical aircraft, civil airliners, and aircraft granted safe conduct by agreement between the parties to the conflicts. Enemy civil aircraft may only be attacked if they are making an effective contribution to military action and their total or partial destruction, capture or neutralization offers a definite

[191] *Supra* note 170 art. 34.
[192] *Supra* note 170 art. 45.
[193] *Supra* note 170 art. 46.
[194] *Supra* note 170 art. 47-48.

military advantage.[195] They may also be attacked if they are "...acting as an auxiliary aircraft to an enemy's armed forces, e.g., transporting troops or military cargo, or refuelling military aircraft."[196] Civil aircraft of neutral States may not be attacked unless they engage in belligerent acts on behalf of the enemy, act as auxiliaries to the enemy's armed forces or otherwise make an effective contribution to the enemy's military action.[197]

7.4. INTERCEPTION AND CAPTURE OF AIRCRAFT

The commander of a military aircraft may exercise the right of interception, visit and search if he suspects that a civil aircraft with neutral marks has in fact enemy character, and if it is the case, the civil aircraft may be captured as prize subject to adjudication.[198] Belligerent military aircraft have a right to intercept civil aircraft outside neutral airspace where there are reasonable grounds for suspecting they are subject to capture, and to proceed for visit and search to an appropriate belligerent airfield.[199]

Concerning measures of interception and supervision, "[b]elligerent States should promulgate and adhere to safe procedures for intercepting civil aircraft as issued by the competent international organization.[200] The procedure refers to the international standard establish by the International Civil Aviation Organization concerning the interception of civil aircraft. Belligerents, neutrals, and Air Traffic Services should establish procedures to help them

[195] *Supra* note 170 art. 40, 62.
[196] *Supra* note 170 art. 63 (b).
[197] *Supra* note 170 art. 70.
[198] *Supra* note 170 art. 112,115-116.
[199] *Supra* note 170 art. 125.
[200] *Supra* note 170 art. 128.

determine if a civil aircraft is in the vicinity of military operations.[201] Enemy civil aircraft and goods on board such aircraft may be captured outside neutral airspace, except medical aircraft and aircraft granted safe conduct by agreement between the parties to the conflict.[202] ..The capture of an aircraft is exercised by intercepting the enemy civil aircraft, ordering it to proceed to a belligerent airfield that is safe for the type of aircraft involved and reasonably accessible and, on landing, taking the aircraft as a prize for adjudication. "As an alternative to capture, a neutral civil aircraft may, with its consent, be diverted from its declared destination."[203]

Neutral civil aircraft are subject to capture outside neutral airspace if they make an effective contribution to the enemy's military action,[204] and "[g]oods on board neutral civil aircraft are subject to capture only if they are contraband",[205] *e.g.*, "...goods which are ultimately destined for territory under the control of the enemy and which may be susceptible for use in armed conflict."[206].."Free goods" are however excluded from capture such as religious objects, medical materials, clothing, bedding, essential foodstuffs, and means of shelter for the civilian population in general, and items destined for prisoners of war.[207]

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[201] *Supra* note 170 art. 130.
[202] *Supra* note 170 art. 141-142.
[203] *Supra* note 170 art. 157.
[204] *Supra* note 170 art. 153.
[205] *Supra* note 170 art. 154.
[206] *Supra* note 170 art. 148.
[207] *Supra* note 170 art. 150.

7.5. PROTECTION OF MEDICAL AIRCRAFT

Finally, as in the *1977 Geneva Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts*, the *San Remo Manual* contains specific provisions for medical aircraft as well by stating that they shall be protected and respected.[208] "Medical aircraft shall be clearly marked with the emblem of the Red Cross or Red Crescent, together with their national colours, on their lower, upper and lateral surfaces,"[209] it is for identification purposes only and do not confer any protected status.[210] Medical aircraft shall not be used to participate in the hostilities and shall not be armed except small arms for the protection of medical personnel in self-defence only.[211] A medical aircraft flying over a territory under belligerent control shall obey an order to land for inspection.[212] Agreement can be concluded with neutral States for the transit of medical aircraft in their airspace or permission to land in their territory. In any case, belligerents shall obey the terms of the agreement made with the neutral States.[213] If there is no agreement with the neutral State or if the entry into neutral State was by error, medical aircraft shall identify itself as soon as possible. When landed, it can be inspected by the neutral State and continue its route if it is a medical aircraft.[214] On the other hand, "[i]f the inspection reveals that the aircraft is not a medical aircraft, it may be captured, and the occupants shall, unless agreed otherwise between the neutral State and the

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[208] *Supra* note 170 art. 174.
[209] *Supra* note 170 art. 175.
[210] *Supra* note 170 art. 176.
[211] *Supra* note 170 art. 178.
[212] *Supra* note 170 art. 180.
[213] *Supra* note 170 art. 181.
[214] *Supra* note 170 art. 182.

parties to the conflict, be detained in the neutral State where so required by the rules of international law applicable in armed conflict, in such a manner that they cannot again take part in the hostilities."[215]

8. CIVIL AVIATION CONFERENCE, CHICAGO,1944

During the Second World War there was little, if any, progress made with respect to commercial aviation. The United Kingdom was producing primary fighters and bombers throughout the conflict while United States was building transport aircraft. In 1943, a Committee was formed to study post-war requirements in engines and aircraft. "It recommended that work should start at once on the design of civil aircraft of new types and on the conversion of military aircraft."[216] The war provided a catalyst for significant technological advances in the area of aviation that were to prove equally beneficial in the civil and commercial aviation context. However, the advancement of civil aviation would require a more developed international regulatory framework than that found in the *Convention Relating to the Regulation of Aerial Navigation of 13 October 1919*.[217] Between the two wars, States relied mainly on bilateral agreements to regulate aerial navigation. "During the Second World War, it became obvious that a new basis for international civil aviation was required which would do away with purely regional arrangements and establish a world-wide organisation to deal with aviation problems."[218]

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[215] *Supra* note 170 art. 183.
[216] Bin Cheng, *The Law of International Air Transport,* (London: Stevens& Sons Limited, 1962) at 7.
[217] Michel de Juglart, *Traité de droit aérien,* Tome 1 (Paris: Librairie Générale de Droit et de Jurisprudence, 1989) at 796.
[218] Christopher Shawcross & Major Beaumont, *Air Law,* Tome 1 4th ed. (London: Butterworths, 1977) at 30.

