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Laws Governing Military Aircraft under International Aviation Law and International Humanitarian Law: A Critique

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Abstract

This paper examines the laws governing military aircraft and elaborates on a set of principles outlined in several conventions that determine their legitimacy and obligations under international law. The research method of this paper is qualitative, and it adopts legal research methodology, which is a library-based black letter approach. The governing regulations of two legal regimes-aviation law and humanitarian law-are considered for the purpose of analysis while considering the practical aspects and distinctive role of military aircraft. The paper is divided into three parts, and Part One provides a brief discussion on the history and evolution of governing laws for military aircraft. The second part of the paper explores the Paris Convention and the Chicago Convention's specific provisions as they relate to military aircraft. Part three of the paper delves into military aircraft under international humanitarian law embedded in the Hague regulations and Protocol I of the four Geneva Conventions and identifies how indiscriminate air attack and unlawful interception violate the law of armed conflict principles. Finally, this paper argues that while assuring legitimacy under the contemporary international legal regime, it would result in state responsibility if an act of military aircraft breached customary international law principles.

Keywords: Military aircraft, *Paris Convention*, *Chicago Convention, Hague rules, Four Geneva Conventions*

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Introduction

One of the most advanced and effective strategic weapons on the modern battlefield is the military aircraft. This became clear and understood when evaluating the evolution of air war regimes and outcomes produced by combat aircraft in post-modern warfare. Since the beginning of the history of aviation, the use of aircraft for military purposes has revealed an efficient and dangerous weapon in the arsenal of a state. First it was used as an observatory post during the First World War, and then the aircraft took a more active role in combat until it became a destructive and deadly weapon during World War II[1]. Because of aviation's lethal tactical and strategic potential in postwar wars, drafters of public international air law have sought to establish and propose significant legal provisions dealing with military aircraft, which have gradually evolved into the present laws. However, it is observed that the concerns for national security that prompted states to legally curtail the access of military aircraft to their territory are not a recent issue but date back to well before the onset of World War I, when aviation was in its infancy.[2] Hence, it is obvious that the fundamental principles of codified international air law that affect military aircraft were created in the shadow of World War I.[3]

Currently, a minimum civil-military regulatory interface within the international legal framework is required to create safe skies on a global level. However, current and previous international legal instruments governing aviation functions have largely dealt with civil or commercial aviation, effectively excluding military aircraft from their sphere of applicability. Although the legal status of state

1 Richard Overy, "*The Air War: 1939-45 Cornerstones of Military History"* **(**Annotated edn, potomac books 2005)140-150

2 Michel Bourbonniere and Louis Haeck ," Military Aircraft and International Law: Chicago Opus 3" (2001) 66,Journal of Air Law and Commerce,885

3 MichaelTremblay,*" The Legal Status of Military Aircraft in International Law"* (LLM Thesis, McGill University,2003) 3-12

aircraft, including military aircraft, has not been specifically dealt with in international treaties, it has not been completely ignored either. This is witnessed when evaluating the content of enacted aviation laws such as the Paris Convention[4] and the Chicago Convention[5]. Furthermore, there are International humanitarian laws (IHL) that apply to armed conflicts that take into account the use of military aircraft in the conduct of hostilities. Those laws elaborate a set of mandatory rules governing the status of aircraft near or in the operational theatre in various treaties, such as the Hague Rules of Air Warfare (HRAW)[6] and the Four Geneva Conventions (IV GC).[7] However, no specific determination or definition has been reached so far on military aircraft by the global community as civil aircraft. But in general, but not in most legal regimes, a military aircraft is considered to include all aircraft operated by commissioned units of the armed forces of a nation bearing the military markings of that nation, commanded by a member of the armed forces, and manned by a crew subject to regular armed forces discipline.[8] Today, due to technological advancements and their expected use in military air operations, including aerial reconnaissance, aerial assault, aerial defence, and aerial interception, the role of military aircraft in aerial combat has changed significantly. Therefore, the legal regime governing military aircraft operations in the contemporary period needs to be identified within these broad areas. As a result, based on selected legal regimes, this article investigates international rules established by convention and customary principles governing the

