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## **Regional aviation safety organisations: enhancing air transport safety through regional cooperation**

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## Chapter 6

# Responsibility and Liability of Regional Aviation Safety Organisations and of Their Member States

*‘It would be difficult to find a topic beset with greater confusion and uncertainty.’*

Francisco V. García Amador  
First International Law Commission’s  
Special Rapporteur on State Responsibility  
(1956-1961)<sup>1</sup>

### 6.1 INTRODUCTION

The success of the GASON proposed in Chapter 2, measured by more effective and uniform implementation of ICAO SARPs and efficiencies in terms of the use of resources by ICAO and its Member States, will to a large degree depend on whether the RASOs which form GASON’s building blocks are appropriately empowered by their Member States to exercise civil aviation safety functions - either on behalf of these Member States or in RASOs own name.

Chapter 5 analysed and classified the various RASO delegation arrangements from an operational point of view. However such delegations also raise questions related to the legal consequences, in terms of international responsibility and civil liability, for the RASO Member States and the regional body itself.<sup>2</sup> The precise legal source and nature of these consequences, which are the subject matter of this chapter, will depend on the legal form of the RASO, its relationship with Member States and third countries, the applicable international legal framework and finally the domestic legislation of the States concerned.

In order to resolve the above issues, this chapter will first clarify and systematise the general principles and concepts concerning the attribution and delegation of State safety functions to aviation authorities from the perspective of domestic and international law (Section 6.2). It will then verify if there are any provisions in the Chicago Convention or its Annexes which could limit the possibility of delegating State safety functions to RASOs, or more generally to exercising these functions on a non-national basis (Section 6.3). Following on from that, this

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<sup>1</sup> Francisco V. García Amador was the UN International Law Commission first special rapporteur on State responsibility.

<sup>2</sup> In this Chapter the term ‘responsibility’ is used when referring to obligations stemming from international law, while the term ‘liability’ is used when referring to situations where a breach of a legal obligation results in damages the recovery of which is being pursued in national courts.

chapter will address the issue of RASO and State responsibility for internationally wrongful acts (Sections 6.4 and 6.5), and domestic civil liability (Section 6.6). Finally this chapter will examine the need to amend the Chicago Convention in view of the emergence of RASOs (Section 6.7).

## **6.2 THE PRINCIPLE OF LEGALITY AND DELEGATION OF STATE SAFETY FUNCTIONS IN CIVIL AVIATION**

### **6.2.1 ATTRIBUTION OF COMPETENCES TO CIVIL AVIATION AUTHORITIES UNDER DOMESTIC LAW**

State organs can only act within the scope of the competences which have been *attributed* to them, which is a reflection of the *principle of legality*, as applied in the general context of administrative law.<sup>3</sup> This principle of attribution is also valid for civil aviation authorities dealing with aviation safety matters, and where the constituting acts of such bodies specify in detailed manner their competences, functions and duties.<sup>4</sup>

In some countries, such as the United Kingdom, the civil aviation authorities are established as an independent agency.<sup>5</sup> In other countries, such as the Netherlands, they are part of the organisational framework of one of the ministries.<sup>6</sup> Sometimes, such as in Poland, the competences are shared, with the ministry having competences for the legislation, and the civil aviation administration for its execution. Finally, in some jurisdictions, such as Germany, more than one administrative body was given the competence to exercise the certification and oversight tasks placed upon a State by the Chicago Convention and its Annexes.<sup>7</sup>

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<sup>3</sup> Hofmann, Rowe, and Türk, *supra* note 116 in Ch.2, 148-151; Michael Nierhaus, 'Administrative Law', in: Introduction to German Law, ed. by Mathias Reimann and Joachim Zekoll (2005), pp. 88-89; Philippos K. Spyropoulos and Théodore Fortsakis, Constitutional Law in Greece, (2009), p. 180; Lionel N. Brown and John Bell, French Administrative Law, (2003), pp. 213-215.

<sup>4</sup> For example, for the competences, functions and duties of the UK civil aviation authority see: the Civil Aviation Act of 1982, Chapter 16; For the competences, functions and duties of the Polish Civil Aviation Authority see: Civil Aviation Act (Ustawa 'Prawo Lotnicze') of 3 July 2002 (Consolidated text in: Official Journal of the Republic of Poland of 28 November 2013, Item 1393).

<sup>5</sup> The UK CAA is a body corporate which is not considered to be a servant or the agent of a Crown in accordance with the Civil Aviation Act of 1982.

<sup>6</sup> In the Netherlands, the Minister of Transport is considered as the national aviation authority and is supported by Human Environment and Transport Inspectorate (ILT) which is an integral part of the Ministry of Transport.

<sup>7</sup> In Germany, which is a federation of sixteen States (*Länder*), the competence has been split between the federal aviation authority and the *Länder* authorities, with the latter being responsible in particular for general aviation policing activities and for administration and licensing of aerodromes; Source: ICAO, 'Final Report on the safety oversight audit of the civil aviation system of the Federal Republic of Germany', (2005), <[http://cfapp.icao.int/fsix/AuditReps/CSAfinal/Germany\\_CSA\\_%20Final\\_Report.pdf](http://cfapp.icao.int/fsix/AuditReps/CSAfinal/Germany_CSA_%20Final_Report.pdf)> [accessed 21 July 2014]. The UK also has more than one civil aviation authority, this however stems from the fact that in addition to the mainland, the UK is also composed of the Overseas Territories. Although from the perspective of the Chicago Convention the UK Overseas Territories are an integral part of the UK, the aviation activities in the Overseas Territories are under the responsibility of their Governors, which in practice either establish their own aviation safety administrations or can rely on the Air Safety Support International, which is a subsidiary company of the UK Civil Aviation Authority charged with supporting the development of civil aviation safety regulation in the

Whether a national civil aviation authority or an administrative body in general can delegate its statutory responsibilities to other entities or individuals is in the first place a matter of domestic law, in line with the above mentioned principle of legality.<sup>8</sup>

In practice, it is not rare for States to delegate the conduct of some of their civil aviation safety tasks outside governmental structures. A study conducted in 2010 by the NLR Air Transport Safety Institute on 32 of the 44 ECAC States showed that in 2008 sixteen ECAC States were making use of inspecting staff contracted from external organisations.<sup>9</sup> The study also showed that fifteen States sub-contracted or delegated specific tasks to a separate organisation.<sup>10</sup> In the EU, legislation was even adopted setting out requirements that should be met by such *qualified entities* when contracted by EU Member States' aviation authorities or by EASA.<sup>11</sup>

In some cases, entities which are not part of the governmental structures are not only authorised to provide technical oversight services, but may also be authorised to issue certificates on behalf of States. This is the case, for example, in the Czech Republic, where the Light Aircraft Association is a competent authority for certification of microlight aircraft and licensing of persons involved in their operation.<sup>12</sup> In Austria, Austrocontrol GmbH was set up in 1994 as a limited liability company with 100% shares owned by the State<sup>13</sup> and is responsible for providing, on behalf of the Austrian government, air navigation services as well as, through a separate division, regulatory tasks including certification and inspection of aircraft, supervision of maintenance and flight operations, the performance of ramp checks on foreign aircraft, the issuance of civil aviation pilots' licenses and certification and oversight of pilot schools.<sup>14</sup>

Some jurisdictions envisage the concept of approved organisations which, in addition to being commercial enterprises, are also given privileges to make statements which under the Chicago Convention are the responsibility of States. This is the case, for example, with the approved design organisations in the EU, which have privileges to approve certain changes to aircraft design.<sup>15</sup> Under An-

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Overseas Territories; for further details see: 'About ASSI', <<http://www.airsafety.aero/about/>> [accessed 15 March 2014].

<sup>8</sup> In addition to manuals concerning RSOOs and RAIOS, ICAO has also published guidelines concerning the establishment of State safety oversight system, which follows the logic of the eight CEs which were presented in Chapter 2. See: ICAO Doc. 9734, Part A, *supra* note 67 in Ch.3.

<sup>9</sup> NLR Air Transport Safety Institute, 'Safety Oversight Comparative Analysis Study', NLR-CR-2009-260, (2010), pp. 20-21.

<sup>10</sup> *Ibid.*

<sup>11</sup> Regulation (EU) No 216/2008, *supra* note 81 in Ch.2, at Annex V.

<sup>12</sup> Light Aircraft Association of the Czech Republic, <<http://en.laacr.cz/about-laa.htm>> [accessed 20 July 2014]. See also the case of Austrian Aeroclub (Österreichischer Aeroclub), a non-profit organization, which acts as an official body in areas such as: licensing of companies which maintain or design and manufacture parachutes, hang-gliders and paragliders; licensing of glider, hang glider and paraglider pilots; maintaining the register for gliders, balloons, microlights, hang gliders and paragliders.

<sup>13</sup> Austrocontrol, 'Company Profile', (on file with author, 2012).

<sup>14</sup> Austrocontrol, 'Annual Report', (2011),

<[http://www.austrocontrol.at/jart/prj3/austro\\_control/data/uploads/pdfs/report\\_11.pdf](http://www.austrocontrol.at/jart/prj3/austro_control/data/uploads/pdfs/report_11.pdf)> [accessed 12 August 2014].

<sup>15</sup> Commission Regulation (EU) No 748/2012, *supra* note 86 in Ch.2, at Annex I, Paragraph 21.A.263.

nex 8 to the Chicago Convention, approval of aircraft design is one of the responsibilities of the 'State of Design'.<sup>16</sup>

Finally, in the US and some other countries which have their civil aviation safety regulatory system based on the American one, the national legal system envisages the concept of authorised *designees*. These individuals, which are not employees of the national aviation authority, may be authorised, on the basis of provisions of law, to conduct regulatory tasks. For example in the US regulatory system, such individuals, when authorised by the FAA administrator,<sup>17</sup> can perform tasks such as 'determining whether aircraft designs, manufacturing, and maintenance meet specific safety standards and certifying the competency of persons that operate aircraft.'<sup>18</sup>

The main benefit of delegation arrangements, such as the ones described above, is to leverage resources and to allow the aviation authority to focus on most important tasks, while leaving routine or low-risk activities to approved organisations, designees, or external contractors. For example in the US, the designees and designated organisations at a certain point performed 'more than 90 percent of FAA's certification activities, thus greatly leveraging the agency's resources.'<sup>19</sup> On the other hand, such delegation arrangements, especially when they involve delegating State tasks to commercial organisations or their employees, can sometimes face political criticism for supposedly allowing industry to *self-regulate*.<sup>20</sup>

While it is therefore clear that a civil aviation authority does not have to discharge all of its statutory responsibilities through in-house resources, a question arises as to what are the legal pre-requisites to enable such delegations, as well as what are their legal consequences.

In the case of two main jurisdictions which were reviewed for the purpose of this study, that is the EU and US, the delegations are allowed only on the basis of a clear statutory provision.<sup>21</sup> In the EU, the principle is that national aviation authorities can delegate only the exercise of certification and oversight tasks, but cannot delegate the responsibility for the final regulatory decision, that is the issuance or revocation / suspension of an approval.<sup>22</sup> Only in limited cases which are clearly envisaged under the EASA Basic Regulation, an EU Member State can delegate to EASA the whole regulatory responsibility, including the audits and inspections, as well as the competence to issue a certificate.<sup>23</sup>

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<sup>16</sup> Annex 8 to the Chicago Convention, Paragraph 1.3.4.

<sup>17</sup> Title 14 CFR Part 183 'Representatives of the Administrator' (see: Code of Federal Regulations', <<http://www.gpo.gov/fdsys/pkg/CFR-2014-title14-vol1/pdf/CFR-2014-title14-vol1.pdf>> [accessed 29 July 2014].

<sup>18</sup> US GAO, 'FAA Needs to Strengthen the Management of Its Designee Programs', GAO-05-40, (2004), at p. 7.

<sup>19</sup> Ibid. at p. 3.

<sup>20</sup> Reuters, 'Will Dreamliner drama affect industry self-inspection?' <<http://www.reuters.com/article/2013/03/02/us-boeing-787-oversight-idUSBRE92104W20130302>> [accessed 20 July 2014].

<sup>21</sup> For the US this authorisation is contained Title 14 CFR Part 183 'Representatives of the Administrator', *supra* note 17. For the EU the authorisations for EASA and EU Member States are contained in: Regulation (EU) No 216/2008, *supra* note 81 in Ch.2.

<sup>22</sup> Ibid. Article 13, which States that 'qualified entities shall not issue certificates'.

<sup>23</sup> This is the case for organisations responsible for production of aeronautical products, and flight simulation training devices. See: Article 20.2 (b)(ii) and Article 21.2 (b)(ii) of Regulation (EU) No 216/2008, *supra* note 81 in Ch.2.

This *numerus clausus* of delegation scenarios in the US and EU aviation law is a reflection of the general principle applicable to delegation arrangements in administrative law according to which delegation cannot be presumed and must be clearly authorised by law. This means that '[a]n administrative agency with statutory responsibility for an exercise of powers cannot delegate them without statutory authorization.'<sup>24</sup> This principle, which is also expressed by a Latin maxim *delegatus non potest delegare*,<sup>25</sup> had been confirmed in the EU in the *Meroni* rulings, which were addressed in Chapter 4,<sup>26</sup> and in the US, through extensive case law.<sup>27</sup>

### 6.2.2 ATTRIBUTION AND DELEGATION OF CIVIL AVIATION STATE SAFETY FUNCTIONS UNDER PUBLIC INTERNATIONAL LAW

Having looked at the general principles concerning attribution and delegation of civil aviation safety functions under domestic law, this section will address the question of delegation of such functions to RASOs from the perspective of public international law. This analysis is an essential pre-requisite for the subsequent discussion about States' and RASOs' potential responsibility for wrongful acts under public international law.

As is the case in the domestic legal systems, where competences have to be clearly attributed to State organs by law, also in the case of international organisations the competence to act is governed by a *principle of attribution*. This principle means, as explained by Blokker, that 'international organizations are competent to act only as far as powers have been attributed to them by the Member States.'<sup>28</sup> This principle can also be referred to as the *principle of speciality*,<sup>29</sup> or the principle of *conferral of powers*.<sup>30</sup> Such attribution can be either explicit, or, although not explicitly envisaged in the constituent instrument of the organisation, implied 'as being essential to the performance of its duties.'<sup>31</sup>

The most comprehensive analysis of the methods by which States attribute or confer powers on international organisations was conducted by Sarooshi, who distinguishes, at the basic level, between the attribution by means of the constituent treaty and ad hoc conferrals.<sup>32</sup> This basic distinction is valid also for RASOs,

<sup>24</sup> Neil Hawke and Neil Parpworth, *Introduction to Administrative Law*, (1996), p. 138.

<sup>25</sup> Stephen H. Bailey, *Cases materials and Commentary on administrative law*, (2005), pp. 463-464.

<sup>26</sup> 'Case C-9/56, *Meroni*', *supra* note 35 in Ch.4, (p. 151), which states that: 'A delegation of powers cannot be presumed and even when empowered to delegate its powers the delegating authority must take an express decision transferring them.' See also: 'Case T-311/06, *FMC Chemical SPRL v. European Food Safety Authority (EFSA)*', in: [2008] ECR II-88, (CJEU,2008), (Paragraph 66).

<sup>27</sup> For an overview of the delegation doctrine in US administrative law see: William F. Funk and Richard H. Seamon, *Administrative Law: Examples and explanations*, (2009), pp. 30-43.

<sup>28</sup> Schermers and Blokker, *supra* note 73 in Ch.4, at p. 157.

<sup>29</sup> See: 'Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion', in: [1996] ICJ Reports 66, (ICJ,1996), (p. 78). In this ruling the ICJ stated that: '[I]nternational organizations are subjects of international law which do not, unlike States, possess a general competence. International organizations are governed by the 'principle of speciality', that is to say they are invested by the States which create them with powers, the limits of which are a function of the common interests whose promotion those States entrust to them.'

<sup>30</sup> Sarooshi, *supra* note 19 in Ch.2.

<sup>31</sup> 'Reparation for Injuries', *supra* note 74 in Ch.4, (p. 182).

<sup>32</sup> Sarooshi, *supra* note 19 in Ch.2, at p. 18.

where, as was demonstrated in Chapter 5, in case of RASOs which are established by international agreements or, in the case of EASA, by supranational law, competences are granted either in the RASO founding document or specific delegation agreements which can be concluded between a RASO and its Member States.

When it comes to a further typology of attribution of competences to international organisations, the situation is more complicated. This is because, as pointed out by Sarooshi:

[T]here is a considerable lack of clarity and consistent usage in the conceptual labels used to describe different types of conferrals by States of powers on international organizations. Such terms as 'ceding', 'alienation', 'transfer', 'delegation' and 'authorization' are used interchangeably by international and domestic courts as well as by commentators, often to refer to the same type of conferral of powers or the same conceptual label is used in a general way to refer to different types of conferrals. However not all conferrals of powers are the same, and there are important differences that flow from the types of conferrals for the legal relationship that is thereby established between States conferring powers and organizations.<sup>33</sup>

Based on the analysis of RASOs' founding documents this study found that where competences are allocated to regional aviation safety bodies, States, rather than using terms such as *transfer*, *delegation* or *authorisation*, prefer to simply list the different competences and refer to them as RASO *functions* or *objectives*.<sup>34</sup> The term *delegation* appears only in the case of one of the organisations studied, that is BAGAIA.<sup>35</sup> Therefore, rather than relying on a specific term, in order to determine the legal consequences of a conferral by a State of competences on a RASO it is necessary to assess all the circumstances of a particular case, including the provisions of the RASO founding agreement, as well as State, ICAO and RASO practice.

Referring back to the theory of international delegations, academic writers generally tend to classify the different arrangements using as the main criterion the degree to which the State powers have been given away to an international organisation. Sarooshi, for example, distinguishes three types of conferrals, that is, agency relationships, delegations, and transfers, depending on the criteria such as the revocability of the conferral, the level of control exercised by a State over the organisation, the possibility to exercise a given power in parallel by a State and the organisation, and other criteria.<sup>36</sup> He also specifies the consequences that each of these three types of conferrals may have for a State and international organisation from the perspective of international responsibility for wrongful acts.<sup>37</sup>

Similarly, Bradley and Kelly propose a typology of what they call *international delegation*, according to criteria related to the legal effect that the delegation has and the degree of independence of the international body to which a dele-

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<sup>33</sup> Ibid. at p. 28.