The United States convened the International Civil Aviation Conference and invited 53 States to meet in Chicago from 1st November until 7th November 1944 to draft a new code of aerial navigation. The Final Act of this Conference was signed by 52 States and contains a "Convention", three "Agreements" and 12 "Technical Annexes".[219] The preamble to the Chicago Convention speaks of cooperation and understanding among the nations and peoples, upon which the peace of the world depends, in order to develop civil international aviation in a safe and orderly manner to operate soundly and economically.[220]

The Convention contains 96 articles divided into 22 chapters and 4 parts: Air navigation, The International Civil Aviation Organization, International Air Transport, and Final Provisions. The first article affirms "...that every State has complete and exclusive sovereignty over the airspace above its territory."[221] This "complete and exclusive sovereignty" principle does not confer a right of innocent passage as is the case with the Law of the Sea. "Additionally, it follows that sovereignty in height over the "air space" is not merely limited to a territorial belt like the territorial waters, and, of, course, the respective space is not free to all nations. There is no "freedom of the air"

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[219] *Ibid.*
[220] *Convention on International Civil Aviation, 7 December 1944*, preamble.
[221] *Ibid.* art.1.

above a State's territory. Such freedom only exists in the "air space" above the High Seas."[222]

This principle is similar to article 1 of the *Paris Convention of 1919* which states that every Power has complete and exclusive sovereignty over the air space over its territory;[223] to article 5 of the *Madrid Convention of 1926* to the effect that Contracting States have complete freedom to authorize or to prohibit the flight over their territory of aircraft registered in a non-contracting State;[224] and to article 1 of the *Habana Convention of 1928* which recognizes the complete and exclusive sovereignty of every Power over the atmospheric space above its territory and territorial waters.[225]

The principle that States have complete and exclusive sovereignty over the airspace above their territory appears now to be recognized under customary international law."[226] The same principle underlies numerous bilateral conventions, and may be regarded as universally accepted. "...[I]n view of this overwhelming body of opinion it must now be acknowledged that the former controversy upon this important question of theory is closed, and that the principle of complete sovereignty in the superincumbent airspace reigns supreme."[227] Identical provisions are to be found in the various treaties and Conventions on civil aviation. "Today, there appears to be little doubt that this

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[222] Nicolas Mateesco Matte, *Treatise on Air-Aeronautical Law,* (Montréal: Institute and Centre of Air and Space Law, 1981) at 132-133.
[223] *Convention relating to the Regulation of Aerial Navigation, 13 October 1919*, art 1.
[224] *Ibero-American Convention Relating to Air Navigation, October 1926*, art.5.
[225] *Habana Convention on Commercial Aviation, 20 February 1928,* art. 1.
[226] *Supra* note 222 at 132.
[227] Lord McNair *et al.*, *The Law of the Air*, (London: Stevens and Sons, 1964) at 6.

principle, repeatedly affirmed in treaties and in municipal statutes, is declaratory of existing international law. The territorial sphere of a state's jurisdiction, therefore, extends upwards into space and downwards to the centre of the earth, the whole in the shape of an inverted cone."[228] However, this statement was made in 1956, prior to the adoption of the *Outer Space Treaty of 1967* in which the United Nations General Assembly declared that the outer space, including the moon and other celestial bodies, is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means.[229] Consequently, it would be more appropriate to say that the territorial sphere of a State looks more like a shape of an inverted cone cut in two.

At the Chicago Conference, the United States was opposed to the establishment of an international organization that would have the power or authority to impose solutions on the state parties. This opposition was based in the belief that an international organization with this authority would tend to favour the interests of less powerful state parties to the detriment of more powerful states such as United States. In the American view, the international authority should only have auxiliary and consultative functions; it would act as an international technical coordinator able to manage security issues, the operation of airports, and oversee industry standardization. Moreover, the American delegation saw the international authority as an excellent means of

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[228] Bin Cheng, "Recent Developments in Air Law", (1956) 9 Current Legal Problems 209.
[229] *Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies*, UNGA Res. 2222 (XXI) 19 December 1966; 610 UNTS 205 (open for signature 27 January 1967, entered into force 10 October 1967).

contributing to world security in that it would be able to monitor the development of military aviation.[230]

The material scope of the Convention is limited to civil aviation alone. "However, the Convention, through the use of an extremely narrow definition of State aircraft, interprets the term civil aviation very broadly. It embraces all matters relating to aviation not exclusively connected with "aircraft used in military, customs and police services."[231] The Chicago Convention deals with international civil aviation requiring that it be developed in a safe and orderly manner.[232] Article 3 of the Convention provides for the exclusion of State aircraft and military aircraft from its application.

Article 3

Civil and state aircraft

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

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

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

(d) The contracting States undertake, when issuing regulations for their state aircraft, that they will have due regard for the safety of navigation of civil aircraft.[233]

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[230] Wienczyslaw Wagner, *Les Libertés de l'Air,* (Paris: Les éditions internationales, 1948) at 98.
[231] Bin Cheng, *The Law of International Air Transport,* (London: Stevens & Sons Limited, 1962) at 112.
[232] *Convention on International Civil Aviation, 7 December 1944, Preamble.*
[233] *Ibid.* art. 3.

The first paragraph of Article 3 is very clear and achieves the goal set out in the preamble and purpose portions of the Convention. However, the second paragraph raises a number of questions. The provisions states that on the one hand, military aircraft are those aircraft used in military services and that such aircraft are to be excluded from the jurisdiction of the Chicago Convention. On the other hand, the expressions "military aircraft" and "aircraft used in military services" are not necessarily synonymous, this question applies *mutatis mutandis* to police and customs aircraft.[234] The Chicago Convention criterion for determining the public character of an aircraft lies in the function it performs at the time, irrespective of their actual ownership, whether private or public. However the notion of public authority of the State must be present when the aircraft is executing a task or a mission to claim the status of state aircraft. "The function they are called upon to fulfil involves the exercise of the public authority of a sovereign State.[235]

Article 3 (c) of the Chicago Convention states that aircraft used in military, customs and police services may not fly over the territory of another State or land thereon without authorisation by special agreement or otherwise and in accordance with the terms thereof. "This prohibition would appear to extend to such aircraft drifting or taxiing on the surface of the water into the territorial

[234] Bin Cheng, "State Ships and State Aircraft", (1958) 11 Current Legal Problems 233.
[235] *Ibid.* at 235.

sea of another State, although not to those carried on board State ships in innocent passage when no attempt is made by them to take off."[236]

The last paragraph of article 3 requires Contracting States to have due regard for the safety of civil navigation when issuing regulations for their State aircraft. We will examine in a following chapter if the Government of Canada complies with the condition of article 3 (d) and how this duty has been translated into national regulations.

