



PÁZMÁNY *1635*
— *a l a p i t v a*

Pázmány Law Working Papers

2021/5

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**Revisiting some of the international
public law implications of Air Traffic
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public authority (acta iure imperii)**

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Revisiting some of the international public law implications of Air Traffic Services being qualified as exercise of public authority (*acta iure imperii*)

by Zoltán Papp*

Abstract. The ongoing recast of the EU Single European Sky (SES) legislative package offers an opportunity to revisit and discuss selected pertinent international public law related aspects of the provision of Air Traffic Services (ATS) namely state responsibility, state liability and state immunity. This paper examines how the public authority characteristics of the provision of ATS carried out by Air Navigation Service Providers (ANSPs) impacts the application of the above listed concepts of international law in the field of air navigation law.

1. Introduction

This paper seeks to revisit some pertinent international public law aspects of the provision of Air Traffic Services (ATS).¹ This is a timely academic exercise since the European Commission recently proposed updating the so-called Single European Sky (SES) regulatory framework², directly or indirectly touching upon some of the issues discussed in this paper. It is of note that Article 28 of the Chicago Convention on International Civil Aviation adopted in 1944³ (hereinafter: Chicago Convention) setting out the ICAO⁴ member states' obligations with regard to providing/ensuring air navigation services (ANS) in their airspace is broader in scope than ATS. While ANS covers a broad range of services and infrastructure, the notion of the exercise of public authority is usually connected to ATS, namely the control of air traffic, in the narrowest sense the controller giving an order to the pilot of the aircraft⁵. It follows that the specific rules of international law pertaining to the exercise of public authority discussed in this paper do not concern all activities of Air Navigation Service Providers (ANSPs). For example air navigation services (ANS) including the management and operation of relevant ANS

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¹ See in particular the writings of dr. Francis Schubert as point of reference in academic literature regarding ANS related state responsibility and liability matters.

² Amended proposal for a Regulation of the European Parliament and of the Council on the implementation of the Single European Sky (recast) (Text with EEA relevance) COM(2020) 579 final {SWD(2020) 187 final} Brussels, 22.9.2020 https://ec.europa.eu/transport/modes/air/news/2020-09-22-ses-more-sustainable-and-resilient-air-traffic-management_en (retrieved February 2021)

³ Convention on International Civil Aviation Doc 7300/9 Ninth edition 2006.

“Article 28 Air navigation facilities and standard systems Each contracting State undertakes, so far as it may find practicable, to: a) Provide, in its territory, airports, *radio services, meteorological services and other air navigation facilities* to facilitate international air navigation, in accordance with the standards and practices recommended or established from time to time, pursuant to this Convention;” (emphasis added)

⁴ International Civil Aviation Organisation seated in Montreal (Canada)

⁵ **Recital (5) Regulation (EC) No 550/2004 of the European Parliament and of the Council of 10 March 2004 on the provision of air navigation services in the single European sky (the service provision Regulation)**

infrastructure would probably be excluded from the scope of the narrowly conceived definition of ATS⁶ referring exclusively to the issuance of air traffic control clearances.⁷

Following the clarification of terminology this paper addresses the interplay between the provision of ATS qualified as exercise of public authority and the following international public law concepts: state responsibility, state liability and state immunity.

2. Terminology and basic assumptions

Under the Chicago Convention, Member States have specific rights and duties in relation to the provision of air navigation services. The latter category (duties)⁸ includes among others those listed in Article 28: the provision of air navigation facilities and standard systems. The title of Article 28 referred to above corresponds to air navigation services,⁹ in respect of which States assumed obligations as to the provision of ANS, supervisory functions and legislative functions in accordance with the Chicago Convention, within the airspace under their responsibility.

The key terms and assumptions used in this paper follow ICAO and EU terminology as appropriate.

Accordingly, Air Traffic Services (ATS) comprise primarily the air traffic control provided for the primary purpose of preventing aerial collisions between aircraft and on the manoeuvring area between aircraft and obstacles.¹⁰ ANS is broader than ATS as it also covers under the SES framework (in addition to ATS) communication, navigation and surveillance services (CNS); meteorological services for air navigation (MET); and aeronautical information services (AIS).¹¹

Cross-border ATS provision means any situation where ANS (including ATS) are provided in one EU Member State by a service provider certified in another EU Member State.¹²

⁶ A thorough legal examination regarding the classification of the activities carried out by ANSPs from the perspective of the exercise of public authority as well from State obligations is beyond the scope of this paper.