4 Convention Relating to the Regulation of Aerial Navigation (Paris Convention), 1919
5 The Chicago Convention on International Civil Aviation,1944
6 Hague Rules of Air Warfare (HRAW), 1923
7 Four Geneva Convention relative to the Protection of Civilian Persons in Time of War (GC IV),1949
8 George N Walne, "The Conduct of Armed Conflict and Air Operations and the Linebacker Bombing Campaigns of the Vietnam War" (USAF pamphlet AFP 110-31: International Law ,1988) para. 2-4b, at 2-4 to 2-5. https://apps.dtic.mil/sti/pdfs/ADA191278.pdf> accessed 05 May 2023

flight of military aircraft as a subset of state aircraft. The paper is divided into three parts. Part one evaluates the history and evolution of governing laws for military aircraft. Part two of the article analyses the two prime conventions governing aviation, the Paris Convention and the Chicago Convention, and their specific provisions governing military aircraft. Part three of the article elaborates on military aircraft under the law of armed conflict within the specific provisions of Hague rules and the four Geneva conventions. To achieve the objective of the paper, this research was carried out as library research, adopting the black letter approach. It was conducted by collecting data through primary resources such as relevant legislation, international conventions, and Secondary sources include research articles, books, journal articles, and other electronic resources.

PART 1

History and the evolution of governing laws for military aircraft

This part of the paper will briefly discuss the historical routes of military aircraft and the evolution of two distinct legal regimes, Aviation Laws and IHL, that oversee their rulings for military aircraft.

Development of military Aircrafts

The development of the aircraft and navigable airship in the first decade of the 20th century marked the beginning of true aviation for military use. On December 17, 1903, the Wright brothers achieved the first powered, sustained, and controlled flight in an aeroplane.[9] They thought such an aircraft would be primarily valuable for military surveillance. The history recorded the first use of an

9 Tara Dixon-Engel and Mike Jackson, *"The Wright Brothers: First in Flight"* (Sterling Publishing Company, Inc., 2007)

airplane for combat purpose on October 23, 1911, during the Italo-Turkish War, when an Italian pilot made one-hour reconnaissance flight over enemy positions near Tripoli, Libya,

in a Blériot XI monoplane.[10] Until '1914, aircraft had no military use except for reconnaissance. However, with the commencement of the First World War, manufacturers were pressed to equip aero planes with guns, bombs, and torpedoes. During World War I, the military value of aircraft was quickly recognised and demonstrated, and modern warfare improved their destructive forces.[11] In World War II, modern fighter planes were used for air combat because they were the fastest and easiest to manoeuvre. Fighter planes were often used in conjunction with bombers to shoot down enemy bombers. Transport planes used for military purposes carried supplies and troops during the war. In the contemporary period, military aircraft can be either combat or non-combat and broadly include jet fighters, bombers, attack helicopters, electronic warfare, maritime crafts, multirole military planes, and unmanned aircraft.

Development of International convention rules for military aircraft

The Hague Peace Conference of 1899, which adopted a declaration prohibiting any aerial bombardment for a period of five years, marked the first attempt to regularise military aviation activities.[12] Later, the First World War showed that the deployment of military aircraft in battle may have a substantial influence on state sovereignty and national security. The WWII later reiterated the matter. As a consequence, the international community opted to choose between the concepts of state sovereignty and freedom of the air.

10 John W.R. Taylor and John F. Guilmartin, Military aircraft, (*Britannica.com,*2023)< https://www.britannica.com/technology/military-aircraft/Stealth> accessed 05 May2023
11 ibid
12 Russell J. Parkinson, "Aeronautics at the Hague Conference of 1899 " (1960) 7, *The Air Power Historian*, 106– 11< *JSTOR*, http://www.jstor.org/stable/44512745 > accessed 06 May 2023.

State sovereignty implies that its legitimacy and authority can be established exclusively by reference to the legal system itself. Hence, sovereignty over the air is vested in the state. Under freedom of the air, one state grants another state or states permission to fly through its territory without landing. Thereby, the concept does not vest exclusive air sovereignty in the state over air. Finally, the global community has chosen to adopt the principle of state sovereignty. This resulted, at the end of the First World War in 1919, in the Paris Convention[13] codifying the concept of air sovereignty. For the first time in legal history, the Convention incorporated provisions for identifying military aircraft in its articles 30 to 32, as discussed later in this paper. It became clear during the Second World War that a new foundation for international civil aviation was needed, one that would replace mainly regional arrangements with a global structure to address aviation issues. Therefore, in the aftermath of World War II, in 1944, the Chicago Convention on Civil Aviation[14] was adopted to deal with civil aircraft and civil aviation. Like the previous Paris Convention, it does not give a definition of "aircraft," and that definition can only be found in subsidiary legal sources. Especially in Article 3, the Convention restricts the scope of its applicability to "civil" aircraft[15]. The Chicago Convention, in contemporary Public international air law, presently has its "Magna Carta" *status quo*. A comprehensive illustration of the governing legal statutes on military aircraft under the Paris and Chicago conventions will be contained in the next part of this article.