The Chicago convention recognizes that, for military necessity or reasons of safety, a contracting State may restrict or prohibit aircraft of other countries from over flying certain portion of its territory and communicate such prohibited areas to the other States and to the International Civil Aviation Organization. A State may require any aircraft entering such areas to land as soon as possible at an airport within its territory.[237] In case of war, the freedom of action of belligerents and neutrals is not affected by the provisions of the Convention.[238]

8.1. ARTICLE 3 *bis* OF THE CHICAGO CONVENTION

On 31 August 1983, a Korean Air lines Boeing 747, designated KE007, left New York on a one-stop scheduled flight for Seoul *via* Anchorage, Alaska. It left Anchorage at 04H00 with 269 passengers on board and was scheduled to arrive in Seoul almost 8 hours later, early in the morning. Soon after its

[236] *Ibid.* at 238.
[237] *Supra* note 232 art. 9.
[238] *Supra* note 232 art. 89.

departure from Anchorage, flight KE007 started deviating to the north from its assigned route which resulted in its penetration into the air space of the Soviet Union and subsequently its transit over Soviet military installations, the Petropavlosk naval base on Kamchatka Peninsula, the Korsakov naval base and the Dolinsk-Sokol air base on Sakhalin Island. There was a United States RC-135 military reconnaissance aircraft in the vicinity heading for Alaska and, apparently, flight KE007 was mistaken by the Soviets as being another reconnaissance aircraft. Followed by Soviet interceptor aircraft, the civil aircraft entered Kamchatka airspace and then flew over the Okhotsk Sea. KE007 then, once again, re-entered Soviet airspace, this time in the vicinity of Sakhalin Island. The Soviets reported that they went through all the prescribed interception procedures in response to the unauthorized entry into its airspace but that the intruder aircraft failed to respond. However, radio transmissions of the Soviet interceptors over Sakhalin Island monitored by the Japanese authorities gave no indication that they called on the intruding aircraft to land.

> On orders from the Area Air Defence Command, the interceptor first fired four warning bursts of tracer shells, and, when this produced no response, two rockets were fired by the interceptors at 06H24 Sakhalin time on 1 September 1983 (18H24, 31 August 1983) and, in the chilling words of the Soviet report, these rockets "terminated the flight" of KE007. The result was the loss of all 269 persons on board.[239]

The report of the Secretary-General of International Civil Aviation Organization, concerning the interception and associated identification, signalling and communications, indicates that the fact-finding investigation

[239] Bin Cheng, *The Destruction of KAL Flight KE007, and Article 3 bis of the Chicago Convention,in Air Worthy* (Deventer: Kluwer Law and Taxation Publishers, 1985) at 54.

determined that "[t]he USSR authorities assumed that KE007 was an "intelligence" aircraft and, therefore, they did not make exhaustive efforts to identify the aircraft through in-flight visual observations."[240]

This attack on a civilian foreign aircraft outraged the entire world and led to the adoption of an amendment to the Chicago Convention by the 25th Session (Extraordinary) of the Assembly on 10 May 1984 which resulted in Article 3 *bis* of the 1944 Chicago Convention on International Civil Aviation.[241]

The preamble of the Protocol stipulates that international civil aviation should be developed in a safe and orderly manner and that the safety and the lives of persons on board civil aircraft must be assured. It also calls on the contracting States to take measures to prevent the violation of other States' airspace and reaffirms the principle of the non-use of weapons against civil aircraft in flight.[242] It emphasizes "...that every State must refrain from resorting to the use of weapons against civil aircraft in flight and that, in case of interception, the lives of persons on board and the safety of aircraft must not be endangered."[243] It also recognizes the right for every State, in the exercise of its sovereignty, to require civil aircraft flying above its territory without authority to land at designated airport.[244] On the other hand, civil aircraft must comply with an order asking for landing and each contracting

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[240] International Civil Aviation Organization, *Destruction of Korean Air Lines Boeing 747 Over Sea of Japan, 31 August 1983: Report of ICAO Fact-Finding Investigation,* Doc. C-WP/7764, ICAO, 1983, at 869. Reproduced in International Legal Materials, (1984) 23 at 864.
[241] *Protocol Relating to an Amendment to the Convention on International Civil Aviation*, Res. A25-1, ICAO, 25th Sess.,Doc. 9436, (1984).
[242] *Ibid.*
[243] *Ibid.* art. 2 para. (a).
[244] *Ibid.* art. 2 para. (b).

State must adopt national regulations to make such compliance mandatory for aircraft registered in that State.[245]

At the same extraordinary session, another Resolution was adopted calling contracting States to co-operate to the fullest extent practicable in reducing the need for the interception of civil aircraft and "...in improving co-ordination between military and civil communications systems and air traffic control agencies so as to enhance the safety of international civil aviation during the identification and interception of civil aircraft."[246] Furthermore, contracting States are invited to harmonize their procedures for the interception of civil aircraft and to adhere to uniform navigational and flight operational procedures by the flight crew of civil aircraft.[247]

8.2. ANNEX 2, RULES OF THE AIR

Article 37 of Chapter VI of the Chicago Convention – International Standards and Recommended Practices – invited "contracting States to collaborate in securing the highest practicable degree of uniformity in regulations, standards, procedures, and organization in relation to aircraft, personnel, airways and auxiliary services in all matters in which uniformity will facilitate and improve air navigation."[248] Consequently, the International Civil Aviation Organization adopts and amends international standards and recommended practices and procedures dealing with several technical aspects of civil aviation such as

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[245] *Ibid.* art. 2 para. (c).
[246] *Co-operation among Contracting States to ensure the safety of international civil aviation and to advance the aims of the Chicago Convention*, Res. A25-3, ICAO, 25th Sess.,Doc. 9436, (1984).
[247] *Ibid.* art.1 (c), (d).
[248] *Supra* note 220 art. 37.

communication systems, airports characteristics, rules of the air and traffic control, licensing, airworthiness, registration, meteorological information, log book, aeronautical maps and charts, customs and immigration, aircraft in distress, and any other matter concerning air navigation as may appear appropriate.[249] A State that cannot comply with any international standard and procedure has to give immediate notification to the International Civil Aviation Organization, and identify where its standards differ. In the case of an amendment to international standards initiated by the International Civil Aviation Organization, a State which does not comply should inform the Council of its action taken which in turn will inform all other States of the difference existing between the international standard and the corresponding national practice of that State.[250] The Council is a permanent body responsible to the Assembly and is composed of thirty-three contracting States elected by the assembly.[251]

The international standards and recommended practices and procedures consist of 18 Annexes to the Chicago Convention.[252] "Sixteen out of eighteen Annexes to the Convention are of a technical nature and therefore fall within the responsibilities of the Air Navigation Bureau and its sections. The remaining two Annexes, Facilitation and Security, are under the purview of the

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[249] *Ibid.*
[250] *Supra* note 220 art. 38.
[251] *Supra* note 220 art. 50.
[252] International Standards and Recommended Practices Annexes to the Convention on International Aviation, online: International Civil Aviation Organization, <http://www.icao.int/cgi/eshop_anx.pl?GUESTguest>. (date accessed: 24 October 2003).

