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The right to travel by air of persons with disabilities

Kovudhikulrungsri, L.

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The Right to Travel by Air of Persons with Disabilities

The Right to Travel by Air
of Persons with Disabilities

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Promotoren: prof. dr. P.M.J. Mendes de Leon
prof. dr. A.C. Hendriks

Promotiecommissie: prof. dr. M.L.P. Loenen
prof. dr. Iur. W. Müller-Rostin (University of Cologne,
Germany)
prof. dr. A. Masutti (University of Bologna, Italy)
dr. J.J. Rijpma

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List of abbreviations

ACAA	Air Carrier Access Act
ACHPR	African Charter on Human and Peoples' Rights
ACI	Airport Council International
ADA	American with Disabilities Act
ADR	Alternative Dispute Resolution
ASA	Air Services Agreement
Athens Convention	Athens Convention relating to the Carriage of Passengers and Their Luggage by Sea, 1974 and Protocol of 2002 to the Athens Convention Relating to the Carriage of Passengers and Their Luggage by Sea, 1974
CA Agency	Canadian Transportation Agency
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CERD	International Convention on the Elimination of All Forms of Racial Discrimination
CERD Committee	Committee on the Elimination of Racial Discrimination
CESCR	Committee on Economic, Social and Cultural Rights
Chicago Convention	Convention on International Civil Aviation
CJEU	Court of Justice of the European Union
Communication Code	Code of Practice: Removing Communication Barriers for Travellers with Disabilities
Core Principles	Core Principles on Consumer Protection
COTIF	Convention concerning International Carriage by Rail
CRC Committee	Committee on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
CRPD Committee	Committee on the Rights of Persons with Disabilities
CRPD Handbook	Handbook for Parliamentarians on the Convention on the Rights of Persons with Disabilities and its Optional Protocol
CTA	Canada Transportation Act
DCFR	Draft Common Frame of Reference
ECAC	European Civil Aviation Conference
ECAC Doc 30	ECAC Policy Statement in the Field of Civil Aviation Facilitation Doc No. 30 (Part I)
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECJ	European Court of Justice
ECtHR	European Court of Human Right
EU	European Union

European Accessibility Act	Directive of the European Parliament and of the Council on the approximation of the laws, regulations and administrative provisions of the Member States as regards accessibility requirements for products and services
HRC	Human Rights Committee
IATA	International Air Transport Association
IATA Recommended Practice 1724	IATA Recommended Practice 1724 General Conditions of Carriage (Passenger and Baggage)
ICAO	International Civil Aviation Organization
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICF	International Classification of Functioning, Disability and Health
ICJ	International Court of Justice
ILC	International Law Commission
ILC Fragmentation Report	International Law Commission on the Fragmentation of International Law
IMO	International Maritime Organization
ITU	International Telecommunication Union
Maastricht Principles	Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights
Montreal Convention of 1999	Convention for the Unification of Certain Rules for International Carriage by Air of 1999
NCLB	No Country Left Behind
NGOs	Non-governmental organizations
Part 382	Nondiscrimination on the Basis of Disability in Air Travel
PWD	Person with disabilities
PWD Manual	Manual on Access to Air Transport by Persons with Disabilities
Regulation 1107	Regulation (EC) No 1107/2006 of the European Parliament and of the Council of 5 July 2006 concerning the Rights of Disabled Persons and Persons with Reduced Mobility when Travelling by Air
Regulation 261	Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91
SARPs	Standard and Recommended Practices
SDGs	Sustainable Development Goals
Standard Rules	Standard Rules on the Equalization of Opportunities for Persons with Disabilities, 1993
TEC	Treaty Establishing the European Community

TFEU	Treaty on the Functioning of the Union
Training Regulations	Personnel Training for the Assistance of Persons with Disabilities Regulations
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
UN Basic Principles	UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law
UN DESA	UN Department of Economic and Social Affairs
UNPRPD	UN Partnership to promote the Rights of Persons with Disabilities
US	United States of America
US DOT	Department of Transportation
USAP-CMA	Universal Security Audit Programme Continuous Monitoring Approach
VCLT	Vienna Convention on the Law of Treaties
Warsaw Convention of 1929	Convention for the Unification of Certain Rules Relating to International Carriage by Air of 1929
WPA	World Programme of Action Concerning Disabled Persons, 1981
WTO	World Trade Organization

1 Introduction

Travel is essential. It is important for people's livelihoods, for it is not only used to pursue recreational activities, but also allows one to take part in other, livelihood-related activities.¹ This importance is so prominent that it has been set in Goal 11.2 of the UN Sustainable Development Goals (SDGs).² This goal seeks to benefit persons with disabilities (PWDs)³ as well as other vulnerable groups.⁴ In relation to modes of transport nowadays, air transport plays a crucial role since it is a proper method by which to travel abroad, over long distances or where speed is of the essence. Therefore, it is not overstated when the International Civil Aviation Organization (ICAO) declared that air travel has changed from being considered a luxury to becoming a commodity.⁵ By combining these facts, this study pays attention to access to air travel of PWDs on an equal basis with others.

1.1 MAJOR STAKEHOLDERS

According to ICAO, there are four major stakeholders in air travel facilitation: States, air carriers, airport operators and passengers and their concerns pertaining to facilitation differs.⁶ With regards to the carriage of passengers, full regulatory compliance is the States' concern; air carriers' primary attention lies on productivity and cost minimization; airport operators aim to reduce congestion in passenger terminals and, lastly, passengers are interested in quality service.⁷ This Section discusses the concerns of these stakeholders about

1 FirstGroup Plc v Paulley, [2017] UKSC 4, para. 93.

2 G.A. Res. 1, U.N. GAOR 70th Sess., U.N. Doc A/RES/70/1 (2015). Goal 11.2 By 2030, provide access to safe, affordable, accessible and sustainable transport systems for all, improving road safety, notably by expanding public transport, with special attention to the needs of those in vulnerable situations, women, children, persons with disabilities and older persons.

3 For a definition of 'persons with disabilities', see Section 1.4.1.

4 For a discussion on a global public good, see Section 1.5.1.2.

5 ICAO, *Consumer Protection and Definition of Passenger Rights in Different Contexts*, Worldwide Air Transport Conference (ATCONF) Sixth Meeting, ATConf/6-WP/5, para. 1.1.

6 ICAO, *Global Aviation Facilitation Plan (GAFP)*, Facilitation Panel (FALP) Ninth Meeting, FALP/9-WP/8, para. 2.1. ICAO does not differentiate between public and private ownership of airports and airlines.

7 *Ibid.*

accessible air travel. For the passengers, I separate PWDs from other passengers to see the specific interest of PWDs.

1.1.1 The needs of persons with disabilities

Normally, when persons wish to travel by air, their concerns include the price of the ticket, security checks at the airport, travel time, visa and border controls, if applicable. However, in the case of a PWD, there are higher obstacles for them to travel by air on an equal footing to persons without disabilities.

According to the ICAO Manual on Access to Air Transport by Persons with Disabilities (PWD Manual), typical problems for PWDs start at the pre-journey and end when leaving the airport of destination.⁸ During booking, access to booking information is an issue. Barrier-free internet booking is one of the highest-ranked services that PWDs need according to the survey on mobility service needs for air passengers with disabilities.⁹ Advertisements for ticket prices lack the telephone-teletype device toll free number for persons with a hearing impairment.¹⁰

One constraint at the airport for PWDs is the accessible environment. Persons with visual or hearing, or both impairments, are challenged by inaccessible information. Inaccessibility at airports for PWDs is mainly caused by certain facilities, which are designed for able-bodied people, as can be seen from the example of the unavailability of accessible parking spaces, raised curbs with no curb cuts, illegible signage, and no direct access to the plane via an air-bridge.¹¹ Besides the physical environment, a number of PWDs have to depend on the assistance of airport officers and airline staff, including their sub-contractors, for the air travel process.¹² Persons with intellectual impairment

8 ICAO, *Manual on Access to Air Transport by Persons with Disabilities*, ICAO Doc 9984 (2013), (PWD Manual). ICAO Circular 274 – Access to Air Transport by Persons with Disabilities is repealed by the PWD Manual.

9 Yu-Chun Chang & Ching-Fu Chen, *Identifying Mobility Service Needs for Disabled Air Passengers*, 32(5), *Tourism Management*, 1214, 1215 (2011).

10 There were cases dealt with the absence of a telephone-teletype device for people who are deaf or hard of hearing) reservation number in a newspaper advertisement published by airlines. See Canadian Transportation Agency, *Accessibility complaints*, <https://services.otc-cta.gc.ca/eng/accessibility-complaints> (accessed 13 Jan. 2017); Canadian Transportation Agency, Decision No. 582-AT-A-1999, (15 Oct. 1999); Canadian Transportation Agency, Decision No. 487-AT-A-1999, (17 Aug. 1999); Canadian Transportation Agency, Decision No. 110-AT-A-1999, 18 Mar. 1999).

11 The non-standardized facility in Suvarnabhumi International Airport in Thailand. See Central Administrative Court Red case No. 1059/2552, 24 June 2009.

12 Michael J. McCarthy, *Improving the United States Airline Industry's Capacity to Provide Safe and Dignified Services to Travelers with Disabilities: Focus Group Findings*, 33(25-26) *Disabil Rehabil*, 2612, 2612 (2001).

may require a one-to-one escort through the airport.¹³ In addition, a quiet route through an airport may be necessary for persons with sensory impairment.¹⁴

Once on board, most of the unsatisfactory experiences are related to the inaccessible design of aircraft cabins, including a narrow lavatory and the seating configuration of the aircraft.¹⁵ Additionally, the lavatory is often too small for a wheelchair; as a result, wheelchair users opt to avoid drinking water before and during flights.¹⁶ Another problem is accessibility to all types of information for persons with visual or hearing impairments.¹⁷

After disembarkation, besides the airport experience, PWDs may face issues about their personal mobility aids such as prostheses, crutches, sticks, walking frames, wheelchairs, and tricycles, which can be either loaded as check-in luggage or treated as carry-on luggage. Even if they can file a complaint and it is successful, compensation for damaged luggage and to electric powered wheelchairs is reported to be limited.¹⁸

On top of these problems, differences in laws and practices among countries cause problems for PWDs because air travel is commonly of an international nature.¹⁹ Abeyratne rightly noted that there are no globally recognized legal

13 UK Civil Aviation Authority Guidance for Airports on Providing Assistance to People with Hidden Disabilities, (CAP 1411), 4.

14 *Ibid.*, 5.

15 *Supra* n. 9, 1215; Matthew Kwai-Sang Yau, Bob McKercher & Tanya Packer, *Traveling with a Disability: More than an Access Issue*, 31(4), Ann. Tour. Res., 946, 954 (2004).

16 *Ibid.*, 954; Yaniv Poria, Arie Reichel & Yael Brandt, *The Flight Experiences of People with Disabilities: An Exploratory Study*, 49(2), J. Travel Res., 216, 218 (2010).

17 For a development and legal issues on in-flight entertainment, see Michael A. Schwartz, *Propelling Aviation to New Heights: Accessibility to In-flight Entertainment for Deaf and Hard Hearing Passengers*, 77 J. Air L. & Com., 151 (2012).

18 Simon Darcy, *Flying with impairments: Improving Airline Practices by Understanding the Experiences of People with Disabilities*, 2007 Travel and Tourism Research Association Proceedings, 61, 67, <http://ttra.omnibooksonline.com/2007/57229-ttra-1.1171436/t-001-1.1171645/f-010-1.1171758/a-010-1.1171759> (accessed 25 May 2017); Equality and Human Rights Commission, *Pay for damaged wheelchairs, leading Paralympian tells airlines*, <https://www.equalityhumanrights.com/en/our-work/news/pay-damaged-wheelchairs-leading-paralympian-tells-airlines> (accessed 13 Jan. 2017). For case law on limited amount of compensation, see Section 5.4.2.3, Chapter 5.

19 Policies regarding types of disability and age of a companion vary among airlines. Thus, persons with any impairment who can fly without an accompanying person with one airline may not be able to do so with other airlines. This hurdle is evidenced by complaints and other nuisances worldwide. For example, Air Canada allows an attendant to travel with a person with disabilities at no charge on a domestic flight. Egypt Air establishes criteria that visually impaired children under 12 years old or hearing impaired children under 15 years old must be accompanied. Austrian sets a travel companion age at 18 years old or older. In contrast, Air New Zealand sets a travel companion age at 16 years old or older capable of physically assisting in your evacuation. See Air Canada, *Medical / Mobility*, <https://www.aircanada.com/ca/en/aco/home/plan/medical-mobility.html> (accessed 25 May 2017); Egyptair, *Special needs*, <https://www.egyptair.com/en/fly/special-services/Pages/special-needs.aspx> (accessed 25 May 2017); Austrian, *Disabled Access to Flights*, <https://www.austrianair.com/en/flight/flight-information/disabled-access-to-flights> (accessed 25 May 2017).

rights for passengers.²⁰ This diversity increases transaction costs for PWDs to check conditions every time they wish to travel as well as for air carriers on their cost of compliance with various legal constraints.