<sup>34</sup> This is the case for example for PASO (see: 'PICASST', *supra* note 81 in Ch.3, Article 7), AAMAC (see: 'AAMAC Treaty', *supra* note 62 in Ch.3, Article 3), ECCAA (see: 'ECCAA Agreement', *supra* note 226 in Ch.3, Articles 5-6), or BAGASOO (see: 'BAGASOO Agreement', *supra* note 128 in Ch.3, Article 5).

<sup>35</sup> 'BAGAIA Agreement', *supra* note 179 in Ch.3, Article 5(k).

<sup>36</sup> Sarooshi, *supra* note 19 in Ch.2, at pp. 28-31.

<sup>37</sup> Ibid. at pp. 33-104.



gation is given.<sup>38</sup> They rightly point out that ‘delegations that allow international bodies to create binding legal obligations are more extensive than similar delegations of only advisory or agenda-setting authority.’<sup>39</sup> This is in line with the findings of this study, which, as Chapter 5 demonstrated, found that delegations to RASOs which create legally binding effects (Level 3 delegations), are in practice much more difficult to achieve and implement than more simple delegations which concern advisory and technical assistance functions, and which do not create legally binding effects for RASO Member States or aviation undertakings.

While the typologies of international delegation arrangements proposed in the existing literature are useful for this study in the sense that they allow the different types of RASOs to be put in the more general context of discussions on conferrals of powers to international organisations or bodies, this study came to the conclusions that these typologies need adaptation before they can be applied in the specific context of RASOs. For this reason it has been decided that the 3-Level typology of delegation arrangements that was proposed in Chapter 5, although of an operational nature, is also a good starting point for discussing RASO delegation arrangements from the perspective of public international law.

The first conclusion that was reached in this respect, is that a distinction has to be made, as is the case under the domestic law, between the *delegation of tasks* and the *delegation of the competence to take a decision*. The theory of international law and the practice of international organisations recognise the possibility of delegating the exercise of tasks only, or using outside experts. In such cases, although the exercise of tasks is allocated to outside experts, the competence to take a decision remains with the delegating organisation,<sup>40</sup> or in our case with a RASO Member State. Level 1 and 2 delegations, as proposed in Chapter 5, are considered as delegation of tasks, while Level 3 delegations also entail the competence to take a decision. For example, RASOs may be given the task of preparing proposals of legislative measures, but the actual adoption of these measures is the responsibility of States, as is clear from the cases reviewed for the purpose of this study.

The second conclusion is that a distinction has to be made between (1) the delegation of State safety functions and duties which are created by the Chicago Convention, and (2) functions and duties which are not dealt with under this international law instrument.

In the first case, regardless of the term used, we will be talking about a relationship of an international *agency*, as was demonstrated on the example of EASA in Chapter 4. This is because, when the delegation concerns a function which is already envisaged under the Chicago Convention, a State is only mandating a RASO to exercise, on its behalf, the functions for which this State is already responsible under international law. This conclusion is also supported by ICAO practice concerning registration of aircraft by RASOs as will be shown in Section 6.3.1.1 below.

In the second case, we will be talking about an *attribution* of a new competence to an international organisation. This distinction is important from the

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<sup>38</sup> Bradley and Kelley, ‘The concept of international delegation’, *supra* note 81 in Ch.4, at pp. 17-25.

<sup>39</sup> *Ibid.* at p. 17.

<sup>40</sup> Schermers and Blokker, *supra* note 73 in Ch.4, at pp. 339-340.

perspective of international State responsibility, as will be demonstrated in Sections 6.4 and 6.5.

### **6.3 THE OBLIGATION TO ESTABLISH AVIATION AUTHORITIES, AS ENVISAGED IN THE CHICAGO CONVENTION AND ITS ANNEXES**

Before addressing the question of international responsibility of States and RASOs for wrongful acts, the final point which needs to be resolved is whether either the Chicago Convention or its Annexes establish any restrictions or conditions with regard to the delegation to RASOs of State safety functions. In order to resolve this issue, the provisions of the Chicago Convention, as well as all safety-related ICAO Annexes and ICAO interpretative manuals concerning RSOOs and RAO were reviewed.

When it comes to the provisions of the Chicago Convention, most of them are formulated in a way which establishes obligations at State level only and do not provide further details as to the nature or structure of the authority which should be actually tasked by a State with discharging these obligations. However some of the articles of the Chicago Convention make a more specific reference to the *appropriate authorities of each of the contracting States* (Article 16 – Search of Aircraft), *State own authorities* (Article 25 – Aircraft in Distress), *appropriate authorities of the State* (Article 30 – Aircraft radio equipment), *appropriate national authorities for certification* (Article 41 – Recognition of existing standards of airworthiness), or *authorities of the other contracting State or States* (Article 83bis – Transfer of certain functions and duties).

Similarly the review of the safety related Annexes to the Chicago Convention reveals a mosaic of different formulations and solutions with regard to the authorities and entities through which ICAO allows or requires States to discharge their obligations. Depending on the technical domain, the Annexes use formulations such as *licensing authority*,<sup>41</sup> *appropriate authority*,<sup>42</sup> *competent authority*,<sup>43</sup> *appropriate national authority*,<sup>44</sup> *issuing authority*,<sup>45</sup> *appropriate certifying authority*,<sup>46</sup> *appropriate airworthiness authority*,<sup>47</sup> *State authority*,<sup>48</sup> *common mark registering authority*,<sup>49</sup> and *responsible authority*.<sup>50</sup>

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<sup>41</sup> See: Annex 1 to the Chicago Convention, at 'Definitions'.

<sup>42</sup> See: ICAO, 'Annex 2 to the Chicago Convention: Rules of the Air', (2005), 'Definitions'; ICAO, 'Annex 10 to the Chicago Convention: Aeronautical Telecommunications, Volume I - Radio Navigation Aids', (2006), Paragraph 12.13.11; Annex 14 to the Chicago Convention, at Paragraph 1.2.1.

<sup>43</sup> See: ICAO, 'Annex 4 to the Chicago Convention: Aeronautical Charts', (2009), Paragraph 11.10.15; Annex 10, Volume I to the Chicago Convention, at Paragraph 3.1.7.1.

<sup>44</sup> See: Annex 6, Part I to the Chicago Convention, at 'Note' to Paragraph 6.12; Annex 8 to the Chicago Convention, at Paragraph 10.3.1; ICAO, 'Annex 18 to the Chicago Convention: The Safe Transport of Dangerous Goods by Air', (2011), at Paragraph 2.7.

<sup>45</sup> See: Annex 6, Part I to the Chicago Convention, at Paragraph 4.2.1.5 (a).

<sup>46</sup> Ibid. at Appendix 8, Paragraph 1.5.

<sup>47</sup> Ibid. at Attachment F, Paragraph 7.

<sup>48</sup> See: ICAO, 'Annex 6 to the Chicago Convention: Operation of Aircraft, Part II - International General Aviation with Aeroplanes', (2008), at Paragraph 2.3.1.1.

<sup>49</sup> See: ICAO, 'Annex 7 to the Chicago Convention: Aircraft Nationality and Registration Marks', (2012), at 'Definitions'.

The most recently adopted Annex 19, which deals with safety management, contains a Standard, which obliges every State to:

[E]stablish relevant authorities or agencies, as appropriate, supported by sufficient and qualified personnel and provided with adequate financial resources. Each State authority or agency shall have stated safety functions and objectives to fulfil its safety management responsibilities.<sup>51</sup>

An explanatory note to the above cited Annex 19 Standard clarifies that:

The term “relevant authorities or agencies” is used in a *generic sense* to include all authorities with aviation safety oversight responsibility which may be established by the State as separate entities, such as: Civil Aviation Authorities, Airport Authorities, ATS Authorities, Accident Investigation Authority, and Meteorological Authority (emphasis added).<sup>52</sup>

Based on the analysis of the context in which the above and other formulations are used, as well as the analysis of ICAO and State practice, the following conclusions were reached:

- (1) Although there is no consistency in the way the different formulations regarding aviation authorities are used in the ICAO Annexes, the vast majority of the ICAO SARPs use broad formulations which refer to a *State*<sup>53</sup> and/or to an *authority* in a generic sense without specifying that it has to be a *national* authority. Annex 6 for example, distinguishes between the ‘State of the Operator’ which is the ‘State in which the operator’s principal place of business is located or, if there is no such place of business, the operator’s permanent residence’, and the *issuing authority* which is specifically responsible, on behalf of the ‘State of the Operator’ for the determination that the operator complies with the provisions of Annex 6 and the issuance of an AOC.<sup>54</sup>
- (2) In the rare cases where an ICAO Annex uses the term *national*, the relevant State and ICAO practice demonstrates that this term is actually also interpreted as covering RASO type authorities. This is for example the case with aircraft design certification, where Annexes 6 and 8 refer in this context to *appropriate national authority*,<sup>55</sup> but where in practice RASOs have been established, such as EASA, which approve

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<sup>50</sup> See: ICAO, ‘Annex 12 to the Chicago Convention: Search and Rescue’, (2004), Paragraph 2.1.1.2.

<sup>51</sup> Annex 19 to the Chicago Convention, at Appendix 1, Paragraph 3.1.

<sup>52</sup> Ibid. Appendix 1, Note 2.

<sup>53</sup> ICAO uses broad concepts such as: ‘State of the Operator’ (The State in which the operator’s principal place of business is located or, if there is no such place of business, the operator’s permanent residence), ‘State of Registry’ (The State on whose register the aircraft is entered), ‘State of Design’ (The State having jurisdiction over the organization responsible for the type design) or ‘State of Manufacture’ (The State having jurisdiction over the organization responsible for the final assembly of the aircraft).

<sup>54</sup> Annex 6, Part I to the Chicago Convention, at Appendix 6.

<sup>55</sup> Ibid. at Paragraph 6.3.1.2.8; Annex 8 to the Chicago Convention, at Part 11, Paragraph 1.1.1.

aircraft design on behalf of States and this has been found acceptable to ICAO.<sup>56</sup> Similarly with respect to the transport of dangerous goods by air, where Paragraph 2.7 of Annex 18 explicitly requires each ICAO Member State to designate ‘an appropriate authority *within its administration* to be responsible for ensuring compliance with this Annex (emphasis added)’, the ECCAA discharges these responsibilities on behalf of the OECS States, and this had been accepted by ICAO.<sup>57</sup>

- (3) Many of the ICAO Annexes explicitly envisage that a State has an obligation to designate an authority, which is to discharge on its behalf relevant safety related responsibilities or provide services which are necessary for international air navigation. This is for example the case, in addition to the above mentioned issuing authority under Annex 6, for: aircrew licensing,<sup>58</sup> publication of aeronautical information publication,<sup>59</sup> provision of meteorological information,<sup>60</sup> international aeronautical telecommunications services,<sup>61</sup> air traffic services,<sup>62</sup> and search and rescue.<sup>63</sup> These provisions are general in nature and do not explicitly limit the authority to be designated as having a *national* status.

In addition, as was mentioned under Section 2.4.3 of Chapter 2, Annexes 13 and 19 explicitly refer to RASOs. A more detailed review of these references

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<sup>56</sup> ICAO USOAP report on EASA (2008), *supra* note 92 in Ch.4.

<sup>57</sup> ICAO USOAP report on OECS (2007), *supra* note 248 in Ch.3, at Paragraph 3.3.8 (used with the permission of the ECCAA).

<sup>58</sup> Annex 1 to the Chicago Convention uses the term ‘Licensing Authority’ which means: ‘The Authority designated by a Contracting State as responsible for the licensing of personnel’.

<sup>59</sup> A State may provide the aeronautical information itself, agree with one or more other Contracting State(s) for the provision of a joint service, or delegate the authority for the provision of the service to a non-governmental agency, provided the Standards and Recommended Practices of this Annex are adequately met (see: Annex 2 to the Chicago Convention, at Paragraph 2.1.1).

<sup>60</sup> Under Paragraph 2.1.4 of Annex 3 to the Chicago Convention, each ICAO Member States ‘shall designate the authority ..., to provide or to arrange for the provision of meteorological service for international air navigation on its behalf.’

<sup>61</sup> Under Paragraph 2.4.1 of Annex 10 – Volume II to the Chicago Convention, each ICAO Member State has an obligation to ‘designate the authority responsible for ensuring that the international aeronautical telecommunications service is conducted in accordance with the procedures of this Annex.’

<sup>62</sup> Under Paragraph 2.1.1 of Annex 11 to the Chicago Convention each ICAO Member State has an obligation to arrange for air traffic services ‘to be established and provided in accordance with the provisions of this Annex, except that, by mutual agreement, a State may delegate to another State the responsibility for establishing and providing air traffic services in flight information regions, control areas or control zones extending over the territories of the former.’ An explanatory note to this provision further clarifies that: ‘If one State delegates to another State the responsibility for the provision of air traffic services over its territory, it does so without derogation of its national sovereignty. Similarly, the providing State’s responsibility is limited to technical and operational considerations and does not extend beyond those pertaining to the safety and expedition of aircraft using the concerned airspace ...’.

<sup>63</sup> Under Paragraph 2.5.1 of Annex 12 to the Chicago Convention each ICAO Member State has an obligation to ‘designate as search and rescue units elements of public or private services suitably located and equipped for search and rescue operations.’

reveals however that ICAO still struggles somewhat with the use of this concept. In the case of Annex 19, ICAO explains in the 'Forward' that:

Certain State safety management functions required in Annex 19 may be delegated to a regional safety oversight organization or a regional accident and incident investigation organization on behalf of the State.

The above formulation and especially the use of the word *certain* suggests that there may be limitations as to the scope or depth of the subject matter delegation. Unfortunately however Annex 19 does not offer further guidance in this respect.

Even more confusing are the provisions of Annex 13, which is the only Annex which actually contains SARPs referring to RASOs. Although Standard 5.1 of this Annex gives to the 'State of Occurrence' the possibility to: 'delegate *the whole* or any part of the conducting of such investigation to another State or a regional accident investigation organization (emphasis added)', the explanatory note which accompanies this provision does not mention a RAIO when clarifying the consequences of *the whole* delegation:

When the whole investigation is delegated to another State or a regional accident investigation organization, *such a State* is expected to be responsible for the conduct of the investigation, including the issuance of the Final Report and the ADREP reporting. When a part of the investigation is delegated, the State of Occurrence usually retains the responsibility for the conduct of the investigation (emphasis added).<sup>64</sup>

Similarly, the ICAO manual on RAIOs seems to suggest that the possibility of delegating investigative functions to a regional body does not relieve a State from establishing a national investigation authority:

In a more complex regional organization, the *national accident investigation authorities* may delegate the whole or part of their functions and responsibilities concerning accident and incident investigation to the RAIO, which would conduct the actual investigation on behalf of Member States. Such investigations would be based on common regional regulations, policies and procedures, while Member States would retain responsibility for the oversight of the system, in accordance with the Chicago Convention (emphasis added).<sup>65</sup>

The above interpretation in the RAIO manual seems to be shared by the ICAO ANC, which at the end of 2013 discussed a proposal for an amendment to Annex 13 introducing an obligation for States to establish an independent accident investigation authority,<sup>66</sup> and where the team which developed the proposed amendment 'felt that a regional accident and incident investigation organization (RAIO) was not an alternative to the national accident and incident investigation authority.'<sup>67</sup>

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<sup>64</sup> Annex 13 to the Chicago Convention, at explanatory note to Paragraph 5.1.

<sup>65</sup> ICAO Doc. 9946, *supra* note 3 in Ch.1, at Paragraph 3.10.1.5.

<sup>66</sup> ICAO, 'Final review of proposed amendment to Annex 13 relating to independence of accident and incident investigations', AN-WP/8803, (Air Navigation Commission, 2013).

<sup>67</sup> ICAO, 'Minutes of the Sixth Meeting', AN Min. 195-6, (195th Session of the Air Navigation Commission, 2014).

This study does not agree with such a restrictive approach. As was demonstrated above, the vast majority of the ICAO Annexes do not oblige States to establish *national* authorities as a means of discharging their safety related obligations, and in those rare cases where such limiting language was included in the SARPs the subsequent State practice has demonstrated that such limitations are not sensible.

In addition, as was pointed out by an official of one of the RAIOS, there are at present between 50 and 60 States which do not have resources and expertise to establish permanent accident investigation authorities.<sup>68</sup> For such countries a requirement to establish a permanent investigation authority would probably result in filing of differences - which is not an answer - or establishing a one person authority to satisfy the ICAO requirement from a formal point of view, but which in practice would not have, on its own, the resources necessary to effectively investigate aviation accidents.<sup>69</sup>

To conclude, ICAO Annexes should be drafted in a way which recognises that it is perfectly acceptable for a State to discharge its safety related obligations under Annex 13 or any other safety related Annex to the Chicago Convention by relying either on a national authority(ies) or, in part or even entirely, on a RASO type body as long as the State concerned can demonstrate that the relevant SARPs are effectively implemented.

### **6.3.1 'STATE OF REGISTRY' AND 'STATE OF THE OPERATOR' IN THE CONTEXT OF ESTABLISHING RASOs: LIMITATIONS OF THE CHICAGO CONVENTION**

The analysis of the legal consequences of establishing RASOs from the perspective of State responsibility under the Chicago Convention would not be complete without also addressing the concepts of the 'State of Registry' and 'State of the Operator', which are linked to basic State responsibilities in the context of international air navigation and stem directly from the provisions of the Chicago Convention.

#### **6.3.1.1 RASO AS A 'STATE OF REGISTRY'**

The 'State of Registry' is one of the fundamental concepts in the Chicago Convention, and the one with which the Convention associates a number of legal consequences, such as the obligation to issue certificates of airworthiness,<sup>70</sup> to validate pilot licenses,<sup>71</sup> or the right to appoint observers to an accident investigation.<sup>72</sup> There are also numerous other rights and obligations which are attached to the 'State of Registry' through the technical Annexes of the Chicago Convention.<sup>73</sup>

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<sup>68</sup> 'Interview No 10', (2014), *supra* note 210 in Ch.3.

<sup>69</sup> *Ibid.*

<sup>70</sup> 'Chicago Convention', Article 31.

<sup>71</sup> *Ibid.* Article 32.

<sup>72</sup> *Ibid.* Article 26.

<sup>73</sup> See for example Annexes 6, 8 and 13 to the Chicago Convention.

A contracting State to the Chicago Convention acquires the status of the 'State of Registry' when an aircraft is entered on its national aircraft registry.<sup>74</sup> This act of registration also creates a unique link between the aircraft and its 'State of Registry' which the Chicago Convention refers to as *nationality of aircraft*.<sup>75</sup> Under the Chicago Convention, the general principle is that an aircraft can have a nationality of only one State – the 'State of Registry'.<sup>76</sup>

In the context of this study the question emerges whether there are any legal limitations as to the ability of a RASO to carry out on behalf of a State the functions of a 'State of Registry'. The general answer to this question is that such a delegation is legally acceptable. Relevant State and ICAO practice demonstrates that it is possible to establish, in compliance with the Chicago Convention, a RASO which would discharge the functions of a 'State of Registry' with respect to, for example, aircraft design (IAC, EASA) or accident investigation matters (IAC).

