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THE APPLICATION OF "INTERNATIONAL LAW" TO SUB-ORBITAL ACTIVITIES – WHAT DOES IT MEAN?

Abstract

In the discussion on draft rules for sub-orbital flights, the Space Law Committee of the International Law Association (ILA) has proposed a provision stipulating that "international law" should be applicable to such activities. However, what could be the meaning of such a provision, in particular when sub-orbital activities are primarily carried out by commercial companies? Private law subjects, such as commercial companies, are not addressees of international law; they do not have international legal personality. Consequently, they cannot not be directly bound by international law. The proposed provision is obviously inspired by international space law which is commonly known as the law "governing the activities of States in the exploration and use of outer space, including the Moon and other celestial bodies", as the title of the Outer Space Treaty of 1967 indicates. It is therefore based on the premise that States are the main actors in outer space. Historically, this was certainly true, and the law of outer space was capable to adapt to commercialisation and privatisation through a specific type of "responsibility", which includes responsibility for non-governmental space activities and obliges States to authorise and supervise them (see Art. VI Outer Space Treaty). However, it is not yet clear whether States also bear this specific type of responsibility for activities which only involve activities in high altitudes but do not conclude an orbit around the Earth. Is the ILA aiming at convincing the international community that it should accept such an extension of the States' responsibility and develop a respective opinio iuris? If this is not the case, the applicability of international law seems to remain limited to sub-orbital flights attributable to States, e.g. activities carried out by or under the effective control of governments. The alternative, to apply "national law" to sub-orbital flights may seem to be more logical and more appealing to States. They could simply treat commercial sub-orbital activities as activities carried out in their sovereign airspace and regulate them to that extent. There seems to be nothing to prevent them from exercising national jurisdiction – without being internationally responsible for the activity. The paper will show that a more precise explanation when, why, and how "international law" is applicable to sub-orbital activities is needed and will make an attempt to propose a suitable formulation.