1.1.2 Other stakeholders

When it comes to providing services to PWDs, States have to monitor compliance on at least two sets of law, namely human rights law and civil aviation law. In principle, air transport rules should be standardized and harmonized because air transport relates to the safety of persons.²¹ Nevertheless, as previously mentioned in Section 1.1.1, laws and practices among countries concerning accessible air travel are not uniform so this also creates problems for States.²²

The notion that imposing human rights duties will impede the competitiveness of private entities²³ is also prevalent in the aviation sector. For airport operators and air carriers, the provision of accessibility to air travel implies trade-offs for airport operators and air carriers. Loss of space in airports and aircraft to accommodate wheelchairs and service animals becomes an opportunity cost.²⁴ Air carriers have to bear the cost of extra fuel to carry heavy mobility aids during carriage of PWDs and their baggage including mobility aids and service animals exceeding the average mass value per passenger.²⁵ In practice, air carriers set weight limits on the carriage of electric wheelchairs.²⁶

//www.austrian.com/Info/Flying/DisabledAccess.aspx?sc_lang=nl&cc=NL (accessed 25 May 2017); Air New Zealand, *Services for People with Wheelchairs*, <http://www.airnewzealand.co.nz/special-assistance-wheelchair-services> (accessed 25 May 2017).

20 Ruwantissa Abeyratne, *Competition and Investment in Air Transport*, 11, (Springer International Publishing 2016). See *supra* n. 5.

21 Ruwantissa Abeyratne, *Rulemaking in Air Transport: A Deconstructive Analysis*, 201, (Springer International Publishing 2016).

22 For different contents among the EU, the US and Canada, see Section 4.6, Chapter 4.

23 Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties*, 58 (Oxford University Press 2008).

24 Lorenzo Casullo, *The Economic Benefits of Improved Accessibility to Transport Systems: Roundtable Summary and Conclusions*, <http://www.itf-oecd.org/economic-benefits-improved-accessibility-transport-systems-roundtable-summary-and-conclusions> (accessed 6 Mar. 2017), 17; Deborah Ancell & Anne Graham, *A Framework for Evaluating the European Airline Costs of Disabled Persons and Persons with Reduced Mobility*, 50(C), JATM, 41, 43 (2016).

25 Ancell & Graham, *ibid.*, 42. A power wheelchair alone can weigh between 70 kilograms to 180 kilograms. According to ICAO, the average mass value per passenger (including normal baggage allowance and excess baggage) to calculate payload capacity is 100 kilograms. ICAO, *Available Capacity and Average Passenger Mass*, http://www.icao.int/Meetings/STA10/Documents/Sta10_Wp005_en.pdf (accessed 6 Mar. 2017).

26 In mid 2015, Jet2, a UK registered carrier, was found to impose weight limits on a carriage of electric wheelchairs, while other EU air carriers waived weight limits. See Roberto

While ensuring access for PWDs, persons without disabilities should not be disregarded. Passengers without disabilities may experience hindrance from the unintended effect of accessible air travel such as less storage space, noise from audio-information provision and tactile pavement design.²⁷

1.2 RESEARCH QUESTIONS

Though priorities among the stakeholders vary, the debatable question is not whether PWDs should be able to travel by air or not, but rather to what extent the physical and informational environment and services should be adjusted to meet their needs. The main questions are:

1. How to balance the rights of PWDs according to States' obligations towards international human rights law and international air law without causing undue burden, either operational or financial, to airports and airline operators or inconveniencing other passengers.
2. How to legally ensure the balance in question (1) in a uniform manner among jurisdictions since air travel has a transnational character and when inconsistent legal provisions benefit no one.

The above research questions are enumerated in the sub-questions in each chapter as follows:

1. Is there a right to travel by air? If so, what does it entail and what is the scope of its obligation?
2. What are the legal principles and obligations for States to ensure access to air travel for PWDs, specifically under the Convention on the Rights of Persons with Disabilities (CRPD)?
3. How have the above legal principles and obligations been implemented at regional and national levels through accessibility standards and non-discrimination laws? How much does ICAO assist or regulate the implementation?
4. What are the remedial measures under accessibility standards and other public laws? What are the remedial measures under private law on international carriage by air? How do these two regimes generate an effective remedy for PWDs?

Castiglioni, *Jet2 Ban to Include Disabled Electric Wheelchair Users*, <http://www.reducedmobility.eu/20150723638/TheNews/jet2-ban-to-include-disabled-electric-wheelchair-users> (accessed 13 Jan. 2017); Roberto Castiglioni, *US Authorities Investigating Jet2 Disability Rules*, <http://www.reducedmobility.eu/20151006654/TheNews/us-authorities-investigating-jet2-disability-rules> (accessed 13 Jan. 2017). See Section 4.6.2.2.G.

²⁷ Casullo, *supra* n. 24, 17.

1.3 METHODOLOGY

1.3.1 The capabilities approach for persons with disabilities

There are many approaches to disability; however, this research builds on the capabilities approach since it tackles the restriction of the Rawlsian equality principle.²⁸ The capabilities approach shifts the attention to considerations of ‘what people are actually able to do and to be’.²⁹ In his Tanner Lectures, Sen gives an example of a PWD who may have the same wealth as others, but the PWD still lacks the ability to move.³⁰ This instance shows the limitation of the Rawlsian equality principle based on primary goods which cannot render justice to PWDs.³¹ It differentiates between functioning and capability. The former refers to a state of being and doing and the latter to freedom and opportunity to achieve functioning. For instance, travelling is functioning, while an opportunity to travel is capability. Whether to promote equality of functioning or of capability is still debatable in different political contexts.³² Yet, this research adheres to the latter since the equality of capability is in line with the equality of opportunity enshrined in the CRPD.³³

The capabilities approach responds to human beings, so it has been integrated into a rights-based approach to development by the UN Development Programme.³⁴ The list of central human capabilities, developed by Nussbaum, also corresponds well to the rights recognized in the Universal Declaration of Human Rights (UDHR).³⁵ Among the ten components, a capability to travel by air can be closely linked to bodily integrity concerning the ability to move freely from place to place, affiliation, friendship and play. Nevertheless, this list is not free from controversy, for it does not set any priority among its components. Nussbaum, however, rebuts the charge, saying that this list contains separate and indispensable components and that all are of central

28 Amartya Sen used to call ‘the capability approach’ in a singular term but in later work, he uses ‘capabilities’. Martha Nussbaum calls capabilities approach.

29 Martha Nussbaum, *Frontier of Justice: Disability, Nationality, Species Membership*, 289-290, (Belknap Press of Harvard University Press 2006).

30 Amartya Sen, *Equality of What? Stanford University: Tanner Lectures on Human Value, Delivered at Stanford University, May 22, 1979*, 218, http://www.ophi.org.uk/wp-content/uploads/Sen-1979_Equality-of-What.pdf (accessed 13 Jan. 2017).

31 Sen, *ibid.*; Nussbaum, *Frontier of Justice*, *supra* n. 29, 17-18.

32 Nussbaum, *Frontier of Justice*, *ibid.*, 171.

33 Convention on the Rights of Persons with Disabilities, (24 Jan. 2007), U.N. Doc. A/RES/61/106, art. 3(e), (CRPD).

34 Martha Nussbaum, *Capabilities, Human Rights, and the Universal Declaration*, 28, in *Human Rights in the World Community: Issues and Action* (Burns H. Weston & Anna Grear, 4th ed., University of Pennsylvania Press 2016).

35 *Ibid.*, 30.

importance to life.³⁶ The indispensability of elements unquestionably shares the same character as the interrelatedness and indivisibility of human rights.

1.3.2 Treaty interpretation

This research analyzes the interaction between two distinct *lex specialis* of international law, namely, human rights law of PWDs and air law. The core treaties in these two branches of law that I will focus on are the CRPD, the Convention on International Civil Aviation (Chicago Convention),³⁷ the Convention for the Unification of Certain Rules Relating to International Carriage by Air of 1929 (Warsaw Convention of 1929),³⁸ and the Convention for the Unification of Certain Rules for International Carriage by Air of 1999 (Montreal Convention of 1999).³⁹ Therefore, the foremost research methodology to interpret and analyze the interaction is the treaty interpretation.

It is accepted by distinguished legal scholars⁴⁰ and practitioners⁴¹ that the problem of fragmentation in international law is overstated. No regime is self-contained since general international law is applicable for treaty interpretation.⁴² Moreover, the method used in treaty interpretation is not fragmented at least in international tribunals.⁴³ Nevertheless, these conclusions are derived from an examination of *lex specialis* in public international law, namely diplomatic law, human rights law and international trade law. It is questionable whether this conclusion holds true for the Warsaw Convention of 1929, and the Montreal Convention of 1999, as they fall within the private

36 *Ibid.*, 28. For prioritized obligations, see Section 3.5.4, Chapter 3.

37 Convention on International Civil Aviation (Chicago, 7 Dec. 1944), 15 U.N.T.S. 295, 61 Stat. 1180, T.I.A.S. No. 1591, (Chicago Convention).

38 Convention for the Unification of Certain Rules Relating to International Transportation by Air (Warsaw, 12 Oct. 1929), T.S. 876, (Warsaw Convention of 1929).

39 Convention for the Unification of Certain Rules for International Carriage by Air, (Montreal, 28 May 1999), ICAO Doc 9740, (Montreal Convention of 1999).

40 Martti Koskenniemi, *The Case for Comparative International Law*, 20 Finn Y.B. Int'l L., 1, 5 (2009); Jame Crawford, *International Law as an Open System: Selected Essays*, 37 (Cameron May 2002).

41 Bruno Simma, *Universality of International Law from the Perspective of a Practitioner*, 20:2 Eur. J. Int'l L., 265, 289 (2009); Declaration of Judge Greenwood, *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Compensation, Judgment, I.C.J. Rep. 2012, p. 394, para. 8.

42 International Law Commission, *Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission, Finalized by Martti Koskenniemi, A/CN.4/L.682 (13 Apr. 2006) para. 192; Bruno Simma & Dirk Pulkowski, *Of Planets and the Universe: Self-contained Regimes in International Law*, 17:3 Eur. J. Int'l L., 483 (2006).

43 Eirik Bjorge, *The Convergence of the Methods of Treaty Interpretation: Different Regimes, Different Method of Interpretation?*, 533 in *A Farewell to Fragmentation Reassertion and Convergence in International Law* (Mads Andenas, Cambridge University Press 2015).

international air law regime and they are under the adjudication of each national court. Shelton observes that States have not consistently applied human rights law over other branches of law.⁴⁴ Therefore, this study will examine the interaction between human rights law and international air law through the four treaty interpretation techniques recommended in the report by the International Law Commission (ILC) on the Fragmentation of International Law (ILC Fragmentation Report). They are (1) to view international law as a legal system so that each norm relates to others; (2) to determine the precise relationship between them either as normative fulfillment or conflicts; (3) to apply the general rules of treaty interpretation reflected in Article 31 – Article 33 of the Vienna Convention on the Law of Treaties (VCLT);⁴⁵ and (4) to make interpretations in accordance with the principle of harmonization.⁴⁶ Not only do these rules of interpretation outline a framework to interpret obligations towards PWDs, but they also distinguish interpretation from the modification of the treaty.⁴⁷

1.3.2.1 Systemic integration

By viewing international law as a legal system, *lex specialis* cannot avail itself of the system of general international law.⁴⁸ In the official ILC Commentaries to the Articles on State Responsibility, Crawford further explains that the maxim *lex specialis derogat legi generali* applies only when there is some actual inconsistency between them or an apparent intention to exclude the other.⁴⁹

A. Relevant rules of international law

It is presumed that when creating new obligations in international law, States do not aim to violate their pre-existing treaty obligations.⁵⁰ Therefore, when interpreting a treaty, one has to view international law as one legal system by using the method in Article 31(3)(c) of the VCLT. From its provision, the interpretation rules go beyond general international law to cover 'any relevant

44 Dinah Shelton, *International Law and 'Relative Normativity'*, 164 in *International Law* (Malcolm D Evans, 3rd ed., Oxford University Press 2014).

45 Vienna Convention on the Law of Treaties (Vienna, 23 May 1969) 1155 U.N.T.S. 331 (VCLT).

46 International Law Commission, *Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission*. A/CN.4/L.702 (18 July 2006) para. 14.