Air Transport Bureau."[253] The duty of the Air Navigation Commission is to consider and to recommend to the Council the adoption or modification of Annexes to the Convention.[254]

The terms "Standard" and "Recommended Practice" have two different meanings:

> a. *Standard* — any specification for physical characteristics, configuration, material, performance, personnel or procedure, the uniform application of which is recognized as necessary for the safety or regularity of international air navigation and to which Contracting States will conform in accordance with the Convention; in the event of impossibility of compliance, notification to the Council is compulsory under Article 38 of the Convention; and
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> b. *Recommended Practice* — any specification for physical characteristics, configuration, material, performance, personnel or procedure, the uniform application of which is recognized as desirable in the interest of safety, regularity or efficiency of international air navigation and to which Contracting States will endeavour to conform in accordance with the Convention;[255]

Resolution A33-14 of the General Assembly of International Civil Aviation Organization recognizes that the airspace as well as many facilities and services will be shared between civil aviation and military aviation resources and requires that where such situations exist usage be arranged in such a manner as to ensure the safety, regularity and efficiency of international civil

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[253] Making an ICAO Standard, online: International Civil Aviation Organization, <http://www.icao.int/cgi/goto.pl?icao/en/anb/mais/index.html>. (date accessed: 23 October 2003).
[254] *Supra* note 220 art. 57.
[255] *Consolidated statement of ICAO continuing policies and associated practices related specifically to air navigation, Appendix A: Formulation of Standards and Recommended Practices (SARPs) and Procedures for Air Navigation Services (PANS)*, Res. A33-14, ICAO, 33rd Sess., (2001).

air traffic. It also stipulates that the operation of state aircraft by the contracting States over the high seas shall be done in such a manner as to 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.[256]

Annex 2 to the Convention on International Civil Aviation – Rules of the Air – is and international standard to which a contracting State shall conform. Chapter 1 of Annex 2 – International Standards – gives the definition of an aircraft as being "[a]ny machine that can derive support in the atmosphere from the reactions of the air other than the reactions of the air against the earth's surface."[257] The rules of the air apply to aircraft bearing the nationality and registration marks of a contracting State, wherever they may be, and also over the high seas.[258] The pilot-in-command is responsible for the operation of the aircraft in accordance with the rules of the air.[259]

8.2.1. INTERCEPTION OF AIRCRAFT

Appendix 2. – Interception of Civil Aircraft – of Annex 2 to the Chicago Convention institutes principles to be observed by States concerning the interception of civil aircraft.[260] Consequently, interception of civil aircraft will be undertaken only as a last resort.[261] When undertaken, it will be limited to

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[256] *Ibid. Appendix P: Coordination of civil and military air traffic.*
[257] *Annex 2 to the Convention on International Civil Aviation – Rules of the Air* – Chapter 1. Definitions.
[258] *Ibid.* art. 2.1.1.
[259] *Ibid.* art. 2.3.1.
[260] *Ibid. Appendix 2. Interception of Civil Aircraft.*
[261] *Ibid. Appendix 2. Interception of Civil Aircraft.* art. 1.1 a).

identify the aircraft, direct it beyond the boundaries of national airspace, guide it away from a specific area or instruct it to land at a designated aerodrome.[262] Practicing interception of civil aircraft is not permitted.[263] Navigational instructions to the intercepted aircraft will be given by radiotelephony when radio contact can be established.[264] And when required to land, the aerodrome has to be suitable for the safe landing of the aircraft type concerned.[265]

Appendix 1. Signals – presents the signals to be used by both the intercepting aircraft and the intercepted aircraft in the event of interception. First, there are signals initiated by an intercepting aircraft and responses by an intercepted aircraft. For example, to indicate that an aircraft have been intercepted, the pilot of an intercepting aircraft would rock its aircraft and flash navigational lights at irregular intervals from a position slightly above and ahead of the intercepted aircraft and, after acknowledgement, a slow level turn on the desired heading. To indicate that it understands and will comply, an intercepted aircraft responds by rocking its aircraft, flashing navigational lights at irregular intervals and following.[266] To indicate to an intercepted aircraft to proceed, an intercepting aircraft will execute"[a]n abrupt break-away from the intercepted aircraft consisting of a climbing turn of 90 degrees or more without crossing the line of flight of the intercepted aircraft."[267] The intercepted aircraft will acknowledge by rocking the aircraft. To indicate to an intercepted aircraft

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[262] *Ibid. Appendix 2. Interception of Civil Aircraft.* art. 1.1 b).
[263] *Ibid. Appendix 2. Interception of Civil Aircraft.* art. 1.1 c).
[264] *Ibid. Appendix 2. Interception of Civil Aircraft.* art. 1.1 d).
[265] *Ibid. Appendix 2. Interception of Civil Aircraft.* art. 1.1 e).
[266] *Ibid.* Appendix 1. Signals, art. 2.1, Series 1.
[267] *Ibid.* Appendix 1. Signals, art. 2.1, Series 2.

to land at a specific aerodrome, an intercepting aircraft will lower its landing gear, show steady landing lights and overfly the runway in use. In response, the intercepted aircraft will lower its landing gear, show steady landing lights and follow the intercepting aircraft and, if the landing is considered safe, proceeding to land.[268]

There are other actions to be taken by the intercepted aircraft in addition to following the instructions given by the intercepting aircraft and responding to visual signals.[269] The intercepted aircraft will notify, if possible, the appropriate air traffic services unit,[270] attempt to establish radio communication with the intercepting aircraft by making a general call on the emergency frequency 121.5 MHz and repeating this call on the emergency frequency 243 MHz if no contact has been establish,[271] or, if equipped with SSR transponder, select Mode A, Code 7700.[272] In case of conflicting instructions received by radio, the intercepted aircraft shall request immediate clarification while continuing to comply with the instructions given by the intercepting aircraft.[273]

9. INTERCEPTION OF AIRCRAFT

It is a well recognized principle in international law that aircraft are not normally entitled to enter the airspace above the territory of a foreign state without that states authorization. There is, however, a difference between the

[268] *Ibid.* Appendix 1. Signals, art. 2.1, Series 3.
[269] *Ibid.* Appendix 2. Interception of Civil Aircraft. art. 2.1 a).
[270] *Ibid.* Appendix 2. Interception of Civil Aircraft. art. 2.1 b).
[271] *Ibid.* Appendix 2. Interception of Civil Aircraft. art. 2.1 c).
[272] *Ibid.* Appendix 2. Interception of Civil Aircraft. art. 2.1 d).
[273] *Ibid.* Appendix 2. Interception of Civil Aircraft. art. 2.2, 2.3.

status of a civil aircraft and state aircraft, especially military aircraft. First, an aerial intrusion may happen for many reasons and in many circumstances. An intrusion by a military aircraft may be deliberate with a hostile intent, such as the gathering of information, for the purpose of launching an attack against a state, to test the defence system of another country, or to support subversive activities. An intrusion by a civil aircraft may be undertaken for illicit reasons like drug trafficking, smuggling, etc. Alternatively it may be due to distress, such as hijacking or the need to conduct an emergency landing due to mechanical difficulties. Or it might be the result of navigational errors or the malfunctioning of a navigation system on board the aircraft. In any event, it is clear in law that an intrusion can be carried out by either civil or a state aircraft, and when referring to state aircraft, by either combat or non-combat aircraft. In many instances States do not react to the intrusion of aircraft into their airspace. In particular, after the Second World War, intruders were not intercepted in most cases, "The abstention may be due to considerations of expediency or humanity, or simply to the unavailability of effective means."[274] Today, the development of sophisticated radar, tracking systems and intercepting aircraft, which are at the disposition of the majority of States, has resulted in a significant increase in interceptions worldwide.

