Global Journal of Arts Humanity and Social Sciences
ISSN: 2583-2034

GSAR PUBLISHERS
GLOBAL SCIENTIFIC AND ACADEMIC RESEARCH

OPEN ACCESS

Global Journal of Arts Humanity and Social Sciences
ISSN: 2583-2034
Abbreviated key title: Glob.J.Arts.Humanit.Soc.Sci
Frequency: Monthly
Published By GSAR Publishers
Journal Homepage Link: https://gsarpublishers.com/journal-gjahss-home/

Volume - 5 | Issue - 11 | November 2025 | Total pages 1086-1090 | DOI: 10.5281/zenodo.17589727

THE PRINCIPLE OF EXCLUSION OF THE STATE AIR CRAFT UNDER INTERNATIONAL CIVIL AVIATION LAWS AND ITS APPLICABILITY IN THE DOMESTIC LAWS OF TANZANIA

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Article History
Received: 25- 10- 2025
Accepted: 08- 11- 2025
Published: 12- 11- 2025

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Abstract

International aviation law is embodied under two segments of aviation systems, the civil aviation laws and the state aviation laws. The state aviation is excluded from the civil aviation. The essence of this exclusion is to enhance the operation of the civil aviation for commercial purposes without difficulties. This exclusion is typically established under Article 3 of the Chicago Convention 1944. In Tanzania the domestic law is applicable to all air craft except only when the law or regulations provides otherwise. The author confirms that this is the disarray between international civil aviation law and domestic civil aviation law in Tanzania which cannot host smooth operation of civil aviation especially international flights due to the persisting inconsistencies between domestic and international law. The author suggest the reforms mainly the amendments of Section 22 and 33 of the Civil Aviation Act CAP 80 R.E 2023 to ensure that the exclusion of state air craft under international civil aviation law is relevant under the domestic civil aviation legal framework in Tanzania.

Key words: International civil aviation, state air craft

1.0.Introduction

This article presents the principle of exclusion of the state air craft under international civil aviation law legal framework and is application under the domestic laws of Tanzania. In this Article we will discuss this principle under international civil aviation and its applicability in the domestic legal and institutional systems of Tanzania. This is due to the fact that international civil aviation law is embodied under two segments of the law. That is international law and domestic laws which gives effect to the internal operation in the state.

1.1. An over view of international civil aviation law and the principle of exclusion of air craft under international law

1.1.1. International Civil Aviation Law

International civil aviation law is the branch of international law that deals with the civil aviation. The sources of law for this branch of law are the international treaties which can be multilateral and bilateral treaties, international customary laws, *jus cogens*, judicial decisions, writing of scholars as per article 38(1) of the statute for establishment of the International Court of Justice.[1]The fact that international civil aviation law is inherent international does not exclude the domestic law of a particular state.

The domestic laws are the sources of international civil aviation. This is due to the legal stand under international law that in order the international laws to have effects in the domestic legal systems must be domesticated under the domestic laws for the dualism states and for the monistic state the international laws forms part and parcel of the domestic laws without the need of domestication. That is the interaction of international law with the domestic laws under monism and dualism theories of incorporation of the international laws into the domestic legal systems.

1.1.2 The principle of exclusion of state air craft under the international civil aviation laws

This principle is the core principle of aviation law which distinguishes civil aviation and state aviation, their legal systems and operations under international and domestic laws. This

[1] 1945

principle makes the aviation to have two segments of the laws, the civil aviation legal system and the state aviation legal system which cannot operate together.

1.1.3. The legal foundation of the principle of exclusion of the principle of state air craft under international laws

The legal foundation of this principle is Article 3(a) of the Chicago Convention on Civil Aviation.[2] According to this provision the Chicago Convention which is regarded as the constitution of civil aviation is not applicable to state air craft. The state air craft are defined under the same provision to mean the military air craft, police air craft and the customs air craft.

This provision expressly excludes the state air craft under the international civil aviation legal framework. This provision is not the last for the exclusion of the state air craft under international civil aviation. Other international conventions for civil aviation security exclude the state air craft under their scope of application.

That is relevant under Article 1(4) of the Tokyo Convention on the Offences and Certain other Acts Committed on Board Air craft,[3]Article 3(2) of the Hague Convention for the Suppression of the Unlawful Seizure of Air Craft,[4]Article (4)(1) of the Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation,[5] and Article 26 of the Rome Convention on the Damage Caused by Foreign Air Craft to the Third Parties on the Surface.[6] The provisions of these conventions have the similar application. The application clauses unanimously state that the convention is not applicable to state air craft to express the exclusion of the state air craft under international civil aviation laws.

1.1.4. The practical aspects of exclusion of state air craft under international civil aviation law

The principle of exclusion of the state air craft under international civil aviation law leads to the following practical aspects under international civil aviation.

1.1.4.1. The protection of the air space sovereignty of the states under international law

The sovereign states under international law have the sovereignty over its air space sovereignty. The doctrine of air space sovereignty is the foundation doctrine under international civil aviation. The sovereign states have the capacity to protect their air space sovereignty against the entry and departure of air craft under its air space.