47 Christian Djefal, *Static and Evolutive Treaty Interpretation: A Functional Reconstruction*, 15-16 (Cambridge University Press 2016).

48 Simma, *supra* n. 41, 275, 289 (2009).

49 James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries*, 307 (Cambridge University Press 2002).

50 Sir Robert Jennings & Sir Arthur Watts (eds.), *Oppenheim's International Law*, 1275 (9th ed, Longman, 1992).

rules of international law applicable in the relations between the parties'.⁵¹ One may then doubt which rules of international law are of relevance. The ILC in its 58th session held that

'Article 31 (3) (c) also requires the interpreter to consider other treaty-based rules so as to arrive at a consistent meaning. Such other rules are of particular relevance where parties to the treaty under interpretation are also parties to the other treaty, where the treaty rule has passed into or expresses customary international law or where they provide evidence of the common understanding of the parties as to the object and purpose of the treaty under interpretation or as to the meaning of a particular term.'⁵²

Thus, rules of international law can be customary international law or general international law.⁵³

A number of private international law conventions directly mention human rights in other treaties.⁵⁴ Human rights law can be considered as customary international law or general international law.⁵⁵ For instance, remedy under the *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)* judgment relies on human rights law and its interpretation by the European Court of Human Rights (ECtHR), the African Commission on Human and Peoples' Rights and the Human Rights Committee (HRC) and it does not view consular protection as a self-contained regime.⁵⁶

The relevant rules can be developed once the conclusion of the treaty has been interpreted.⁵⁷ The International Court of Justice (ICJ) in *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* confirms that newly developed norms are relevant for the interpretation of the treaty concluded in 1977.⁵⁸

51 International Law Commission, *supra* n. 42, para. 422.

52 International Law Commission, *Report of the International Law Commission of its Fifty-Eighth Session*, G.A. Res. 10, U.N. GAOR, 61st Sess., U.N. Doc. A/61/10, (2006), 414-415.

53 International Law Commission, *supra* n. 51, paras 463-469. The World Trade Organization and the ICJ also apply customary international law and general international law when interpreting the treaty in dispute. See *Oil Platforms case (Iran v. United States of America) (Merits)* I.C.J. Reports 2003 (6 Nov. 2003), p. 161, para. 41.

54 Cecilia Fresnedo De Aguirre, *Public Policy: Common Principles in the American States*, 379 *Recueil des Cours*, 224 (2016); James J. Fawcett, Máire Ní Shuilleabháin & Sangeeta Shah, *Human Rights and Private International Law*, 44 (Oxford University Press, 2016).

55 José E. Alvarez, *Beware Boundary Crossings*, 44 in *Boundaries of State, Boundaries of Rights: Human Rights, Private Actors, and Positive Obligations* (Tsvi Kahana & Anat Scolnicov, Cambridge University Press 2016).

56 *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Merits, Judgment, I.C.J. Rep. 2010 (30 Nov. 2010), paras 63-88.

57 Giorgio Gaja, *The Protection of General Interest in the International Community: General Course on Public International Law*, 364 *Recueil des Cours*, 66 (2011).

58 *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, I.C.J. Rep. 1997 (25 Sept. 1997), para. 112.

Rule 20 of the ILC Fragmentation Report establishes that customary international law or general principles of law can apply to interpret treaty in three scenarios: (1) a treaty is unclear or open-textured; (2) customary international law or general principles of law provide a recognized meaning of terms in a treaty and (3) the treaty is silent on the applicable law.⁵⁹

B. Applicable between the parties

Other treaties can be taken into account when interpreting the treaty in dispute.⁶⁰ The question concerns the phrase ‘applicable between the parties’ because in case of multilateral conventions, ‘parties’ can mean either the parties to a dispute or parties to the treaty being interpreted. For the World Trade Organization (WTO), only the treaties to which all WTO members were parties are to be taken into consideration.⁶¹ By the same token, in *Mox Plant/OSPAR Arbitration*, the tribunal did not consider the convention not ratified but signed by Ireland and the UK.⁶²

The ILC Fragmentation Report pointed out the negative impact of this method especially in case of multilateral conventions because it is rather difficult, if not impossible, to know the exact States Parties between two multilateral conventions.⁶³ The arbitrator in *Mox Plant/OSPAR Arbitration* also criticized that the tribunal should at least treat the non-ratified but signed convention as evidence of the common views of the two parties.⁶⁴ Koskenniemi proposed another way of interpretation to be able to refer to a treaty which was ratified by the parties in a dispute.⁶⁵

Similarly, when applying human rights standards to private international law cases, there is a debate on a question concerning the parties to a human rights convention. One approach is to differentiate an application between a dispute among the EU Member States and a dispute which relates to other non-EU Member States because all EU member States have ratified the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).⁶⁶ The other approach considers that if the application of foreign law is against human rights protected in the State of the forum, the judge must respect and protect the human rights value even if the State of the applicable foreign law is not a party to the human rights treaty.⁶⁷

59 International Law Commission, *supra* n. 46, para. 20.

60 International Law Commission, *ibid.*, para. 21.

61 International Law Commission, *supra* n. 42, para. 448.

62 International Law Commission, *ibid.*, para. 441.

63 International Law Commission, *ibid.*, para. 471.

64 International Law Commission, *ibid.*, para. 441.

65 International Law Commission, *ibid.*, para. 472.

66 Fawcett, Shuilleabhain & Shah, *supra* n. 54, 49.

67 Fresno De Aguirre, *supra* n. 54, 229.

C. *Evolutionary interpretation*

The ILC remarks that because international law is a dynamic legal system, subsequent developments in customary law and general principles of law may affect the meaning in a treaty provision.⁶⁸ Further, the systemic integration allows for interpreting the term in a treaty in a non-static manner when the concept used in the treaty is open or evolving, and there is no idiosyncratic definition.⁶⁹

1.3.2.2 *Relationships between two or more norms*

The ILC Fragmentation Report separates the relationship between norms in two ways. One is when one norm assists in the interpretation of another and the other is when there are normative conflicts.⁷⁰ In the latter case, the rules in the VCLT examined in Section 1.3.2.3 will shed light.

1.3.2.3 *General rules of interpretation*

Article 31 – Article 33 of the VCLT lay down treaty interpretation rules. They can be briefly described as follows.

A. *General rules*

The underlying interpretative principle requires interpretation in good faith.⁷¹ Article 31 further calls for respecting the ordinary meaning of the text (the textual approach).⁷² However, the ordinary meaning can be drawn from the text, its preamble, and annexes as well as any agreement relating to the treaty in connection with the conclusion of the treaty (the contextual approach).⁷³ This technique also takes the following into consideration:

- 'a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
- b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

68 International Law Commission, *supra* n. 46, para. 22.

69 International Law Commission, *supra* n. 42, para. 478(a); International Law Commission, *supra* n. 46, para. 23. See the term 'disability' in CRPD in Section 1.4.1 and the term 'bodily injury' in Section 5.3.5, Chapter 5.

70 International Law Commission, *supra* n. 46, para. 14(2).

71 VCLT, art. 31(1).

72 For an example of case law, see Paul Stephen Dempsey & Michael Milde, *International Air Carrier Liability: The Montreal Convention of 1999*, 48 (McGill University, 2005).

73 VCLT, art. 31(2).

- c) Any relevant rules of international law applicable in the relations between the parties.⁷⁴

The other method takes the object and purpose of a treaty into account.⁷⁵ This so-called teleological approach pays more attention to the intention of the drafters than the text.⁷⁶ In any case, the object and purpose cannot be applied to interpret a clear provision for an opposite meaning.⁷⁷ In reality, one treaty contains more than just the objective and purpose, and there may be conflicts among objects and purposes. In the *US – Import Prohibition of Certain Shrimp and Shrimp Products*, the Appellate Body at the WTO took several objectives in the WTO Agreement into account and interpreted the objective on the optimal use of the world's resources per the objective of sustainable development.⁷⁸

B. Supplementary means

This research acknowledges that the legal weight among these legal documents is not equal. The preparatory works serve as a supplementary means to clarify the ambiguous meanings, the object and the purpose of the treaty.⁷⁹ Therefore, when there is no doubt on the meaning of the text, the court finds it not necessary to refer to preparatory works.⁸⁰

While the non-legal binding force of the General Comment and concluding observations has been acknowledged, it should not be undervalued because the ICJ in *Diallo* gave great weight to the interpretation of human rights by the human rights treaty body.⁸¹ Besides, international conventions on the international carriage in other modes of transport can be compared for the purpose of uniform interpretation.⁸²

⁷⁴ VCLT, art. 31(3).

⁷⁵ VCLT, art. 31(1). Subparagraph (c) has been discussed in Section 1.3.2.1 above. For an example of case law, see Dempsey & Milde, *supra* n. 72, 50-53.

⁷⁶ Jean Allain, *Legal Reports No. 2 Treaty Interpretation and the United Nations Convention on the Rights of Persons with Disabilities*, <http://www.disabilityaction.org/fs/doc/publications/legal-report-2-treaty-interpretation-and-the-un-convention-on-the-rights-of-persons-with-disabilities.pdf> (accessed 13 Jan. 2017) 6.

⁷⁷ Richard K Gardiner, *Treaty Interpretation*, 218 (2nd ed., Oxford University Press, 2015).

⁷⁸ WTO, *US – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R 12 Oct. 1998, paras 17.

⁷⁹ VCLT, art. 32.

⁸⁰ James Crawford, *Brownlie's Principles of Public International Law*, 383 (8th ed., Oxford University Press 2012).

⁸¹ *Diallo*, *supra* n. 56, para. 66.

⁸² Malcolm A. Clarke, *Contracts of Carriage by Air*, 31 (3rd ed., Lloyd's List 2010).

C. Languages

The CRPD, the Chicago Convention, and the Montreal Convention of 1999 have been authenticated in more than two languages.⁸³ Most of the provisions of the Montreal Convention of 1999 are derived from the Warsaw Convention of 1929 which was drawn up in French.⁸⁴ Probably, national courts have to interpret French terms and legal concepts. Gardiner, exploring cases in the UK and the US on the interpretation of the expressions 'bodily injury' and '*lésion corporelle*', concludes that the US court and the UK court despite reaching a similar conclusion applied a different technique.⁸⁵ He concluded that there is no concrete rule on the method of interpretation for this problem; however, he inclines to look at the context and the preparatory draft.⁸⁶ Another possibility provided by Article 33 of the VCLT is to apply the meaning which best reconciles the text after considering the object and purpose of the treaty.⁸⁷

1.3.2.4 Principle of harmonization

When facing a conflict between different international norms, courts have two options: one is to accept such a conflict and resolve it, and the other is to avoid touching a conflict through interpretation techniques.⁸⁸ The conflict avoidance option is supported by the principle of harmonization and adopted by judicial bodies which tend not to address the normative conflict explicitly.⁸⁹

83 CRPD, art. 50; Protocol on the Authentic Six-Language Text of the Convention on International Civil Aviation (Chicago, 1944), Montreal 11 Oct. 1998; Montreal Convention of 1999, concluding paragraphs. While the Montreal Convention of 1999 was negotiated and drafted in English, it was translated into other five languages. See Dempsey & Milde, *supra* n. 72, 49.

84 Warsaw Convention of 1929, art. 36.

85 The US Supreme Court in *Eastern Airlines v. Floyd*, considered the French legal system during the time the Warsaw Convention of 1929 was concluded. In *King v. Bristow Helicopter*, the House of Lords compared the Warsaw Convention of 1929 with the Convention on International Carriage by Rail which amended the '*corporelle*' to '*l'intégrité corporelle ou mentale*'. See Gardiner, *supra* n. 77, 429-433. See Section 5.3.5, Chapter 5.

86 Gardiner, *ibid.*, 434.

87 Clarke, *supra* n. 82, 32.

88 Erika de Wet & Jure Vidmar, *Conclusions*, 309 in *Hierarchy in International Law: The Place of Human Rights* (Erika de Wet & Jure Vidmar, Oxford University Press, 2012).

89 Erika de Wet & Jure Vidmar, *ibid.*, 309. The ECtHR mentioned that when construing contradictory instruments, it should be as harmonized as possible in order to avoid any opposition between them when it dealt with the UN Security Council resolutions on travel ban, the right to freedom of movement and the right to private and family life. See ECtHR, *Nada v. Switzerland*, no. 10593/08 12 September 2012. For other cases concerning private international law conventions and the ECHR, see Fawcett, Shuilleabhain & Shah, *supra* n. 54, 54-56.