Development of international humanitarian laws governing military aircrafts

The universal codification of IHL began in the nineteenth century

13 ibid (n4)
14 ibid (n5)
15 ibid art 3(a)

with the development of aviation matters.[16] However, the continuous and rapid technological progress being made in the area of aviation led to complicated questions to be determined in armed conflict, such as proportionality and the indiscriminate nature of air attacks under IHL. It is apparent that even today, it is challenging to apply treaty rules, particularly those controlling IHL, to military aviation because of the unique nature of the crucial role played by aircraft in combat operations in modern conflicts. However, specific rules have gradually evolved and been established in the contemporary period. Especially the Hague Rules of 1922, the Hague Convention of 1954, the San Remo Manual, and the four Geneva Conventions are recognized as principle laws having obligations embedded in them to be adhered to the operation of military aircraft in armed conflicts.

PART 2

Aviation Laws governing Military Aircrafts

This part of the article explains the legal provisions available in two conventions, namely the Paris Convention and the Chicago Convention, which govern the functions of military aircraft and provide foundations for military warfare exclusive to the air sovereignty of states in international law.

Military aircrafts under Paris Convention of 1919

The first codification of public international air law originated in the Convention for the Regulation of Aerial Navigation of October 13, 1919. The Convention recognized a distinction in public international law between "private aircraft" and "state aircraft." In this convention the military aircraft has been recognized as in the category of State aircraft within the following articles, namely:

16 Amanda Alexander, "A Short History of International Humanitarian Law" (2015) 26 (1) European Journal of International Law <https://academic.oup.com/ejil/article/26/1/109/497489> accessed 06 May2023

"Article 30 - The following shall be deemed to be State aircraft:

(a) Military Aircraft;

(b) Aircraft exclusively employed in a 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."[17]

"Article 31 - *Every aircraft commanded by a person in military service detailed for the purpose shall be deemed to be a military aircraft*[18].

It is important to note that a specific disposition pertaining to military aircraft was included within **Article 32** of the Paris Convention, which reads;

"*No military aircraft of a contracting state shall fly over the territory of another contracting state nor land thereon without special authorization. In case of such authorization 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*."[19]

The Paris Convention's Articles 30 to 32 establish a presumption as to what is to be "deemed" to be a state or military aircraft rather than providing a definition of "military aircraft." In addition to the aforementioned Articles 30 and 31, the Convention defended the

17 ibid (n4) art 30
18 ibid art 31
19 ibid art 32

notion of a state aircraft in terms of a state public authority and, as a result, established a special regulatory regime for military aircraft and aircraft used solely for state purposes. According to Article 31, an aircraft can only be considered a military aircraft if it is operated for military objectives and is under the command of a member of the military. So, from the very beginning of the international air law regime established by this convention, military aircrafts were given a special status restricting their freedom of operation in foreign sovereign air space and making them subject to a "special authorization" of the state to be overflown. As per Article 32, aircraft from other states are not allowed to fly over restricted zones inside the state, save for military, postal, customs, and police aircraft. When flying to another country, a state aircraft does not have the same rights it does when flying within its own country of origin. State police and customs aircraft may be permitted to cross the border under special state-to-state agreements, but military aircraft cannot fly over the territory of another state or nation without a special authorization. However, as a result of Article 32, military aircraft are excluded from the legal enforcement actions that other governments may use against civil aircraft, recognising the military aircraft's sovereign immunity.[20] Another fundamental principle was the acknowledgement of the principle that the Convention should not affect the duties and rights of belligerents and neutrals in wartime. In Article 38 of the Convention, the concept was expressed as follows:

Article 38 - *ln 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.*[21]

It seems the Convention not only did not set any restrictions to this effect, but it also appeared to indicate that in the event of war,

20 ibid (n2) p.891.
21 ibid (n4) art 38

anything is permissible. As a result, military aircraft are accorded a unique status that allows for unrestricted missions during wartime. It is evident that international law rule which stipulates military aircraft are instruments of nations fulfilling noncommercial

sovereign functions, was crystallised in the Paris Convention. Then, as a result of its widespread adoption, this standard developed into a conventional one. In the work of famous legal publicists, the development and current status of this norm are categorically and unquestionably accepted.[22]

Military aircrafts under Chicago Convention of 1944

The Convention on International Civil Aviation, or Chicago Convention of 1944 [23], is the core document regulating international civil aviation. Its governing body, the International Civil Aviation Organisation (ICAO), is responsible, among other duties, for minimum standards of flight safety as a specialised agency of the United Nations (UN). The Convention contains 96 articles divided into 22 chapters and 4 parts: The Chicago Convention does not contain a definition of the word "aircraft," and the status of military aircraft was also not re-envision within it. In plain English, Article 3 of the Convention limits its applicability to "civil" aircraft; nonetheless, , and the remaining provisions of the Convention must be elucidated in light of this limitation. Thus, evaluating the implied terminologies of Article 3 will amplify the degree of applicability of the convention to military aircrafts . It reads as follows:

Article 3

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

22 International Court of Justice (ICJ) 1945, Article 38 (d),("subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law ")
23 ibid (n5)

(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 a 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."[24]

The inference of Article 3(a) above is very clear and achieves the goal set out in the preamble and purposes of the Convention. It gives the impression that the material scope of the Convention is limited to civil aviation alone.[25] However, Article 3 (b) raises a number of questions. The provisions state 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.[26] 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[27]. According to Article 3(b) of the Convention, although the use of the phrase "shall be deemed to be" resulted in an aberration from the state of definition, the word "deemed" resulted in a presumption. Therefore, it is crucial to correctly determine both the nature of the enumeration and the nature of the presumption when interpreting Article 3(b). Using a **broad interpretation** of Article 3(b), the enumeration would not be limited. Therefore, in order to justify its application to other fields, many other types of aircraft may be involved in activities of the state; for instance, governmental aircraft such as privately

24 ibid (n5) Art 3
25 ibid (n5) Art 3(a)
26 ibid Art 3 (b)
27 Bin Cheng, "State Ships and State Aircraft" (1958) 11 Current Legal Problems, 233 < https://doi.org/10.1093/clp/11.1.225 > accessed 05 May 2023

owned aircraft conveying military troops, disaster relief, VIP travel, postal services, and medical, mapping, or geological survey services could be considered. The consequence of this approach is an expansion of the exception, reducing the scope of applicability

of the Chicago regulatory system. However, if one resorts to a **restrictive interpretation** of Article 3(b), the enumeration becomes limitative or exhaustive, and the only category of aircraft excluded from the applicability of the convention by the Chicago Convention are those used in "military, customs, and police services."[28] In this regard, a restrictive interpretation may limit the use of the exception and broaden the area in which the convention framework is applicable. Because the aforementioned article does not expressly define the nature of this enumeration, there is an interpretive conundrum with Article 3(b). However, this research contends that a restrictive interpretation is more resource-full than the other. Therefore, regardless of its actual ownership, whether private or public, the Chicago Convention criterion for defining an aircraft's public character is based on the role it plays at the time.[29] This certainly represents a practical solution to the problem. So, it's possible that a specific aircraft could have two classifications: civil and state. The ICAO navigation and security criteria should be adhered to if a military aircraft is being utilised to undertake a "civil flight," in which case the "military" aircraft would be subject to the rights established by the Chicago Convention. Thus, states should not allow military aircraft that do not respect ICAO standards to make civil flights. However, the public authority of the state must be present when the aircraft is executing a task or a mission to claim the status of a state aircraft.[30] Hence, it is perceived that the global community does not have a universally accepted interpretation of Article 3(b). This lack of a common interpretation is certainly

28 ibid 225
29 ibid 233.
30 ibid (n28)

problematic. It is, however, important to note that the presumption carried by this provision applies to the nature of the flight and not to the aircraft itself. Hence, under Article 3(b), it is conceivable that a given aircraft may be classified alternatively as either civil or state. Based on the presumptive background, each state can have a different interpretation of Article 3(b), and this creates an "open door," resulting in divergence in national air regulations.

Article 3(c)[31] states that on the basis of a specific authorization and in accordance with the terms of such authorization, state/ military aircraft may fly within a foreign sovereign territory. Such permission must be granted "or otherwise" in a particular agreement. According to state practise, obtaining "ad hoc" permission properly obtained through diplomatic channels or a bilateral or multilateral agreement between the States involved is the preferred method of authorization; it would appear that a simple operational air traffic control (ATC) clearance for the flight would not be sufficient to meet the requirements of Article 3(c).[32] Thus this article contain the directive towards the state/military aircraft on overflight. Hence, as previously noted, while the application of state aircraft is expressly excluded as per Art. 3(a), the current article, however, infers that the convention applies to state or military aircraft; thus, the logic of the convention, which is restricted to civil aircraft, is further inveigled.