⁷ For definition of air traffic control clearances see International Civil Aviation Organization ICAO Annex 11 Air Traffic Services: Air Traffic Control Service, Flight Information Service, Alerting Service – Fourteenth edition July 2016, p. 1-3

⁸ Michael Milde: International Air Law and ICAO Second Edition, essential air and space law, Eleven International Publishing 2012, pp. 47, 49

⁹ Dr. Francis Schubert: State responsibilities for Air Navigation Facilities and Standards – Understanding its Scope, Nature and Extent, In: Journal of Aviation Management 2010, pp 23-24

¹⁰ International Civil Aviation Organization ICAO Annex 11 Air Traffic Services: Air Traffic Control Service, Flight Information Service, Alerting Service – Fourteenth edition July 2016 Definitions

¹¹ **Regulation (EC) No 549/2004 of the European Parliament and of the Council of 10 March 2004 laying down the framework for the creation of the single European sky (the framework Regulation) (Text with EEA relevance) - Statement by the Member States on military issues related to the single European sky Official Journal L 096 , 31/03/2004 P. 0001 – 0009 (consolidated version 04/12/2009). Article 2 point 4**

¹² Ibid, Article 2 point 41

It is broadly recognised that the provision of ATS is connected with the exercise of public authority,¹³ which are not of economic nature.¹⁴

The terms *acta iure imperii* (a term used in state immunity literature), the exercise of governmental authority (a term used in state responsibility literature) exercise of public authority (a notion employed by the EU SES regulations) used in academic literature are not necessarily identical content-wise. However, all of these notions seem to refer to situations where the exercise of public authority is treated differently in international law from all the other activities of the State and other (non-State) stakeholders.

3. International responsibility of states for wrongful acts applicable in inter-state relations and State liability under international and national law

3.1 State responsibility issues arising in the context of the application of Article 28 of the Chicago Convention

It is established in international law that every internationally wrongful act of a State entails the international responsibility of that State¹⁵ towards another State or States or the international community or other subjects of international law. The internationally wrongful act of a State is an act or omission, which is attributable to the State under international law and constitutes a breach of a so-called primary international obligation of the State in question.¹⁶ Article 28 of the Chicago Convention is a primary treaty obligation of each Contracting State to the Chicago Convention. In this regard the breach of Article 28 by a Contracting State may give rise to international responsibility of that given State breaching the obligation.

From the perspective of this paper, the question is whether the conduct of entities de facto exercising governmental authority such as the command of an air traffic controller employed by a corporatized or fully privatised ANSP designated by a State to carry out that State's functions stemming from the obligations under Article 28 can be attributable to the State responsible for the provision of ATS under the Chicago Convention. Codifying customary international law,¹⁷ Article 5 of the ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts stipulates that acts and/or omissions of entities empowered to carry out *functions of a public character* normally exercised by state organs are (indeed) attributable to the State.¹⁸ This could provide firm grounds to establish the international

¹³ Lazar Vrbaski: Liability of Air Navigation Service Providers: Towards an International Solution 2012, p. 4

¹⁴ **Recital (5) Regulation (EC) No 550/2004 of the European Parliament and of the Council of 10 March 2004 on the provision of air navigation services in the single European sky (the service provision Regulation) as well as**

ECJ Case C-364/92 SAT Fluggesellschaft v. EUROCONTROL 19 January 1994, para 30

¹⁵ Draft Articles of States for Internationally Wrongful Acts with commentaries 2001, Article 1

¹⁶ Draft Articles of States for Internationally Wrongful Acts with commentaries 2001, Article 2

¹⁷ James Crawford: Brownlie's Principles of Public International Law, Oxford University Press, 8th Edition 2012 p. 540