The principle of harmonization applies when there is a conflict between a superior norm and another norm so one should interpret the hierarchically lower norm under this principle or else the higher will prevail.⁹⁰

Under international law, the rules of *jus cogens* attain the highest status and the obligations under the UN Charter appear thereafter. While *jus cogens* norms entail obligations *erga omnes*, not all obligations *erga omnes* reach the peremptory status. The importance of obligations *erga omnes* lies in its responsibility towards other States because every State, other than the injured State may invoke the responsibility of the State violating such obligations.⁹¹

Treaties may indicate a hierarchy among provisions. Treaties, particularly human rights treaties, contain a clause to prevent States from relying on the rights recognized in the treaty and not applying the more favourable protection clause in other laws. This saving clause differs from Article 31(3)(c) of the VCLT because the former lays down the treaty interpretation rule to give effect to a provision providing more human rights protection while the latter involves the external context.⁹² In conformity with this long-standing tradition, the CRPD also contains such a clause.⁹³

The function of this clause is not decisive among scholars. It can be viewed as a rule on treaty interpretation, a principle of precedence or a conflict resolution rule.⁹⁴ Nevertheless, this provision is essential to States which recognize additional rights or more extensive rights than those in the treaty.⁹⁵ Its interpretation enables States to comply with the international law which aims to protect and 'never to weaken or undermine the safeguard of recognized human rights'.⁹⁶

90 International Law Commission, *supra* n. 46, para. 42.

91 Draft Articles on State Responsibility, Official records of the General Assembly, Fifty-sixth Session, Supplement 10 A/56/10, art. 48(1)(b).

92 Adamantia Rachovitsa, *Treaty Clauses and Fragmentation of International Law: Applying the More Favourable Protection Clause in Human Rights Treaties*, 16 Hum. Rts. L. Rev., 77, 91 (2016).

93 CRPD, art. 4(4). See e.g. International Covenant on Civil and Political Rights (New York, 16 Dec. 1966) 999 U.N.T.S. 171 and 1057 U.N.T.S. 407, art. 5(2), (ICCPR); International Covenant on Economic, Social and Cultural Rights (New York, 16 Dec. 1966) 993 U.N.T.S. 3, art. 5(2) (ICESCR); European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 Nov. 1950), 312 E.T.S. 5, art. 53, (ECHR).

94 Rachovitsa, *supra* n. 92, 81.

95 Ben Saul, David Kinkley & Jacqueline Mowbray, *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases, and Materials*, 268, (Oxford University Press 2014).

96 Separate opinion of Judge Cançado Trindade, *Diallo*, *supra* n. 56, para. 89.

1.3.3 Comparative approach and selection of comparisons

I examine current regulations in order to assess their coherence with the CRPD. Furthermore, these regulations will be compared to those of ICAO so as to critically observe the actual legal force of the latter.

Two selection criteria are adopted. One is based on the functional method of comparative law and to propose *lex ferenda*, that is, comparisons must be 'in the same stage of legal, political and economic development'.⁹⁷ The functional approach is criticized concerning its universal assumption that all societies face the same social problem.⁹⁸ However, this study finds this observation to be a strong argument to apply functional comparison since human rights hold universal values.

The other selection criteria is the ratification status to the CRPD, the Chicago Convention, the Warsaw Convention of 1929, and the Montreal Convention of 1999. While aiming to choose regulations from countries with different ratification status, the research found restrictions in the preliminary survey because the level of development in States ratifying neither the Warsaw Convention of 1929 nor the Montreal Convention of 1999⁹⁹ is incomparable to those of other selected jurisdictions, namely, the European Union (EU), the United States (US) and Canada. A closer look at the regulations of Thailand, which has not ratified the Warsaw Convention of 1929 or the Montreal Convention of 1999, reveals that they are incompatible with those of the other states due to a lack of comparable legal provisions, cases to courts or the national human rights commission.¹⁰⁰ Consequently, comparisons are made between regulations from the EU, the US and Canada, each of which represents a different ratification scenario. While Canada ratified all conventions, the others are not a contracting party to at least one convention as shown in Table 1.

Air services agreements (ASAs) as well as general rules tariffs are also reviewed to see an implementation of regional and national regulations. This research selects three ASAs between the EU, the US and Canada and the template

⁹⁷ Mathias Siems, *Comparative Law*, 27 (Cambridge University Press, 2014).

⁹⁸ Siems, *ibid.*, 37.

⁹⁹ According to ICAO, Antigua and Barbuda, Bhutan, Burundi, Chad, Djibouti, Eritrea, Guinea-Bissau, Haiti, Kiribati, Marshall Islands, Micronesia, Nicaragua, Palua, Saint Kitts and Nevis, San Marino, Sao Tome and Principe, Somalia, South Sudan, Tajikistan, Thailand, Timor-Leste, and Tuvalu do not ratify the Warsaw Convention of 1929 and the Montreal Convention of 1999. See International Civil Aviation Organization, Current lists of parties to multilateral air law treaties, <http://www.icao.int/secretariat/legal/lists/current%20lists%20of%20parties/allitems.aspx> (accessed 25 May 2017).

¹⁰⁰ Thailand has the Persons with Disabilities Empowerment Act, B.E. 2550 (2007) and the Ministerial Regulation on prescription of characteristics and provision of equipment, facilities or services in buildings, places, vehicles and transportation services for access of persons with disabilities to govern air travel of PWDs. None of them deals with booking process, refusal to carry PWDs, security screening procedure and damage on mobility and assistive device.

ASA compiled by ICAO. General rules tariffs are chosen from the world's top five airlines of 2016.¹⁰¹ They are Emirates, Qatar Airways, Singapore Airlines, Cathay Pacific and All Nippon Airways; however, in order to relate to the jurisdictions studied in this research, the general rules tariffs of Lufthansa, KLM, Delta, United Airlines and Air Canada are examined.

While there are guidelines published by trade associations like the International Air Transport Association (IATA) and the Airports Council International (ACI), this study does not examine them since they address private entities, not States. However, this does not generate an incomplete picture since their contents are mostly in line with those of ICAO because they are directed towards ICAO sources.¹⁰²

1.4 TERMINOLOGY

At the outset, it is necessary to clarify some terms omnipresent in the study. They are PWDs, air travel and mobility aids.

1.4.1 Persons with disabilities

PWDs are the main subject in this study, so the first step is to define who they are. Actually, a review of term usage and definition in legal documents pertaining to air travel of ICAO, the EU, and the US, as well as decisions by the Canadian Transportation Agency (CA Agency) since this term is not defined in Canada, which are demonstrated in Table 2, shows a number of terms in use to refer to PWDs, including the terms 'disabled persons', 'persons with reduced mobility' and 'individual with a disability'. However, this research uses persons with disabilities as referred to in the CRPD. It also tries to avoid any derogatory language and to use people-first language.

The CRPD does not define PWDs but it describes disability as an evolving concept.¹⁰³ Under the description in the CRPD, this term consists of three components: (1) long-term impairments, (2) interaction with barriers and (3) hindrance to full and effective participation in society.¹⁰⁴ The interaction with barriers reflects recognition of the social model of disability which takes the view that disability is socially constructed. Yet, Kayess and French note that the description demonstrates a conceptual confusion between impairment and

101 Skytrax, *The World's Top 100 Airlines in 2016* http://www.worldairlineawards.com/awards/world_airline_rating.html (accessed 13 Jan. 2017).

102 International Air Transport Association, *IOSA Standards Manual*, INT 1, (8th ed., International Air Transport Association 2014); Airports Council International, *Airports & Persons with Disabilities: A Handbook for Airport Operators*, 2, (4th ed., Airports Council International 2003).

103 CRPD, preamble (e).

104 CRPD, art. 1.

disability because it only provides that only the persons with impairments may be subject to disability.¹⁰⁵ This limitation causes social oppression under the social model.¹⁰⁶ They further recommend construing this term in accordance with what the drafters actually intended rather than with what they wrote.¹⁰⁷ A perusal of the concluding observations indicates that the Committee on the Rights of Persons with Disabilities (CRPD Committee) asks States Parties to incorporate the social and human rights-based model of disability.¹⁰⁸ In short, PWDs should include persons without impairment but being disabled by society.

From the concluding observations together with the Handbook for Parliamentarians on the Convention on the Rights of Persons with Disabilities and its Optional Protocol (CRPD Handbook), States Parties are free to define the term PWDs more broadly as long as it is subject to the social and human rights-based model of disability.¹⁰⁹ A review of the definitions of PWDs shown in Table 2 demonstrates a mixed approach between the medical model and the social model of disabilities as shown in the description of the CRPD because impairment is still a factor in evaluating disability. Except for the US, past and perceived impairments are not explicitly covered in the definition of the other countries.¹¹⁰

Apart from this dissimilarity, three shared elements are found. First, all of them fall along the same line that the duration of impairment is not a major issue to exclude persons from being considered as PWDs.¹¹¹ Second, interactions with barriers are limited to when using transport, which is reasonable

105 Rosemary Kayess & Phillip French, *Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities*, 8:1 Hum. Rts. L. Rev. 1, 21 (2008).

106 *Ibid.*, 21.

107 *Ibid.*, 22.

108 See Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Report Submitted by Turkmenistan*, (Thirteenth session, 2015), U.N. Doc. CRPD/C/TKM/CO/1, paras 5-6; Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Report Submitted by Paraguay*, (Ninth session, 2013), U.N. Doc. CRPD/C/PRY/CO/1, paras 7-8; Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Report Submitted by Peru*, (Seventh session, 2012), U.N. Doc. CRPD/C/PER/CO/1, paras 6-7; Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Report Submitted by Mauritius*, (Fourteenth session, 2015), U.N. Doc. CRPD/C/MUS/CO/1, paras 5-6.

109 UN Office of the High Commissioner for Human Rights, *From Exclusion to Equality Realizing the rights of persons with disabilities*, 13 (2007). The CRPD Committee even stated that Mongolia appears to be trapped with the concept of 'permanent disability'. An implication is non-permanent disability can be incorporated into the definition. See Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Report Submitted by Mongolia*, (Thirteenth session, 2015), U.N. Doc. CRPD/C/MNG/CO/1, para. 5. This manner is in line with the rules of treaty interpretation. For an evolutive interpretation, see Section 1.3.2.1.C.

110 14 C.F.R. § 382.3 (2009).

111 *Ibid.*

since the regulations cover air travel.¹¹² Last, the interactions reduce or limit the mobility of PWDs. The first two elements are similar to those of the CRPD. The third one is worth paying careful attention to because of its different use of the term. The third element in both US and Canada appears to fit with the hindrance of full and effective participation in society as mentioned in the CRPD because both refer to limitations in activity.¹¹³ ICAO and the EU, sharing an almost verbatim definition, refer to the reduction of mobility.¹¹⁴ On the surface, this phrasing casts doubt as to whether it connects with actual society or not. However, a closer look taking the capabilities approach brings this phrase into line with the CRPD. The reduction of mobility connects with bodily integrity in Nussbaum's list which encompasses the ability to move; as a result, reduction of this ability impedes social participation.

Despite some resemblances, the interpretations remain varied and debatable, particularly in cases of persons with obesity,¹¹⁵ and persons with allergies.¹¹⁶ At this stage, the aim of this research is not to give a detailed definition of PWDs in relation to air travel. Rather, it intends to illustrate an evolving concept of disability embedded in the CRPD. While at the first stage, this study was designed to cover types of impairment as broadly as possible,

112 For the meaning of travel by air, see Section 1.4.2.

113 Canada uses the International Classification of Functioning, Disability and Health (ICF). See World Health Organization, *International Classification Of Functioning, Disability and Health* (World Health Organization, 2001). Kayess and French are of the view that the ICF, incorporating the medical model with the social model approach, can be one criterion in deciding exactly what factors constitute a person with disabilities, although the CRPD does not refer to ICF in any preamble. See Kayess & French, *supra* n. 105, 24.

114 Annex 9, *Facilitation*, (14th ed. Oct. 2015), 1-4; Regulation (EC) No 1107/2006 of the European Parliament and of the Council of 5 July 2006 concerning the Rights of Disabled Persons and Persons with Reduced Mobility when Travelling by Air, OJ L 204, 26.7.2006, p. 1-9, art. 2, (Regulation 1107).

115 The European Commission interpreted that persons with obesity may be subject to Regulation 1107 but it did not further discuss air fare. See European Commission, *Interpretative Guidelines on the Application of Regulation (EC) N° 1107/2006 of the European Parliament and of the Council of 5 July 2006 Concerning the Rights of Disabled Persons and Persons with Reduced Mobility when Travelling by Air*, SWD (2012) 171 Final, 11.6.2012, 3.

The European Court of Justice ruled that obesity can constitute a disability in the Employment Equality Directive. See Case C-354/13 *Fag og Arbejde (FOA) v Kommunernes Landsforening (KL)* [2014]. The CA Agency ruled that obesity can constitute a disability in the context of air travel. See Canadian Transportation Agency, Decision No. 6-AT-A-2008, (10 Jan. 2008); Section 4.6.3.3, Chapter 4.