9.1. INTERCEPTION OF MILITARY AIRCRAFT

In the case of interception, state aircraft, and particularly military aircraft, have been treated differently than civil aircraft, even with the adoption of article 3

[274] Oliver J. Lissitzyn, "The Treatment of Aerial Intruders in Recent Practice and International Law", (1953) 47 American Journal of International Law 585.

bis of the Chicago Convention and the International Standard of Annex 2, Rules of the Air, concerning the interception of civil aircraft. Most aerial incidents involving military aircraft have occurred between American and Soviet military aircraft. "It would be futile to engage in prolonged description of numerous incidents involving the aircraft of these two countries that occurred after World War II, particularly since the published documentation about most of the incidents discloses basic disagreement with respect to the facts of each case."[275] The issue of who fired first, intruder or interceptor, has been central to most disputes involving incidents between Soviet and American military aircraft.

A more recent incident involving the interception by Chinese fighter aircraft of an American surveillance aircraft and a subsequent collision in international airspace, however is worth considering to demonstrate how the perceptions and version of events as put forward by the states involved can impact on the rights of the state parties. The United States version of the events of the collision is as follows. On Sunday, 31 March 2001, at 9:15 a.m. local time in China, two fighter aircraft from the People's Republic of China intercepted a U.S. Navy EP-3 maritime patrol aircraft on a routine surveillance mission over the South China Sea in international air space.[276] There was physical contact between one of the Chinese aircraft and the EP-3, causing sufficient damage for the U.S. plane that it issued a "Mayday" signal. A mayday is a declared in-

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[275] Myres S. McDougal, Harold D. Lasswell & Ivan A. Vlasic, *Law and Public Order in Space,* (New Haven and London: Yale University Press, 1963) at 272-273.
[276] "Chinese Fighter Aircraft Intercept American Plane", statement by the U.S. Pacific Command (1 April 2001), online: U.S. Department of States, <http://usinfo.state.gov/regional/ea/uschina/chinaftr.htm>. (date accessed: 4 November 2003).

flight emergency that occurs when a pilot determines that the aircraft is in such danger that it must land at the nearest airfield in order to protect the aircraft and its crew.[277] The American plane was reportedly on autopilot when the Chinese plane began to closely shadow it, and was on autopilot at the time of the collision. To American military analysts this suggests that the U.S. plane made no sudden movements that would have caused the mid-air collision, thus the Chinese plane necessarily must have made the initial contact. The Chinese fighter bumped the wing of the larger, slower U.S. Navy aircraft, which was conducting routine operations about 70 miles off the Chinese Island of Hainan in international airspace. After declaring an emergency, the U.S. pilot made a safe landing at an airfield on Hainan Island, People's Republic of China.[278] The Chinese pilot and his aircraft were missing. According to Chinese authorities, "...the American plane was not in international airspace, but Chinese airspace. In addition, the U.S. EP-3 rammed the Chinese fighter, causing the fighter pilots death, and the emergency landing of the American aircraft."[279] Therefore the U.S. should apologize to China, to the widow of the Chinese fighter pilot, take full responsibility for the entire incident, and cease reconnaissance flights in the South China Sea.

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[277] "An Analysis of the U.S. – China EP-3 incident (2001 April)", online: Area Studies Center, <http://www.areastudies.org/documents/asia011.html>. (date accessed: 4 November 2003).
[278] "Navy Admiral Describes Aircraft Incident In South China Sea", statement released by the U.S. Pacific Command (1 April 2001) online U.S. Department of States, <http://usinfo.state.gov/regional/ea/uschina/chinasea.htm>. (date accessed: 4 November 2003).
[279] *Supra* note 277.

On the other hand, Defence Secretary Donald H. Rumsfeld declared after talking with U.S. Navy pilot Lt. Shane Osborn that the EP-3 plane didn't turn and strike one of the Chinese jets that were "buzzing" the surveillance aircraft. Rumsfeld said The EP-3 was on autopilot and it did not deviate from a straight and level path until it had been hit by the Chinese fighter aircraft. "Then, the American plane's autopilot went off and it made a steep left turn and lost some five-to-eight-thousand feet in altitude as the crew attempted to regain control."[280]

Both American and Chinese governments remained at odds over the legal status of the spy plane's flight path, 70 miles off the coast of Hainan. U.S. officials repeatedly restated their view to the Chinese that military aircraft have sovereign immunity under international law and practice, and as such even though the aircraft was located on Chinese territory the Chinese had no right to enter or inspect the aircraft. To do so or to detain its 24-person crew would be a violation of the sovereign territory of the United States. America claimed that under customary international law, the body of international law not enumerated in treaties, vessels in distress still enjoy sovereign immunity when they are forced to land or dock in another country's territory. Some advisors relied on an obscure American case from the 19th century to support this view:

> In the United States, this was established in an early 19th century Supreme Court opinion, known as the Schooner Exchange Incident. Under that ruling, a French warship was forced to dock in Philadelphia because of particularly stormy seas. Justice John Marshall ruled that the consent to land

[280] *Supra* note 277.

> was implied when the port took in the ship, thus protecting its sovereign immunity.[281]

While this case may be helpful in a domestic context, it does not establish a norm or practice among states that raises the principles expressed therein to the status of customary international law. On the other side, the Chinese claimed that the plane was in violation of international law, even before the collision. This plane was on a routine spy mission, it was not an innocent flight. "Foreign Ministry spokesman Zhu Bangzao declared that the plane had violated Chinese airspace, and landed without permission thus losing its sovereign immunity. As a result, the Chinese government was perfectly within its rights in boarding the aircraft and attempting to determine the reason for the intrusion."[282] This argument also justified detaining the crew and examining the equipment on board. Jiang Zemin stepped forward to charge that the U.S. was fully responsible for the crash and owed China an apology. On a practical level, the Chinese wanted access to the data collected by the EP-3 earlier that day as it would allow the Chinese to identify which of their systems is vulnerable to interception. But in the case of this collision, the near instant consensus among U.S. military pilots was that if anyone was at fault, it was the Chinese. The 24 American crew members were released eleven days later and the EP-3 was returned to the United States in pieces three months later.

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[281] Eli J. Lake, "Legal status of U.S. spy plane unclear", online: All Prisoners of War – Missing In action, <http://www.aiipowmia.com/inter21/in040401leg.html>.(date accessed: 4 November 2003).

[282] Nancy Gibbs & Michael Duffy, "Saving Face", online: Time Asia, <http://www.time.com/time/asia/news/magazine/0,9754,105658,00.html>.(date accessed: 4 November 2003).

