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Legal Committee – Topic 1

Director – Pablo Mendes de Leon

THE STATUS OF STATE AIRCRAFT

I. Introduction

The following conditions make a case on the legal status of State aircraft topical:

- Its legal status under international and national law, which is not as clear as one might wish, leading to;
- uncertainty as to the legal management of cases involving State or civil aircraft;
- exemption of State aircraft from regulatory regimes on the operation of air services.

In many cases, international civil aviation conventions and agreements, regional arrangements such as those made by the EU and national civil aviation acts exclude military aircraft and military operations from their scope. That said, multilateral agreements, regional arrangements and national laws may contain specific provisions on the operation of State aircraft without regulating it in detail.

Important consequences are attached to the qualification of an aircraft as State and civil aircraft. Those consequences are related to:

- the application of safety and security rules;
- authorisation to fly across the airspace of another State;
- Permission to fly to a point in a foreign State;
- the establishment of State responsibility;
- The liability of the operator.

Multilateral and regional regimes do not draw up a coherent framework for the regulation of State aircraft. To begin with, definitions of State aircraft are either lacking at all levels or, if in place, they are ambiguously defined. National laws, including US FAA regulations, may refer to 'public aircraft' rather than to State aircraft. Public aircraft are aircraft operated for "non-commercial purposes." They are generally exempted from compliance with civil Federal Aviation Regulations.

II. Regulatory context

1. Applicability of the Chicago Convention (1944)

Article 3 of the Convention on international civil aviation, concluded in Chicago in 1944, henceforth referred to as the *Chicago Convention* (1944), or *the Convention*, makes a distinction between *State aircraft* and *civil aircraft*. It states that it only applies to civil aircraft, and not to State aircraft. Hence, the operation of State aircraft is excluded from its scope.

Despite the announcement that State aircraft is explicitly excluded from its scope, the same provision (Article 3(b)) goes on by saying that no State aircraft of a contracting State is allowed to fly over the territory of another State or land thereon without authorization by special agreement or otherwise, and in accordance with the terms thereof.

Neither Article 96 (listing definitions) nor Article 3 contains a definition of State aircraft. An indication is given by the following:

"Aircraft used in military, customs and police services shall be deemed to be State aircraft."[1]

The above quoted formulation in Article 3(b) of the Chicago Convention appears to make room for other aircraft (than aircraft used in military, customs and polices services) to be included in the same category. This is confirmed by national laws, international practices and the opinion of authors.

2. Identification of State aircraft

State aircraft can be identified as aircraft:

- Which is registered in the non-civil aircraft registry of a State; or:
- Belongs to or, or is owned by the State; or:
- Is operated by the State.

For State one may also read 'State bodies'. The above criteria are indications for the identification of aircraft as State aircraft. Legal (see above and below) and practical factors pertaining to the use of the aircraft may lead to other conclusions.

Under national legal regimes, the following categories of operations may be deemed to fall under the term aircraft used for public, including but not limited to military, customs and police, services:

- coast guard;
- search and rescue ;
- emergency assistance;
- humanitarian flights;
- geological survey services;
- carriage of heads of states and official personalities;
- carriage of remote station supplies;
- carriage of prisoners (of war), or persons travelling in custody.

A State may charter aircraft registered in a civil registry for the performance of the above services giving rise to the question pertaining to the status of the aircraft under international air law, and international law generally. Uncertainty or confusion may also arise when both persons travelling in custody and the 'general public' are carried on the same flight.

3. *Acta iure imperii* and *acta iure gestionis*

In order to shed legal light on the above subject, recourse may be had to public international law concepts separating acts of State into two categories, namely *acta iure imperii* and *acta iure gestionis*. The first category encompasses acts which the State carries out as a sovereign power, whereas the second category includes acts performed by the state as if it were a private operator.

If that approach is followed, State aircraft would be aircraft which is operated by the State acting in its *public functions*, or as a sovereign power. The Chicago Convention and related Standards and Recommended Practices (SARPs) laid down in 19 Annexes established by ICAO would be applicable to aircraft operated by the State as a participant to the economic sector. Depending upon national law as explained by national case law and domestic practices, a State can invoke immunity for acts which fall

[1] See Article 3(b) of the Chicago Convention

under *acta iure imprerii*. This point is relevant for the establishment of both civil and criminal jurisdiction in cases involving the operation of State, and military, aircraft.