¹⁸ Draft Articles of States for Internationally Wrongful Acts with commentaries 2001 p. 43 "(3) The fact that an entity can be classified as public or private according to the criteria of a given legal system, the existence of a greater or lesser State participation in its capital, or, more generally, in the ownership of its assets, the fact that it is not subject to executive control—these are not decisive criteria for the purpose of attribution of the entity's

responsibility of the State for the provision of ATS carried out by a subject of private law (e.g. a corporatized ANSP), if other cumulative conditions of state responsibility are also fulfilled (e.g. breach of Article 28 occurs in connection with an aerial accident).¹⁹

No rights arise from international responsibility of a State, which may accrue directly to any person or entity other than another State unless otherwise provided for by an international treaty such as in the case of human right treaties.²⁰ The obligations set out in Article 28 of the Chicago Convention are not owed to a non-state entity hence the said Article does not generate any right to bring a civil law lawsuit against the State before a national court by nationals (natural persons or legal persons) of Contracting States of the Chicago Convention.²¹

Therefore, in case of a breach of Article 28 by a State, natural persons may not seek reparation including monetary compensation solely available to States and other subjects of international law in accordance with international law (so-called secondary obligation of States owed to other States to provide reparation for the breach of primary obligations).²²

International law permits States to espouse at their discretion non-state claims of their nationals for damages in connection with Article 28 of the Chicago Convention thereby exercising diplomatic protection²³ with a view to invoking the state responsibility of another State in terms of Article 28 of the Chicago Convention. However, there are no precedents in international law for the exercise of such diplomatic protection nor for inter-state disputes regarding a purported breach of Article 28 of the Chicago Convention, which could have been submitted to the Council of ICAO or an international court (e.g. International Court of justice).²⁴

The lack of inter-state disputes arising out of Article 28 may result from the fact that it is difficult to prove the breach of Article 28 of the Chicago Convention (and the relevant Annexes of the Chicago Convention) as it affords considerable discretion to states regarding the modalities of its application.²⁵ Another possible explanation is that the breach of Article 28 of the Chicago Convention usually does not cause damage directly to another State or States and

conduct to the State. Instead, article 5 refers to the true common feature, namely that these entities *are empowered, to exercise specified elements of governmental authority.*" (emphasis added)

¹⁹ The pertinent question whether ANS activities falling outside the scope of ATS and not being qualified as exercise of governmental authority but recognized as a State obligation under Article 28 of the Chicago Convention provided by a private entities such as ANSPs (e.g. communications, navigation and surveillance services) are attributable to a State and capable of triggering state responsibility is not addressed in this paper.

²⁰ Draft Articles of States for Internationally Wrongful Acts with commentaries 2001, p. 95

²¹ Dr. Francis Schubert: State responsibilities for Air Navigation Facilities and Standards – Understanding its Scope, Nature and Extent, In: Journal of Aviation Management 2010, p. 25

²² Draft Articles of States for Internationally Wrongful Acts with commentaries, 2001, Part II – Content of the International responsibility of a State

²³ A State may not present an international claim in respect of an injury to its national before the injured person has exhausted all local remedies. ILC Draft Articles on Diplomatic Protection 2006, Article 14.1.

²⁴ Invoking international responsibility of states before the ICJ in relation to the Chicago Convention have been so far principally limited to the following themes: prohibition of use of force against aircraft (see so-called aerial incidents cases) or the competence of the ICAO Council as regards dispute settlement (see: Joint application of Bahrain, Egypt, Saudi Arabia and United Arab Emirates dated 4 July 2018). Furthermore, out of the few legal claims submitted to the Council of ICAO by ICAO Member States none was concerned with the application of Article 28 of the Chicago Convention. For the full list of such ICAO Member States' claims see Andrew P. Opolot: The work of ICAO in the legal field, ICAO legal seminar Nairobi Kenya 27-28 Nov 2017, pp 30-31 https://www.icao.int/Meetings/LegalSeminar/Documents/AO_The%20Work%20of%20ICAO%20in%20the%20Legal%20Field.pdf (retrieved February 2021)

²⁵ Dr. Francis Schubert: State responsibilities for Air Navigation Facilities and Standards – Understanding its Scope, Nature and Extent, In: Journal of Aviation Management 2010, p. 30

under normal circumstances States are rather reluctant to embrace claims of individuals before international public law courts. Instead, the damage claims of persons or entities who could potentially be directly affected by an act or omission of an ANSP are usually channelled into legal processes established under (different) national legal systems.