9.2. INTERCEPTION OF CIVIL AIRCRAFT

The use of force to intercept civil aircraft generates significantly greater condemnation from the international community than does the interception of military aircraft. Since the adoption of article 3 *bis* of the *Chicago Convention* and the procedure for interception of civil aircraft contained in Annex 2, one would expect that the recurrence of an incident similar to the shooting down of Korean Air Lines Flight KE007 is unlikely. Were such a situation to arise again, the principles to be observed are enunciated in Appendix 2. – Interception of civil aircraft – of Annex 2 and stipulate that "...an interception will be limited to determine the identity of aircraft, unless it is necessary to return the aircraft to its planned track, direct it beyond the boundaries of national airspace, guide it away from a prohibited, restricted or danger area or instruct it to effect a landing at a designated aerodrome."[283]

Nevertheless, interception of civil aircraft occurs frequently. It is standard operating procedure to scramble jet fighters whenever a jetliner goes off course or radio contact is lost. For example, between 11 September 2001 and June 2002, NORAD scrambled jets or diverted combat air patrols 462 times, almost seven times as often as the 67 scrambles from September 2000 to June 2001.[284]

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[283] *Annex 2 to the Convention on International Civil Aviation – Rules of the Air –Appendix 2,* art. 1.1 b).

[284] Leslie Miller, "Military now notified immediately of unusual air traffic events", online: For Those Who Care About Our Future, <http://www.wanttoknow.info/020812ap>. (date accessed: 6 November 2003).

In 1990, the United States began aerial monitoring of the Peru-Colombia airbridge, under the U.S. Southern Command program "Support Justice". "The objective of the program was to use U.S. aerial tracking aircraft, such as AWACs and P-3s, to confirm anecdotal law enforcement information regarding the frequent use of small private aircraft to quickly move the majority of cocaine products within the Andean region."[285]

The detection and interception of civil aircraft was executed in a joint operation by U.S. aircraft and the Peruvian Air Force (FAP), who intercepted the suspected aircraft. Information on a suspect flight came from a variety of sources including the U.S. Department of Defence, the U.S. Drug Enforcement Administration, the Peruvian military and elsewhere. In a case where a U.S. aircraft detects a suspect flight while on patrol, the suspect aircraft is tracked passing through the Air Defense Identification Zone and an FAP interceptor aircraft is guided to the suspect aircraft. There is an FAP liaison officer on board the U.S. tracking aircraft under the direct command and control of an FAP commander on the ground. The FAP attempts to identify the aircraft as a legitimate using a number of tools including previously filed flight plans. If it is considered a suspect aircraft, the Peruvian Air Force initiates an interception in three phases.

> Phase I, focuses upon attempting radio contact; Phase II focuses upon signalling the suspect aircraft by firing warning shots; and Phase III, the FAP interceptor is authorized use of deadly force to disable the suspect aircraft and force it down. Authorization for the use of deadly force on civilian aircraft

[285]Peru Investigation Report: The April 20, 2001 Peruvian Shootdown Accident, (August 2, 2001), online: U.S. Department of State, <http://www.state.gov/g/inl/rls/rpt/pir/4397.htm>. (date accessed: 6 November 2003)

> requires the approval of the Commander, FAP VI/RAT [Peruvian Air Force Sixth Territorial Air Region], a general officer; or, in his absence, his executive officer, a colonel.[286]

On April 20, 2001 an American tracking aircraft with two Americans and a Peruvian Air Force officer on board initially detected a suspected floatplane, an "aircraft of interest", on the Peru-Brazil border. After verifications on the ground with air traffic services, the information was passed to the Peruvian Air Force officer that the detected aircraft did not have a flight plan; the aircraft became a "suspect aircraft". The floatplane took off from Islandia, Peru, on the Amazon River near the borders of Peru, Brazil and Colombia. The plane took a westerly course along the Amazon, bound for Iquitos, Peru. There were 5 persons on board the Cessna 185 floatplane, tail number OB-1408. The pilot was Kevin Donaldson and the passengers were James Bowers, his wife Veronica, all missionaries of the Association of Baptists for World Evangelism, and their young children Cory and Charity. They had been living in Peru for many years. The Bowers had been in nearby Leticia, Colombia to obtain a residence visa for Charity, whom they had recently adopted. The Peruvian officer on board the American tracking aircraft sent the information to his ground commander who dispatched an interceptor A-37 aircraft, a light attack and reconnaissance aircraft also called the Dragonfly. Radio transmissions were executed in order to establish contact with the intercepted aircraft to no avail. Phase two was initiated and two warning shots fired over the suspected aircraft, but the floatplane maintained a steady flight path. The Peruvian Air Force Officer in command on the ground called the Commanding

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[286] *Idem.*

General in Lima to inform him of the situation and request authorization to initiate Phase three. From this point on, a series of simultaneous messages occurred that caused communications to become congested. A confused and ultimately unsuccessful effort was made by Peruvian military and Peruvian civilian authorities to identify the missionary plane and the intentions of its crew, as mandated by the standard operating procedures governing the operation of the aerial interdiction program.

At this time, the A-37 fired two salvos of approximately three seconds each resulting in the death of two U.S. citizens, a mother and a child, and the wounding of the pilot. "One of the shots fired by the military interceptors pierced the heart of Veronica Bowers and continued through and into the baby's head. Both died instantly. Donaldson, Bowers and Bowers' son Cory survived the subsequent ditching in the Amazon River near the village of Huanta, Peru."[287]

This policy, in essence, presumed any civilian aircraft in drug-producing areas to be guilty unless proven innocent, and permitted the use of deadly force when there was only the suspicion of involvement in the smuggling of drugs. The language limitations of Peruvian and American participants – particularly under stress - played a role in reducing the timely flow of information, and

[287] Kirby J. Harrison, "Shootdown of floatplane is warning signal for GA", online: Aviation International News, <http://www.ainonline.com/issues/06_01/june_01_shootdownpg3.html>.(date accessed: 6 November 2003).

comprehension of decisive messages related to the interception of Cessna OB-1408 in April 2001.

Unfortunately, the fate of the floatplane OB-1408 ended in the Amazon River; the lives of innocent victims were lost due to the non-observance of International Standards adopted by the International Civil Aviation Organization.

Consequently, in April 2001, after the tragic accident involving the loss of innocent life in Peru, the United States suspended the "Airbridge Denial Program" against civil aircraft suspected of trafficking in illicit drugs. However, on August 19, 2003, the President of United States authorized the Department of State to resume assistance to Colombia in carrying out an "Airbridge Denial Program".[288] The State Department has now taken over the U.S. Airbridge Denial Program from the Central Intelligence Agency (CIA) and has contracted with the Maryland-based aviation company ARINC to train Colombian pilots and other technicians to fly surveillance aircraft. Previously, this work was done by DynCorp, a company with close links to the CIA. Headquartered in Annapolis, Maryland, ARINC conducts business in 140 countries and is specialized in communications and systems engineering challenges in five major industries – airports, aviation, defense, government,

[288] Statement by the Press Secretary: Presidential Determination Regarding U.S. Assistance to he government of Colombia Airbridge Denial Program, online: U.S. Department of State, <http://www.state.gov/g/inl/rls/prsrl/ps/23382.htm>. (date accessed: 7 November 2003).

and transportation.[289] "...ARINC Incorporated has been awarded a competitive contract by the U.S. Army Communications and Electronics Command to act as contractor for the U.S. Airbridge Denial Program in Colombia and Peru."[290] ARINC was to be assisted in that contract by two subcontractors: Provincial Air Lines of St. John's, Newfoundland, Canada; and ITI Solutions of San Antonio, Texas.