4. Access to foreign airspace

Access by State aircraft to foreign airspace must be given by "authorization by special agreement or otherwise"; whereas flights into foreign airspace must be operated and in accordance with the terms of such special agreement (see Article 3(c) of the Chicago Convention (1944)). This formulation is hardly different from that employed in Article 6 of the same Convention, dictating that access to foreign airspace for the operation of international scheduled air services is subject to the "special permission or authorization" of the State into whose airspace the service is performed. Neither Article 3(c) nor Article 6 prescribes formalities with which such authorisation or permission must comply. Hence, use can be made by unilateral and/or *ad hoc* permits, bilateral agreements, regional or inter-regional agreements such as those made by or under the auspices of NATO.

An *ad hoc* Air Traffic Control (ATC) clearance of the flight in question operated by a foreign State aircraft does not meet the standard of Article 3(c). However, it is up to the State whose airspace is 'intruded' by foreign State aircraft to judge this question, and to take remedies in case it feels that the State using the foreign State aircraft does not comply with the conditions laid down in Article 3(c), vesting that State with "*State responsibility*" for the act of intrusion.

Overflight rights for *civil* aircraft operating *non-scheduled flights* may be granted under Article 5 of the Chicago Convention "without the necessity of obtaining prior permission, and subject to the right of the State flown over to require landing." Hence, this regime is substantially different from the regime prevailing for transit flights operated by *State aircraft*, while it gives more freedom on the operation of transit services to operators of civil aircraft.

The same is true for the transit flights operated by civil aircraft engaged in scheduled services. They are covered by the International Air Transit Agreement of 1944 to which 133 States are a party.

5. Liability

According to the International Law Commission, when a State commits, *through its agents acting in their official capacity*, an internationally wrongful act, it incurs responsibility and: "… is under an obligation to make full reparation for the injury caused by the internationally wrongful act." [2]

Hence, it must therefore be *firstly* assessed whether the commander of the aircraft can be qualified as an agent of the State, who acted in his official capacity. *Secondly*, the question of State responsibility comes up when this agent infringed an obligation of international law, for instance, by operating a State aircraft flying through foreign airspace without authorisation. *Thirdly*, it must be asked which remedies must be offered in order to repair the injury. Such remedies can consist of diplomatic moves, withdrawal of future permits, and cancellation of the agreement or political actions such as asking the foreign State for apologies.

The circumstances of each case dictate which measures are appropriate.

[2] See Article 31(1) of the Articles of the International Law Commission on *State Responsibility*

6. Conclusions

Article 3 of the Convention does not contain *a definition* of State aircraft. It includes a number of services which may be deemed to be services operated by state aircraft. State practice shows that the examples given by the Convention are not exhaustive. States have used their freedom to qualify aircraft as state aircraft pursuant to their national legislation and international practice.

Admittedly, a broad interpretation of the term "police services" could bring a number of the above categories, such as coast guard and carriage of prisoners of war, under that term. This approach could extend the application of the term "State aircraft" so that, amongst others, the uniform set of safety regulations (including SARPs) would not be applicable to their operation.

National law and subsequent practices show that States prefer to adopt a broader interpretation of the term, precisely for the reason of avoiding the application of the strict safety, liability and environmental rules as maintained in the civil sector to the operation of State aircraft. This is evidenced by State, as opposed to federal, laws in the US stipulating that "state aircraft are available to be used in the interest of state business." That broad interpretation is not only dictated by legal but also by policy considerations because the identification of an aircraft as a State aircraft gives States broader discretionary powers as to the use of the craft in question.

III. Questions

A. Would you be in favour of requesting ICAO to convene a diplomatic conference in order to assess whether more clarity on the definition of State aircraft is required?

B. If so, would you propose to amend the Chicago Convention (1944), or:

C. Request ICAO to adopt a Resolution on the status of State aircraft under international air law?

D. How would you assess the impact from other sources of international law such as conventions protecting humanitarian interventions, including the International Red Cross, the Geneva Conventions of 12 August 1949 for *the Amelioration of the Wounded and Sick in Armed forces in the Field*, on the status and operation of State aircraft?

E. Would you endorse a global regulation on liability for damages caused by the operation of State aircraft?

F. In which regulatory context should safety and security of State aircraft be addressed?

G. Do you see a role for regional organisations to regulate the above questions, to begin with?

H. If so, which regional organisations?

I. Finally, would you support regulation of the operation of State aircraft under national law?

IV. Bibliography

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