116 See Canadian Transportation Agency, Decision No. 4-AT-A-2010, (6 Jan. 2010); Canadian Transportation Agency, Decision No. 134-AT-A-2013, (28 Mar. 2013); Canadian Transportation Agency, Decision No. 335-AT-A-2007 (29 June 2007), paras 28-35. For a person with severe environmental or chemical sensitivities, see Canadian Transportation Agency, Decision No. 604-AT-A-2006, (31 Oct. 2006). For cat allergy, see Canadian Transportation Agency, Decision No. 66-AT-A-2010, (25 Feb. 2010), paras 70, 104-105. For dog allergy, see Canadian Transportation Agency, Decision No. 528-AT-A-2004, (5 Oct. 2004). For the view of the US, see Section 4.6.2.1.C. For the provision of reasonable accommodation, see Section 4.6.2.4 Chapter 4.

it later accepted that there are various types of mental disorders from anxiety to depression, and services in relation to air travel may differ among persons with each type of mental impairment.¹¹⁷ Therefore, this study confines its scope to address only persons with a physical impairment, persons who temporarily have a physical impairment at the time of travel, persons with past perceived impairment, persons with obesity and persons with allergies.

1.4.2 Travel by air

Travel means to make a journey or to go from one place to another.¹¹⁸ This research pays attention to air transport as a means of travel. So applying this meaning, travel by air means to go from one place to another by commercial aircraft.

The research has not chosen to distinguish between the terms 'travel by air', 'air travel', 'air transport' or 'carriage by air'. They can be used interchangeably depending on the context.

1.4.3 Mobility aid, devices and assistive technologies

The legal instruments explored in this study use various terms to refer to aids and devices used by PWDs such as mobility aids (CRPD, ICAO, US and Canada), mobility equipment (ICAO and EU) and assistive devices (ICAO, US and EU). Accordingly, these terms are used interchangeably.

1.4.4 Live assistance

According to the Report of the Working Group to the Ad Hoc Committee, live assistance 'includes human assistance, such as guides and readers, and animal assistance, such as guide dogs'.¹¹⁹ The term 'live assistance' is mentioned in the CRPD and is understood in an unrestrictive manner to cover

117 The CA Agency once decided a case concerning a person who was claustrophobic and required a window seat to ease his discomfort. But the CA Agency found that claustrophobia could be an impairment but the claimant was not able to demonstrate the other two factors, namely activity limitations and participation restrictions. *See* Canadian Transportation Agency, Decision No. 60-AT-A-2010, (19 Feb. 2010).

118 Oxford English Dictionary, <http://www.oed.com/view/Entry/205268?rskey=GhLZ9e&result=2&isAdvanced=false#eid> (accessed 13 Jan. 2017); Cambridge Dictionary, <http://dictionary.cambridge.org/dictionary/english/travel> (accessed 13 Jan. 2017).

119 Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities Working Group, *Report of the Working Group to the Ad Hoc Committee*, 24, U.N. Doc. A/AC.265/2004/WG.1 (2004).

humans and animals.¹²⁰ When applying the expression to air travel, it consists of accompanying persons and service animals.

While dogs are the most accepted service animal, other animals can also be used to assist PWDs. Trained capuchins can become helpers for persons with physical impairment. Guide horses can do the same duty as guide dogs for persons with visual impairment and dog allergies.¹²¹

Neither the CRPD nor the preparatory draft draws a line on types of eligible service animals. The drafting history reflects a debate on this issue, but it reached the conclusion not to restrict any kinds of animal assistance.¹²² Similarly, ICAO leaves the types of service animals open and allows each State to set its regulations.¹²³ At this stage, the term ‘service animal’ in this study is a general term to cover any animal providing assistance to PWDs.

1.5 GENERAL HUMAN RIGHTS CONCEPTS ON PERSONS WITH DISABILITIES AND AIR TRAVEL

Before the adoption of the CRPD, disability was not an explicit ground of non-discrimination in the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).¹²⁴ Almost 30 years later, the Committee on the Economic, Social and Cultural Rights (CESCR) declared that the reason for the absence of disabil-

120 The CRPD General Comment No. 2, instead of giving a definition, it names guide dogs as the only example. See Committee on the Rights of Persons with Disabilities, General Comment 2, Art. 9 (Eleventh session, 2014), U.N. Doc. CRPD/C/GC/2, para. 29.

121 Helping Hands, *Who We Are*, <https://monkeyhelpers.org/> (accessed 24 Feb. 2017); The Guide Horse Foundation, *Message from the Guide Horse Foundation*, <http://www.guidehorse.com/> (accessed 24 Feb. 2017); R J Huss, *Why Context Matters: Defining Service Animals Under Federal Law*, 37 Pepp. L.R. 1163, 1182 (2010).

122 UN Department of Economic and Social Affairs Division for Social Policy and Development, *Daily Summary of Discussion at the Seventh Session 20 January 2006*, <http://www.un.org/esa/socdev/enable/rights/ahc7sum20jan.htm> (accessed 13 Jan. 2017).

123 The reason may be due to the discussion in the Facilitation Panel in 2012, the Swiss representative proposed to either define or change service animals to refer to assistance dogs at most. See ICAO, *Facilitation Panel Seventh Meeting, Proposal to Amend Annex 9 SARPs Relating to Persons with Disabilities*, 5, <http://www.icao.int/Meetings/FALP/Documents/Falp7-2012/WP3/WP3.EN.pdf> (accessed 13 Jan. 2017); Annex 9, *supra* n. 114.

8.37 Recommended Practice.—Service animals accompanying persons with disabilities should be carried free of charge in the cabin, on the floor at the person’s seat, subject to the application of any relevant national or aircraft operator regulations.

PWD Manual, *supra* n. 8, xiii. Service animals. Animals, normally being dogs or other animals, specified in national regulations. See Section 4.6.3.2, Chapter 4.

124 The HRC has considered a handful complaints relating to disability discrimination and referred to disability in concluding observation. See Wouter Vandenhoe, *Non-discrimination and Equality in the View of the UN Human Rights Treaty Bodies*, 130, (Intersentia 2005); Andrea Broderick, *The Long and Winding Road to Equality and Inclusion for Persons with Disabilities*, 58, (Intersentia 2015).

ity-related provisions may be owing to ‘the lack of awareness of the importance of addressing this issue explicitly’.¹²⁵ There are only three non-binding documents concerning the rights of PWDs under the UN addressing human rights and PWDs, namely, the World Programme of Action Concerning Disabled Persons, 1981 (WPA), the Standard Rules on the Equalization of Opportunities for Persons with Disabilities, 1993 (Standard Rules) and the General Comment No. 5: Persons with Disabilities, issued by the CESCR in 1994.

According to the *travaux préparatoires* of the CRPD, the Chilean delegate proposed stipulating different modes of transportation including air transport in a provision on accessibility because this is where discrimination occurs, but there was no further record concerning the discussion of this proposal.¹²⁶ Even though air transport, as well as other modes of transport, is not directly mentioned in the CRPD, this proposal highlights two relevant points. The first is the significance of accessible air transport for PWDs and the other is the relationship between accessibility and non-discrimination, which will be discussed in Section 1.5.4.

The CRPD and the Chilean delegate proposal mentioned above illustrate that accessibility and non-discrimination on the basis of disability play a crucial role in reinforcing access to air travel of PWDs on an equal basis to others. Both attained the status of a general principle and contain a substantive provision under the CRPD.¹²⁷ Also, accessibility and non-discrimination on the basis of disability contain nexus to the SDGs which the CRPD Committee often recommends States Parties pay special attention to.¹²⁸

In addition to the above two principles, personal mobility is also a precondition for PWDs to be included in society.¹²⁹ Accessibility and personal

125 Committee on Economic, Social and Cultural Rights, General Comment 5, Persons with Disabilities (Eleventh session, 1994), U.N. Doc. E/1995/22, para. 6.

126 UN Department of Economic and Social Affairs Division for Social Policy and Development, *UN Convention on the Human Rights of People with Disabilities Sixth Ad Hoc Committee Daily Summaries 5 August 2005*, <http://www.un.org/esa/socdev/enable/rights/ahc6sum5aug.htm> (accessed 13 Jan. 2017).

127 CRPD, arts 3(b), (f), 5, 9.

128 Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Report Submitted by Italy*, (Sixteenth session, 2016), U.N. Doc. CRPD/C/ITA/CO/1, paras 12, 22; Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Report Submitted by Lithuania*, (Fifteenth session, 2016), U.N. Doc. CRPD/C/LTU/CO/1, paras 14(b), 22(d); Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Report Submitted by Portugal*, (Fifteenth session, 2016), U.N. Doc. CRPD/C/PRT/CO/1, para. 22; Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Report Submitted by Serbia*, (Fifteenth session, 2016), U.N. Doc. CRPD/C/SRB/CO/1, para. 18; Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Report Submitted by Uganda*, (Fifteenth session, 2016), U.N. Doc. CRPD/C/UGA/CO/1, para. 17(e).

129 Holger Kallehauge, *General Themes Relevant to the Implementation of the UN Disability Convention into Domestic Law: Who is responsible for the implementation and how should it be performed?*, 209 in *The UN Convention on the Rights of Persons with Disabilities: European and*

mobility are two sides of the same coin.¹³⁰ From the *travaux préparatoires*, it is understood that the former deals with the environment in the broadest sense, while personal mobility focuses on the individual.¹³¹ Therefore, the concept will not be completed without addressing personal mobility.

1.5.1 Accessibility

1.5.1.1 Meaning

Accessibility is a precondition for PWDs to live independently and participate fully and equally in society.¹³² However, the WPA, the Standard Rules, Geneal Comment No. 5 and the final text of the CRPD do not provide a definition of accessibility. In the discussion on the draft article on accessibility, no exact reason was specified as to why there was no definition of accessibility in the final text. The discussion demonstrated only that the Chair of the Sixth Session raised the question whether there was a need for a definition and if accessibility should be considered a principle, but the drafting histories contain no precise answer.¹³³

However, despite the fact that accessibility still lacks a plain definition in the final text of the CRPD, the discussion and the contents of Article 9 demonstrate some common elements that constitute accessibility. The definition of accessibility in the Chair's Draft Elements of a Comprehensive and Integral International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities, which was not compiled in the Working Group's text, reads:

“‘Accessibility’ means the measure or condition of things and services that can readily be reached or used by people including those with disabilities, which could be achieved, through inclusive and universal design or adaptation and by legal and programmatic means, in order to promote their access to the physical environment, public transportation and information and communication, including informa-

Scandinavian perspectives (Oddnyì Mjò“ll Arnardoittir & Gerard Quinn, Martinus Nijhoff 2009).

130 Report of the sixth session of the Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, 14, U.N. Doc. A/60/266 (2005).

131 *Ibid.*, 16.

132 CRPD General Comment 2, *supra* n. 120, para. 1. The CESCR also mentioned in its General Comment No. 5 that the lack of accessible transport reduces the realization of rights in the ICESCR, such as the right to work and the right to education. *See* CESCR General Comment 5, *supra* n. 125, para. 23.

133 *Supra* n. 126.

tion, communication and assistive technologies, and to societal structures and decision- and policy-making processes.¹³⁴

The National Human Rights Institutions which supported the incorporation of a definition of access or accessibility also proposed a definition. This reads as follows:

‘access is not an act or state but a freedom to enter, to approach, to communicate with, to pass to or from, or make use of physical, environmental and societal structures, goods and services, systems and processes regardless of type and degree of disability, gender or age.’¹³⁵

From these two definitions, accessibility comprises not only the physical environment but also public transportation, information and communication and services.¹³⁶ The application of access further than the built environment was strongly supported by the representatives from the EU, New Zealand, Thailand and various , non-governmental organizations (NGOs).¹³⁷ In particular, transportation was expressly insisted on to be incorporated into the area to be accessible to PWDs by the representatives from Chile, Korea and Panama.¹³⁸ As a result, Article 9 of the CRPD incorporated the foregoing aspects in its first paragraph.

In addition, the issue of accessibility addresses people with all types of impairment and not only those with mobility impairment. In the sixth session of the Ad Hoc Committee, Israel observed that accessibility should include mental and cognitive issues.¹³⁹ This was transcribed into obligations in Article 9 concerning access to information and communication so as to cover persons with sensory, hearing or mental impairment.¹⁴⁰

134 UN Department of Economic and Social Affairs Division for Social Policy and Development, *Chair’s Draft Elements of a Comprehensive and Integral International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities*, art. 2, <http://www.un.org/esa/socdev/enable/rights/wgcontrib-chair1.htm> (accessed 13 Jan. 2017).