It is also possible to have a RASO discharging on behalf of States the functions associated with aircraft registration, including the issuance of certificates of registration and airworthiness. In 2014 there was one RASO (ECCAA), having such competences. In such cases however aircraft still have the nationality of the State on behalf of which they are registered in accordance with Article 17 of the Chicago Convention. For example, in the case of aircraft registered by ECCAA, each OECS Member State retains its national registration marks as assigned by ICAO.<sup>77</sup> It is not possible to overcome this limitation without an amendment to the Chicago Convention.

A limited exception to the general principle of registering aircraft on a national basis is contained in Article 77 of the Chicago Convention. This exception is available only to aircraft operated by an *international operating agency*, which is an airline established by two or more of the ICAO Member States on the basis of an international treaty.<sup>78</sup> According to an ICAO Council determination made in 1967 on the basis of Article 77 of the Chicago Convention, aircraft of international operating agencies can be registered either *jointly* by the States constituting the agency or on an *international basis*.<sup>79</sup> In both cases all aircraft of an international operating agency which are registered on other than a national basis will bear the same common registration mark.<sup>80</sup>

The only practical example of application of the possibility of non-national aircraft registration has so far been the case of Arab Air Cargo, which is an international operating agency set up in 1983 by Iraq and Kingdom of Jordan and still functioning today.<sup>81</sup> Although all aircraft of Arab Air Cargo have a common non-

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<sup>74</sup> The Annexes to the Chicago Convention define the 'State of Registry' as 'The State on whose register the aircraft is entered'. For further commentary on legal aspects of aircraft registration and nationality from aviation safety perspective see: Huang, *supra* note 29 in Ch.1, at pp. 24-32.

<sup>75</sup> 'Chicago Convention', Article 17.

<sup>76</sup> *Ibid.* Article 18.

<sup>77</sup> 'Interview No 7', (2014), *supra* note 232 in Ch.3.

<sup>78</sup> Pablo Mendes de Leon, *Cabotage in Air Transport Regulation*, (1992), pp. 128-134.

<sup>79</sup> ICAO, 'Resolution on Nationality and Registration of Aircraft Operated by International Operating Agencies', (Reproduced in ICAO Doc. 9587 'Policy and Guidance Material on the Economic Regulation of International Air Transport').

<sup>80</sup> *Ibid.* at Paragraph 1.

<sup>81</sup> For an overview of this case see: Michael Milde, 'Nationality and registration of aircraft operated by Joint Air Transport Operating Organizations or International Operating Agencies', AASL, X (1985). For a critical analysis of the ICAO Council resolution see: Khairy El - Hussainy,

national registration mark assigned by ICAO (4YB), the actual registration tasks are performed by the Kingdom of Jordan, which also carries out the functions of the 'State of Registry' on behalf of Iraq,<sup>82</sup> and is considered as a 'Common mark registering authority' from the perspective of Annex 7 to the Chicago Convention which deals with aircraft registration.<sup>83</sup> Furthermore according to the ICAO determination concerning Arab Air Cargo, the governments of Iraq and Jordan are:

[J]ointly and severally bound to assume the obligations and responsibilities which under the Convention on International Civil Aviation attach to the State of registry; any complaints by other contracting States will be accepted by both the Governments of Jordan and Iraq.<sup>84</sup>

The example of Arab Air Cargo represents a case of a *joint* aircraft registration by a number of ICAO Member States. However, from the perspective of this study of greater relevance is the second possibility envisaged by the ICAO Council, namely that of *international aircraft registration*. So far however there have been no cases of using this possibility in practice.

The above mentioned ICAO resolution of 1967, defines international aircraft registration as:

[T]he cases where the aircraft to be operated by an international operating agency would be registered not on a national basis but with an international organization having legal personality, whether or not such international organization is composed of the same States as have constituted the international operating agency.<sup>85</sup>

The ICAO has further clarified in its Resolution that:

[I]n arriving at its determination [the Council], shall be satisfied that any system of international registration devised by the States constituting the international operating agency gives the other Member States of ICAO sufficient guarantees that the provisions of the Chicago Convention are complied with.<sup>86</sup>

Finally, according to the subject matter Resolution, the following criteria have to be met, as a minimum, by States envisaging international aircraft registration:

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'Registration and Nationality of Aircraft operated by International Agencies in Law and Practice', Air Law, X (1985), pp. 15-27.

<sup>82</sup> A similar solution is envisaged under Article 18 of the Convention on offences and certain other acts committed on board aircraft, signed at Tokyo, on 14 September 1963 (Tokyo Convention) which provides that: 'If Contracting States establish joint air transport operating organizations or international operating agencies, which operate aircraft not registered in any one State those States shall, according to the circumstances of the case, designate the State among them which, for the purposes of this Convention, shall be considered as the State of registration and shall give notice thereof to the International Civil Aviation Organization which shall communicate the notice to all States Parties to this Convention.'

<sup>83</sup> Annex 7 to the Chicago Convention, at 'Definitions' and at Paragraph 3.5.

<sup>84</sup> Milde, 'Nationality and registration of aircraft operated by Joint Air Transport Operating Organizations or International Operating Agencies', *supra* note 81, at p. 149.

<sup>85</sup> Resolution on International Operating Agencies, *supra* note 79, at 'Appendix 1'.

<sup>86</sup> Ibid. at Appendix 2, Part II.



- (1) The States constituting the international operating agency shall be jointly and severally bound to assume the obligations which, under the Chicago Convention, attach to a State of registry;
- (2) The operation of the aircraft concerned shall not give rise to any discrimination against aircraft registered in other Contracting States with respect to the provisions of the Chicago Convention;
- (3) The States constituting the international operating agency shall ensure that their laws, regulations and procedures as they relate to the aircraft and personnel of the international operating agency when engaged in international air navigation shall meet in a uniform manner the obligations under the Chicago Convention and the Annexes thereto.<sup>87</sup>

According to Milde ‘in the discussions leading to the Council Resolution, it has been suggested that even ICAO itself or the United Nations or other international organizations could become such a registering authority.’<sup>88</sup> This leads to the conclusion that a RASO could be considered as an international aircraft registering authority subject to the following conditions and limitations:

- (1) The RASO should be established as an entity with a separate legal personality. This requirement set by the ICAO Council is also in line with the findings of this study, according to which the establishment of a relationship of an international agency requires the organisation which acts on behalf of States to possess a separate international legal personality (see Section 4.3.2 of Chapter 4);
- (2) The international registration functions of a RASO would be applicable only to aircraft of joint operating agencies as envisaged under Article 77 of the Chicago Convention. This is the main practical limitation of the Chicago Convention with regard to non-national aircraft registration. In respect to aircraft operated by operators not having status of joint operating agencies a RASO can only carry out, on behalf of States, the national responsibilities of the ‘State of Registry, as is the case today with ECCAA;
- (3) From the perspective of Annex 7 to the Chicago Convention a RASO carrying out international registration functions should be considered as a common mark registering authority, and in this respect would be obliged to establish and maintain a dedicated ‘non-national register or, where appropriate, a part thereof, in which aircraft of an international operating agency are registered.’<sup>89</sup>

Finally it has to be reiterated that the ICAO Council Resolution concerning non-national aircraft registration is clear that the setting up of an international

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<sup>87</sup> Ibid.

<sup>88</sup> Milde, ‘Nationality and registration of aircraft operated by Joint Air Transport Operating Organizations or International Operating Agencies’, *supra* note 81, at p. 150

<sup>89</sup> Annex 7 to the Chicago Convention, at ‘Definitions’.

aircraft registration scheme does not relieve the States participating in such a scheme from the responsibilities that the Chicago Convention attaches to the 'State of Registry', and that the States concerned shall be jointly and severally responsible for assuming these obligations.<sup>90</sup>

Given the fact that so far there has been no practical case of application of international aircraft registration, it is not clear what the position of the ICAO Council would be as to the possibility of joint and several responsibility of the States and the international aircraft registering authority. This study argues that such possibility should not be excluded, given the fact that the international aircraft registering authority would be exercising on behalf of States safety critical tasks such as the issuance of certificates of airworthiness.

Should such parallel responsibility of the international registering authority be allowed, this would be the only case of an international organisation directly bound by the provisions of the Chicago Convention.<sup>91</sup> The legal basis for such responsibility would then be the determination of the ICAO Council made in accordance with Article 77 of the Chicago Convention.

### **6.3.1.2 RASO AS A 'STATE OF THE OPERATOR'**

The second basic State safety function under the Chicago Convention is the 'State of the Operator', which was introduced through Article 83bis of the Convention, and is defined as 'the State where the operator has his principal place of business or, if he has no such place of business, his permanent residence'.<sup>92</sup> As is the case with the 'State of Registry', the details of the tasks and responsibilities of the 'State of the Operator' are defined in the technical Annexes to the Chicago Convention, and notably Annex 6.

There is no doubt that under the current international legal framework a RASO can discharge on behalf of a State the functions of a 'State of the Operator'. As was already mentioned above, Annex 6 clearly distinguishes between the 'State of the Operator' and the authority responsible for the issuing of the AOC. This gives States the possibility of designating a RASO as the latter. ECCAA is the only example of a RASO which in 2014 was discharging 'State of the Operator' functions on behalf of its Member States.

However, there are certain legal pitfalls that States should be aware of when deciding to discharge their 'State of the Operator' responsibilities on other than a national basis.

The first point of attention is the fact that ICAO does not readily accept all schemes where several States act jointly as the 'State of the Operator'. This is, for example, presently the case with the Scandinavian Airline System (SAS), which is a consortium established in 1951 by Sweden, Norway and Denmark under an international agreement.<sup>93</sup> For the purpose of safety oversight of SAS, the three participating States concluded an agreement under which they share oversight responsibilities, including through the establishment of a joint Scandinavian Flight Safety Office (STK), and joint issuance of approvals and certificates for this com-

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<sup>90</sup> Resolution on International Operating Agencies, *supra* note 79, at Appendix 2, Part 1.

<sup>91</sup> For cases where an international organisation could be bound indirectly by the provisions of the Chicago Convention see Section 6.5.4 below.

<sup>92</sup> 'Chicago Convention', Article 83 bis (a).

<sup>93</sup> Mendes de Leon, *supra* note 78, at pp. 125-127.

pany, which means in practice that the approvals are granted on one document issued jointly by the civil aviation authorities of these three States.<sup>94</sup> In relation to this arrangement the ICAO USOAP audit of Norway conducted in 2006 has raised a finding according to which:

[N]o evidence was provided to show that there was appropriate legal basis for such an oversight mechanism and that Norway had established a means to ensure that its national and international obligations for safety oversight in the delegated areas were fulfilled.<sup>95</sup>

As a result ICAO has recommended to Norway to:

[E]nsure that there is an appropriate legal basis for it to assume responsibility on the oversight of SAS International and for the delegation of oversight tasks to STK.<sup>96</sup> When and if applicable, Norway should also establish a means to ensure that its national and international obligations for safety oversight in the delegated areas are fulfilled.<sup>97</sup>

The above demonstrates that ICAO seems to accept that a number of its Member States could act jointly as a 'State of the Operator', provided that there is a clear legal basis for the delegation of safety oversight tasks to a joint safety oversight office, and the States concerned can demonstrate that national and international obligations for safety oversight are met. However, this study argues, that the fact that three ICAO Member States jointly sign an AOC of the airline dilutes the 'State of the Operator' responsibilities and does not allow clear identification of which authority is responsible, from a practical point of view, for safety oversight of the operator. It could be argued that in schemes such as this, either:

- (1) the principles similar to those which were developed by the ICAO Council for joint aircraft registration should be applicable, that is designation of a single 'State of the Operator' which should act on behalf of all the States concerned, or
- (2) the States concerned should delegate the exercise of the functions of 'State of the Operator' to a RASO.

The second point to which States should pay attention is the split between the 'State of Registry' and the 'State of the Operator'. Such a scenario is possible under Article 83bis of the Chicago Convention, which in such cases provides for

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<sup>94</sup> The SAS is under oversight of OPS-Utvalget (Scandinavian Surveillance System), which is an entity established by an Agreement signed on 20 December 1951 by the Foreign Ministers of Sweden, Denmark and Norway for the purpose of promoting cooperation among Scandinavian flight safety authorities. The OPS-Utvalget agreement also establishes the STK which is designated as a joint inspection office to perform relevant approval and oversight tasks with respect to SAS. The AOC of SAS is signed by the Directors General of the three authorities on behalf of OPS-Utvalget (Source: ICAO, 'Final report on the safety oversight audit of the civil aviation system of the Kingdom of Norway', (2006), <[http://cfapp.icao.int/fsix/AuditReps/CSAfinal/Norway\\_USOAP\\_Final\\_Audit\\_Report.pdf](http://cfapp.icao.int/fsix/AuditReps/CSAfinal/Norway_USOAP_Final_Audit_Report.pdf)> [accessed 12 August 2014].

<sup>95</sup> Ibid. at Appendix 1-1-05.

<sup>96</sup> Ibid.

<sup>97</sup> Ibid.

the possibility of *transferring* all or part of the functions and duties of the ‘State of Registry’ to the ‘State of the Operator’. Such transfers allows the exercise of all safety functions related to international air navigation to be kept under the responsibility of a single State, which then has a holistic view of the safety performance of both the operator and its aircraft. However, given the fact that international organisations cannot be party to the Chicago Convention, the conclusion of Article 83bis agreements is only possible between States. From a RASO perspective this has two consequences:

- (1) Where a RASO exercises on behalf of its Member States the functions and duties of the ‘State of the Operator’ or ‘State of Registry’ it will not be able to conclude Article 83bis with third countries, at least in its own name;<sup>98</sup>
- (2) Where a RASO exercises on behalf of its Member States only the functions and duties of the ‘State of Registry’, while the RASO Member States continue to exercise the functions and duties of the ‘State of Operator’, any agreement concerning the transfer of responsibilities which may be concluded between the RASO and its Member States, may not be recognised by third countries.<sup>99</sup>

## **6.4 GENERAL PRINCIPLES OF INTERNATIONAL STATE RESPONSIBILITY**

### **6.4.1 ACT OR OMISSION ATTRIBUTABLE TO A STATE UNDER INTERNATIONAL LAW**

The starting point for analysing the implications of establishing regional aviation safety bodies for international State responsibility is the basic principle of international law according to which every internationally wrongful act of a State entails the international responsibility of that State. This principle was applied in a number of cases by the Permanent Court of International Justice (PCIJ) and the ICJ,<sup>100</sup> and is reflected in Article 1 of the International Law Commission’s (ILC) ‘Draft

<sup>98</sup> It could be envisaged however, that a RASO is authorised to conclude Article 83bis agreements on behalf of its Member States.

<sup>99</sup> It cannot be excluded however that a RASO which is designated by its Member States as a joint registering authority under Article 77 of the Chicago Convention could be a party to a transfer agreement which could be recognised as valid under the Chicago Convention. Indeed, Article 83bis (c) of the Chicago Convention provides that its provisions of paragraphs a) and b) shall also be applicable to cases covered by Article 77 of the Chicago Convention. The deliberations of the legal committee which led to the formulation of the Article 83bis considered this issue, but finally decided not to go into more details as it was believed that it would be difficult to ‘consider all different cases of transfer of functions and duties from joint and international operating organizations to the contracting States which were not members of such organizations’. For further details see: Burkhardt von Erlach, ‘Public law aspects of lease, charter and interchange of aircraft in international operations’, in: Master Thesis, (McGill University: Institute of Air and Space Law, 1990), (pp. 84-87).

<sup>100</sup> ‘Phosphates in Morocco (Italy v France), Judgement’, in: [1938] PCIJ Series A/B-No 74, (PCIJ,1938), (p. 28); ‘Corfu Channel, Judgement’, in: [1949] ICJ Reports 4, (ICJ,1949), (p. 23); ‘Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)’, in: [1986] ICJ Reports 14, (ICJ,1986), pp. 142-143).

Articles on State Responsibility' (DASR).<sup>101</sup> It essentially means that if a State breaches an obligation created by international law, this entails that State's responsibility and as a consequence an obligation of reparations.<sup>102</sup> The reparations can take the form of restitution, compensation or satisfaction.<sup>103</sup>

An internationally wrongful act occurs when there is an act or omission which is *attributable* to a State under international law, and which constitutes a breach of an international obligation of that State.<sup>104</sup> The notion of attribution in this sense is a different concept from empowering a body or organisation to act under administrative or international law, as was addressed under Section 6.2 above, and denotes 'an operation of attaching a given action or omission to a State.'<sup>105</sup>

Firstly the notion of an act or omission has to be considered. In the context of this study these would be primarily acts or omissions related to the conduct of safety oversight activities, such as certifications, inspections, or the taking of enforcement actions to address identified non-compliances. Legislative activities could also be considered as a potential act or omission triggering international State responsibility. This could be the case for example where a State has an obligation stemming from the Chicago Convention to adopt a rule, and does not fulfil this obligation in due time or fulfils it incorrectly.<sup>106</sup>

Concerning the attribution aspects, as was demonstrated under Section 6.2, States discharge their civil aviation safety responsibilities either through governmental departments, but also through private entities such as subcontractors or authorised organisations and persons. When it comes to the civil aviation authorities, the situation is straightforward, as regardless of a particular setup, all these agencies and ministries constitute parts of a State's government and therefore the acts of their civil servants, acting within their official capacity, will be the acts of the State itself, and thus attributable to the State. As stated by the ICJ:

According to a well-established rule of international law, the conduct of any organ of a State must be regarded as an act of that State. This rule ... is of customary character.<sup>107</sup>

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<sup>101</sup> UN, 'Draft articles on responsibility of States for internationally wrongful acts (DASR)', Yearbook of the International Law Commission, Volume II, Part 2 (2001). For further commentary see: James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries*, (2002), p. 77. The DASR do not have a status of an international treaty, and have been only noted by the UN General Assembly, and commended to the attention of States (UN General Assembly Resolution 65/19 of 6 December 2010). It is however considered that the DASR is largely a codification of customary international law; see: James Crawford, *State Responsibility: The General Part*, (2013), pp. 42-44.