Invoking the breach of Article 28 in a dispute between States may pertain to the breach of obligation of the other State or States to discharge their regulatory and supervisory functions that is distinct from the duty incumbent on a State to ensure the provision of ATS in the airspace falling under its sovereignty. It is noteworthy in this regard that the European Union has acquired significant competences from Member States in the field of international civil aviation covered by the Chicago Convention, albeit not exclusively.²⁶

Based on its competences, the EU is carrying out extensive regulatory (SES legislation) and gradually expanding supervisory functions (EASA) in connection with Article 28 of the Chicago Convention. As a result of the enhanced role of the EU, the responsibility of the EU under international law may theoretically be invoked by a State Party or States Parties to the Chicago Convention for a breach of Article 28 of the Chicago Convention. The EU however, is not party and is not foreseen to become a Party to the Chicago Convention.²⁷ Therefore, a dispute arising from the non-performance of ANS provision, ANS related legislative or supervisory obligations falling under EU competence would probably have to be filed against *all* EU Member States being all ICAO Member States.²⁸ Such a legal dispute could be decided by the Council of ICAO and subsequently by an international arbitral tribunal or by the International Court of Justice in accordance with Chapter XVIII (Articles 84-85) of the Chicago Convention.

3.2 State liability issues arising in the context of the provision of ATS under international as well as national law

The notion of State liability construed as meaning that natural persons may bring claims for damages arising out of breach by a State of its international obligations directly against the State in question is not established in international public law.²⁹ A State may incur liability under an

²⁶ C-366/10 Judgment of the Court (Grand Chamber) of 21 December 2011. *Air Transport Association of America and Others v Secretary of State for Energy and Climate Change*, para 69

²⁷ Only a State may become Party to the Chicago Convention (Article 92-93 of the Chicago Convention). Nevertheless the European Union maintains close cooperation with ICAO. A Memorandum of Cooperation was signed to that effect by the Parties in 2011.

²⁸ Reference should be made to a complaint lodged by the United States to the Council of the ICAO against fifteen EU Member States in 2000 challenging the compatibility of an EU regulation aiming at reducing aircraft engine noise with the Chicago Convention on civil aviation (“Hushkit” dispute). The United States eventually withdrew its complaint. For more information on this case see: *Admissibility of U.S.-EU “Hushkits” dispute before the ICAO*, *AJIL* Vol. 95, No. 2, Apr 2001 pp. 410-412. The Draft Articles on the responsibility of international organizations, with commentaries (2011, not yet in force) addresses issues arising from the correlation between the special status of EU in international law and the attributability of the acts of EU’s Member States to the EU when Member States implement EU law. pp. 102-103

²⁹ In the work of the International Law Commission (ILC) State liability has emerged originally as a strict liability mechanism applicable to injurious consequences arising out of acts carried out on the territory of a State not prohibited by the law. This concept was relevant in the context of transboundary (environmental) damage and has been on the agenda of ILC since 1978. This approach remained however difficult and controversial. Alan E. Boyle:

international treaty in specific instances such as for example when a State is the operator of an installation that causes damage to natural persons.³⁰ In the same spirit a State may alternatively assume some limited form of residual liability for damages if the operator of the installation is a non-state entity.³¹ State liability may also describe the absolute direct liability of a State vis-à-vis another State for damages suffered by the latter or by the nationals of the latter in connection with ultra-hazardous activities carried out on the territory of the liable State. The only clear example of the before mentioned liability is related to outer space activities (launching of state objects)³² pursuant to Article II of the Convention on International Liability for damages caused by State objects. Moreover, some human rights treaties explicitly set up compensation mechanisms available to victims of human rights violations.³³

Since there is neither (such) explicit reference to State liability in the Chicago Convention nor in the Annexes of the Chicago Convention or in the SES regulations³⁴, State liability may not be invoked against a State Party to the Chicago Convention in a national court by natural or legal persons solely based on the breach of Article 28. Notwithstanding the above, States may assume State liability for the provision of ATS under an international agreement concluded to that effect. Such agreements signed between EU/EEA Member States³⁵ usually cover the liability aspects of cross-border ATS provision, but may not necessarily establish the primary liability of a State.³⁶

Finally, it should be noted that the term State liability is also used in national (private) law if the latter provides that the liability of the State may be engaged under national law for damages incurred by natural or legal persons. This form of State liability under national law may also arise from the provision of ATS, if so permitted by national legislation.