As stated in the wording of Article 3(d), [33] the Convention's "due regard" provision, which is applicable both in times of peace and of armed conflict, continues to be the principal treaty duty placed on governments for the control of the flight of military aircraft. It seems these specific applications include the interception of civil aircraft by military aircraft, the potential use of force against civil

31 ibid (n4) art 3(c)
32 Michael Milde,"Rendition Flights and International AirLaw" (*redress.org* 2008)< https://redress.org/wp-content/uploads/2018/01/Jul-08-.pdf > accessed 06 May 2023
33 ibid (n4) art 3(d)

aviation, the conduct of military activities that might endanger civil air navigation, and the interface for communication between the military and the civilian sector.[34] Thus, the term due regard in Article 3(d) becomes an obligation for contracting states of the

Chicago Convention. It creates an obligation on states to regulate state aircraft or military aircraft in order to ensure that state or military aircraft exercise appropriate attention as well as heed and care for the safety of the course and position of civil aircraft, avoiding obstruction to the course of and collisions with civil aircraft[35]. Furthermore, as every obligation has a corresponding right, this interpretation presupposes that civil aviation is legitimately entitled to receive this attention. Indeed, an obligation of due regard is expected from the state or military aircraft, hence the convention is again deviating from the principle of application mentioned in Art. 3(a). The "due regard" rule in Art. 3(C) thus creates a reciprocal obligation on military aircraft towards civil air navigation.

Article 3 *bis* of the Chicago Convention[36] is one of the provisions that attempts to regulate actions governing interception of civil aircraft, and the interaction between civil and military aircraft. It was adopted into the Chicago Convention by the UN General Assembly's 25th Session in 1984 (extraordinary)[37] in reaction to many instances in which a civilian aircraft was shot down after unintentionally violating another country's airspace and being erroneously identified as a military aircraft. The turning point was Korean Air Lines Flight 007, a Boeing 747 with 269 passengers on board that the Soviets shot down after mistaking

34 ibid (n2) 891
35 ibid
36 ibid (n5) art 3 *bis*
37 See Protocol Relating to an Amendment to the Convention on International Civil Aviation, Res. A25-1, ICAO, 25th Session , Doc. 9436, (1984).

it for another reconnaissance plane.[38] Article 3 *bis* reiterates the prohibition against the use of weapons by civil aircraft while in flight and requests that the contracting states take action to stop airspace violations by other nations.[39] 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.,*[40] 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.[41] Article 3 bis does not identify the "appropriate means" that may be used during the interception.[42] Nor does it identify "the relevant rules of international law" or "the relevant provisions of this Convention," except in subparagraph (a), where it prohibits the use of weapons against civil aircraft[43]; It makes the claim that "the lives of persons on board and the safety of aircraft must not be endangered," and it makes reference to the obligations and duties of states under the UN Charter.[44] These objectives were expected to be achieved if the interceptions of civil aircraft conformed to the determinations made by the International Court of Justice (ICJ) in many rulings. For instance, the ICJ in the Corfu Channel Case (*United Kingdom v. Albania*), Merits in 1949 , held that:

"*elementary considerations of humanity rather than necessity, even more exacting in peace than war*"[45]

In light of the threat posed, it appears that the final expectation of

38 Farooq Hassan, "A Legal Analysis of the Shooting of Korean Airlines Flight 007 by the Soviet Union" (*scholar.smu.edu. Com,* 1984) <https://scholar.smu.edu/jalc/vol49/iss3/3> accessed 02 May 2023
39 ibid (n5) art 3 bis para. (a).
40 ibid.
41 ibid (n5) art 3 bis para (b)
42 Christine D. Gray, "*International Law and the Use of Force"* (2nd edn, OUP 2004) 97-99
43 ibid (n5) art 3 bis para (a).
44 ibid
45 [1949] ICJ. Rep. 4 at 22.

the law was to prohibit excessiveness in the retaliatory measure and not to prohibit self-defence actions. In general, this new law intends to prohibit any use of armed force against a civil aircraft. The restriction on operating military aircraft as it previously existed before adopting Article 3bis extends the use of military power to the extent that it cannot use weapons or open fire to destroy the aircraft, but it may lawfully employ any other measure aimed at stopping the security breach. Thus, scholarly opinion supports the conclusion that Article 3bis is a principle of customary international law,[46] and to contravene it by function of military aircraft would amount to a grave breach.

Interestingly, the Paris Convention's initial norms governing the legal status of military aircraft, which recognised the military aircraft's sovereign immunity, were ultimately not directly or implicitly rejected by the Chicago Convention. Nonetheless, unlike the Paris Convention, the Chicago Convention applies only to civil aviation and civil aircraft, as mentioned in Article 3, but obviously does not limit the scope of applicability to military or state aircraft. Therefore, this research argues that the effect of the Chicago Convention on military aircraft is considerable. Consequently, the status of military aircraft was not redefined with the Chicago Convention and seems to have been further reiterated, as stated in the Paris Convention, as a norm of customary international law.