<sup>102</sup> UN, 'DASR (2001)', *supra* note 101, Article 31. See also: 'Case concerning the Factory at Chorzów (Germany v Poland), Judgement', in: [1928] PCIJ Series A-No 17, (PCIJ,1928), (p. 29). In this case the PCIJ stated that: 'it is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation.'

<sup>103</sup> UN, 'DASR (2001)', *supra* note 101, Articles 34-37.

<sup>104</sup> *Ibid.* Article 2. See also: 'Phosphates in Morocco (1938)', *supra* note 100, (p. 28); 'United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran), Judgement', in: [1980] ICJ Reports 3, (ICJ,1980), pp. 29-31).

<sup>105</sup> Crawford, *supra* note 101, at p. 84.

<sup>106</sup> For example when a State fails to transpose a particular ICAO SARP into its national legal order and does not notify a difference under Article 38 of the Chicago Convention.

<sup>107</sup> 'Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion', in: [1999] ICJ Reports 62, (ICJ,1999), (p. 87).

When it comes to international State responsibility for actions undertaken by entities which are not part of the governmental structures, the case of ATM and provision of ANS offers a useful analogy, given that many States provide such services today through corporatized or privatised ANSPs.<sup>108</sup>

As pointed out by Van Antwerpen:

[N]otwithstanding the organizational format, the underlying State in whose airspace ... air navigation services are being provided is ultimately responsible for the conduct of the air navigation service provider that is involved with the service provision, whether or not through its agents or through an entity outside its governmental structures.<sup>109</sup>

The above stems from the fact that under Article 28 of the Chicago Convention, a State has a general responsibility towards other contracting parties to provide in its territory ANS and facilitates, and to ensure that these meet the minimum standards as established under the Chicago Convention.<sup>110</sup> According to ICAO, the territorial State remains responsible to fulfil these obligations, even when it has decided to delegate their practical implementation to another State.<sup>111</sup>

Does a similar principle apply in the case of delegation by State of civil aviation safety oversight, regulatory and enforcement activities outside of governmental structures?

From the perspective of the Chicago Convention the reply to the above question is affirmative, which means that the acts and omissions of corporate law entities which exercise elements of governmental authority can be attributed to States from an international law point of view. This is clear both from the general principles of international law of State responsibility, and the provisions of Chicago Convention and its Annexes.

In this respect, the main guidance is offered by Article 5 of the DASR which clarifies that:

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Also as pointed out by Crawford (*supra* note 101, at p. 83): 'Under many legal systems, the State organs consist of different legal persons (ministries or other legal entities), which are regarded as having distinct rights and obligations ... For the purposes of international law of State responsibility the position is different. The State is treated as a unity, consistent with its recognition as a single legal person under international law.'

<sup>108</sup> CANSO, 'Guide to Separation of Service Provision and Regulation', (2011), at p. 36.

<sup>109</sup> Van Antwerpen, *supra* note 52 in Ch.1, at p. 115.

<sup>110</sup> Some treaties explicitly provide for attribution to States of actions undertaken by operational entities. For example the 'Outer Space Treaty' in its Article VII attributes to a State responsibility for any damage caused to other States-parties, including their nationals, by objects launched from its territory or facilities, and it is irrelevant if the launch is performed by a governmental or non-governmental entity. See: 'Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and other Celestial Bodies', London, Moscow and Washington, 27 January 1967, 610 UNTS 205.

<sup>111</sup> See: ICAO, 'Assembly Resolution A38-12: Consolidated Statement of continuing ICAO policies and associated practices related specifically to air navigation', (38th ICAO Assembly, 2013), which States, at Appendix G that: '[A]ny delegation of responsibility by one State to another or any assignment of responsibility over the high seas shall be limited to technical and operational functions pertaining to the safety and regularity of the air traffic operating in the airspace concerned.' Similarly: ICAO, 'Annex 11 to the Chicago Convention: Air Traffic Services', (2001), at Note to Paragraph 2.1.

[T]he conduct of a person or entity which is not an organ of the State under Article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.

As explained by Crawford, the entities referred to in Article 5 of the DASR may include:

[P]ublic corporations, semi-public entities, public agencies of various kinds and even private entities, provided that in each case the entity is explicitly empowered by the law of the State to exercise functions of a public character normally exercised by State organs.<sup>112</sup>

However, it has to be underlined that, in accordance with Article 5 of the DASR, actions of corporate entities will be attributable to States only in those cases where they ‘exercise elements of the governmental authority.’ This point is important in view of the fact that such entities may provide similar services to governments as well as to other companies on the market. For example, some airlines may wish to contract certification services with a view to helping them to prepare for audits conducted by aviation authorities.<sup>113</sup> Such commercial services will not be considered as falling within the scope of Article 5 of DASR.

In addition, as was demonstrated under Section 6.3, most of the ICAO Annexes actually explicitly envisage the possibility for a State to designate authorities or organisations which are tasked to exercise, on its behalf, the various responsibilities and tasks codified in these Annexes. From the perspective of the Chicago Convention it does not matter if such organisations or bodies are set up under public or private law of the State concerned. It is up to the State to decide how best to organise the discharge of its safety related responsibilities. However States have to be aware that if such organisations are empowered by law to exercise elements of the governmental authority, their acts may be attributable to States under international law.

#### **6.4.2 BREACH OF AN INTERNATIONAL LEGAL OBLIGATION**

Up to 2014 there had been very limited number of cases considered, even preliminarily, from a perspective of international State responsibility under the Chicago Convention.<sup>114</sup> Most of the cases which emerged did not reach the stage of the ICJ, and were usually settled through negotiations between the States concerned.<sup>115</sup> However, it is also true that the ICAO Council had, on a number of occasions, determined that certain State actions constituted infractions of the Chicago Convention within the meaning of its Article 54(j)-(k). These cases concerned

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<sup>112</sup> Crawford, *supra* note 101, at p. 100.

<sup>113</sup> For example Austrocontrol, which is a corporatized entity authorized by law to conduct civil aviation certification and oversight tasks in Austria, has also established a subsidiary company - Austro Control GmbH International – which provides training, consultancy and project support services to civil aviation industry.

<sup>114</sup> Weber, *supra* note 48 in Ch.1, at pp. 40-44.

<sup>115</sup> *Ibid.*

aviation security, and more precisely the shoot-down or interception of civil aircraft.<sup>116</sup>

As far as the concept of the breach of an international obligation is concerned, the first point that has to be made is that such a breach does not have to result in *damage* in order to trigger the responsibility.<sup>117</sup> This is a different formulation from that in domestic law, where the responsibility and resulting civil liability typically occurs when there is damage resulting from an act, based on fault/negligence or abnormally dangerous activity, attributable to a person and with a clear causal link between the damage and the act.<sup>118</sup>

The breach of an international obligation which is attributable to a State is sufficient to trigger the responsibility under international law. In practice however, when it comes to aviation safety, cases involving questions of State responsibility are not likely to arise unless they involve material damages.

It is also irrelevant what the origin or source of the legal obligation is, because international law does not distinguish between responsibility *ex contractu* or *ex delicto*.<sup>119</sup>

There is also a clear distinction between State *responsibility* under international law and domestic *liability*, which is addressed under Section 6.6. In general, liability has a broader meaning and may also involve acts that are not unlawful under international law, but which cause damage or injury, and which on this basis create an obligation of compensation.<sup>120</sup>

As was demonstrated in Chapter 2, the system of the Chicago Convention establishes a number of safety related obligations for States, including, the obligation to implement SARPs or to notify the differences (Article 37 and 38), to issue or validate the certificates of airworthiness and pilot licences (Article 31 and 32), to licence the usage of on-board radio equipment (Article 30), to enforce rules related to the flight and manoeuvre of aircraft (Article 12), or to investigate accidents occurring in its territory (Article 26). States can potentially be found in breach of any of them.

In addition, as was demonstrated by Huang in his study of international obligations related to safety and security of civil aviation, it could be argued that failure by a State to establish an effective safety oversight system is a breach of an obligation which every State owes towards all other States, hence a breach of an obligation effective *erga omnes*.<sup>121</sup> This could occur especially if the deficiencies in a State's safety oversight system were confirmed by ICAO in an objective manner.<sup>122</sup> Such a breach could arguably lead to State responsibility, as interna-

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<sup>116</sup> ICAO, 'Infractions of the Convention on International Civil Aviation', C-WP/11186, (185th session of the ICAO Council, 1999).

<sup>117</sup> Crawford, *supra* note 101, at p. 84.

<sup>118</sup> European Group on Tort Law, *Principles of European Tort Law: text and commentary*, (2005).

<sup>119</sup> '[A]ny violation by a State of any obligation, of whatever origin, gives rise to State responsibility and consequently, to the duty of reparation'; See: 'Rainbow Warrior (New Zealand v France)', in: [1990] RIAA, Volume XX, (New Zealand-France Arbitral Tribunal, 1990), (p. 251).

<sup>120</sup> For further discussion see: Schermers and Blokker, *supra* note 73 in Ch.4, at p. 1006; Crawford, *supra* note 101, at p. 75.

<sup>121</sup> Huang, *supra* note 29 in Ch.1, at p. 231.

<sup>122</sup> This would be for example the case when ICAO, following the USOAP monitoring activities, issues a Significant Safety Concern (SSC) in respect to one of its Member States.



tional law does not limit State responsibility to breaches of obligations established by treaties only.<sup>123</sup>

The above leads to the conclusion that a breach of an obligation of effective civil aviation safety oversight, including resulting from acts or omissions conducted by non-governmental entities acting on behalf of a State, can result in an international responsibility of that State, and subsequently an obligation of reparations if the breach has resulted in an injury.<sup>124</sup> However, as underlined by Crawford in his commentary to DASR, 'there is no such thing as breach of an international obligation in the abstract',<sup>125</sup> which means that each case has to be analysed separately taking into account, in the first place, the obligation of the State concerned, the substance of the conduct required, the standard to be observed, the result to be achieved and relevant circumstances and facts of a particular case.<sup>126</sup>

The question that now needs to be addressed is whether the above principles also apply when States delegate their State safety functions to a RASO.

## **6.5 INTERNATIONAL RESPONSIBILITY OF RASOs AND THEIR MEMBER STATES**

### **6.5.1 DETERMINING INTERNATIONAL LEGAL PERSONALITY OF RASOs**

The international law regarding responsibility of international organisations is still not settled and many issues are open to interpretation or even disputes.<sup>127</sup> Leckow and Plith characterise the current situation in this respect in the following way:

While it is recognised that States should be held responsible for their actions, the rules governing responsibility of international organizations are less clear. As a general principle, there is little doubt that international organizations should bear responsibility for wrongful acts. But the international legal jurisprudence and practice governing the circumstances in which responsibility will be imposed on international organizations is not extensive or well-defined.<sup>128</sup>

In 2011 the UN ILC presented to the UN General Assembly 'Draft Articles on the Responsibility of International Organizations' (DARIO)<sup>129</sup> with associated commentary,<sup>130</sup> which is a result of ten years of work by the ILC on this subject.

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<sup>123</sup> 'Rainbow Warrior', *supra* note 119, (p.251).

<sup>124</sup> Injury includes any damage, whether material or not, caused by the internationally wrongful act of a State. See: UN, 'DASR (2001)', *supra* note 101, Article 31(2).

<sup>125</sup> Crawford, *supra* note 101, at p. 124.

<sup>126</sup> *Ibid.*

<sup>127</sup> Chittharanjan F. Amerasinghe, *Principles of the International Law of International Organisations*, (2005), p. 384.

<sup>128</sup> Ross Leckow and Erik Plith, 'Codification, Progressive Development or Innovation? - Some Reflections on the ILC Articles on the Responsibility of International Organizations', in: *Responsibility of international organizations: essays in memory of Sir Ian Brownlie*, ed. by Maurizio Ragazzi (2013), p. 225.

<sup>129</sup> UN, 'Draft articles on the responsibility of international organizations (DARIO)', *Yearbook of the International Law Commission*, Volume II, Part 2 (2011).

<sup>130</sup> UN, 'Commentary to draft articles on the responsibility of international organizations', *Yearbook of the International Law Commission*, Volume II, Part 2 (2011).

The ILC in its general commentary to DARIO recognised the difficulties in codifying this area of law by referring to limited availability of pertinent practice and limited use of procedures for third-party settlement of disputes to which international organisations are parties.<sup>131</sup> As a result, DARIO constitutes more of a progressive development of international law than its codification.<sup>132</sup>

Regardless of the above controversies, there are a number of principles, which are considered as of customary character in relation to responsibility of international organisations under international law.

First of all, the very principle that an international organisation can be held responsible for breaches of international law is of customary character,<sup>133</sup> and was confirmed in the rulings of the ICJ.<sup>134</sup>

It is also clear that in accordance with international law, only organisations vested with international legal personality have a legal existence separate from their Member States, and thus can have their international responsibility potentially engaged, or can demand responsibility of other international persons. This has been confirmed both by the ICJ,<sup>135</sup> and the ILC, which in Article 2(a) of DARIO provided the following definition of an international organisation:

[I]nternational organization means an organization established by a treaty or other instrument governed by international law and *possessing its own international legal personality*. International organizations may include as members, in addition to States, other entities (emphasis added).<sup>136</sup>

*A contrario* therefore, if an organisation does not possess international legal personality separate from its Member States, then it constitutes merely an extension of States and thus when an organisation acts, it is as if the States were acting themselves.<sup>137</sup> For the purpose of this study the latter would be the case with the pre-RASOs established in the form of national foundations / associations and / or on the basis of MoUs or working arrangements.

As pointed out by Schermers and Blokker, 'today it is generally recognised that international organizations have international legal personality, unless there is clear evidence to the contrary.'<sup>138</sup> They further point out, that the prevailing school of thought at present is that:

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<sup>131</sup> Ibid. at 'General Commentary', Paragraph 5.

<sup>132</sup> In 2011 the UN General Assembly took note of the articles on the responsibility of international organizations, presented by the International Law Commission and commended them to the attention of the governments and international organizations without prejudice to the question of their future adoption or other appropriate action (see: United Nations General Assembly Resolution 66/100 of 9 December 2011). For a more general discussion about the relevance of DARIO see: Maurizio Ragazzi, 'Responsibility of international organizations: essays in memory of Sir Ian Brownlie', (2013).

<sup>133</sup> UN, 'DARIO commentary (2011)', *supra* note 130, at p.13.

<sup>134</sup> 'Difference Relating to Immunity from Legal Process', *supra* note 107, (p.88-89).

<sup>135</sup> 'Reparation for Injuries', *supra* note 74 in Ch.4, (pp. 178-179, 184-185).

<sup>136</sup> UN, 'DARIO (2011)', *supra* note 129, Article 2(a).

<sup>137</sup> This has been confirmed by the ICJ in the case: 'Certain Phosphate Lands in Nauru', *supra* note 10 in Ch.3, (p.258). See also: Sarooshi, *supra* note 19 in Ch.2, at p. 34.

<sup>138</sup> Schermers and Blokker, *supra* note 73 in Ch.4, at p. 991.

[International] organizations are international legal persons not *ipso facto*, but because the status is given to them either explicitly, or if there is no constitutional attribution of this quality, *implicitly*. If organizations are empowered to conclude treaties, to exchange representatives, and to mobilize international forces ... how can such powers be exercised without the organization having the status of an international legal person?<sup>139</sup>

In view of the above, for the purpose of the present analysis, only RASOs proper will be taken into account, with a caveat that – as was demonstrated under Section 5.5 of Chapter 5 – only a few of the agreements constituting RASOs explicitly provide for their international legal personality.

The presumption of existence of international legal personality is particularly strong in case of RASOs which have been vested with the competence to issue regulatory documents on behalf of their Member States (Level 3 delegation). This presumption follows from the relationship of an international agency, which was presented under Section 4.3.2 of Chapter 4, and which is created between a RASO and its Member States in cases where the former is empowered to act under international law with legally binding effects. In addition many of the RASOs have also concluded headquarters agreements with their host States. This treaty making activity is also an indication of an international legal personality.

As Sections 6.5.2 and 6.5.4 will explain, distinction has to be made between the attribution of the international legal personality to an organisation in relations with the Member States of that organisation, and vis-à-vis third countries. In the latter case, the question of recognition of the organisation as an international legal person becomes relevant. Finally a distinction has to be made between international legal personality and domestic legal personality (the latter will be dealt with in Section 6.6.4.1).

Overall, at least nine RASOs from the core sample can be considered as having a certain degree of international legal personality, either because it has been explicitly envisaged in its founding treaty (AAMAC, PASO), because the organisation has been granted or has the legal competence to accept Level 3 delegations (EASA, IAC, ECCAA, BAGASOO, BAGAIA), or because it has concluded or has the competence to conclude headquarters agreements (BAGASOO, BAGAIA, AAMAC, CASSOS, IAC, ECCAA).

Table VIII below presents a summary of possible indicators for determining international and domestic legal personality for selected RASOs.

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<sup>139</sup> Ibid. p. 989.

**Table VIII: Indicators for determining international and domestic legal personality of selected RASOs**

	Established by an international agreement	International personality explicit in the founding document	Domestic personality explicit in the founding document	Concluded or may conclude a Headquarters Agreement	Audited independently by ICAO under USOAP	Concluded or may conclude delegation agreements or other international	Authorised agent of its member States under the Chicago Convention	Designated as a technical agent under BASAs	Third countries recognise certificates issued by the RASO
EASA			X		X		X	X	X
IAC	X		X	X		X	X	X	X
BAGASOO	X		X	X		X			
BAGAIA	X			X		X			
CASSOA	X		X						
AAMAC	X	X	X	X					
PASO	X	X	X						
ECCAA	X		X	X	X		X		X
CASSOS	X		X	X					

## 6.5.2 THE SUBSTANCE OF RASOs RESPONSIBILITY UNDER INTERNATIONAL LAW

### 6.5.2.1 PRELIMINARY REMARKS

When discussing the substance of RASOs' international responsibility a distinction has to be made, on the one hand, between such international responsibility of a RASO towards its Member States and, on the other hand, towards third-

countries. This distinction is important in view of the principle *pacta tertiis nec nocent nec prosunt*, which does not permit an imposition of an obligation on a State, or international organisation, without its consent.<sup>140</sup>

The relationship between a RASO and its Member States will in the first place be regulated by the constituent treaty and other relevant documents, such as the headquarters / host State agreement,<sup>141</sup> or bilateral delegation agreements. These documents, as well as general rules of international law can be a source of rights and obligations in the bilateral relations between a RASO and its Member States. If such obligations are breached, international responsibility could, in principle, be invoked by the organisation<sup>142</sup> or its Member States.<sup>143</sup> The main difficulty in such cases would of course be the fact that ‘there is no compulsory system for review of the acts of international organizations by external bodies’.<sup>144</sup> In the case of RASOs only some of their constituent documents explicitly provide for such mandatory dispute resolution mechanisms,<sup>145</sup> which from the perspective of DARIO could be referred to as special rules of international law, or *lex specialis*.<sup>146</sup>

The question of international responsibility of a RASO vis-à-vis the non-Member States is even more complicated in view of the above invoked principle *pacta tertiis nec nocent nec prosunt*, and the consequent lack of a third party effect of the RASO founding documents. This issue is probably most relevant from

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<sup>140</sup> ‘Vienna Convention on the Law of the Treaties’, *supra* note 63 in Ch.2, Articles 35-36.