135 *Supra* n. 126.

136 This definition is broader than the scope provided in the Standard Rule because the latter discusses accessibility in the process of the equalization of opportunities in two aspects: access to physical environment and access to information and communication. In other words, it does not mention services. See *Standard Rules on the Equalization of Opportunities for Persons with Disabilities*, GAOR, 48th Sess., Rule 5, U.N. Doc. A/48/96 (1993).

137 *Supra* n. 126.

138 *Ibid.*; UN Department of Economic and Social Affairs Division for Social Policy and Development, *UN Convention on the Human Rights of People with Disabilities Ad Hoc Committee Daily Summaries 16 January 2006*, <http://www.un.org/esa/socdev/enable/rights/ahc7sum16jan.htm> (accessed 13 Jan. 2017).

139 *Supra* n. 126.

140 CRPD, art. 9(f), (g).

In short, accessibility covers three areas, namely, (1) physical environment¹⁴¹ and transportation, (2) information and communication¹⁴² and (3) services; accessibility is intended to uphold the quality of living for people with all types of impairment. Further details of the obligations towards these three areas in relation to air travel will be discussed in Section 3.4.2.1, Chapter 3.

1.5.1.2 Accessibility as a global public good

At first glance, accessibility seems to benefit PWDs mainly as seen in Section 1.1.1. By applying the capabilities approach, the perception of accessibility as an expenses and compliance issue is shifted to accessibility as another factor to fulfill human capabilities. The UN Department of Economic and Social Affairs (UN DESA) pronounces that the benefits of linking the capabilities approach to the issue of accessibility are stated along with the fact that accessibility benefits all people.¹⁴³

Apart from trivial evidence on the negative effect that human rights duties obstruct market growth, when the capabilities approach supplants the utilitarian measurement, this conflict vanishes.¹⁴⁴ Likewise, incorporating capability value into an economic analysis yields extensive impacts on everyone.¹⁴⁵ Operators also benefit by increasing the number of passengers and, in turn, increasing revenue.¹⁴⁶ The cost of handling and assisting is reduced by an accessible environment because PWDs can travel more independently.¹⁴⁷ From an economic perspective, accessible air travel benefits not only PWDs

141 According to the Report of the 9th Session of the Conference of States Parties to the CRPD, Theresia Degener, a member of the CRPD Committee viewed information and communication in the sphere of physical environment. See UN Division for Social Policy and Development Disability, Report of the ninth session of the Conference of States Parties to the Convention on the Rights of Persons with Disabilities, CRPD/CSP/2016/5, Annex II, para. 29.

142 CRPD, art. 2. "Communication" includes languages, display of text, Braille, tactile communication, large print, accessible multimedia as well as written, audio, plain-language, human-reader and augmentative and alternative modes, means and formats of communication, including accessible information and communication technology; 'Language' includes spoken and signed languages and other forms of non spoken languages.

143 Department of Economic and Social Affairs (DESA) of the United Nations Secretariat, *Accessibility and Development Mainstreaming Disability in the Post-2015 Development Agenda*, ST/ESA/350, http://www.un.org/disabilities/documents/accessibility_and_development.pdf (accessed 25 May 2017), 27.

144 Fredman, *supra* n. 23, 59.

145 Casullo, *supra* n. 24, 15.

146 Casullo, *ibid.*, 15.

147 Casullo, *ibid.*, 16.

but also other passengers because accessibility through universal design¹⁴⁸ takes all passengers into account. Generally, the public sectors benefit from an inclusive society since the capability to travel is a pre-condition to education, work and other livelihood-related activities.¹⁴⁹

This position is also affirmed by the Supreme Court of Canada in *Council of Canadians with Disabilities v. VIA Rail Canada*,¹⁵⁰ when examining whether a rail company should provide accessible trains or not. It held that

‘This is not a fight between able-bodied and disabled persons to keep fares down by avoiding the expense of eliminating discrimination. Safety measures can be expensive too, but one would hardly expect to hear that their cost justifies dangerous conditions. In the long run, danger is more expensive than safety and discrimination is more expensive than inclusion.’¹⁵¹

This reasoning demonstrated that even if one views accessibility as a cost, it is worth the investment in order to achieve the goal of inclusion which is one of the SDGs.

Doubtlessly, the UN DESA qualifies accessibility as a global public good because of its non-rivalry and non-excludability.¹⁵² The UN DESA does not further explain whether accessibility belongs to a pure or impure public good.¹⁵³ It is possible that goods that ought to be pure public goods are in fact impure public goods since not everybody is guaranteed access to these goods yet.¹⁵⁴ In my view, this is comparable to *lex lata* and *lex ferenda*.

1.5.2 Personal mobility

The CRPD does not define ‘personal mobility’. Later, the CRPD Committee elaborates on this by stating that Article 20 recognizes the right of PWDs to

148 CRPD, art. 2. “Universal design” means the design of products, environments, programmes and services to be usable by all people, to the greatest extent possible, without the need for adaptation or specialized design. “Universal design” shall not exclude assistive devices for particular groups of persons with disabilities where this is needed.

149 Casullo, *supra* n. 24, 16.

150 *Council of Canadians with Disabilities v. VIA Rail Canada Inc.* [2007] 1 S.C.R. 650.

151 *Ibid.*, para. 221.

152 *Supra* n. 143, 27.

153 A pure public good is a thing or condition which concerns all and which cannot be secured by private and individual activity while an impure public good is being exclusive or being competitive. See Inge Kaul, Isabelle Grunberg & Marc A. Stern, *Global Public Goods: International Cooperation in the 21st Century*, 3 (Oxford University Press 1999).

154 Erik André Andersen & Birgit Lindsnaes, *Towards New Global Strategies: Public Goods and Human Rights*, 38 (Brill 2007).

move freely with the greatest possible independence.¹⁵⁵ It gives the impression that ‘to move freely’ has the same meaning as ‘personal mobility’ since the CRPD Committee makes use of this term when referring to personal mobility.

An obligation under Article 20(a) pertaining to the facilitation of personal mobility of PWDs can create an overlapping obligation on accessible air travel in conjunction with Article 9. This overlap occurs when the CRPD Committee suggests that States Parties make a country report. Both Article 9 and Article 20 request contents on access to public transport.¹⁵⁶ Doubtlessly, this repetitive request means one sees similar contents addressed differently by the States Parties either under Article 9 or Article 20, or both. For instance, the EU and its Member States referred to the same regulation in their country report to the CRPD Committee in an inconsistent manner, namely, in Article 9,¹⁵⁷ Article 20,¹⁵⁸ and both Articles.¹⁵⁹

155 Committee on the Rights of Persons with Disabilities, *Guidelines on treaty-specific document to be submitted by states parties under article 35, paragraph 1, of the Convention on the Rights of Persons with Disabilities*, (Second session, 2009) U.N. Doc. CRPD/C/2/3.

156 *Ibid.*, 8, 12.

157 *Initial Report on the Implementation of the Provisions of the Convention on the Rights of Persons with Disabilities submitted by Belgium*, (13 March 2013), U.N. Doc CRPD/C/BEL/1, para. 51; *Initial Report on the Implementation of the Provisions of the Convention on the Rights of Persons with Disabilities submitted by Cyprus*, (27 February 2015), U.N. Doc CRPD/C/CYP/1, para. 77; *Initial Report on the Implementation of the Provisions of the Convention on the Rights of Persons with Disabilities submitted by Latvia*, (29 October 2015), U.N. Doc CRPD/C/LVA/1, para. 106; *Initial Report on the Implementation of the Provisions of the Convention on the Rights of Persons with Disabilities submitted by Lithuania*, (2 December 2014), U.N. Doc CRPD/C/LTU/1, para. 51; *Initial Report on the Implementation of the Provisions of the Convention on the Rights of Persons with Disabilities submitted by Poland*, (3 November 2015), U.N. Doc CRPD/C/POL/1, para. 92; *Initial Report on the Implementation of the Provisions of the Convention on the Rights of Persons with Disabilities submitted by Serbia*, (29 September 2014), U.N. Doc CRPD/C/SRB/1, para. 111; *Initial Report on the Implementation of the Provisions of the Convention on the Rights of Persons with Disabilities submitted by Sweden*, (18 September 2012), U.N. Doc CRPD/C/SWE/1, para. 87.

158 *Initial Report on the Implementation of the Provisions of the Convention on the Rights of Persons with Disabilities submitted by Czech Republic*, (27 June 2013), U.N. Doc CRPD/C/CZE/1, para. 210; *Initial Report on the Implementation of the Provisions of the Convention on the Rights of Persons with Disabilities submitted by Germany*, (7 May 2013), U.N. Doc CRPD/C/DEU/1, para. 163; *Initial Report on the Implementation of the Provisions of the Convention on the Rights of Persons with Disabilities submitted by Slovakia*, (24 September 2014), U.N. Doc CRPD/C/SVK/1, para. 196; *Initial Report on the Implementation of the Provisions of the Convention on the Rights of Persons with Disabilities submitted by Republic of Slovenia*, (30 Oct. 2015), U.N. Doc. CRPD/C/SVN/1, para. 117.

159 *Initial Report on the Implementation of the Provisions of the Convention on the Rights of Persons with Disabilities submitted by the European Union*, (3 December 2014), U.N. Doc CRPD/C/EU/1, paras 53, 109; *Initial Report on the Implementation of the Provisions of the Convention on the Rights of Persons with Disabilities submitted by Austria*, (10 October 2011), U.N. Doc CRPD/C/AUT/1, paras 112, 205; *Initial Report on the Implementation of the Provisions of the Convention on the Rights of Persons with Disabilities submitted by the United Kingdom*, (3 July 2013), U.N. Doc CRPD/C/GBR/1, para. 95.

1.5.3 Discrimination on the basis of disabilities

Prior to the adoption of the CRPD, discrimination on the grounds of disability had been recognized as an obstacle for PWDs to access transport as well as public places and services by the CESCR¹⁶⁰ and the Committee on the Rights of the Child (CRC Committee).¹⁶¹

1.5.3.1 Definition

The CRPD defines discrimination on the basis of disability in Article 2. The first sentence of the CRPD definition is similar to the definition of discrimination under the International Convention on the Elimination of All Forms of Racial Discrimination (CERD)¹⁶² and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).¹⁶³ It reads:

‘any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field...’¹⁶⁴

From this description, discrimination on the basis of disability can be extracted in relation to three factors. First, it is a distinction, exclusion or restriction. Evaluation criteria on whether the same or different treatment is wrong or not are found in other factors. In this sense, distinction and discrimination do not affect the substantive meaning because distinction in this sense covers only a discriminatory distinction.¹⁶⁵

The second factor is that such distinct treatment is based on the basis of disability. The term ‘on the basis of disability’ modifies any distinction, exclusion or restriction to mean that such distinction, exclusion or restriction does not address the particular disability-related needs.

Third, there is a purpose or effect to impair or nullify the recognition of human rights and freedom on an equal basis with others. Only the distinction, exclusion or restriction intending or affecting recognized human rights and fundamental freedoms constitutes discrimination in the CRPD. The recognition of human rights and fundamental freedoms means that disability-based dis-

160 CESCR General Comment 5, *supra* n. 125, para. 15.

161 Committee on the Rights of the Child, *Consideration of Reports Submitted by The Bahamas*, (Thirty-eighth session, 2005), U.N. Doc. CRC/C/15/Add.253, paras 45-46.

162 International Convention on the Elimination of All Forms of Racial Discrimination (New York, 7 Mar. 1966) 660 U.N.T.S., art. 1(1).

163 Convention on the Elimination of All Forms of Discrimination against Women (New York, 18 Dec. 1979) 1249 U.N.T.S., art 1.

164 CRPD, art 2.

165 Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, 44 (Kehl am Rhein 1993); Saul, Kinkley & Mowbray, *supra* n. 95, 180.

crimination is not a stand-alone provision, similar to Article 2(2) of the ICCPR.¹⁶⁶

Not every differentiation constitutes disability-based discrimination. Two situations are viewed as a legitimate distinction, exclusion or restriction under the CRPD. One is when such differentiation is reasonable and objective. The other justification laid down in Article 5(4) of the CRPD is a specific measure necessary to accelerate or achieve *de facto* equality of PWDs. The objective justification has been noted by the HRC and the CESCR and been used by States.¹⁶⁷ According to the preparatory works of the CRPD, this exemption might possibly be misinterpreted so it should not be added explicitly in the text.¹⁶⁸ Despite being excluded from the text, the objective and reasonable justification is applied by the CRPD Committee.¹⁶⁹ In other words if it is not too burdensome to the duty holders, they have to provide such accommodation, as failure to do so amounts to discrimination.¹⁷⁰

Different treatment to level the playing field for PWDs do not constitute discrimination.¹⁷¹ For instance, a wheelchair user cannot use stairs to enter an aircraft, so providing a lift or a jetway for the wheelchair user to access an aircraft is not discriminatory practice. The special measures to obtain equality for PWDs are not equaled to discrimination despite involving favorable treatments.¹⁷² During the draft of the CRPD, the UN High Commissioner for Human Rights studied and concluded that special measures do not constitute discrimination of other groups subject to three conditions: first, they aim to correct unequalled conditions; second, they are based on reasonable and

166 Sarah Joseph & Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary*, 764 (3rd ed., Oxford University Press 2013); Saul, Kinkley & Mowbray, *ibid.*, 185.