State Responsibility and International Liability for Injurious Consequences of Acts not Prohibited by International Law: A Necessary Distinction? *The International and Comparative Law Quarterly* Vol. 39. No. 1. Jan 1990, p. 1.

³⁰ Such treaties primarily concern oil pollution stemming from navigation, nuclear damage, hazardous waste. DOCUMENT A/CN.4/543 Survey of liability regimes relevant to the topic of international liability for injurious consequences arising out of acts not prohibited by international law (international liability in case of loss from transboundary harm arising out of hazardous activities), prepared by the Secretariat, 2004, p. 112

See international civil nuclear liability regime established pursuant to the 1997 Vienna Convention on Civil Liability for Nuclear Damage and the 1997 Convention on Supplementary Compensation for Nuclear Damage — Explanatory Texts IAEA International Law Series No. 3 (Revised) p. 23 or ship owner's liability for any pollution damage caused by the ship as a result of an incident under Article III and Article V of International Convention on Civil Liability for Oil Pollution Damage (1992).

³¹ Such a residual State liability may take the form of the provision of public funds as indicated in Article V. 2 or Article VII.1 of Consolidated text of the Vienna Convention on Civil Liability for Nuclear Damage of 21 May 1963 as amended by the Protocol of 12 September 1997.

³² It is of note that under Article VIII of the Convention on International Liability for damages caused by State objects a State may present claims on behalf of its nationals against the launching State through diplomatic channels.

³³ See: European Convention on Human Rights (Rome, 1950)

³⁴ Niels Van Antwerpen: *Cross-Border Provision of Air Navigation Services with Specific Reference to Europe: Safeguarding Transparent Lines of Responsibility and Liability*, Wolters Kluwer, 2008, p. 118-119

³⁵ See for example FABEC Treaty of December 2010, which is limited in its territorial scope to its Signatory States: Germany, Belgium, France, Luxembourg, Netherlands, Switzerland.

³⁶ See for example: Agreement establishing the North European Functional Airspace Block signed in Tallinn on June 4, 2012 by the governments of Estonia, Finland, Latvia and Norway. Article 27: liability.

3.3 Interim conclusions on state responsibility and state liability under international and national law

In sum, international law does not create an obligation for states to mirror/replicate international responsibility rules under Article 28 of the Chicago Convention by imposing State liability in domestic private law for damages caused to persons by corporatized or fully privatised ANSPs empowered to discharge governmental functions. This implies that States are free to regulate (private law) liability rules with respect to damage suffered by natural or legal persons arising from the provision of ATS by an ANSP certified and designated by the State in question (domestic ATS provision). The same applies to cross-border ATS liability rules involving an ANSP certified in another State under their domestic law or under international agreements³⁷ with other States as appropriate.

Nonetheless, the domestic liability system of states are apparently strongly inspired by the rules pertaining to the international responsibility regime³⁸ in that they may establish (primary or residual) State liability based on national law (civil law or administrative law) for damages arising from the provision of ATS.

Finally, it should be observed that provision of ATS as exercise of public authority by private law entities (ANSPs) is attributable to the State that is responsible for providing ATS in the airspace in question under Article 28 of the Chicago Convention. Thus the international responsibility of the State to vis-à-vis other States may be established in such cases. However there are no precedents for State responsibility established with regard to Article 28 by the Council of ICAO or an international court. Notwithstanding the fact that the provision of ANS is not addressed in this paper it is of relevance to note that ANS which is broader in scope than ATS may also give rise to State responsibility under specific circumstances as the provision of ANS is a State obligation of Article 28 of the Chicago Convention.³⁹

³⁷ It is of note that the Convention for the Unification of Certain Rules for International Carriage by Air - Montreal, 28 May 1999 may become applicable in terms of establishing the liability of ANSPs. See Article 37 on the right of recourse available to carriers against third parties, including ANSPs. Article 29 on the basis of claims is also relevant as the so-called exclusive/preemptive remedial characteristics of the Montreal Convention should also be taken into account by inter-state agreements specifying rules of cross-border ANSP liability.