<sup>141</sup> The conclusion of headquarters agreements is explicitly envisaged in: ‘BAGASOO Agreement’, *supra* note 128 in Ch.3, Article 17; ‘BAGAIA Agreement’, *supra* note 179 in Ch.3, Article 15; ‘AAMAC Treaty’, *supra* note 62 in Ch.3, Article 7; ‘Agreement establishing the Caribbean Aviation Safety and Security Oversight System’, (2008), Article XVI.

<sup>142</sup> In the ‘Reparations for Injuries’ case, the ICJ stated that ‘it cannot be doubted that the Organization has the capacity to bring an international claim against one of its Members which has caused injury to it by a breach of its international obligations towards it’; see: ‘Reparation for Injuries’, *supra* note 74 in Ch.4, (p. 180).

<sup>143</sup> The RASO Member States have various ways of exerting influence on the functioning of the organisation, notably through the control of its budget and work programme, so an international action would be used as a means of a last resort.

<sup>144</sup> Crawford, *supra* note 71 in Ch.4, at p.196.

<sup>145</sup> For example CASSOA, if it fails to resolve any dispute with a Member State through a dispute resolution mechanism can bring the case to the East African Court of Justice, whose decisions are final; see: CASSOA Protocol, *supra* note 150 in Ch.3, Article 18. Similarly the ECCAA can be party to the proceedings in front of arbitration tribunals in cases involving its disputes with Member States; see: ‘ECCAA Agreement’, *supra* note 226 in Ch.3, Article 24. Also EUROCONTROL can be a party in dispute resolution proceedings with its Member States, and which involve a possibility of arbitration at the Permanent Court of Arbitration in The Hague, as provided in: ‘Consolidated version of the EUROCONTROL international Convention relating to co-operation for the safety of air navigation of 13 December 1960, as variously amended’, Brussels, 27 June 1997, Final Act of the Diplomatic Conference. The position of EASA is specific, as eventual disputes related to the implementation of the EU legislation are resolved between EU institutions and EU Member States in front of the CJEU.

<sup>146</sup> See Article 64 of DARIO, *supra* note 129, which states that: ‘These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of an international organization, or a State in connection with the conduct of an international organization, are governed by special rules of international law. *Such special rules of international law may be contained in the rules of the organization applicable to the relations between an international organization and its members* (emphasis added).

the perspective of the Chicago Convention and the safety related obligations that it establishes for the vast majority of the States around the world.

At present, the safety related obligations established by the Chicago Convention and its Annexes, including in particular the obligation to transpose and apply the SARPs are applicable to the 191 Contracting Parties to the Convention. Currently no RASO can accede to the Chicago Convention, because this instrument is not open for the participation of international organisations.<sup>147</sup> Some practice of ICAO and its Member State is emerging which gives RSOOs a status similar to States, but today this practice is still not consistent and thus far away from constituting a rule of customary international law.<sup>148</sup>

### 6.5.2.2 ULTIMATE STATE RESPONSIBILITY UNDER THE CHICAGO CONVENTION

Based on the fact that only States can be parties to the Chicago Convention, ICAO has formulated the principle of *ultimate State responsibility*, which is expressed in the following formulation:

Responsibility/accountability: The State of being responsible for an undertaking, person, thing or action and for which an organization or individual or both are liable to be called to account. An ICAO Contracting State and its respective civil aviation authority are ultimately responsible for the implementation of ICAO SARPs within their State. A State may either perform these obligations or, through mutual agreement, have another organization perform and be accountable for these functions; however, the State retains the responsibility under its duties of sovereignty.<sup>149</sup>

The principle of ultimate State responsibility under the Chicago Convention was further elaborated by ICAO in the specific context of RASOs. The ICAO Safety Oversight Manual explains that ‘only the State has responsibility for safety oversight, and this responsibility may not be transferred to a regional body ...’,<sup>150</sup> and that this principle applies ‘regardless of the level of authority delegated to the RSOO.’<sup>151</sup>

The above approach is also followed by ICAO under the USOAP, where even when a State discharges certain of its safety oversight functions through a RASO, ICAO links the findings made during audits of such a RASO with the USOAP audit results of the State concerned.<sup>152</sup>

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<sup>147</sup> ‘Chicago Convention’, Articles 92-93.

<sup>148</sup> So far only one Assembly resolution has been adopted which States that, where applicable: ‘word “States” ... should be read to include RSOOs’; see: Assembly Resolution A37-5, *supra* note 71 in Ch.2.

<sup>149</sup> ICAO Doc. 9734 Part B, *supra* note 3 in Ch.1, at Page xi.

<sup>150</sup> Ibid. at Paragraph 2.1.8.

<sup>151</sup> Ibid. at Paragraph 4.1.35.

<sup>152</sup> For example, following the USOAP audit of EASA, ICAO linked the findings of this audit with the results of the USOAP audits of EU Member States and clarified that: ‘ICAO Contracting States that are members of EASA will always maintain their individual responsibility for such competencies and, hence, for all audit results that are derived from the audit carried out on EASA. Once an EASA Member State’s audit is completed, the latest EASA safety oversight audit report will be linked to the final safety oversight audit report of the State concerned.’ See: ICAO USOAP report on EASA (2008), *supra* note 92 in Ch.4, at Paragraph 1.1.9.

In the domain of ATM the principle of non-transferability of responsibility has even been confirmed by an ICAO Assembly Resolution A38-12 which states, that:

[A]ny delegation of responsibility by one State to another or any assignment of responsibility over the high seas shall be limited to technical and operational functions pertaining to the safety and regularity of the air traffic operating in the airspace concerned.<sup>153</sup>

The principle of ultimate State responsibility has also been raised in the initial process of establishing EASA in the form of an international organisation, and where the report of the Expert Group on Legal Issues stated that:

[T]he group took the view that the Chicago Convention does not prevent Member States from delegating such certification and/or licensing tasks to EASA, provided that it is clearly established that, for the purpose of the Chicago Convention, the ultimate responsibility remains with the Member States.<sup>154</sup>

The principle of non-transferability of responsibilities under the Chicago Convention applies not only in relations between States and RASOs but also in between the States themselves. This means that the Chicago Convention does not allow, through an act of delegation, a State to be relieved from ultimate legal responsibility associated with the obligation towards other States-parties to the Chicago Convention – so in other words, to transfer such responsibility.

*De lege lata* the only exception in the Chicago Convention from the principle of non-transferability of responsibilities is its Article 83bis, which allows a 'State of Registry' to be 'relieved of responsibility in respect of the functions and duties transferred' to a 'State of the Operator'.<sup>155</sup> The crucial issue is the third party effect of Article 83bis, which means that any transfer agreement signed between States party to Article 83bis will have to be recognised by other States bound by Article 83bis,<sup>156</sup> on condition that the transfer agreement had been duly notified to them.<sup>157</sup> The implications of Article 83bis from the perspective of RASOs were addressed under Section 6.3.1.2.

In view of the above, even in the case of RASOs which enjoy Level 3 delegations, the transfer of Chicago Convention related safety tasks and associated

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<sup>153</sup> Assembly Resolution A38-12, *supra* note 111. Similar principle is expressed in: Annex 11 to the Chicago Convention, at Note to Paragraph 2.1.

<sup>154</sup> Report on the Work of the Expert Group on Legal Issues (AER/98/17), *supra* note 20 in Ch.4, at p. 11.

<sup>155</sup> For more information on practical implementation of Article 83bis see: ICAO, 'Guidance on the Implementation of Article 83 bis of the Convention on International Civil Aviation', Circular 295, (2003).

<sup>156</sup> Article 83bis was introduced into the Chicago Convention through an amending protocol adopted by the ICAO Assembly on 6 October 1980, and in force since 20 July 1997; see: ICAO, 'Protocol Relating to an Amendment to the Convention on International Civil Aviation (Article 83bis)', ICAO Doc 9318, (1980).

<sup>157</sup> See: Chicago Convention, Article 83bis (b), which states that: 'The transfer shall not have effect in respect of other contracting States before either the agreement between the States in which it is embodied has been registered with the Council and made public pursuant to Article 83 or the existence and scope of the agreement have been directly communicated to the authorities of the other contracting State or States concerned by a State party to the agreement.'

responsibilities takes place only *inter se*, which may have relevance for civil liability of Member States of a RASO in their internal relations (an issue which is addressed under Section 6.4), but does not create effects vis-à-vis third countries from the perspective of the Chicago Convention. In such cases we should be speaking essentially about an *agency relationship*, whereby the regional body is acting on behalf of and in the name of its Member States.

The above understanding seems to be confirmed by the intention of States expressed in RASO founding documents. In those cases where safety functions have been delegated, even potentially, at Level 3, the founding documents speak about RASOs acting ‘on behalf of its Member States’ or ‘upon delegation’. This is the case even in the EU, where the tasks and responsibilities of the ‘State of Design’, ‘State of Registry’ and ‘State of Manufacture’ when related to design aspects, have been transferred to EASA on an exclusive basis, but where nevertheless the EASA’s Basic Regulation speaks about it as acting ‘on behalf of Member States’.<sup>158</sup> Similar language can be found in constituent documents of BAGASOO,<sup>159</sup> BAGAIA,<sup>160</sup> and ECCAA.<sup>161</sup>

In addition, when the governments of the EU Member States<sup>162</sup> notified ICAO about the establishment of EASA, the text of the diplomatic note, coordinated at the EU level, referred to EASA as an ‘authorised representative for the fulfilment of governmental obligations as State of design or manufacture, as specified in Part II of Annex 8 to the Chicago Convention.’<sup>163</sup> These notifications were recognised by ICAO, which subsequently conducted two USOAP audits of EASA.<sup>164</sup>

In view of the above, the most obvious conclusion to be drawn with regard to international responsibility of RASOs is an analogy with Article 28 of the Chi-

<sup>158</sup> See: Regulation (EU) No 216/2008, *supra* note 81 in Ch.2, Article 17(2)(e), which states that: ‘For the purposes of ensuring the proper functioning and development of civil aviation safety, the Agency shall: ... in its fields of competence, carry out, on behalf of Member States, functions and tasks ascribed to them by applicable international conventions, in particular the Chicago Convention.’ See also: *ibid.* Article 20(1), which states that: ‘With regard to the products, parts and appliances referred to in Article 4(1)(a) and (b), the Agency shall, where applicable and as specified in the Chicago Convention or its Annexes, carry out on behalf of Member States the functions and tasks of the State of design, manufacture or registry when related to design approval.’

<sup>159</sup> See: ‘BAGASOO Agreement’, *supra* note 128 in Ch.3, Article 5(e) which states that: ‘The functions of the BAGASOO shall be to: Perform certification and surveillance tasks on behalf of Member States CAAs, as required.’

<sup>160</sup> See: ‘BAGAIA Agreement’, *supra* note 179 in Ch.3, Article 5(k), which states that: ‘The functions of the BAGAIA shall be to: Conduct, either in whole or any part of, an investigation into an aircraft accident or serious incident upon delegation by a State of Occurrence in the BAG Sub-Region, by mutual arrangement and consent between the State of Occurrence and the BAGAIA.’

<sup>161</sup> See: ‘ECCAA Agreement’, *supra* note 226 in Ch.3, Article 5(k), which states that: ‘For the attainment of its purposes the Authority may regulate civil aviation in the Participating States on behalf of and in collaboration with Participating States.’

<sup>162</sup> In addition to EU Member States, the notification was made also by Norway, Iceland and Switzerland, which are associated with the EU aviation safety system on the basis of separate international agreements and for which EASA also acts as an authorised technical agent.

<sup>163</sup> See: Template for EU Member States démarche to ICAO on the transfer of regulatory tasks to EASA, *supra* note 77 in Ch.4, which states that: ‘The ... Government has therefore the pleasure to thereby notify to ICAO and its Contracting States that the European Aviation Safety Agency is now its authorised representative for the fulfilment of its obligation, as State of design or manufacture, as specified in Part II of Annex VIII to the Chicago Convention.’

<sup>164</sup> ICAO USOAP report on EASA (2008), *supra* note 92 in Ch.4, at Paragraph 1.1.8.



chicago Convention. This means that even when a State decides to discharge all or some of its safety related responsibilities through a regional safety body, it has to be aware that, from the Chicago Convention point of view, it has not relieved itself from potential international State responsibility, and the actions of a RASO can be attributed to it.

The non-transferability of legal responsibility in case of an agency relationship is in line with the theory of this legal concept under international law. Sarooshi comments on this issue as follows:

An important consequence of an agency relationship is that the principal is responsible for its agent's acts that are within the scope of the conferred powers. Accordingly where an organization acts as an agent for certain States then the States concerned are responsible for any unlawful acts committed by the organization in the exercise of conferred powers.<sup>165</sup>

Similarly Amerasinghe observes that:

[I]t is also clear that where such agency is proved to exist the liability of the members would not really be for the obligations of the organization but a direct liability for their own obligations which have been incurred by the organization acting as their agent ....<sup>166</sup>

The principle of ultimate State responsibility under the Chicago Convention probably contributes to an overall reluctance of States in establishing RASOs with far reaching regulatory and oversight competences (Level 3 RASOs). Indeed the question of national sovereignty and responsibility has been mentioned in this context by many of the RASO officers interviewed for the purpose of this study. This reluctance to establish an organisation for the actions of which they could be held responsible is something not specific to RASOs, but rather a manifestation of a more general attitude of States towards international organisations. Using the words of Nakatani:

The reasons why member States resist accepting responsibility for an act of an international organization are twofold. Firstly, within the general context of State responsibility, what States fear most is the loss of their dignity, and this seems to be the main reason why States are reluctant to admit responsibility or even the facts leading to the attribution of responsibility. Secondly, within the particular context of the responsibility of member States, States consider it irrational, or at least unconvincing, the proposition that they should incur responsibility for another entity, even if it has been constituted by their will. Overcoming these selfish concerns does not appear to be easy.<sup>167</sup>

On the other hand the fact that States remain ultimately responsible under the Chicago Convention also means that they have a stronger incentive to make sure that their RASO is appropriately equipped to discharge the functions and duties the consequences of which may at the end of the day be attributed to them.

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<sup>165</sup> Sarooshi, *supra* note 19 in Ch.2, pp. 50-51.

<sup>166</sup> IIL Yearbook, *supra* note 89 in Ch.4, at p.354.

<sup>167</sup> Kazuhiro Nakatani, 'Responsibility of Member States towards Third Parties for an Internationally Wrongful Act of the Organization', in: Responsibility of international organizations: essays in memory of Sir Ian Brownlie, ed. by Maurizio Ragazzi (2013), p. 301.

From an international law point of view, the non-transferability of safety responsibilities which States have under the Chicago Convention can also be defended using an argument that States should not be allowed to release themselves from international obligations by hiding behind another international legal personality.<sup>168</sup>

To conclude, while the point of departure in international law is that Member States should not be held responsible for wrongful acts committed by international organisations,<sup>169</sup> it is also true that international organisations are governed by the principle of speciality, which was invoked in Section 6.2.2, and which may provide for specific rules of attribution and wrongfulness. In this respect, when analysing RASOs it is of fundamental importance to carefully scrutinise the underlying relationship which exists between the organisation and its Member States. This was very aptly underlined by ILC in its commentary to DARIO: 'the diversity of international organizations may affect the application of certain articles, some of which may not apply to certain international organizations in the light of their powers and functions.'<sup>170</sup>

In fact, in the case of an agency relationship between a State and an international organisation or body, one should apply in the first place the rules concerning the international responsibility of States rather than of international organisations. In this respect, this study very much agrees with Brownlie, who summarised this problem as follows:

The literature tends to focus upon the existence or not of a distinct legal personality – an international organization – and then to assume that the terms of the constituent instrument are not only relevant but represent a legal regime which third States must accept. The appropriate analysis is to treat the organization (or the joint agency of States) simply as a part of the factual elements, which, upon analysis, may lead to the responsibility of the member States, or some of them, to a third State. On this view the applicable legal category is that of State responsibility, and not the law of international organizations.<sup>171</sup>

The above approach will be especially pertinent in the case of organisations such as ECCAA, which, although separate from its Member States from an international law point of view, has been so deeply integrated into the national legal orders of the OECS Member States, that it has, from that internal law perspective, become an organ of these States, as was explained in Section 3.6.2.2 of Chapter 3.

Similarly, a clear distinction has to be made between the Level 3 and other RASOs. In the latter case, it is the RASO Member States which continue taking decisions, such as issuing or revoking a certificate, from a legal point of view,

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<sup>168</sup> Dan Sarooshi, 'International Organizations and State Responsibility', in: Responsibility of international organizations: essays in memory of Sir Ian Brownlie, ed. by Maurizio Ragazzi (2013), p. 84; Ian Brownlie, 'The responsibility of States for the acts of international organizations', in: International Responsibility today: Essays in the Memory of Oscar Schachter, ed. by Maurizio Ragazzi (2005), p. 362.

<sup>169</sup> Jean d'Aspremont, 'Abuse of the Legal Personality of International Organizations and the Responsibility of Member States', IOLR, (2007), pp. 95-96; UN, 'DARIO commentary (2011)', *supra* note 130, at p. 96.

<sup>170</sup> UN, 'DARIO commentary (2011)', *supra* note 130, at 'General Commentary', p.3.

<sup>171</sup> Brownlie, *supra* note 168, at p. 360.

although they may be assisted in this process, to a greater or lesser extent, by their RASO.

Finally, the above discussion about ultimate State responsibility under the Chicago Convention should be separated from the question of eventual *parallel* responsibility of a RASO under international law, an issue which is dealt with in Section 6.5.4.