> The U.S. role in the drug interdiction plan will consist of working closely with Colombian officials to identify suspect planes, and passing along coordinates from U.S. and Colombian radar stations to Colombian crews flying Cessna Citation surveillance planes. The surveillance planes will then direct Colombian Air Force jets toward the suspect aircraft. The surveillance planes will have at least one bilingual observer, most likely from the US, to maintain contact with radar operators and Colombian Air Force commanders, U.S. officials said. The pilots have also undergone extensive language training. (Language barriers are believed to have contributed to the April 2001 incident.) [291]

On 29 October 2003, the new Air Force Commander of Columbia said that he would not hesitate to order suspected drug flights shot down if they are tracked by U.S. and Columbian authorities and ignore warnings to land. He said that pilots of aircraft smuggling drugs "are violating the sovereignty of the country committing a crime and

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[289] ARINC corporate information, online: ARINC, <http://www.arinc.com/corp_info/index.html>. (date accessed: 8 November 2003).
[290] Arinc Will Support U.S. Army Drug Interdiction in South America, Arinc Press Release April 24,2002, online: ARINC, <http://www.arinc.com/news/2002/04-24-02.html>. (date accessed: 8 November 2003).
[291] Flight Shoodowns to Resume?, online: Weekly News Update On The Americas, <http://www.americas.org/news/nir/20030824_flight_shootdowns_to_resume_.asp>. (date accessed: 8 November 2003).

violating norms that are laid out in Columbia`s air manuals."[292] The program has still not yet been restarted in Peru.

10. MILITARY AIRCRAFT IN CANADA

The jurisdiction over civil aviation in Canada was not originally attributed to the legislatures of the provinces nor to the federal government by the *British North America Act, 1967* in the division of their respective powers as aerial navigation was not sufficiently developed at that time.[293] However, since 1867, the courts have addressed this question and in a 1932 decision the Privy Council pronounced "...that further legislative powers in relation to aerial navigation reside in the Parliament of Canada...and...it would appear that substantially the whole field of legislation in regard to aerial navigation belongs to the Dominion...under its power to make laws for the peace, order and good government of Canada."[294]

Today, under the *Aeronautics Act,* the Minister of Transport is responsible for the development and regulation of aeronautics and the supervision of all matters connected with aeronautics.[295] On the other hand, the Governor in Council may make regulations respecting aeronautics and, among other things; the areas within which aircraft coming from outside Canada are to land and the conditions to which such aircraft are subject;[296] the classification and

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[292] Andre Selsky, "Columbia Vows to down on drug", online: Washington Post, <http//www.whashingtonpost.com/ac2/wp-dyn/A36752-...> (date accessed: 30 October 2003).
[293] *British North America Act, 1867, 30-31 Vict., c. 3 (U.K.).*
[294] *Re Aerial Navigation. A.-G. Can v. A.-G.Ont. et al.,* (1932) 1 D.L.R. 58.
[295] *Aeronautics Act,* R.S.C. 1985, c. A-2, s. 4.2.
[296] *Ibid.* s. 4.9 (*j*).

use of airspace and the control and use of aerial routes;[297] and the prohibition of the use of airspace or aerodromes.[298] The Minister of Transport may also establish a board of inquiry to inquire into the circumstances of any accident involving an aircraft, or any incident involving an aircraft that, in the opinion of the Minister, endangered the safety of persons.[299] The Minister may cooperate with officers of Her Majesty in right of Canada on all matters relating to defence,[300] but the Minister of National Defence is responsible with respect to any matter relating to defence, including any matter relating to military personnel or a military aircraft, military aerodrome or military facility of Canada or a foreign state.[301] The act applies to all persons and to all aeronautical products in Canada,[302] subject to any regulations made by the Governor in Council respecting the application of the Convention on International Civil Aviation signed at Chicago, 7 December 1944, as amended from time to time.[303]

The definition of aircraft provided in the *Aeronautics Act* is not final as the act provides that:

> "aircraft" means
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> (a) until the day on which paragraph (b) comes into force, any machine capable of deriving support in the atmosphere from reactions of the air, and includes a rocket, and

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[297] *Ibid.* s. 4.9 (*k*).
[298] *Ibid.* s. 4.9 (*l*)..
[299] *Ibid.* s. 6.3 (1).
[300] *Ibid.* s. 4.2 (*l*).
[301] *Ibid.* s. 3.(1).
[302] *Ibid.* s. 4.
[303] *Ibid.* s. 4.9.

> (b) on and after the day on which this paragraph comes into force, any machine capable of deriving support in the atmosphere from reactions of the air, other than a machine designed to derive support in the atmosphere from reactions against the earth's surface of air expelled from the machine, and includes a rocket;[304]

The Canadian legislation takes into account the definition of aircraft provided by the International Civil Aviation Organization in its documents by using the same wording at paragraph (b) but not enforcing it as of yet. As a result, the definition of aircraft in force in the *Aeronautics Act* is simply paragraph (a): "any machine capable of deriving support in the atmosphere from reactions of the air, and includes a rocket."[305] This earlier definition of aircraft was abandoned by the International Civil Aviation Organization after the use of hovercraft in which this machine was falling into the category of aircraft as it was supported in the atmosphere from reactions of the air. This explains the addendum to the definition of aircraft by the terms "...other than a machine designed to derive support in the atmosphere from reactions against the earth's surface of air expelled from the machine..."[306] Furthermore, the definition of aircraft in the *Aeronautics Act* as it stands today also includes a rocket. Transport Canada Civil Aviation (TCCA) proposals to amend the *Aeronautics Act* are contained in the TCCA Discussion Paper, dated 30 June 2000. These proposals were made in order to "update the Act in light of international trends and initiatives and ensure that Canada continues to meet

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[304] *Ibid.* s. 3.(1).
[305] *Ibid.*
[306] *Ibid.*

its international obligations."[307] On 11 May 2001, the proposals to amend the act as revised in response to consultation comments were presented. It was proposed that, for the purposes of the Act, the broader definition of "aircraft" as per paragraph (a) be the operative definition. Paragraph (b) will be revoked. Any aircraft to which some or all of the Canadian Aviation Regulations (CARs) are not intended to apply will be identified, as necessary and appropriate, in the CARs. Therefore, the following recommendation was made:

> From the legal perspective, it remains preferable to have a broad definition in the Act and to exclude certain craft or objects through the regulations. The FAR [US Federal Aviation Regulations] definition would potentially exclude some but not all things which TCCA would want to exclude from the definition of aircraft. The Discussion Paper proposal is the ICAO definition of aircraft (with the addition of "rockets").[308]

As of today, no final decision has been made yet concerning this amendment.