PART 3

Military aircraft under the International Humanitarian Law

In general, armed conflicts are classified as either international (IAC) or non-international (NIAC) under IHL. An armed conflict must be properly classified in order to identify which set of rules

46 Malcolm N. Shaw, *"International Law"* (5th edn , CUP 2003) 477

apply to the parties involved. As stated earlier, the role and function of military aircraft in armed conflict are crucial and decisive. Therefore, the outcome of the military aircraft participating in belligerent activities must be clearly identified and adhered to within the IHL principle, with no exception as other parties are subjected. In addition, during times of armed conflict, international law governing the conduct of hostilities imposes obligations on parties involved to distinguish themselves from the civilian population. This position was outlined in the following manner in the ICJ's Advisory Opinion in the Legality of the Threat or Use of Nuclear Weapons Case (1996):

"*a use of force that is proportionate under the law of self-defence, must, in order to be lawful, also meet the requirements of the laws applicable in armed conflict which comprise in particular the principles and rules of humanitarian law.*[47]

Hence, once determining a claim of military aircraft status in an armed conflict, the relevant legal principles concerning military aircraft are drawn from customary international law principles codified in treaty laws. In light of this, the discussion that follows will focus on two primary legal documents that include important provisions governing military aircraft under the law of armed conflict:

Hague Rules of Air Warfare, 1922[48]

The Draught Hague Rules of Air Warfare (HRAW) contain sixty-two articles.[49] Although these rules were never adopted in legally binding form, they are of importance as an authoritative attempt to clarify and formulate rules of law governing the use of military aircraft and other aircraft in war. As per the HRAW In a scenario

47 [1996] I.C.J. Rep. 226 at 245 [Nuclear Weapons]
48 Hague Rules of Air Warfare, Drafted by a Commission of Jurists at the Hague, December 1922 - February 1923.
49 ibid

involving air warfare, only two opposing belligerents and neutral states are recognised under the rules[50] as distinct parties. Military aircraft, public non-military aircraft, private aircraft, and flying ambulances are the four different classifications of aircraft.[51]

The first article of the HRAW 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.*"[52] HRAW specifies A military aircraft's crew must be entirely composed of military personnel, and it must be commanded by someone who is commissioned or enlisted in the state's armed forces. [53] The interpretation is a reasonable effort as it elaborates for the first time on the nature of the military aircraft, but it seems like a subjective codification since the conversion of state to military does not assess. The HRAW is crucial once more because the marking of military aircraft has not before been covered by any treaty provision as it has. The laws specify how crucial it is that a military aircraft have an outside mark indicating its country and military origin in order for it to be visible.[54] This can be distinct and important. Whether or not an aircraft is a military aircraft is important because military aircraft may exercise belligerent rights.[55] Further HRAW Art 17 and 18 stipulate that flying ambulances must have the distinctive Red Cross emblem in addition to the conventional identification markers. These markers must be permanently attached, unable to change while in flight, and large enough to be seen from all sides as well as from the top and bottom.[56] The Art. 19 of the HRAW edicts prohibit

50 ibid art 13-17
51 ibid
52 ibid (n48) art 1
53 ibid art 14
54 ibid art. 3.
55 ibid art. 13.
56 ibid art. 7

perfidy through the use of false external markings on the aircraft[57], as such combatant status should be easily recognised. Indeed, in the context of the discussion of markings, it is often assumed that military aircraft will be marked.

More importantly, the HRAW represented many rules governing military aircraft operations. Especially aerial bombardment, which amounts to an indiscriminate bombing: *dolus eventualis*, or conditional intent, over a civilian population without attempting to attack military objectives, was prohibited. For the first time, the legitimacy of air attack in the presence of military objectives was recognised, and its effect on international law was reflected in the form of specific rules from Articles 22, 24, and 25 and residual provisions in HRAW.[58] First, the HRAW provides that the bombardment of a civilian population for the purpose of terrorising them is prohibited.[59] Further, the rules stated that aerial bombardment is only permitted during military air operations when it is directed at a military target whose destruction would give the belligerent a clear military advantage.[60] Bombardment of private property, not of a military character is prohibited as follows; "... *cities, towns, villages, dwellings, or buildings not in the immediate vicinity of the operations of land forces is prohibited.*[61] The circumstances in which this provision was drawn up in **Article 22** read with **Article 24** make their interpretation a simple matter, especially as regards an air attack that may be directed exclusively against a military objective, i.e., the attacker's intention must be to destroy the military object alone.[62] The question of intention is, in fact, decisive in interpreting any such rule. Moreover, the possibility of subsumption was limited to the concept of "military

57 ibid art 19
58 ibid art 22,24 and 25
59 ibid art. 22
60 ibid (n48) art. 24
61 ibid
62 James M. Spaight, *"Air Power and War Rights"* (3rd edn, Longmans, Green 1947) 76-99

objective." Not every object could therefore be considered a military objective -only those whose destruction would constitute a military advantage representing the *sine qua non* for military success.