167 Human Rights Committee, General Comment 18, Art. 2 (Thirty-seventh session, 1989), para. 13; Committee on Economic, Social and Cultural Rights, General Comment 20: Art. 2 para. 2 (Forty-second session, 2009), U.N. Doc. E/C.12/GC/20, para. 13. See Dagmar Schiek, Lisa Waddington & Mark Bell, *Non-Discrimination Law*, 372 (Hart Publishing 2007); *Griggs et al. v. Duke Power Co.* 401 U.S. 424 (1971). For the criteria adopted by the CRPD Committee, see Section 3.4.1 Chapter 3.

168 Report of the fourth session of the Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, 13, U.N. Doc. A/59/360 (2004).

169 Committee on the Rights of Persons with Disabilities, *H.M. v. Sweden* (Communication no. 3/2011), U.N. Doc. CRPD/C/7/D/3/2011, para. 8.3; Committee on the Rights of Persons with Disabilities, *F v. Austria* (Communication no. 21/2014), U.N. Doc. CRPD/C/14/D/21/2014, paras 2.4, 8.7. See Section 3.4.1, Chapter 3.

170 Aart Hendriks, *Disabled Persons and Their Right to Equal Treatment: Allowing Differentiation while Ending Discrimination*, 1:2 Health & Hum. Rts., 152, 167 (1995).

171 *Ibid.*, 167-168; Aart Hendriks, *The Significance of Equality and Non-Discrimination for the Protection of the Rights and Dignity of Disabled Persons*, 60 in Human Rights and Disabled Persons (Theresia Degener & Yolan Koster-Dreese, Martinus Nijhoff 1995).

172 CRPD, art. 5(4); CESCR General Comment 5, *supra* n. 125, para. 9.

objective criteria and last, they are of a temporary nature.¹⁷³ A general example of this measure is the quota system. The positive measures should not be misinterpreted as reasonable accommodation in Article 5(3) because they address a dissimilar group. While positive measures are addressed at a group, reasonable accommodation focuses on an individual.¹⁷⁴

What makes the CRPD outstanding is the second sentence of the definition, which includes denial of reasonable accommodation as discrimination on the basis of disability.¹⁷⁵ This will be discussed separately in Section 1.5.3.3 owing to its novelty at the international level.

1.5.3.2 Forms of discrimination on the basis of disability

During the drafting, there were debates on the inclusion of direct and indirect discrimination in the text, but in the end the meeting concurred that they were bracketed by the term ‘all forms of discrimination’.¹⁷⁶ A comparison of its definition in the CRPD¹⁷⁷ to that in the ICCPR and the ICESCR shows that the purpose or effect to impair or nullify the recognition of human rights implicates both formal and substantive discrimination.¹⁷⁸ In addition, harassment, instruction to discriminate, and multiple discrimination are covered by the CRPD.¹⁷⁹

The term ‘on the basis of disability’ implies that the CRPD protects not only PWDs but also others who are discriminated against on the grounds of disability, such as those who associate with PWDs. However, since it falls outside

173 UN Office of the High Commissioner for Human Rights, *Background Conference: The Concept of ‘Special’ Measures in International Human Rights Law*, 1 <http://www.un.org/esa/socdev/enable/rights/documents/ahc6ohchrspmeasures.doc> (accessed 13 Jan. 2017). Positive measures may need to be of a permanent nature in an exceptional case. See CESCR General Comment 20, *supra* n. 167, para. 9.

174 Broderick, *supra* n. 124, 119.

175 For the discussion of adding denial of reasonable accommodation, see UN Department of Economic and Social Affairs Division for Social Policy and Development, *Daily Summary of Discussions Related to Article 7*, <http://www.un.org/esa/socdev/enable/rights/ahc4sumart07.htm> (accessed 13 Jan. 2017).

176 UN Department of Economic and Social Affairs Division for Social Policy and Development, *Comments, Proposals and Amendments Submitted Electronically for the Seventh Session*, <http://www.un.org/esa/socdev/enable/rights/ahcstata2sevscomments.htm> (accessed 13 Jan. 2017). The EU and India proposed to delete the last sentence since it is covered by ‘all forms of discrimination’ while Japan Disability Forum supported to explicitly mention indirect discrimination because there was little awareness about this concept in Japan and it was in line with the provision in the CEDAW. See Broderick, *supra* n. 124, 96; H.M., *supra* n. 169, para. 8.3.

177 CRPD, art. 2. See Section 1.5.3.1.

178 Saul, Kinkley & Mowbray, *supra* n. 95, 181; Joseph & Castan, *supra* n. 166, 777.

179 Stefan Trömel, *A Personal Perspective on the Drafting History of the United Nations Convention on the Rights of Persons with Disabilities*, 1 Eur. Y.B. Disability L., 115, 123 (2009); Aart Hendriks, *The UN Disability Convention and (Multiple) Discrimination: Should EU Non-Discrimination Law be Modeled Accordingly?*, 2 Eur. Y.B. Disability L., 7, 13 (2010).

the scope of this study, the debate on the meaning of ‘on the basis of disability’ will not be further discussed here.¹⁸⁰

The CRPD assigns this obligation to States so this brings into question whether the CRPD covers private-sector discriminations or not because nowadays air carriers and airport operators are mostly private entities. At the beginning of the aviation industry, governments commonly built and operated airports and held a large portion of shares in airlines. Later, they delegated this function to provide public transport to private entities through public-private partnerships or privatization and allowed private entities to compete in the market. Absolving private entities from non-discrimination duties is illogical because this will open up leeway for States to privatize their public function and relieve them from their human rights obligations. By reviewing the obligations in the CRPD, the answer is affirmative because the CRPD requires States to ‘eliminate discrimination on the basis of disability by any person, organization or private enterprise’.¹⁸¹

1.5.3.3 Denial of reasonable accommodation as a form of discrimination

The CRPD and its preparatory draft do not define how the concept of reasonable accommodation fits into any forms of discrimination.¹⁸² There was a debate on whether the term ‘reasonable’ is a qualifier or not but the Coordinator of the fourth session of the Ad-Hoc Committee viewed reasonable accommodation as a single term.¹⁸³ Despite this fact, reasonable accommodation is subject to disproportionate or undue burden as seen from its definition in the CRPD, which reads:

180 For the support on inclusion of discrimination by association, see *supra* n. 134; Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Report Submitted by Tunisia*, (Fifth session, 2011), U.N. Doc. CRPD/C/TUN/CO/1, para. 8; Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Report Submitted by Spain*, (Sixth session, 2011), U.N. Doc. CRPD/C/ESP/CO/1, para. 20; Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Report Submitted by Peru*, *supra* n. 108, paras 6-7; Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Report Submitted by Cook Islands*, (Thirteenth session, 2015), U.N. Doc. CRPD/C/COK/CO/1, para. 10. For the other side’s argument, see Hendriks, *ibid*.

181 CRPD, art. 4(e). See Committee on the Rights of Persons with Disabilities, *Nyusti and Takács v. Hungary* (Communication no.1/2010), CRPD/C/9/D/1/2010. For obligations concerning air travel, see Section 3.3 and Section 3.4.4, Chapter 3 and for the *obiter dictum* of Lady Hale, see Section 5.3.2.3, Chapter 5.

182 The question on which form of discrimination is equaled to failure to make reasonable accommodation has been answered differently. In the EU, it can be viewed as a form of direct, indirect, *sui generis* form of discrimination or not explicitly mentioned the status at all. See Schiek, Waddington & Bell, *supra* n. 167, 740-745; Anna Lawson, *Disability and Equality Law in Britain*, 186 (Hart Publishing 2008).

183 *Supra* n. 175.

‘necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.’¹⁸⁴

This meaning gives rise to another problem concerning what a disproportionate or undue burden is. The UN, in the CRPD Handbook, does not delineate this term.¹⁸⁵ The unclear meaning of disproportionate or undue burden has been raised in the drafting histories of the CRPD and by Lawson, as this leaves the door open for States Parties to freely interpret this exemption.¹⁸⁶ In the draft General Comment No. 2, the burden to provide reasonable accommodation must be balanced with the inherent dignity of PWDs. Thus a more costly or technically challenging adjustment may not be considered disproportionate if it respects PWDs’ dignity better than in other ways.¹⁸⁷ Nonetheless, this sentence disappears from the General Comment but dignity, autonomy and choices of an individual remain factors to be taken into account for providing reasonable accommodation.¹⁸⁸

The CRPD Committee does not delineate the criteria to assess what constitutes a disproportionate or undue burden; as a consequence, different practices may exist among States. Furthermore, a disproportionate or undue burden can vary between countries with and without State subsidies and between major and smaller private entities.¹⁸⁹ After studying the Concept of Reasonable Accommodation in Selected National Disability Legislation prepared by the UN Department of Economic and Social Affairs, a list of factors considered as exceptions to accommodate PWDs can be grouped as follows: (1) cost, (2) health and safety of any person making the adjustment (3) environ-

184 CRPD, art. 2.

185 UN Office of the High Commissioner for Human Rights, *supra* n. 109.

186 Lawson, *supra* n. 182, 31-32; UN Department of Economic and Social Affairs Division for Social Policy and Development, *Position Paper of People with Disability Australia Incorporated (Australian) National Association of Community Legal Centres*, <http://www.un.org/esa/socdev/enable/rights/ahc8docs/ahc8naclc2.doc> (accessed 13 Jan. 2017).

187 Committee on the Rights of Persons with Disabilities, General comment on Article 9: Accessibility Draft prepared by the Committee (Eleventh session, 2014), CRPD/C/11/3, para. 24.

188 An example in this draft general comment is to put every effort into providing an accessible main entrance to an existing building instead of adapting the back door but it was criticized by Denmark, which submitted its concern on the term ‘every effort’ and suggested that the draft use the term ‘reasonable effort’ instead. See UN Office of the High Commissioner for Human Rights, *Response from the Government of Denmark with regards to Draft General Comment on Article 9 of the Convention – Accessibility*, 2, <http://www.ohchr.org/Documents/HRBodies/CRPD/GC/DenmarkArt12.doc> (accessed 13 Jan. 2017); CRPD General Comment 2, *supra* n. 120, para. 26.

189 Anna Lawson, *The United Nations Convention on the Right of Persons with Disabilities: New Era or False Dawn?*, 34:2 Syracuse J. Int’l L. & Com. 563, 597 (2007); Kallehauge, *supra* n. 129, 211.

mental detriment, (4) size of operation, (5) practicability, and (6) the alteration of the nature or operation of the business.¹⁹⁰ This review shows that exceptions differ from country to country whereby the common factor is the financial cost. These selected pieces of legislation are mostly general disability-related law or employment law. Since they do not specifically focus on transport, special rules about PWDs travelling by air will be explored in Section 4.6.2.2, Chapter 4.

The CRPD Committee sheds some light on this issue in their communications. In *Marie-Louise Jungelin v. Sweden*, the CRPD Committee accept that States Parties enjoy a certain margin of appreciation when assessing the reasonableness of the accommodation measure but argue that reasonable accommodation should be analyzed on a case-by-case basis and the reasonableness and proportionality should be assessed in view of the requested context.¹⁹¹ This perception is in line with an interpretation of non-discrimination in the ICCPR.¹⁹² Yet, the legal weight is uncertain since it is the dissenting opinion. Reasonable accommodation was again raised before the CRPD Committee in *H.M. v. Sweden* where the CRPD Committee briefly noted that Sweden has not indicated that accommodating the request of a PWD in this communication would impose a disproportionate or undue burden.¹⁹³ Consequently, the CRPD Committee concluded that silence implied that Sweden was able to accommodate PWDs and failure to do so violated the obligation of non-discrimination on the basis of disability.¹⁹⁴ This communication does not render any further criteria on the disproportionate or undue burden, but rather shows a procedure that sees States having to defend themselves.

1.5.4 Interrelationship among general human rights concepts

Accessibility, personal mobility and non-discrimination on the basis of disability are interconnected. The nexus between accessibility and personal mobility is mentioned in Section 1.5.2 above.