In contrast, the definition of aircraft given in the Nation*al Defence Act* differs from the one presented in the *Aeronautics act*. The *National Defence Act* provides the following definition of aircraft:

> "aircraft" means flying machines and guided missiles that derive their lift in flight chiefly from aerodynamic forces, and flying devices that are supported chiefly by their

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[307] *Proposals to amend the Aeronautics* Act, online: Transport Canada, <http://www.tc.gc.ca/civilaviation/Regserv/Affairs/cars/AeronauticsAct/proposal/ProposalAA.htm#interp>. (date accessed: 28 October 2003).
[308] *Ibid.*

> buoyancy in air, and includes any aeroplane, balloon, kite balloon, airship, glider or kite;[309]

The definition of aircraft encompasses two descriptions of flying objects; on the one hand, there are flying machines and guided missiles that derive their lift in flight chiefly from aerodynamic forces and, on the other hand, there are flying devices that are supported chiefly by their buoyancy in air, and includes any aeroplane, balloon, kite balloon, airship, glider or kite. The definition does not include rocket as in the Aeronautics act but includes guided missiles. Although both terms are not similar and do not bear the same meaning. A rocket being "[a] cylindrical projectile that can be propelled to a great height or distance by the combustion of its contents and the backward ejection of waste gases...," or, "[a]n elongated device or craft in which a rocket engine is the mean of propulsion."[310] And on the other hand, a missile being "[a] destructive projectile that is self-propelling and directed by remote control or automatically."[311]

10.1. CANADIAN AVIATION REGULATIONS

The Canadian Aviation Regulations are a compilation of regulatory requirements designed to enhance safety and the competitiveness of the Canadian aviation industry. They correspond to the broad areas of aviation which Transport Canada Civil Aviation is mandated to regulate. Nevertheless, these regulations do not apply in respect of Canadian military aircraft when used under the authority by the Minister of National Defence and to foreign

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[309] *National Defence Act*, R.S.C. 1985, c. N-5, s. 2.
[310] *The New Shorter Oxford English Dictionary, s.v.* "rocket".
[311] *The New Shorter Oxford English Dictionary, s.v.* "missile".

military aircraft which are exempted from the Minister to the application of these regulations.[312]

There is no definition of aircraft or military aircraft in the regulations but the term "aeroplane" is described as being "...a power-driven heavier-than-air aircraft that derives its lift in flight from aerodynamic reactions on surfaces that remain fixed during flight."[313] As mentioned previously, the Canadian Legislator desires to give a broad definition to aircraft in *Aeronautics Act* and any aircraft to which some or all of the Canadian Aviation Regulations are not intended to apply will be identified, as necessary and appropriate, in the CARs. This explains the wide variety of "flying objects" administered by these regulations such as airships, balloons, gliders, gyroplanes, hang gliders, heavier-than-air aircraft, helicopters, land aircraft, large aeroplanes, lighter-than-air aircraft, model aircraft, model rocket, non-pilot aircraft, ornithopters, powered gliders, private aircraft, rockets, small aircraft, and ultra-light aeroplanes.

Part VI – General Operating and Flight Rules – of the regulations deals with general flight rules applying to all aircraft and Division IX – Emergency Communications and Security of Part VI – is entitled *Interception Signals, Interception of Aircraft and Instructions to Land.* It specifies that no person shall give an interception signal or an instruction to land except "...a peace officer, an officer of a police authority or an officer of the Canadian Forces

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[312] *Canadian Aviation Regulations,* S.O.R./1996-433, s. 102.01.
[313] *Ibid.* s. 101.01(1).

acting within the scope of their duties...or...a person authorized to do so by the Minister...if such authorization is in the public interest and is not likely to affect aviation safety."[314] The pilot-in-command of an intercepted aircraft shall comply with the instructions to land given by an authorized person mentioned above.[315] Both the intercepting and the intercepted aircraft shall comply with the rules of interception set out in the *Canada Flight Supplement.*[316]

The *Canada Flight Supplement* is a joint civil/military publication. It contains information on Canadian and North Atlantic aerodromes and is used as a reference for the planning and safe conduct of air operations. The section of Interception of Civil Aircraft specified that interceptions are made only in case of unidentified hostile aircraft until definitively proven to the contrary. "Intercepted aircraft should maintain a steady course and under no circumstances take retaliatory action such as shining a light on an interceptor or attempt evasive action. Retaliatory action on the part of an intercepted aircraft could be construed a hostile intent and might result in drastic consequences.[317] The signals for use in the event of interception presented in *Canada Flight Supplement* are identical and comply with the standards of *Annex 2 – Rules of the Air* at *Appendix 2. – Interception of Civil Aircraft* to the *Chicago Convention*.

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[314] *Ibid.* s. 602.144 (1), (2).
[315] *Ibid.* s. 602.144 (3).
[316] *Ibid.* s. 602.144.(4).
[317] *Canada Flight Supplement,* Interception of Civil Aircraft, 30 October 2003, at F13.

The intercepted aircraft shall follow the instructions given by the intercepting aircraft, notify the appropriate air traffic services and attempt to establish radio communication with the intercepting aircraft on the emergency frequency. In case of conflicting instructions received by radio from any source, always follow the instructions of the intercepting aircraft.

CONCLUSION

Early in aviation history, States realized the advantage of using flying machines in support of military operations. The first military aircraft were rudimentary and most of the time consisted of a tethered hot air balloon with one or two observers on board reporting what they saw from the air. However, one of the most important questions arising out of the use of military aircraft in an armed conflict was how States were to define the legal status of the airspace in which these aircraft were to manoeuvre and conduct their operations. The international discussions evolved around two diametrically opposed concepts concerning the basic principle of airspace: the freedom of the air doctrine and the sovereignty of airspace above the territory of State doctrine. The damage caused by aerial bombardment during the First World War convinced the States that control over airspace was essential to ensuring the security of the State. The sovereignty of airspace principle became the cornerstone of air navigation in international conventions.

The Two World Wars contributed significantly to the progress and the development of air transportation. At the end of Second World War, the aeronautic industries, exclusively devoted to the war effort during the hostilities, were now relying on commercial air transport to support their business activities. The world realized that worldwide air navigation would require the negotiation and adoption of an International convention. However, even though States recognized the need to effectively regulate civil aviation and civil aircraft this desire did not extend to state aircraft. The Chicago

Convention directly expresses the will of the States to exclude this type of aircraft from the international framework. Thus state aircraft, which encompasses military aircraft, were not captured by the international legal framework but rather it was left to States to provide for the safe and effective operation of these aircraft in the own domestic legislation and regulations. On the other hand, the Law of armed conflict does address the status of military aircraft but only in the context of armed conflict as belligerent or neutral involved in the conduct of hostilities.

The most controversial role played by military aircraft today and in the recent past, is the interception of civil aircraft. A proper knowledge and better application of the rules governing the actions of intercepted and intercepting aircraft is required. The interception of civil aircraft is undertaken to determine the identity of aircraft not to pronounce a death penalty on the people on board. Consequently, when military aircraft and civilian aircraft are sharing the same airspace, in peacetime or wartime, military aircraft shall exercise a due regard for the safety of navigation of civil aircraft.

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JURISPRUDENCE

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