The aforesaid obligatory laws codified in HRAW stem from those that objected to the prohibition of "indiscriminate" attacks on civilian and private properties in armed conflict. This is obviously the initial effort in developing the legal principles of distinction, proportionality, precautions, humanity, and avoidance of unlawful methods or means of war of the Law of Armed Conflict. As those obligations are inevitably owed to the accountability actions of military aircraft pilots, and they must ensure their adherence in aerial operations. This rule is again important because it facilitates and alarms military aircraft operators in advance of the measures to be implemented to avoid indiscriminate and degrading human rights. Thus, the rules in HRAW governing military aircraft during the conduct of hostilities not only protect the victims after the event, i.e., after hostilities have taken place, but also make an assumptive effort to inculcate knowledge in military pilots prior to engagement in air operations.

Rules under Four Geneva Conventions in 1949[63]

The foundation of IHL is the four of Geneva Conventions, which were adopted on August 12, 1949. The protection of war victims and international law, which governs the conduct of armed conflict and aims to lessen its impacts, are the main concerns of all four conventions. Being the most potent and effective tool, military aircraft were also subjected to the specific provisions available in those conventions in armed conflict. Two Protocols, in addition to the four 1949 Geneva Conventions adopted in 1977, strengthen the protection of victims of international(Protocol I) and non-

63 ibid (n7)

international (Protocol II) armed conflicts.[64] Important regulations governing military aircraft operations contained in Protocol I[65] are identified in this discussion.

Protocol 1[66] relates to the protection of victims of international armed conflicts either on the ground or in the air under the principles of humanity, distinction, necessity, and proportionality. Hence, for this discussion, specific provisions provided in protocol related to air travel are considered. Part II (Articles 8-34)[67] extends the protection of the Conventions to civilian medical personnel, equipment, and supplies, as well as to civilian units and transports, and contains detailed provisions on medical transportation, including a regime for the protection of medical aircraft. **Article 18**[68] provides medical aircraft have to be clearly marked with their national colour and the emblem of the Red Cross on a white background, the Red Crescent, or the red lion and sun on a white background. **Article 21**[69] provides that medical vehicles shall be respected and protected in the same way as mobile medical units under the Convention and this Protocol, and as per **Article 23**[70]**,** it is insisted that they will be protected by the employment of the emblem, and this protection can only be successful if they can be identified and recognised as medical aircraft. **Art. 24**[71] directs that medical aircraft be respected and protected in the air. As per **Article 27**[72]**,** military medical aircraft must follow designated routes and

64 The Geneva Conventions and their Additional Protocols,(*icrc.org* ,2014) <(https://www.icrc.org/en/document/geneva-conventions-1949-additional-protocols#:~:text=In%20response%2C%20two%20Protocols%20Additional,the%20way%20wars%20are%20fought> accessed 06 May 2023

65 Protocol 1, Additional to the IV Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 8 June 1977

66 ibid

67 ibid (n 65) Part II

68 ibid (n 65) art 18

69 ibid art 21

70 ibid art 23

71 ibid art 24

72 ibid art 27

altitudes and must bear a Red Cross or Red Crescent. **Article 35** [73] of the Additional Protocol provides that and establishes a prohibition on using 'weapons, projectiles, materials, and methods of warfare of a nature to cause superfluous injury or unnecessary suffering'. This rule has crystallised into a customary norm in international humanitarian law.[74]

The above articles are particularly concerned with the safety of medical personnel and medical equipment in armed conflict and impose an obligation on the parties concerned based on the humanity and distinction principle. Hence, when an aerial operation takes place, state responsibility arises on the nature of military air craft operation within these provisions, whether the matter in issue is an air raid, aerial bombing, or interception. Therefore, the aforesaid articles 23,24, 27 and 35 on medical transportation, identification of markings, are to be concerned with two aspects: interception/attack of belligerent aircraft and an aircraft that is clearly in a *hors de combat* state. Rules of proportionality and distinction of International Humanitarian law prohibit the attack on a disabled aircraft that has lost its means of combat or on an aircraft where the pilot is surrendering. Yet it is crucial to keep in mind that under Chicago Convention **Article 89**[75], it is acceptable to pretend to be disabled or in distress in air combat if the goal is to persuade the enemy to cease an attack. As a result, an aircraft that seems damaged can still be attacked legally. Further, in the case of interception, these provisions must be read with Article 3bis of the Chicago Convention too. The wording of **Art 49 (3)** Protocol I[76] makes the provisions applicable to "air or sea warfare that may affect the civilian population, individual civilians, and civilian