The air space sovereignty under International Civil Aviation is established under Article 1 of the Chicago Convention on Civil Aviation. Under international civil law in order a foreign air craft to enter into the air space of another state must seek the consent, permission or authorization in order a foreign air craft to fly over the territory of another state.

[2] 1944
[3] 1963
[4] 1970
[5] 1971
[6] 1952

1.1.4.2. The state air craft are not allowed to fly over the air space of states without authorization or special permission

Under International Civil Aviation Law the state air craft are not allowed to fly over the air space of states without special authorization, permission and diplomatic clearance. This is established under Article 3(c) of the Chicago on Civil Aviation. This is due to the fact that the state air craft do not follow under the civil aviation legal framework. The state aircraft follow under the national defense and security legal framework, diplomatic and consular law, and international humanitarian law.

This is revealed by the claims of Bolivia and other Latin America countries, Argentina, Cuba, Ecuador, Nicaragua, Uruguay and Venezuela against France, Spain and Italy for forced landing of the Presidential flight of the President of Bolivia Evo Morales due to suspicions that Edwin Snowden was on board in the presidential air craft of the president of Bolivia. The United Nations General Secretary by then Ban Ki – Moon held that: “a head of the state and his or her air craft enjoy immunity and inviolability.”[7] This proves that the state air craft like military, police, customs services and presidential flights needs the diplomatic clearance in order to fly over the territory of another state.

1.1.4.3. The pilotless air craft are not allowed to fly over the territory of the state without authorization

The unmannered or pilotless or drones under international aviation laws are not allowed to fly over the territory of states without permission or authorization. This is established under Article 6 of the Chicago Convention. The pilotless air craft are among of the threats against the air space sovereignty of the state in the contemporary times. The states can exercise the air space sovereignty against the entry of unmanned air craft in their air space in case their entry was not authorized by the specific state. Thus the state can exercise the interception of such unmannered air craft in order to protect their air sovereignty against the entry of unmanned air craft without permission or authorization.

2. The incorporation of the international civil aviation law in Tanzania

Tanzania is the sovereign state as it well expressed under Article 1 of the Constitution of the United Republic of Tanzania.[8] Tanzania is the democratic state as it is well stated under Article 1 of the same constitution therefore; adhere to the principle of separation of power established under Article 4 of the constitution. This principle is exercised in Tanzania through three organs of the state, the legislature, executive and the judiciary.

The legislature is vested with the power to enact the law in Tanzania under Article 64(1) of the constitution. The ratification and incorporation process of the international convention in

[7]United Nations (2013), Latin American Nations Voice Concerns to Ban over rerouting of Bolivian Leader’s plane. Retrieved on 25/10/2025 also available at en.wikipedia.org/wiki/Evo -Morales -grounding incident.
[8] 1977 as amended 2005

Tanzania is done by parliament with legislative in Tanzania under Article 63(3)(e) of the constitution. This process is the manifestation of dualism theory of incorporation of international laws into domestic law of the particular state.

Tanzania as the member of the international community ratified and incorporated the Chicago Convention on Civil Aviation into domestic law by enacting the domestic law and regulation for the implementation of this convention in Tanzania. The enacted piece of legislation for this purpose is the Civil Aviation Act.[9]

The essence of this legislation is well established under the preamble of the statute. That is an "Act to make the provisions to enable effect to given Chicago Convention, and generally to provide for the control, regulation and orderly development of civil aviation and to establish a regulatory authority in relation to air transport, aeronautical airport services, air navigation services and to provide for its operation…"[10]

This entails that the aim of the legislator for enacting this Act is to have an act of the parliament as the domestic law to give the effect of the Chicago Convention into the domestic legal system. That is the domestication of the international civil aviation laws into the domestic laws of Tanzania.

3. The application of the principle of exclusion of the state air craft in Tanzania legal system

The exclusion of the state air craft in Tanzania legal system is not similar like the way it is excluded under International Laws expressed under the Chicago Convention. Under the Civil Aviation Law Act of Tanzania the state air craft are not excluded under this law. This is expressed under Section 22 of the Act at the first manifestation for the application of the civil aviation law in Tanzania on the regulation of civil aviation in Tanzania on the regulation of civil and state air craft. and through the powers of responsible Minister under Section 33 of the same Act as the second instance.

The provisions of section 22 establish the application of the civil aviation legal framework to all air craft unless otherwise provided under the law or the regulations. However, this legislation has no specific section which excludes the state air craft from civil aviation as the international civil aviation legal framework requires.

The provision of Section 33 of the same statute empowers the Minister to include any category of an air craft under the civil aviation legislation in Tanzania. This is possible when the Minister publishes in the gazette to authorize the application of the civil aviation legislation to all air craft in Tanzania. This is the second manifestation for the application of the civil aviation legal framework in Tanzania.

4. The implication of the inclusion of the all air craft under the civil aviation law in Tanzania

So far we have seen that the legal frame work in Tanzania for civil aviation is applicable to all air craft except only when the law provides otherwise. However, the international legal framework under the Chicago Convention expressly excludes the state air craft under the civil aviation legal system. This disarray between the international law and domestic law in Tanzania over civil aviation law has the following legal implication.