### **6.5.3 RELEVANCE OF RASOs OVERSIGHT BY ITS MEMBER STATES**

As the involvement of international organisations in global governance increases so do the calls for their increased accountability for actions. In this sense the term *accountability* is necessarily broader than responsibility and liability. Leckow and Plith characterise it in the following way:

[A]ccountability generally refers not only to the political process of ensuring that institutions live up to their promises vis-à-vis its member States and other interested stakeholders, but also to the responsibility to comply with applicable duties and obligations, and to accountability in other senses of the word, including moral accountability.<sup>172</sup>

In the context of this study the question of RASO oversight by its Member States is particularly relevant. ICAO addresses this issue briefly in its RSOO manual, where it is clarified that:

[A]lthough the State may delegate specific safety oversight tasks and functions to an RSOO ..., the State must still retain the minimum capability required to carry out its responsibilities under the Chicago Convention. States must always be able to properly and effectively monitor the safety oversight functions delegated to the RSOO.<sup>173</sup>

The oversight issue, in the context of delegation of ANS provision, is also raised by Van Antwerpen, who attaches important legal consequences to it:

In the event of an act or omission of ... privatised air navigation service provider it turns out that the State has failed to keep the appropriate regulatory oversight or has failed to verify the compliance of the air navigation service provider to rules and regulations imposed by the State, this could trigger the ultimate State responsibility. At the same time, if the State has met its obligations and has not failed to perform audits or regulatory oversight, the act or omission ... should not trigger State responsibility.<sup>174</sup>

Oversight of RASOs is very much linked with the principle of ultimate State responsibility, as States will generally want to exercise a certain degree of control over organisations upon which they confer civil aviation safety related competences. Especially when a RASO is exercising Chicago Convention related safety functions and duties on behalf of its member States, the latter may feel a particular need to exercise a certain degree of oversight, given States' ultimate

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<sup>172</sup> Leckow and Plith, *supra* note 128, at p.226.

<sup>173</sup> ICAO Doc. 9734 Part B, *supra* note 3 in Ch.1, at Paragraph 2.1.8.

<sup>174</sup> Van Antwerpen, *supra* note 52 in Ch.1, at p. 165.

responsibility under the Convention. As was pointed out by a former Chairman of the EASA Management Board:

In the event of an accident in a State's territory, a Minister in that State cannot, for political reasons, simply shrug off regulatory responsibility to EASA. At the very least the Minister would need to demonstrate to his/her public and Parliament that the State has done what it can to monitor the effectiveness of the Agency.<sup>175</sup>

This study agrees that States need to exercise oversight over a RASO they create. However, in this case one should not require the same method of oversight as in respect of a service provider, which should be subject to the same safety requirements regardless of its organisational or corporate structure, and where accordingly the level of oversight should also always be the same.

The level of RASO oversight required from its Member States should not lead to the need to control in detail every aspect of the regional body's actions or to the replication of expertise at national and regional levels, as this would effectively defeat the very purpose of establishing regional safety bodies.

The proper approach should be rather to look at a State and all entities working on its behalf as a system which, taken together, should guarantee the level of safety oversight required by the Chicago Convention and its safety related Annexes. Under this approach, oversight of a RASO could be organised by relying on mechanisms similar to those used by States to control the functioning of national agencies. This includes regular reporting by a RASO on its activities, the setting up of a supervisory or management board, and most importantly the regular and ad hoc auditing of RASO operations, accounts and administrative practices.<sup>176</sup> In this respect a distinction has to be made, between oversight, and direction or operational control.<sup>177</sup>

As to the consequences - from an international law point of view - of a lack of proper oversight over a RASO, this study argues that, in such cases, the eventual RASO Member States' responsibility is not a question related to the attribution of actions, which stems from the underlying legal relationship between a RASO and its Member States, but rather a matter of the required *standard of conduct*, which has to be assessed on a case by case basis in the light of all the relevant facts and circumstances. By standard of conduct is meant here the overall effectiveness of the safety oversight system of the RASO Member State. This overall effectiveness will also depend on the robustness of the oversight that the Member States exercise over the RASO. For example, it will be more difficult for a State to defend itself if an aviation accident resulted from the fact that it has not notified ICAO of a difference with applicable international safety requirements because 'its' RASO did not have a system for identifying such differences, than in a situation where an accident happened despite all the relevant requirements having being complied with and effectively implemented.

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<sup>175</sup> Former Chairman of the EASA Management Board, 'Interview No 12', (2014).

<sup>176</sup> For example in the EU, the EASA is subject to regular audits by the European Court of Auditors. See: Regulation (EU) No 216/2008, *supra* note 81 in Ch.2, Article 60.

<sup>177</sup> See in this respect also the commentary to DARIO which explains that from the perspective of the law of international responsibility oversight is in principle not to be identified with either direction or control (UN, 'DARIO commentary (2011)', *supra* note 130, at p.38).

As is the case with engaging international responsibility of a RASO, this study did not identify court cases related to engaging international responsibility of States for the actions of their RASOs. In practice engaging such responsibility could be complicated due to the fact that a RASO acts as an agent representing multiple principals. Which State to engage may not be so obvious, while engaging more than one may not always be practical.

At the same time, liability cases involving questions of aviation safety and oversight responsibilities are usually associated with accidents and resulting damages. Thus, while maintaining ultimate State responsibility is important from the perspective of the improvement of the overall international system of aviation safety, from the perspective of the victims of aviation accidents and their families, the more relevant are questions concerning civil liability of a RASO under domestic law and the duty to compensate damages. These issues are addressed in Section 6.6.

#### **6.5.4 PARALLEL RESPONSIBILITY OF RASOs VIS-À-VIS NON-MEMBER STATES**

Whilst the principle of ultimate State responsibility under the Chicago Convention answers the question concerning the consequences that the establishment of a RASO may have for its Member States, this principle does not fully explain the question of a possible parallel responsibility of a RASO vis-à-vis the non-Member States.

‘Although it may not frequently occur in practice, dual or even multiple attribution of conduct [in international law] cannot be excluded’,<sup>178</sup> and the jurisprudence confirms that.<sup>179</sup> In the specific aviation context, the ICAO Council Resolution on non-national aircraft registration which was reviewed under Section 6.3.1.1 also suggests that multiple attribution of conduct is possible not only in situations involving States but also an international organisation.

Although this study did not identify any case of a State trying to engage international responsibility of a RASO in respect to safety functions envisaged under the Chicago Convention, such possibility should therefore not be completely excluded. What conditions would need to be met, in order for such responsibility to be engaged?

First of all, as was pointed under Section 6.5, it is an established principle of international law that the responsibility of an organisation can be engaged only if that organisation is vested with a separate legal personality under international law.<sup>180</sup> Such international legal personality would be effective vis-à-vis non-Member States only if they have explicitly or implicitly recognised a RASO.<sup>181</sup> Such international recognition ‘is implied when a State (or an organization) is admitted as a member, when an agreement is entered into with a State (or an organization), or when the State is invited to a session or a conference.’<sup>182</sup>

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<sup>178</sup> Ibid. at p.16.

<sup>179</sup> For an overview of the international case law where multiple attribution took place see: Francesco Messineo, ‘Multiple Attribution of Conduct’, Research Paper 11 (2012), The Research Project on Shared Responsibility in International Law (SHARES) 2012), available at: [www.sharesproject.nl](http://www.sharesproject.nl).

<sup>180</sup> UN, ‘DARIO (2011)’, *supra* note 129, Article 2(a).

<sup>181</sup> Schermers and Blokker, *supra* note 73 in Ch.4, at p. 990.

<sup>182</sup> Ibid. at p. 1183.

With regard to the above, this study found that most of the RASOs are regularly invited by ICAO to international symposia and conferences, in addition some of them, such as IAC or EASA, have either concluded numerous working arrangements with third-countries, or have been designated as authorised agents of their Member States under BASAs concluded with third countries. Some of them, such as EASA or ECCAA, have also been subject to ICAO USOAP audits, which too is a sign of recognition in international relations.<sup>183</sup>

In addition, the present study found that third countries recognise the legal effects that the currently operational Level 3 RASOs, that is EASA, IAC and ECCAA, take on behalf of their Member States. In the case of IAC, third countries readily accept that this RASO acts on behalf of, for example, the Russian Federation in aviation accident investigations.<sup>184</sup> Airlines certified by the ECCAA are able to operate to third countries, meaning that the AOCs and Certificates of Airworthiness issued by this RASO are considered as valid under the Chicago Convention.<sup>185</sup>

The case of EASA is quite specific and one could argue that in fact the relationship of international agency that exists between this RASO and EU Member States is globally recognised. This is because EASA acts as a 'State of Design' for one of the leading aircraft manufacturers in the world, namely Airbus. Airbus aircraft can be found on registries of many countries around the world.<sup>186</sup> This means that such third country 'States of Registry', readily accept Type Certificates issued by EASA on behalf of EU Member States,<sup>187</sup> and exchange with EASA information which is necessary for ensuring the continuing airworthiness of the aircraft.<sup>188</sup>

The second element which would need to be established before engaging international legal responsibility of a RASO is a breach of an international legal obligation incumbent on a RASO. In the case of RASOs' international responsibility vis-à-vis the non-Member States, this means in practice that one would have to demonstrate that a RASO is effectively bound by the provisions of the Chicago

<sup>183</sup> ICAO USOAP report on EASA (2008), *supra* note 92 in Ch.4; ICAO USOAP report on OECS (2007), *supra* note 248 in Ch.3.

<sup>184</sup> See for example: Accident Investigation Board Norway, 'Report concerning aviation accident on the Cape Heer heliport, Svalbard, Norway, 30 March 2008 with MIL MI-8MT, RA-06152, operated by SPARK+ AIRLINE LTD.', Report, SL 2013/06, (2013); National Transportation Safety Committee of Indonesia, 'Aircraft Accident Investigation Report, Sukhoi Civil Aircraft Company, Sukhoi RRJ-95B; 97004, Mount Salak, West Java, Republic of Indonesia, 9 May 2012', KNKT.12.05.09.04, (2012); Ministry of Infrastructure Development Tanzania, 'Report on the accident to Ilyushin IL-76TD aircraft registration ER-IBR which occurred on 23 March 2005 in lake Victoria near Mwanza, Tanzania', Civil aircraft accident No. CAV/ACC/3/05.

<sup>185</sup> In 2006 the ECCAA has obtained Category 1 under the US FAA IASA programme. This gave to the ECCAA certified airlines the possibility to fly to the US. In 2014 the LIAT international airlines, an ECCAA certified operator incorporated in Antigua and Barbuda was operating scheduled flights to Puerto Rico (US).

<sup>186</sup> At the beginning of May 2014 Airbus aircraft were operated by 398 operators coming from all the regions of the world. For a detailed overview see: Airbus, 'Airbus for analysts' <<http://www.airbus.com/tools/airbusfor/analysts/>> [accessed 10 May 2014].

<sup>187</sup> For a list of working arrangements between EASA and non-EU countries concerning the validation of EASA Type Certificates see: EASA, 'Working Arrangements' <<http://easa.europa.eu/document-library/working-arrangements>> [accessed 6 August 2014].

<sup>188</sup> For obligations concerning interactions between 'State of Design' and 'State of Registry' see Annex 8 to the Chicago Convention.

Convention. Given the fact that RASOs cannot be parties to this Convention, the existence of such an obligation would have to be demonstrated through other means.

Sarooshi argues that even in the relationship of an international agency there is a 'general presumption that an organization retains a joint responsibility for any unlawful acts committed',<sup>189</sup> although this study was not able to identify other authorities which explicitly share this view.

Another way of making such a determination would be to argue that some provisions of the Chicago Convention, and more generally the obligation to provide effective safety oversight is an obligation *erga omnes*, as was already demonstrated by Huang.<sup>190</sup> This would mean that RASOs are bound by these obligations, because as was stated by the ICJ:

[I]nternational organizations are subjects of international law and, as such, are bound by any obligation incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties.<sup>191</sup>

The above argument is especially relevant in case of RASOs enjoying Level 3 delegations, which are expected to carry out their safety functions in compliance with Chicago Convention and its Annexes. The obligation to respect the Chicago Convention and its Annexes has been for example explicitly stated in the EASA Basic Regulation.<sup>192</sup> Similarly ICAO, when auditing RASOs, takes the Chicago Convention and its Annexes as reference standards, and expects the RASOs, as agents of States, to be compliant with relevant provisions of these instruments.<sup>193</sup>

Finally, some third countries, such as the US, Canada or Brazil, have recognised, on the basis of BASAs, that RASOs, such as EASA or IAC, can carry out Chicago Convention related safety functions on behalf of their Member States, meaning that they have recognised such RASOs as authorised agents of their Member States. Under these BASAs bilateral partners of RASO Member States expect these regional organisations to carry out the relevant safety functions in compliance with the SARPs, and thus to be bound by them.

The proposition made in this section, namely the recognition that some of the RASOs could be bound by the provisions of the Chicago Convention, can of course be controversial. However, this study would not be complete without considering this issue, even if on a preliminary basis. Level 3 RASOs in particular have both the legal capacity, being an international legal person, and operational competences such as safety certification, which can be discharged negligently. Outright rejection of the possibility of holding such RASOs responsible for their acts, which at the end of the day create binding effects under the Chicago Convention, could effectively amount to putting these organisations in a legal vacuum,

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<sup>189</sup> Sarooshi, *supra* note 19 in Ch.2, at p.51.

<sup>190</sup> Huang, *supra* note 29 in Ch.1, at p. 231.

<sup>191</sup> 'Interpretation of the Agreement of 25 March 1951 between WHO and Egypt, Advisory Opinion', in: [1980] ICJ Reports 73, (ICJ,1980), pp. 89-90).

<sup>192</sup> Regulation (EU) No 216/2008, *supra* note 81 in Ch.2, at Preamble clause No 7, Article 20(1), and Article 27.

<sup>193</sup> ICAO USOAP report on EASA (2008), *supra* note 92 in Ch.4; ICAO USOAP report on OECS (2007), *supra* note 248 in Ch.3.

especially if there is also no mechanism allowing individuals to engage RASOs' non-contractual liability.

The possibility of holding an organisation responsible or liable for its actions generally contributes to this organisation exercising more due diligence, or better duty of care in the performance of its functions. This would be relevant especially in cases where a State has delegated the exercise of all or most of its safety functions to a RASO and has to rely to a very large extent on such an organisation for demonstrating compliance with the Chicago Convention and its Annexes.

At the same time, it is not expected that the question of international responsibility of a RASO would readily arise in front of international courts or tribunals. In the history of the Chicago Convention, there has not been a single case heard by international judicial bodies and related to breach of international obligations directly involving State safety oversight responsibilities.<sup>194</sup> Also, 'as in the case of international claims against States, claims against international organizations can be brought as international claims only when the local remedies have been exhausted.'<sup>195</sup> This means bringing the claim first before the competent organ of the organisation or 'before arbitral tribunals, national courts or administrative bodies when the international organization has accepted their competence to examine claims.'<sup>196</sup>

In this respect, the question of civil liability of RASOs, which is the subject matter of the next section, is probably of greater practical relevance.

## **6.6 CIVIL LIABILITY OF RASOs FOR NEGLIGENT SAFETY OVERSIGHT UNDER DOMESTIC LAW**

### **6.6.1 INTRODUCTION**

Liability of regulators and supervisors for non-contractual damages is a topic of recurrent debate in law.<sup>197</sup> As pointed out by Gisen and Bell, this can in part be attributed to the fact that modern societies can increasingly be characterised as service-providing societies, with greater focus on the citizen as a consumer, and the emergence of supervision as a service offered by a State to protect the interests of the general public.<sup>198</sup>

The other reason highlighted in academic writings is the alleged emergence of the *compensation culture*, where victims may be seeking compensation

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<sup>194</sup> The shooting down of the Malaysian Airlines aircraft, flight MH17, in July 2014 could change that however, if the accident investigation (ongoing at the moment of writing this study) would reveal serious deficiencies in the safety management system of the ANSP which was responsible, on behalf of the Ukrainian State, for taking decisions related to the management of the airspace in which the shooting down took place.

<sup>195</sup> Schermers and Blokker, *supra* note 73 in Ch.4, at p. 1192.

<sup>196</sup> UN, 'DARIO commentary (2011)', *supra* note 130, at pp.72-74.

<sup>197</sup> For a good overview see: Mads Andenas, Duncan Fairgrieve, and John Bell, *Tort Liability of Public Authorities in Comparative Perspective*, (2002); Cherie Booth QC and Dan Squires, *The Negligence Liability of Public Authorities*, (2006).

<sup>198</sup> Ivo Gisen, 'Regulating regulators through liability: the case for applying normal tort rules to supervisors', *Utrecht Law Review*, 2 (2006), p. 8; John Bell, 'Governmental Liability: some comparative reflections', *InDret*, 1 (2006), p. 3.



not only from the primary *tortfeasor*, but also from other *deep pockets*, including the State.<sup>199</sup>

Regardless of the policy discussions, the fact is that courts recognise the possibility of holding regulators liable for damages stemming from their negligent actions. An overview of case law from EU Member States shows that such liability can be established in cases involving areas as diverse as: damages caused by police, fire-fighting brigades, unsafe road infrastructure, food safety authorities, motor vehicle inspections, and financial regulation.<sup>200</sup>

The above is also true in respect to aviation safety regulation – although, fortunately, the cases involving liability of aviation safety regulators and supervisors are not numerous. However, the available, aviation related, case law comes mainly from the common law jurisdictions, so it is not certain if the civil law countries would adopt a similar approach.

#### **6.6.2 NON-CONTRACTUAL LIABILITY OF CIVIL AVIATION SAFETY REGULATORS: REVIEW OF CASE LAW<sup>201</sup>**

The analysis of the available case law, which, as underlined above, comes mainly from the common law jurisdictions, allows the conclusion to be reached that generally two conditions need to be demonstrated by a plaintiff in order to establish civil liability involving an aviation safety regulator, that is a breach of a duty of care, and damages resulting from the breach.<sup>202</sup>

In the reviewed cases the courts recognised that aviation safety regulators owe a duty of care to the general public, including individual airline passengers:

- In *Perrett v. Collins*, the claimant was injured as a result of an airworthiness problem which was not detected by an inspector acting on behalf of the UK Civil Aviation Authority. The court found that the defendants owed a duty of care to the claimant:

An injured passenger's sole remedy may be against the person who has certified the aircraft to fly. The denial of a duty of care owed by such a person in relation to the safety of the aircraft towards those who may suffer personal injuries, whether as passengers in the aircraft or upon ground, would leave a gap in the law of tort (Lord Justice Hobhouse).<sup>203</sup>

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<sup>199</sup> Gisen, 'Regulating regulators', *supra* note 198, at p. 13.