³⁸ Dr. Francis Schubert: State responsibilities for Air Navigation Facilities and Standards – Understanding its Scope, Nature and Extent, In: *Journal of Aviation Management* 2010, p. 30 see also SESAR Joint Undertaking: A proposal for the future architecture of the European Architecture, 2019, p. 129

³⁹ In this regard the question arises as to the attributability of the acts not qualified as the exercise of public authority of ANSPs to the State certifying the ANSP that owes specific international obligations towards other State Parties in accordance with Article 28 of the Chicago Convention. For more information on this topic regarding whether the conduct of State owned or controlled companies is attributable to the State see: *Draft Articles of States for Internationally Wrongful Acts with commentaries*, 2001, p. 48

4. State immunity issues arising in the context of the provision of ATS

Under the notion of sovereign immunity, a sovereign cannot be made subject to the judicial processes of his country.⁴⁰ Over the centuries national laws have tended to limit or even exclude the immunity of the state from lawsuits before its own courts.⁴¹

International public law is probably more concerned with the so-called state immunity distinct from sovereign immunity because of foreign elements directly involved in such cases. The widely accepted restricted doctrine of state immunity, derived from the principle of the sovereign equality, prevents a state from being sued for its public acts (*acta iure imperii*) in a foreign court. Jurisdictional immunity is different from enforcement immunity in that measures of constraint are only enforceable against the provider of ATS (ANSPs) if certain very strict (additional) conditions are fulfilled,⁴² for example in case the State on whose behalf the ANSP acted renounces its immunity from enforcement.

The definition of State may include agencies or instrumentalities of the State or other entities to the extent they are entitled to perform and are actually performing acts in the exercise of sovereign authority of the State.⁴³ This implies that the acts of ANSPs may be qualified as acts of a State as long as they exercise sovereign authority as ATS providers on behalf of the State that designated them to provide services in its airspace thereby enjoying immunity from the jurisdiction of a foreign State.

Nonetheless, the doctrine of (restricted) state immunity is not absolute as there are certain exceptions allowing for piercing the “veil of state immunity” pursuant to customary international law.⁴⁴ With respect to personal injuries and damage to property caused by a State (ANSP) the State’s (ANSP’s) jurisdictional immunity would not be applicable before a foreign court if the act or omission occurred in the territory of a foreign State and as cumulative condition the author of the act or omission was present in the territory (of the foreign State) when the damage occurred. If interpreted in accordance with the ordinary meaning of the words⁴⁵, this is usually not the case when cross-border ATS is provided since the ANSP is physically not located in the State where the damage occurs⁴⁶ in connection with the provision of ATS. A UN commentary stresses that this exemption from State immunity deliberately excludes transboundary injuries or trans-frontier torts or damage so as to exclusively address

⁴⁰ Malcolm M. Shaw: International Law, Sixth Edition, Cambridge, 2012, p. 698

⁴¹ See for example United States. Paul Stephen Dempsey: Privatization of the Air: Governmental Liability for Privatized Air Traffic Services Annals of Air and Space Law Vol. XXVIII 2003 p. 104-105 as well as Dr. Francis Schubert: The liability of Air Navigation Service Providers: Some lessons from the Single European Sky in Daniel Calleja Crespo and Pablo Mendes de Leon, Achieving the Single European Sky: Goals and Challenges, Kluwer 2011, p. 53

⁴² United Nations Convention on Jurisdictional Immunities of States and Their Property not yet in force but reflecting customary international law. – Part IV

⁴³ United Nations Convention on Jurisdictional Immunities of States and Their Property not yet in force but considered by several courts as reflecting customary international law – Article 1. (b) (iii). James Crawford: Brownlie’s Principles of Public International Law, Oxford University Press, 8th Edition 2012 p. 490 See also Article 27.2 of the European Convention on State Immunity (1972)

⁴⁴ United Nations Convention on Jurisdictional Immunities of States and Their Property not yet in force but reflecting customary international law – Part III

⁴⁵ Vienna Convention on the law of treaties, 1969, Paragraph 1 of Article 31

⁴⁶ A very similar wording is used in Article 11 of the European Convention on State Immunity (Treaty No. 74. Council of Europe) which is in force between eight European states.

routine (domestic) traffic accidents.⁴⁷ This means that the above described exemption from State immunity related to personal injury and damage is not applicable to cross-border ATS provision, thereby the immunity from jurisdiction of an ANSP before a foreign court remains theoretically guaranteed.