4.1. Tanzania exercised territorial sovereignty over the ratification and domestication of the Chicago Convention on the regulation of civil and state air craft contrary to international customary law

The sovereign state has the competence under international law to make the ratification and domestication of the international laws the laws according to her interests affecting domestic affairs of that particular state. This competence under international law is known as territorial sovereignty under international law. That is the capacity of the state to make the laws and enforce them against anything over its territory.

This capacity is exercised according to the interests of that state which cannot be interfered by any other state. However, under the trends of contemporary international law the territorial sovereignty of the state cannot be exercised absolutely without considering the international norms, international customary laws and the *jus cogens* which a state is not allowed to derogate from them.

For example no state now can be permitted under international law to enact domestic laws which authorize genocide contrary to the genocide convention. In respect of this study the exclusion of the state air craft under international civil aviation legal and institutional framework manifests the international customary law on the civil aviation. This is the foundational customary international law established under international convention on civil aviation. In order the state to deviate from it must object this international customary law.

In order the state to become the persistent objector must object the application of international customary law since the emerging of that international customary law. The exclusion of the state air craft under international law is an old international customary law like how international civil aviation is old.

This is due to the fact that the exclusion of state air craft under international civil aviation law was established under the Paris Convention[11] and under Article 3 of the Chicago Convention[12]on civil aviation. Therefore, Tanzania cannot become the persistent objector to this international customary law which existed and was codified under international convention at the early stages of the development of international civil aviation and before the

[9] CAP 80 R.E 2023
[10] ibid
[11] 1919
[12] 1944

independence of Tanganyika and the Union between Tanganyika and Zanzibar to form the United Republic of Tanzania.

4.2. Tanzania did not honor the principle of *pacta sunct servanda* on the exclusion of state air craft under domestic legal frame wok

The principle of *pacta sunct servanda* is established under Article 26 of the Vienna Convention on International treaties[13] which requires the states to honor the terms of international treaties with good faith. This principle of exclusion of the state air craft under international civil aviation legal framework is established under the international convention.

This means that all member states to this convention must honor this principle with good faith. The inclusion of all air craft under the civil aviation legal framework means that the state does not honor the international convention which she consented.

4.3. Tanzania did not honor the principle of supra nationality

Under international law the principle of supra nationality requires the member states to the international community like the regional integration or international organization to surrender her sovereignty to that international community.

The surrender of the state sovereignty to international community makes the state to obey some regulatory mechanisms of that international community. Tanzania by ratifying the Chicago Convention is the member of the International Civil Aviation Organization (ICAO) which is the specialized agency of the United Nations. This is the international organization with the jurisdiction over the all contracting states to ICAO.

Thus, Tanzania is supposed to surrender her sovereignty under this international organization for regulation of international civil aviation. The inclusion of the state air craft under civil aviation legal framework cannot be regulated by ICAO because the Chicago convention explicitly excludes the state air craft from its application.

5. Conclusion and Recommendations

5.1. Conclusion

The principle of exclusion of state air craft under international legal framework is well expressed under Article 3(a) of the Chicago Convention for the protection of air space sovereignty of states and enhancement of air transport for commercial basis without obstacles. This Chicago Convention jurisprudence marked the historical shift from the Paris Convention to the air transport for commercial basis.

That is the essence of international civil aviation law as it is excluded from state air craft. So far, we have seen that Tanzania is the dualistic state; in order the international law to operate in the domestic state must be ratified and domesticated into the domestic legal system unlike the monistic states where the international law is the part of domestic law without the domestication process.

However the domestication of the Chicago Convention particularly under Article 3(a) of the Chicago Convention into domestic legal system of Tanzania is inconsistency with the international law. The international law excludes the state air craft under the international legal framework for civil aviation but the domestic legal framework in Tanzania is applicable to all categories of air craft unless otherwise provided under the law and the responsible Minister has the power under the law to extend the application of the civil aviation legal framework in Tanzania to any category of air craft contrary to international law.

This is the disarray between the domestic laws of Tanzania with the international civil aviation law. This disarray cannot host smooth operation of civil aviation laws in Tanzania due to non-harmonized legal framework between international law and domestic laws.

5.2. Recommendations

In order to facilitate the smooth operation of civil aviation in Tanzania the author suggests the following recommendations; the government of the United Republic of Tanzania should amend Sections 22 and 33 of the Civil Aviation Act[14] which enable the application of this domestic law to all air craft in Tanzania contrary to Article 3 of the Chicago Convention.

The amendments of these sections should explicitly state that the Civil Aviation Act shall not be applicable to state air craft like Article 3(a) of the Chicago Convention how it excludes the state air craft from the scope and application of international civil aviation laws. These amendments will enable the interface and harmonization of the law between international law and domestic civil aviation law of Tanzania.

This proves that Tanzania honors the principle of *pacta sunct servanda* under international law of treaties and the principle of supra nationality applicable under international organizational or regional integration law which are relevant under international civil aviation laws.

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