<sup>200</sup> Cees C. van Dam, 'Aansprakelijkheid van Toezichthouders, Een analyse van de aansprakelijkheidsrisico's voor toezichthouders wegens inadequaat handhavingstoezicht en enige aanbevelingen voor toekomstig beleid', Text primarily in English, (British Institute of International and Comparative Law, 2006), <[www.wodc.nl/onderzoeksdatabase/aansprakelijkheid-van-toezichthouders-met-publieke-taken.aspx#publicatiegegevens](http://www.wodc.nl/onderzoeksdatabase/aansprakelijkheid-van-toezichthouders-met-publieke-taken.aspx#publicatiegegevens)> [accessed 7 August 2014].

<sup>201</sup> For further commentary on some of these cases see: John Korzeniewski, 'Liability of Aviation Regulators: Are the floodgates opening?', *ASL*, XXV (2000), pp. 31-34.

<sup>202</sup> More generally, in the EU case law it was established that when an action for damages against an act of EU institution is brought to the CJEU, the elements that have to be demonstrated are a wrongful or illegal act, damage, and causation. These elements can be considered as general principles of tort liability in EU Member States; see: 'Case C-4/69, Lütticke v. Commission', in: [1971] ECR I-325, (CJEU, 1969), (p. 337).

<sup>203</sup> 'Perrett v Collins', in: [1998] 2 Lloyd's LR 255, (p.259).

- Similarly in *Swanson v. Canada*, which involved negligent safety oversight and lack of enforcement action in respect of a small airline which suffered an accident involving passenger casualties, the Federal Court of Appeal of Canada stated that:

The Aeronautics Act [RSC 1985, c A-2 (Canada)] and [the] Regulations made thereunder if not explicitly imposing a duty of care of the general public, at least do so by implication in that this is the very reason for their existence. The flying public has no protection against avaricious airlines, irresponsible or inadequately trained pilots, and defective aircraft if not [for] the Department of Transport and must rely on it for enforcement of the law and regulations in the interest of public safety.<sup>204</sup>

And thereafter:

Transport Canada's failure to take any meaningful steps to correct the explosive situation which it knew existed at Wapiti amounted to a breach of the duty of care it owed the passengers.<sup>205</sup>

- Finally in another UK case, *Philcox v. The Civil Aviation Authority*, Lord Justice Millet argues as follows:

It is clear to my mind that the risk which the scheme of the legislation is designed to prevent is the risk that the owner or operator of an aircraft will fly the aircraft even when it is unfit to fly; and that the persons for whose protection the scheme has been established are the passengers, cargo owners and other members of the public likely to be harmed if an unfit aircraft is allowed to fly.<sup>206</sup>

As far as the breach of the duty of care is concerned, the *standard of conduct* required by the courts in the abovementioned cases was negligence:

- In *Perrett v. Collins*, the court found that the duty of care was exercised negligently which resulted in liability for damages:

Lord Justice Hobhouse stated:

[A]n inspector exercising reasonable care would not have certified that the aircraft was in an airworthy condition.

Similarly Lord Justice Bruxton observed that:

A person who has the misfortune to suffer these consequences (death or injury) should surely be able to look to the organisation that has certified the plane as fit to fly, and that exists in order to enable the plane to fly, if that certification was made negligently.

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<sup>204</sup> 'Swanson et al v The Queen in right of Canada', in: [1991] 80 DLR (4) 741, (Federal Court of Appeal of Canada, (p. 750). For a more general commentary on this case see: Ewa M. Swiecicki, 'Liability of the Canadian Government for the Negligent Enforcement of Aviation Safety Legislation', AASL, XVIII/I (1993), pp. 275-308.

<sup>205</sup> 'Swanson v Canada', *supra* note 204, at pp. 756-757.

<sup>206</sup> 25 May 1995 (unreported). Quote following 'Perrett v Collins', at *supra* note 203.

Finally Lord Justice Swinton Thomas concluded:

[A] member of the public would expect that a person who is appointed to carry out these functions of inspecting aircraft and issuing permits would exercise reasonable care in doing so.<sup>207</sup>

- Similarly, in *Swanson v. Canada*, the court found that an agency charged with the regulation of the safety of commercial airlines was liable for negligently permitting an airline to continue unsafe practices. The agency had issued warnings to the airline in question but failed to take any further enforcement proceedings to require compliance with safety standards. In the words of the court:

Transport Canada officials negligently performed the job they were hired to do; they did not achieve the reasonable standard of safety inspection, and enforcement which the law requires of professional persons similarly situated. It was not reasonable to accept empty promises to improve where no improvement was forthcoming. It is incomprehensible that a professional inspector of reasonable competence and skill would choose not to intervene in a situation which one of his own senior staff predicted was virtually certain to produce a fatal accident.<sup>208</sup>

A different approach seems to exist in the US, where the FAA may enjoy immunity from claims under the so called discretionary function exception of the Federal Tort Claims Act.<sup>209</sup> Two cases are of relevance here: *United States v. Varig Airlines*, and *United States v. United Scottish Insurance Company*, which were considered jointly by the US Supreme Court.<sup>210</sup> The circumstances of the cases were very similar, and involved aspects related to airworthiness certification of aircraft. In both cases, following appeals, the lower instance courts found that the US government, acting through the FAA, was liable for negligently certifying the design of an aircraft or its modification.

Both of the above cases were ultimately referred to the US Supreme Court which reversed the decisions on the basis of statutory exception which excludes from the scope of the Federal Tort Claims Act:

[A]ny claim based upon ... the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.<sup>211</sup>

The US Supreme Court came to the conclusion that:

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<sup>207</sup> 'Perrett v Collins', *supra* note 203.

<sup>208</sup> 'Swanson v Canada', *supra* note 204, at pp. 756-757.

<sup>209</sup> Federal Tort Claims Act, Title 28 of USC, Part IV, Paragraph 2680(A).

<sup>210</sup> US Supreme Court, *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines) et al.*, Certiorari to the United States Court of Appeals for the Ninth Circuit, No. 82-1349. Together with No. 82-1350, *United States v. United Scottish Insurance Co. et al.*, also on certiorari to the same court; 467 US 797 (1984), 19 June, 1984.

<sup>211</sup> Federal Tort Claims Act, *supra* note 209.

The FAA's implementation of a mechanism for compliance review is plainly discretionary activity of the 'nature and quality' protected by 2680(a). Judicial intervention, through private tort suits, in the FAA's decision to utilize a 'spot-checking' program as the best way to accommodate the goal of air transportation safety and the reality of finite agency resources would require the courts to 'second-guess' the political, social, and economic judgments of an agency exercising its regulatory function.<sup>212</sup>

No other circumstances of the case were analysed by the US Supreme Court.

### 6.6.3 REVIEW OF CASE LAW: CONCLUSIONS

All of the above cases were considered in a domestic, common law context. In addition, in all these cases, both the claimant and the defendant had the same nationality.

With the exception of the cases of US origin, where the US Supreme Court has excluded FAA responsibility for negligent certification of aircraft airworthiness on the basis of a statutory exemption, all of the other cases recognise the possibility of holding aviation regulators liable for damages.

In particular, the cases cited are unanimous in recognising that the aviation regulators owe a *duty of care* towards the travelling public, and set *negligence* as a threshold beyond which the regulator may be held liable.

### 6.6.4 APPLICATION OF TORT LIABILITY PRINCIPLES TO RASOs

There is at present no international instrument which would harmonise the domestic civil liability regimes of States in respect to damage caused through the conduct of civil aviation safety regulatory and oversight tasks. Such instruments exist for example as regards the carriage of passengers and cargo by air,<sup>213</sup> damage caused by aircraft to third parties,<sup>214</sup> or, going beyond aviation, the launching of objects into outer space.<sup>215</sup>

In view of the above, the possibility to engage civil liability of a regional aviation safety body would depend on the provisions of the RASO founding document and relevant national law, and in the first place on the recognition of separate legal personality of such a body under domestic law. Here the situation is slightly clearer than in the case of international legal personality, as this study found that the domestic legal personality is usually explicitly provided for in the RASO founding documents (see Table VIII in Section 6.5.1 above).

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<sup>212</sup> US Supreme Court, *supra* note 210, at Section IV.

<sup>213</sup> 'Convention for the Unification of Certain Rules for International Carriage by Air', Montreal, 28 May 1999.

<sup>214</sup> 'Convention on Compensation for Damage Caused by Aircraft to Third Parties', Montreal, 2 May 2009, (not yet in force).

<sup>215</sup> 'Outer Space Treaty', *supra* note 110.

#### 6.6.4.1 RECOGNITION OF RASO LEGAL PERSONALITY IN DOMESTIC PROCEEDINGS

In the case of RASOs, that is organisations established on the basis of international agreements or supranational law, in nine out of ten cases studied, the legal instruments concerned explicitly recognise the domestic legal personality of the organisations including their right to be a party to legal proceedings or to *sue and be sued*.<sup>216</sup> Of course such recognition is granted only for the purpose of domestic proceedings in the territories of the Member States of the organisation and may be conditional upon incorporation of the agreement into the national legal system.<sup>217</sup>

Amerasinghe argues that even when the constituent document does not provide for domestic legal personality, Member States of the organisation are under an obligation to grant it based on the principle of good faith.<sup>218</sup> Similarly Blokker and Schermers point out that national courts usually ‘see no reason to deny the legal personality of organizations in which their own State participates.’<sup>219</sup> This would mean that even when domestic legal personality of a RASO is not explicitly envisaged under its founding document, it should not prevent Member States from recognising such personality if needed.

As far as third countries are concerned, the recognition of a legal personality of a RASO is not certain but also not entirely excluded. Some States, such as Switzerland, may recognise legal personality of an organisation in its internal legal system on the basis of the fact that the organisation has international legal personality.<sup>220</sup> Others, such as the UK, may recognise the personality of an international organisation of which they are not members if executive organs of their government have had previous dealings with the organisation, that is, already recognised it, or if the organisation has personality in one or more of the foreign States that are its members.<sup>221</sup>

#### 6.6.4.2 JURISDICTIONAL IMMUNITY OF RASOs IN DOMESTIC PROCEEDINGS

The question of immunity from jurisdiction may also have to be considered. In nine out of ten cases studied, RASO constituent documents contain provisions on privileges and immunities although the scope of these rights varies considerably.

Some of the agreements explicitly provide for almost complete immunity of a RASO from legal proceedings. This is the case for ECCAA and its employees, which are immune from ‘legal process with respect to acts performed by them

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<sup>216</sup> For EASA see: Regulation (EU) No 216/2008, *supra* note 81 in Ch.2, Article 28(2); For IAC see: ‘IAC Statute’, *supra* note 107 in Ch.3, Article 6; For BAGASOO see: ‘BAGASOO Agreement’, *supra* note 128 in Ch.3, Article 2(3); For CASSOA see: CASSOA Protocol, *supra* note 150 in Ch.3, Article 3(3); For AAMAC see: ‘AAMAC Treaty’, *supra* note 62 in Ch.3, Article 7(2); For PASO see: ‘PICASST’, *supra* note 81 in Ch.3, Article 4.3; For ECCAA see: ‘ECCAA Agreement’, *supra* note 226 in Ch.3, Article 5; For CASSOS see: CASSOS Agreement, *supra* note 141, Article V; For EUROCONTROL see Articles 34-35 of: ‘EUROCONTROL consolidated Convention (1997)’, *supra* note 145.

<sup>217</sup> Amerasinghe, *supra* note 127, at p. 70.

<sup>218</sup> *Ibid.* at p. 76.

<sup>219</sup> Schermers and Blokker, *supra* note 73 in Ch.4, at p. 1023.

<sup>220</sup> Amerasinghe, *supra* note 127, at p. 71.

<sup>221</sup> *Ibid.* at p. 75.

in their official capacity except when such immunity is waived by the [EC-CAA].<sup>222</sup> Other agreements may simply require RASO Member States to accord to the organisation and its personnel privileges and immunities as may be necessary for the fulfilment of their objectives and the exercise of their functions, which is the case for BAGASOO,<sup>223</sup> BAGAIA,<sup>224</sup> and CASSOS.<sup>225</sup>

In the case of a RASO established under the aegis of a REIO, its privileges and immunities may derive from the REIO founding treaty, as in the case for EASA,<sup>226</sup> and CASSOA.<sup>227</sup>

Finally special protocols may be attached to a RASO founding agreement specifying in detail the immunities and privileges granted, which is the case for AAMAC.<sup>228</sup>

A number of RASO founding documents also envisage conclusion of headquarters or host-State agreements where further privileges and immunities may be granted, as is the case for instance with BAGASOO, BAGAIA, AAMAC, and CASSOS.

Some RASOs, such as IAC or ECCAA, have concluded headquarters agreements, which contain privileges and immunities, although the conclusion of such agreements is not explicitly envisaged in the founding documents of these RASOs.<sup>229</sup>

A review of the recent practice of domestic courts' cases concerning immunity of international organisations, demonstrates that generally courts are not willing to uphold immunity of organisations in absence of a clear treaty provision in this respect.<sup>230</sup>

In addition, at least in Europe, before upholding immunity of an international organisation the courts will normally check if the organisation has provided for an alternative mechanism which ensures an aggravated individual's right to an effective remedy. Where this is not the case, some courts may decide to deny an international organisation the right to immunity if granting it would put its State in breach of the constitution or international law obligations related to human rights.<sup>231</sup>

In view of the above it is important to verify to what extent the RASOs provide individuals with effective means for reviewing and satisfying their eventual claims. The results of this review are presented in the following section.

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<sup>222</sup> 'ECCAA Agreement', *supra* note 226 in Ch.3, Article 25(7).

<sup>223</sup> 'BAGASOO Agreement', *supra* note 128 in Ch.3, Article 7(2).

<sup>224</sup> 'BAGAIA Agreement', *supra* note 179 in Ch.3, Article 15(2).

<sup>225</sup> CASSOS Agreement, *supra* note 141, Article XVI(1).

<sup>226</sup> Regulation (EU) No 216/2008, *supra* note 81 in Ch.2, Article 30.

<sup>227</sup> CASSOA Protocol, *supra* note 150 in Ch.3, Article 17.

<sup>228</sup> 'AAMAC Treaty', *supra* note 62 in Ch.3, at 'Protocole annexé au Traité instituant les AAMAC'.

<sup>229</sup> 'Соглашение между Правительством Российской Федерации и Межгосударственным Авиационным Комитетом об условиях его пребывания на территории Российской Федерации (Agreement between the Government of the Russian Federation and the Interstate Aviation Committee on the conditions of its stay in the Russian Federation)', Moscow, 20 October 1995, on file with the author; 'Agreement between the Government of Antigua and Barbuda and the Eastern Caribbean Civil Aviation Authority regarding the Headquarters of the Authority', St. John's, 15 April 2008, on file with the author.

<sup>230</sup> Cedric Ryngaert, 'The Immunity of International Organizations Before Domestic Courts: Recent Trends', IOLR, 7 (2010), p. 124.

<sup>231</sup> *Ibid.* pp. 132-144.

#### 6.6.4.3 TORT LIABILITY PROVISIONS IN RASO FOUNDING DOCUMENTS

As far as tort liability is concerned, only a limited number of RASO founding documents contain any provisions dealing explicitly with this issue. This limited treatment of tort liability in founding documents is a general trend for international organisations.<sup>232</sup> Of the ten RASO agreements studied only three contain liability provisions.<sup>233</sup> This is the case for EASA, EUROCONTROL and AAMAC. These three organisations have very similar principles applicable to them.<sup>234</sup>

- (1) The contractual liability is governed by the law applicable to the contract in question;
- (2) In the case of non-contractual liability, the organization shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its services or by its servants in the performance of their duties (EASA, AAMAC); or, make reparation for damage caused by the negligence of its organs, or of its servants in the scope of their employment, in so far as that damage can be attributed to them (EUROCONTROL).

The case of PASO is also worth mentioning. This organisation only assists its Member States in the performance of safety oversight duties. PASO inspectors, when performing their tasks are treated as inspectors of the Member States concerned (Level 1 delegation). Accordingly, while the PASO founding agreement does not contain liability provisions, it obliges the Member States to 'indemnify inspectors from any pertinent legal suit arising out of the appropriate performance of their duties.'<sup>235</sup>

What is therefore clear from the above analysis is that RASO founding documents do not follow a particular pattern as far as civil liability provisions are concerned. European States seem to accord greater importance to clarity here, but this can be partly attributed to the fact that both EASA and EUROCONTROL have operational and executive functions - that is provision of ANS in the case of EUROCONTROL, and certification of aircraft in case of EASA - the negligent exercise of which may result in damages to the general public. The AAMAC treaty is an exception as far as other parts of the world are concerned, but it was largely inspired by the EASA Basic Regulation.<sup>236</sup>

This study proposes that, from a policy point of view, the treatment of RASOs regarding civil liability should chiefly depend on the type of delegations and competences they have been granted by States. This means that:

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<sup>232</sup> Klabbers, *supra* note 73 in Ch.4, at p. 272.

<sup>233</sup> In addition the Minsk Agreement, which establishes the IAC, contains provisions on the liability of the States – Contracting Parties to this Agreement ('Minsk Agreement', *supra* note 105 in Ch.3, Article 16).

<sup>234</sup> For EUROCONTROL see: 'EUROCONTROL consolidated Convention (1997)', *supra* note 145, Article 28; For EASA see: Regulation (EU) No 216/2008, *supra* note 81 in Ch.2, Article 31; For AAMAC see: 'AAMAC Treaty', *supra* note 62 in Ch.3, Article 8.

<sup>235</sup> 'PICASST', *supra* note 81 in Ch.3, Article 8(3).

<sup>236</sup> A former EASA rulemaking director was advising the AAMAC States on the drafting of the AAMAC Treaty.

- In case of 'Level 1' delegations - authorisation of individual inspectors only - the approach taken by PASO seems to be reasonable. Given that in such cases the regional inspectors act under the control and in the name of the national authority and execute national law, there would be little grounds for holding a RASO liable for their actions. In such cases, indemnification by the Member States of regional inspectors should be sufficient should they be found liable by national courts. 'Level 1' RASOs should therefore require that an indemnification clause is included in the service contracts and ensure that insurance policies of the national authorities for which they work, if used, also cover their inspectors;
- The situation is different with Level 2 delegations - where the performance of technical work is delegated to a RASO - and especially Level 3 delegations - where a regional authority also takes legally binding decisions. In Level 2, but especially in Level 3 delegations, the treatment afforded to RASOs should not be significantly different to the one applicable to national aviation authorities. This is because in both cases the RASO will be conducting – within the scope of delegation – actual tasks of safety oversight, including certifications, inspections etc.