73 ibid art 35
74 Jean-Marie Henckaerts and Louise Doswald-Beck, "*International Committee of the Red Cross, Customary International Humanitarian Law – Volume I: Rules*" (CUP 2005) 237-244
75 ibid (n5) art 89
76 ibid (n 65) art 49(3)

objects on land." However, the most important obligation lies in the following terms of the article:

"They further apply to all attacks from the sea or from the air against objectives on land but do not otherwise affect the rules of international law applicable in armed conflict at sea or in the air".[77]

As directed in the above provision, if the requirements to select acceptable techniques and targets exist in air raids, it shall be the duty to ensure that the proportionality principle is followed every time. The crew of an aircraft or a missile has no time to consider alternatives and is rarely sufficiently certain that a different attack will actually be successful. As a result, those planning and deciding on an attack on an enemy military aircraft are simply unable to predict where such a moving target will actually be hit. **Articles 51 and 56**[78] forbid indiscriminately attacking civilian targets and destroying supplies of food, water, cultural properties and other necessities of life. Here direct assaults on civilian (non-military) targets fall under the category of indiscriminate attacks by using uncontrollable technologies like land mines, biological weapons, and nuclear weapons. As per **Article 57**[79]**,** air strikes are subject to the obligations to do «everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection;» to «take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimise,"collateral damage; and to cancel or suspend an attack "if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack may be expected to" violate the rule of proportionality. The specific obligations are outlined in Article 57, which mostly mirrors

77 ibid
78 ibid (n65) art 51-56
79 ibid art 57

customary international humanitarian law applicable in both international and non-international armed conflicts. The majority of issues related to arial attacks in international armed conflicts fall under this category, and if proceedings are initiated for war crime or any other sort of violation of IHL based on this scenario, individual criminality of aircraft operators and state responsibility under collective responsibility may result.

In general, under armed conflict, military aircraft participating in belligerent activities must therefore be expected to engage only legitimate targets anywhere in the theatre of war and outside of

a neutral jurisdiction.[80] When taken together with the Chicago Provisions, the IHL principles, and the principles of the Geneva

Conventions, those laws express that parties are not prohibited from using aircraft to strike legitimate military targets as long as they follow the proportionality principle and refrain from using indiscriminate bombing.

Conclusion

The thorough regulation of the law of air warfare has made aircraft one of the most contentious aspects of the law of war. Generally, problems posed by military aircraft have far more to do with traditional concepts of the laws of war on land than with the specificities of air combat in the strict sense of the term. Nevertheless, the current public international air law has a considerable area governing military aircraft that evolved into existing statutes in the aftermath of World War II. Having examined the law governing military aircraft under two distinct legal regimes: convention-related aviation laws and laws governing armed conflict, it was necessary to identify the nature of the laws affecting military aircraft. The Paris Convention made a distinction for the

80 ibid (n74)

first time in public international law between "private aircraft" and "state aircraft," "which includes military aircraft as state aircraft. It is inferred that the Paris Convention has acknowledged that military aircraft that performed sovereign functions benefited from sovereign immunity. The Chicago Convention, being the magna carta of contemporary aviation law, neither explicitly nor implicitly negated the customary norms affecting the legal status of military aircraft as initially codified within the Paris Convention. So the status of military aircraft was not amended by the Chicago Convention and remains as stated in the Paris Convention. However, the Convention, through the use of an extremely narrow

definition of "state aircraft, interprets the term civil aviation very broadly and creates a regulatory distinction between the flight of a state aircraft and the flight of a civil aircraft. Therefore, this article argues that the applicability scope of the Chicago Convention, as expressed in Article 3, is not limited to civil aircraft. This stance was further reiterated once Article 3bis was enacted in 1983, when the prohibition of the use of force against civil aircraft was already a part of general international law. Thus, that provision aimed to create a direct customary law obligation towards military aircraft to protect civil aircraft. Under the humanitarian legal regime, there are elaborated sets of rules in different treaties governing the status of military aircraft in armed conflict. The Hague Rules have set forth the issues and obligations of aerial bombardment, which amount to indiscriminate bombing posed by military aircraft and has significantly more to do with classical conceptions of land law than with the specificities of air conflict. The Geneva Conventions, especially Protocol I, mainly concern the preservation of customary international law obligations based on the principles of humanity, distinction, necessity, and proportionality when conducting air operations. Finally, this study made the observation that no unified and specifically codified laws are available that affect military

aircraft in current regimes. However, according to this study, statutes embedded in both aviation law and IHL regimes already impose both individual and collective culpability under state responsibility in the case of indiscriminate air assaults and illegal air interceptions by military aircraft, which is in grave violation of customary international law.