Notwithstanding the above, in some States as for example in the United States out of the two cumulative conditions described earlier only one (namely damage occurring in the territory of the State) is sufficient to trigger exemption from State immunity.⁴⁸

The state immunity doctrine is not applicable in an entirely domestic context since the ANSP designated by the State that certified the ANSP to provide ATS is not acting on behalf a foreign State hence the foreign element necessary to establish immunity is lacking.

With respect to the cross-border ATS context, state immunity is also irrelevant. The reason for this is that in the event that an ANSP is providing ATS in an airspace under the sovereignty of a foreign State, such exercise of public authority is derived from the prerogatives of the State enjoying full and exclusive sovereignty over the airspace in question where ATS is provided (the original certifying State is not sovereign in the airspace where the ATS is provided). Thus in such a scenario no foreign State is involved that could invoke immunity.

It is difficult to predict, however, whether in the context of cross-border ATS provision the ANSP could or could not invoke State immunity (of a foreign State) in the event that damage claims against the ANSP are brought before the court of the State where the ANSP was certified or in a third State. Notwithstanding that theoretically speaking such a scenario is possible, the author of this paper is not aware of any relevant precedents. For example in the Überlingen case the acts or omissions of the Swiss ANSP Skyguide acting on behalf of the German State in the airspace of Germany was not challenged before a Swiss court.⁴⁹

5. Conclusions

The special public authority characteristics of ATS have varying degrees of impact on the application to the provision of ATS of the relevant concepts of international law highlighted in this paper, namely state responsibility, state liability and state immunity.

State responsibility: The public authority characteristic of ATS is relevant from the point of view of State obligations since ANSPs are qualified as private entities exercising elements of governmental authority in respect of the provision of ATS. Hence, in a purely domestic context their activities are attributable to the State that designated (and usually certified) them. Moreover, not only the provision of ATS but also the provision of ANS that is broader in scope than ATS is a State obligation under Article 28 of the Chicago Convention, giving rise to State

⁴⁷ Draft articles on Jurisdictional Immunities of States and their properties, with commentaries 2001, p. 45

⁴⁸ 28 U.S. Code § 1605 General exceptions to the jurisdictional immunity of a foreign state (a) (5)

⁴⁹ Bashkirian Airlines brought claim for damage compensation against Germany before a German court in relation to the mid-air collision that occurred in German airspace. See 4 O 234/05 H 27. Juli 2006 Landgericht Konstanz 4. Zivilkammer Im Namen des Volkes Grund- und Teilurteil

responsibility under specific circumstances.⁵⁰ There is no precedent, however, for established international responsibility of a State with regard to a breach of Article 28 of the Chicago Convention.

State liability: State liability is not a generally established concept of international law. States may however recognize at their discretion State liability arising from the provision of ATS under their national law or by concluding international inter-state agreements to that effect.

State immunity: Notwithstanding the fact that in light of its public authority characteristics the provision of ATS gives rise to State immunity from courts of foreign states such an exemption from jurisdiction is not applicable in a purely domestic ATS context since the foreign (State) element is missing. As regards the provision of cross-border ATS, state immunity does not apply in proceedings brought against an ANSP before the courts of the State that designated the ANSP due to the lack of a foreign (State) element. In the field of cross-border ATS provision there is no precedent for established State immunity in legal proceedings brought against an ANSP before the courts of the State that certified the ANSP.

⁵⁰ As referred to earlier the classification of ANS according to the purpose and nature of the ANS activities is a precondition for adequately addressing ANS related responsibility and liability issues. In this regard several questions arise including the following: Which ANS related activities are qualified as exercise of public authority? Is the provision of all ANS related activity a State obligation under Article 28 of the Chicago Convention? What are the „ordinary” activities of ANSPs falling outside the scope of both the exercise of public authority and obligations of States in accordance with Article 28 of the Chicago Convention?