In the EU, during the discussions on the establishment of EASA, there had also been no doubt about the necessity of a liability regime 'to ensure that EASA, including its staff, would be liable for its own wrongdoings.'<sup>237</sup> The legal experts who studied the various options for the setting up of EASA observed that the need for such a liability regime would be justified on the grounds that EASA would have rulemaking and certification competences.<sup>238</sup>

The possibility of a liability action encourages regulators and supervisors to exercise their operational tasks diligently and with care, meaning that the risk of damage to be caused by the supervised or regulated entities is also reduced. In addition, if a public body has been given regulatory tasks, it should perform them properly and if it fails to do so and this results in damages, there should be a possibility to hold it liable, just as any other person would be held accountable for an improper performance.

The availability of appropriate mechanisms allowing individuals to claim damages from a RASO in case of non-contractual liability becomes particularly important in the case of RASOs which enjoy Level 3 delegations. Given that, to a large extent, such RASOs will be acting as agents of States under the Chicago Convention, a liability mechanism may in practice be the only way to recover damages from a RASO that it may have caused as a result of potentially negligent performance of its regulatory functions.

Where the possibility of holding a RASO liable for negligent oversight is envisaged, or at least not excluded, the regional body can arrange for an insurance policy or other scheme covering such potential liability exposure.<sup>239</sup>

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<sup>237</sup> Report on the Work of the Expert Group on Legal Issues (AER/98/17), *supra* note 20 in Ch.4, at p. 11.

<sup>238</sup> *Ibid.*

<sup>239</sup> In the EU the liability exposure of EASA for negligent safety oversight or certification work is entirely covered by the EU budget; see: EASA, 'Opinion of the EASA Management Board on the



## 6.7 ASSESSING THE NEED FOR AN AMENDMENT OF THE CHICAGO CONVENTION

The emergence of RASOs, especially those with Level 3 competences, could also trigger questions as to the eventual need to amend the Chicago Convention in order to clearly enable these organisations to exercise safety related competences in their own name, and thus to take full responsibility, from the international law point of view, for the work they are doing.

While this study does not believe that there would be, at present, sufficient interest amongst the ICAO Member States in opening a discussion on this subject, should such a debate be launched in the future, two main possibilities could be further explored.

The first option could be a limited amendment of the Chicago Convention, altering the scope of its current Article 83bis in a way to allow transfer of safety functions not only to other States but also to international organisations.

Another option would be through the inclusion of the so called *REIO clause*, which provides for the possibility of adherence to an international treaty of a REIO, such as the African RECs or the EU.<sup>240</sup>

The consequence of adding a REIO clause to the Chicago Convention would be the recognition by all ICAO Member States of the possibility of transferring certain competences from States to a REIO. This would, *de lege*, reverse the direction of attribution of conduct from the perspective of the Chicago Convention. Such a situation exists, for example, in the context of World Trade Organisation (WTO), in which the EU participates as a REIO, and where the actions of EU Member States implementing EU law and constituting a breach of WTO obligations are attributed to the EU in the WTO dispute settlement process.<sup>241</sup> At the same time, adding a REIO clause to the Chicago Convention would not cover the RASOs which are established outside of a REIO framework, so this solution also has its shortcomings.

This study recognises of course that the actual need for an amendment of the Chicago Convention, putting aside the political willingness of the States to actually do that, could be a point of moot. On the one hand, the principle of ultimate responsibility for safety oversight may discourage States from establishing 'Level 3' RASOs which 'provide the best dividend in terms of efficiency and the effective use of resources'.<sup>242</sup> On the other hand, States could take less interest in aviation safety, if they were to be allowed to release themselves from ultimate responsibility and *hide* behind a regional body – which is why ICAO puts so much emphasis on individual State responsibility in its manual on RSOOs.<sup>243</sup>

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2010 Annual Accounts, Annex 1, Non-contractual liabilities', (EASA Management Board Decision 07-2011, 2011).

<sup>240</sup> For example by 2011, EU had acceded to over 70 international treaties by virtue of a REIO clause. See: CEPS, 'Upgrading the EU's role as Global Actor: Institutions, Law and the Restructuring of European Diplomacy', (2011), p. 5.

<sup>241</sup> Jose Manuel Cortés Martin, 'European Exceptionalism in International Law? The European Union and the System of International Responsibility', in: *Responsibility of international organizations: essays in memory of Sir Ian Brownlie*, ed. by Maurizio Ragazzi (2013), pp. 194-195.

<sup>242</sup> ICAO Doc. 9734 Part B, *supra* note 3 in Ch.1, at Paragraph 3.1.1.

<sup>243</sup> *Ibid.* at Paragraph 4.1.35.

In view of the above - should an amendment to the Chicago Convention be seriously considered - a reasonable compromise to reflect the most far reaching delegations to RASOs would probably be not to release States from responsibility, but rather to clearly establish in the Chicago Convention a principle of *joint and several responsibility* of a RASO and its Member States. There are precedents for using such solutions in international treaties. This is the case for example under the 'Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including Moon and Other Celestial Bodies',<sup>244</sup> Another solution could be to establish a subsidiary responsibility of the RASO Member States, which is a solution used under Article XI of the 'Operating Agreement on the International Maritime Satellite Organization (INMARSAT)',<sup>245</sup>

## 6.8 GENERAL CONCLUSIONS

The success of the GASON proposed in Chapter 2, measured by more effective and uniform implementation of ICAO SARPs and efficiencies in terms of the use of resources by ICAO and its Member States, will to a large degree depend on whether the RASOs which form GASON's building blocks are appropriately empowered to exercise civil aviation safety functions and duties – either on behalf of their Member States or in RASOs own name. In this respect the clarity of concepts, limitations, conditions and consequences of attributing and delegating safety functions to RASOs is of fundamental importance for the feasibility of the GASON.

This chapter has therefore, first of all, clarified and systematised the general principles concerning the attribution and delegation of civil aviation safety functions, both in domestic and international law context. Secondly, it has verified to what extent the Chicago Convention and its safety related Annexes establish limitations or conditions concerning the attribution and delegation of such functions. Finally this chapter has analysed the consequences that the establishment of RASOs can have for States and the regional body itself from the perspective of their international responsibility and liability under domestic law.

In this respect the following conclusions have been reached:

While a State has numerous safety related responsibilities under the Chicago Convention and its Annexes, it does not necessarily have to discharge all these responsibilities through governmental departments. This chapter has identified numerous examples of Chicago Convention related responsibilities being exercised through non-governmental entities, including sub-contractors, not-for-profit associations, approved organisations, individual designees, and even, as in the case of Austria, aviation authorities established in a form of a limited liability company.

<sup>244</sup> See in particular the last sentence of Article VI of that treaty (*supra* note 110), which provides that: 'When activities are carried out in outer space, including the moon and other celestial bodies, by an international organization, responsibility for compliance with this Treaty shall be borne both by the international organization and by the States Parties to the Treaty participating in such organization.'

<sup>245</sup> 'Operating Agreement on the International Maritime Satellite Organization (INMARSAT)', London, 3 September 1976, 15 ILM 233.

In accordance with the *principle of legality*, the competence of a non-governmental entity to exercise civil aviation regulatory or oversight tasks has to be clearly identified, or in other words *attributed* to such entity by law. In addition, given that delegation cannot be presumed, a national civil aviation authority can delegate to other entities the exercise of tasks which have been attributed to it only on the basis of a clear statutory authorisation. Finally, a review of the Chicago Convention and its safety related Annexes has demonstrated that:

- (1) Although there is no consistency in the way the different formulations regarding aviation authorities are used in the Annexes, the vast majority of the ICAO SARPs use broad formulations which refer to a *State* and/or to an *authority* in a generic sense without specifying that it has to be a national authority;
- (2) In the rare cases where an ICAO Annex uses the term *national*, the relevant State and ICAO practice demonstrates that this term is actually interpreted as covering also RASO type authorities;
- (3) Many of the ICAO Annexes explicitly envisage that a State has an obligation to designate an authority, which is to discharge on its behalf relevant safety related responsibilities, or provide services necessary for international air navigation.

In 2014 there were only two ICAO Annexes, that is No 13 and No 19, which explicitly refer to RASOs, although only Annex 19 actually contains Standards and Recommended Practices in this respect. Analysis of the relevant provisions of these two Annexes revealed that ICAO is still struggling somewhat with accepting that a RASO could completely replace a national aviation authority.

Based on the above, it was concluded that ICAO should ensure that SARPs more clearly reflect that it is perfectly acceptable for a State to discharge its safety related obligations under Annex 13 or any other safety related Annex to the Chicago Convention by relying in part or even entirely on a RASO type body, as long as the State can demonstrate that the relevant SARPs are effectively implemented.

Similar to the domestic law context, from the perspective of international law, the competence of an international organisation to act is governed by the principle of *attribution*, or *speciality*. There is however today ‘considerable lack of clarity and consistent usage in the conceptual labels used to describe different types of conferrals by States of powers on international organizations.’<sup>246</sup>

Nevertheless, having reviewed and analysed the provisions of RASO founding documents, relevant ICAO documentation, State and international courts practice, as well as academic writings, this chapter came to the following conclusions:

- (1) From the international law point of view, nothing today prevents a State from delegating the exercise of its State safety functions, as envisaged under the Chicago Convention and its Annexes, to a RASO. However, given the fact that *de lege lata*, only States can be parties to the Chicago

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<sup>246</sup> Sarooshi, *supra* note 19 in Ch.2, pp. 28-31.

Convention, such delegation does not relieve a State from *ultimate responsibility* of compliance. Even when States establish Level 3 RASOs, as was proposed under Chapter 5, the transfer of responsibility in such cases takes place only *inter se*, not vis-à-vis other ICAO Member States.

(2) Furthermore, three general types of delegations of powers to RASOs were distinguished: agency relationships, delegations proper, and transfers. Although this typology corresponds to the general theory of conferrals of powers on international organisations as proposed by Sarooshi, it was also adapted in order to take into account the specificities of the international aviation law context:

- (a) An *agency relationship* occurs, when States use Level 3 delegations in respect to functions for which they are responsible under the Chicago Convention. In such cases a RASO will be exercising such functions on behalf of the State concerned, meaning that it can change its rights and obligations under international law;
- (b) *Delegation proper* occurs when States give to a RASO functions which are not created by the Chicago Convention. In such case we can in fact speak about an attribution of a competence which a RASO will be carrying out in its own name. An example of such a delegation would be the establishment of a regional inspection scheme like the EASA standardisation programme which was presented in Chapter 4;
- (c) *Transfer of responsibilities* results in releasing a State from an obligation of compliance. Today transfers are envisaged only under Article 83bis of the Chicago Convention. Given the fact that RASOs cannot be parties to the Convention, Article 83bis transfers are in principle possible only between States. This study has identified a potential, but very limited, possibility of a RASO concluding Article 83bis agreements in the case when it would be designated as common mark registering authority under Article 77 of the Chicago Convention dealing with aircraft of international operating agencies.

When it comes to potential responsibility of RASOs under international law, the basic premise stemming from case law of the ICJ and the provisions of DARIO is that such responsibility can be engaged only in respect to those RASOs which have a recognised separate international legal personality. This chapter concluded that, as few RASO founding agreements explicitly provide for it, the existence of such a separate legal personality has to be assessed on a case by case basis.

In the case of RASOs analysed for the purpose of this study, it was found that the majority of them can be considered as having legal personality and thus having their international legal personality potentially engaged. The substance of such responsibility in the first place depends on the underlying relationship which exists between a RASO and its Member States in accordance with the principle of specialty. Given the fact that RASOs cannot be parties to the Chicago Convention, the main source of their international law obligations are their founding agree-

ments. The obligations stemming from such founding agreements are directed towards RASO Member States.

This chapter demonstrated that, from the perspective of international responsibility for the exercise of functions created by the Chicago Convention, the actions of RASOs would normally be attributed to its Member States. This is because, in such cases, the RASO acts as an agent of States.

This chapter also considered whether the international legal responsibility of a RASO could be engaged by a non-Member State in respect to the provisions of the Chicago Convention. This question is especially relevant in respect to Level 3 RASOs which are expected to carry out their delegated safety functions in compliance with the Convention and its safety related Annexes. While realising that arguing in favour of such responsibility is a controversial issue in view of the fact that RASOs cannot be a party to the Chicago Convention, this study nevertheless came to the conclusion that such possibility should not be excluded *a priori*, especially in the case of RASOs which have operational responsibilities, such as aircraft certification, the negligent exercise of which could contribute to accidents.

This chapter argued that, from a legal point of view, RASO responsibility vis-à-vis third countries could be justified by the fact that some of the safety oversight obligations can be considered as *erga omnes*, as was demonstrated by other studies. In addition, such responsibility could be considered at least in relation to those countries which explicitly recognised a RASO and their safety competences by concluding BASAs with RASO Member States.

Irrespective of the above, this study did not identify any cases heard by international courts or tribunals and related to breach by either a State or a RASO of international safety oversight or regulatory obligations. In practical terms it is therefore more likely that, rather than international responsibility of RASOs being engaged by States, potential victims of aviation accidents would rather try to engage RASOs civil liability for damages. In this respect this study concluded as follows:

- (1) There is at present no international instrument which harmonises the domestic civil liability regimes of States in respect to damage caused by negligent conduct of civil aviation safety regulatory and oversight tasks. Accordingly such civil liability would depend primarily on provisions of the RASO founding documents and applicable domestic law;
- (2) A limited number, that is three, founding documents of the RASOs studied explicitly provide for the possibility of holding them liable for non-contractual damages. In addition this study has identified case law - albeit entirely from domestic, common law jurisdictions - where courts confirmed that national aviation regulators owe a duty of care towards the travelling public and set negligence as a threshold beyond which the regulator may be held liable. Similar principles could be applied to RASOs;
- (3) The possibility to engage civil liability of a RASO would in the first place depend on the recognition of its separate legal personality under domestic law. This should normally not be a problem as far as the jurisdictions of the RASO Member States are concerned, but could be more difficult in case of non-Member States. The question of jurisdictional immunity in domestic proceedings would also have to be considered. In this respect the

study concluded that most of the RASO founding documents studied contain provisions on privileges and immunities, although the scope of the rights granted vary considerably;

- (4) It is recommended that the treatment of RASOs, from a civil liability point of view, should chiefly depend on the type of delegations and competences they have been granted by their Member States. The more operational competences have been given to a RASO, the exercise of which can result in damages to third parties, the more stringent the liability regime should be. In this respect, it was advocated that States should promote in the RASO founding agreements clear provisions on their liability, especially in the case of organisations enjoying 'Level 3' delegations.

Overall, this chapter found no evidence that any particular provision or principle of international law would be a serious obstacle for the establishment or functioning of RASOs. It was concluded that States are even able to establish organisations vested with power to issue certificates on their behalf.

From the perspective of the Chicago Convention, and as was pointed out above, the main limitation to RASO functioning is the fact that only States can be a party to the Convention. This means that, from the perspective of the Chicago Convention, RASOs can only act as agents of States and the latter cannot be released from their ultimate responsibility for compliance with the requirements of the Convention and its safety related Annexes by establishing a RASO.

In addition, three more specific limitations were identified from the perspective of the Chicago Convention concerning the delegation of State safety functions to a RASO. These limitations are related to the exercise by a RASO of the functions and duties of the 'State of Registry' and 'State of the Operator':

- (1) Although a RASO can act as a 'State of Registry' with respect to individual States, meaning registering aircraft on their behalf, such aircraft would still have the nationality of the State on behalf of which they were registered in accordance with Article 17 of the Chicago Convention. There is thus today no possibility for a RASO to register aircraft on a *multinational* basis. The only exception to this rule could be aircraft operated by international operating agencies under Article 77 of the Chicago Convention. To date however there has been only one case of an international operating agency having its aircraft registered on a non-national basis (Arab Air Cargo), but this scheme involved a number of States acting jointly as a 'State of Registry' rather than delegating registration functions to an international organisation;
- (2) Where a RASO exercises on behalf of its Member States the functions and duties of the 'State of the Operator' or 'State of Registry' it will not be able to conclude Article 83bis with third countries in its own name. This stems from the fact that only States can be parties to the Chicago Convention and thus benefit from its Article 83bis;
- (3) Where a RASO exercises on behalf of its Member States the functions and duties of the 'State of Registry', while the RASO Member States continue

to exercise the functions and duties of the ‘State of Operator’, agreements concerning the transfer of responsibilities which may be concluded between the RASO and its Member States, may not be recognised by third countries. Similar to point (2) above this limitation results from the fact that RASOs cannot be party to the Chicago Convention.

This chapter also considered the need to amend the Chicago Convention in order to clearly enable RASOs to exercise safety tasks in their own name. While realising that such an amendment is not a realistic prospect for the time being, two suggestions have been put forward for consideration. The first option could be a limited amendment of the Chicago Convention, altering the scope of its current Article 83bis in a way to allow transfer of safety functions not only to other States but also to international organisations. The second option could be to introduce into the Chicago Convention a REIO clause, which provides for the possibility of adherence to an international treaty of a REIO, such as the African RECs or the EU.<sup>247</sup> The latter option would however not cover the RASOs which are established outside of a REIO framework.

This chapter recognised that the actual need to amend the Chicago Convention, putting aside the political willingness of the States to actually do that, could be a point of moot. On the one hand, it was argued, ultimate responsibility for safety oversight discourages States from establishing ‘Level 3’ RASOs which ‘provide the best dividend in terms of efficiency and the effective use of resources’.<sup>248</sup> On the other hand, it was argued, States could take less interest in aviation safety, if they were to be allowed to release themselves from ultimate responsibility and *hide* behind a regional body – which is why ICAO puts so much emphasis on individual State responsibility in its manual on RSOOs.<sup>249</sup>

While not excluding the possibility of amending the Chicago Convention in the long term, this chapter argued that what is needed in the short term is a much clearer policy from ICAO on the role of States in the supervision of RASOs. It was proposed that such a policy could be included in one of the future editions of the ICAO RSOO and RAIO manuals, or the new Annex 19 which, as it applies to safety management in general, has a horizontal application.

This chapter further advocated that such supervision policy should be based on the principle that States and RASOs working on their behalf must be seen as a system which, taken together, should guarantee the level of safety oversight required by the Chicago Convention. Such oversight policy should not lead to the need to control in detail the actions of a regional body, or create a risk of duplication of expertise at national and regional levels.

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<sup>247</sup> For example by 2011, EU had acceded to over 70 international treaties by virtue of a REIO clause. See: Upgrading the EU’s role as Global Actor: Institutions, Law and the Restructuring of European Diplomacy, p. 5.

<sup>248</sup> ICAO Doc. 9734 Part B, *supra* note 3 in Ch.1, at Paragraph 3.1.1.

<sup>249</sup> *Ibid.* at Paragraph 4.1.35.