190 UN Department of Economic and Social Affairs Division for Social Policy and Development, *The Concept of Reasonable Accommodation in Selected National Disability Legislation*, <http://www.un.org/esa/socdev/enable/rights/ahc7bkgrndra.htm> (accessed 13 Jan. 2017). Cost: Australia, Canada, Ireland, Israel, the United Kingdom and the United States; Health and safety: Australia, and Canada; Environmental detriment: Australia; Size of operation: Canada, Israel and the United States; Practicability: The United Kingdom; Alteration of the nature or operation of the business: The United States.

191 Committee on the Rights of Persons with Disabilities, *Marie-Louise Jungelin v. Sweden*, (Communication No. 5/2011), U.N. Doc. CRPD/C/12/D/5/2011, para. 10.5.

192 Joseph & Castan, *supra* n. 166, 700.

193 *H.M.*, *supra* n. 169, para. 8.5.

194 *H.M.*, *ibid.*, para. 8.8. This reasoning is followed in *X. v. Argentina* (Communication no. 8/2012), U.N. Doc. CRPD/C/11/D/8/2012, para 8.5.

Accessibility is closely intertwined with non-discrimination.¹⁹⁵ First, the State's obligation to ensure access to PWDs 'on an equal basis with others' in Article 9 of the CRPD shows a link between accessibility and non-discrimination on the basis of disability.¹⁹⁶ Second, reasonable accommodation is another connection between accessibility and discrimination on the basis of disability. Also, reasonable accommodation is a bridge between personal mobility and non-discrimination on the basis of disability. Waddington noted that personal mobility implicitly refers to reasonable accommodation.¹⁹⁷

Under the CRPD, reasonable accommodation will apply when accessibility is not sufficient.¹⁹⁸ Dissimilarly, accessibility is related to groups but reasonable accommodation is related to an individual.¹⁹⁹ The duty to provide accommodation is an *ex ante*, while the duty to provide reasonable accommodation depends on the request of an individual.²⁰⁰ An *ex ante* duty is subject to gradual implementation but reasonable accommodation has an immediate effect because reasonable accommodation often requires little to no cost.²⁰¹

Despite their difference, the same lack of access can require either reasonable accommodation or gradual implementation of accessibility standards depending on whether it concerns individuals or PWDs in general.²⁰² Compared to a claim on access to airports or aircraft, if a person using a wheelchair asks an aircraft operator to provide an on-board wheelchair for himself or herself, it is a reasonable accommodation claim. A claim becomes a claim on accessibility once such a person requests the availability of an on-board wheelchair in the whole fleet of aircraft to meet the need of all wheelchair users. Accessibility can trigger disability-based discrimination. The CRPD Committee confirms this relationship in that accessibility is a precondition for PWDs to live independently; therefore, denial of access to a physical environment, transportation, information and communication technologies, and facilities

195 Before the adoption of the CRPD, the CESCR in its General Comment No. 14 concerning the right to the highest standard of health recognized that accessibility and non-discrimination overlap because inaccessible health facilities, goods and services all lead to discrimination. See Committee on Economic, Social and Cultural Rights, General Comment 14, Art. 12 (Twenty-second session, 2000) U.N. Doc. E/C.12/2000/4, para. 12.

196 Anna Lawson, *Reasonable Accommodation and Accessibility Obligations: Toward a More Unified European Approach?*, 11 Eur. Anti-Discrimination L. Rev. 11, 14 (2011).

197 Lisa Waddington, *Breaking New Ground: The Implications of Ratification of the UN Convention on the Rights of Persons with Disabilities for the European Community*, 116 in *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian perspectives* (Oddnýr Mjón Arnardóttir & Gerard Quinn, Martinus Nijhoff 2009).

198 CRPD, art. 5(3); CRPD General Comment 2, *supra* n. 120, para. 9. See *F*, *supra* n. 169, paras 8.5, 8.7.

199 CRPD General Comment 2, *ibid.*, para. 25.

200 CRPD General Comment 2, *ibid.*, paras 25-26.

201 Broderick, *supra* n. 124, 247.

202 *Nyusti and Takács*, *supra* n. 181, para. 9.2.

and services open to the public should be viewed in the context of discrimination.²⁰³

1.6 LEGAL FORCE OF STANDARDS AND RECOMMENDED PRACTICES (SARPS)

1.6.1 Introduction of SARPS

Next to the treaty-based provision of the Chicago Convention, public international air law is based on, among others, Standards and Recommended Practices (SARPS) established and updated from time to time by ICAO. This section analyses the legal force of such SARPS.

1.6.2 Legal force of Standards

The first paragraph of Article 37 of the Chicago Convention clarifies the objective on uniform Standards to facilitate and improve navigation, so the provision requires Contracting States to 'collaborate securing the highest practicable degree of uniformity'.²⁰⁴ A definition of Standards:

'any specification for physical characteristics, configuration, material, performance, personnel or procedure, the uniform application of which is recognized as necessary for the safety or regularity of international air navigation and to which Contracting States will conform in accordance with the Convention; in the event of impossibility of compliance, notification to the Council is compulsory under Article 38 of the Convention.'²⁰⁵

According to Article 37 and the quoted definition, States accepted to observe the Standards which are designed to achieve uniform practice; however, the term 'practicable' reduces the degree of compliance to the level that States find practicable. Milde rightly affirms that this accepted obligation is not 'to comply with' but 'to collaborate in securing the highest practicable'.²⁰⁶

Article 38 of the Chicago Convention further requires States finding such impracticability to notify ICAO immediately or within 60 days in the case of

²⁰³ CRPD General Comment 2, *supra* n. 120, para. 23.

²⁰⁴ Chicago Convention, art. 37 para. 1.

²⁰⁵ ICAO, Resolution A36-13, Appendix A. This definition is similar to a definition in Annexes relating to safety and a definition in Annex 16 and Annex 17.

²⁰⁶ Michael Milde, *International Air Law and ICAO*, 173-174 (3rd ed., Eleven International Publishing 2016).

amendments to Standards so ICAO can notify other States.²⁰⁷ This notification system ensures the acknowledgement of non-uniformity.

Yet, the unclear scope of the term 'practicable' in Article 37 and 'impracticable' in Article 38 has not been free from controversy.²⁰⁸ Even though ICAO expects States to observe Standards unless they file a notification of difference, in practice, States have sole discretion to decide on the provision that is practicable for them.²⁰⁹

Moreover, the period to 'immediately' notify any difference is itself questionable in its practicability. Dempsey points out that the immediate notification can be triggered either by the date on which SARPs become effective under Article 90 of the Chicago Convention, which will be discussed in Section 1.6.5, or by the date when a State finds any impracticability of observance with a Standard.²¹⁰ He concludes that, in practice, States are free to notify ICAO at any time or not at all.²¹¹

Even though Huang accepts the authority of States to deviate from Standards, he suggests that some Standards such as those involving safety and security are so pivotal that they may not be departed from.²¹² These Stand-

²⁰⁷ Chicago Convention,

Article 38 Departures from international standards and procedures

Any State which finds it impracticable to comply in all respects with any such international standard or procedure, or to bring its own regulations or practices into full accord with any international standard or procedure after amendment of the latter, or which deems it necessary to adopt regulations or practices differing in any particular respect from those established by an international standard, shall give immediate notification to the International Civil Aviation Organization of the differences between its own practice and that established by the international standard. In the case of amendments to international standards, any State which does not make the appropriate amendments to its own regulations or practices shall give notice to the Council within sixty days of the adoption of the amendment to the international standard, or indicate the action which it proposes to take. In any such case, the Council shall make immediate notification to all other states of the difference which exists between one or more features of an international standard and the corresponding national practice of that State.

²⁰⁸ Milde, *supra* n. 206, 174; Thomas Buergenthal, *Law-making in the International Civil Aviation Organization*, 76 (Syracuse University Press 1969); Ruwantissa Abeyratne, *Convention in International Civil Aviation: A Commentary*, 421 (Springer International Publishing 2014); Brian F. Havel & Gabriel S. Sanchez, *The Principles and Practice of International Aviation Law*, 72 (Cambridge University Press 2014); Jiefang Huang, *Aviation Safety and ICAO*, 60 (Kluwer Law International 2009); Paul Stephen Dempsey, *Compliance & Enforcement in International Law: Achieving Global Uniformity in Aviation Safety*, 30 N.C.J. Int'l L. & Com. Reg. 1, 2 (2004-2005); Pablo Mendes de Leon, *The Legal Force of ICAO SARPs in a Multilevel Jurisdiction Context*, 12: 2-3 J. LuchtRecht, 11, 12 (2013).

²⁰⁹ Milde viewed that States must comply with SARPs in good faith and the duty to notify is unconditional while Buergenthal interpreted that good faith offers States broad discretion on when to notify. See Milde, *ibid.*, 174, 179; Buergenthal, *ibid.*, 78; Huang, *ibid.*, 60.

²¹⁰ Dempsey, *supra* n. 208, 15.

²¹¹ Dempsey, *ibid.*, 15.

²¹² Huang, *supra* n. 208, 61-62.

ards may have acquired the *erga omnes* status because of their necessity in the community.²¹³

1.6.3 Legal force of Recommended Practices

Traditionally, the compulsory force of Recommended Practices is weaker than that of the Standards, or rather, it is not mandatory at all. Consequently, unlike the case of Standards, States are not obliged to make a notification of any difference in Recommended Practices and there is no legal effect from not doing so.²¹⁴

According to Huang's review of ICAO Assembly resolutions, the dividing line between SARPs is unclear.²¹⁵ The Assembly has repeatedly directed the ICAO Council to monitor and analyze the deviation of State's regulations and practices from SARPs to eliminate such differences.²¹⁶ This type of resolution does not differentiate whether the dissimilarity is from Standards or Recommended Practices; it focuses only on differences which are 'important for the safety, regularity, and efficiency of international air navigation'.²¹⁷ Hence, minor or insignificant differences are permitted. A widely approved resolution may formulate customary international laws.²¹⁸ In my view, this type of resolutions only aims at an ICAO organ to monitor differences from SARPs but it contains no instruction to States.²¹⁹ In Annexes, a notification of differences to the Recommended Practices by States is written in a hortatory manner only.²²⁰ Therefore, the physical acts, and not only verbal acts via resolutions, have to be taken into account to see whether States treat Standards and Recommended Practices indifferently or not.²²¹

213 Huang, *ibid.*, 62.

214 Huang, *ibid.*, 62; Ludwig Weber, *International Civil Aviation Organization (ICAO)*, 46 (Kluwer Law International, 2012).

215 Huang, *ibid.*, 63.

216 See ICAO, Resolution A35-14, Appendix D, para. 2; Resolution A36-13, Appendix D, para. 2; Resolution A37-15, Appendix A; Resolution A38-11, para. 13; Resolution A39-22, para. 13.

217 See ICAO, Resolution A35-14, Appendix D, para. 2; Resolution A36-13, Appendix D, para. 2; Resolution A37-15, Appendix A; Resolution A38-11, para. 13; Resolution A39-22, para. 13.

218 Abeyratne, *supra* n. 21, 146.

219 Huang viewed that this resolution indirectly addresses the member States. See Huang, *supra* n. 208, 191.

220 See Annex 18, *The Safe Transport of Dangerous Goods by Air*, (4th ed. Jul. 2011), foreword. Huang noted that the Council does not elevate the recommended practices to the level of standards so there is a different status between standards and recommended practices. See Huang, *supra* n. 208, 191.

221 Huang summarized legal scholars' view that the vote on resolution does not mirror the intention of States to comply with such resolution. See Huang, *ibid.*, 193.

1.6.4 The role of ICAO

The notification system cannot conclusively indicate any uniformity with the Standards.²²² ICAO does not have any sanction mechanism to enforce compliance with SARPs in any Annex; therefore, it strengthens its monitoring system instead by establishing safety and security audit programmes to verify the compliance of States with Annexes.

Another ICAO initiative is to publish a model clause for an ASA which refers to SARPs.²²³ Then the ICAO Assembly often strongly urges States to implement its model clause on aviation safety and aviation security.²²⁴

1.6.5 Implementation of SARPs

1.6.5.1 Implementation methods

The national legal system is a means to examine how States transpose treaty provisions into the rules of domestic law. In the US case *British Caledonian Airways Ltd. v. Bond*,²²⁵ the US Court of Appeals for the District of Columbia Circuit mentioned that Article 33 of the Chicago Convention is self-executing because it does not require any implementing legislation. However, the minimum standards on airworthiness for the purpose of Article 33 are found in Annex 8 to the Chicago Convention, and the court did not further explain on SARPs implementation.²²⁶ On the contrary, it appears that Annexes to the Chicago Convention are not self-executing; hence, SARPs can be legally binding on States through their promulgation.²²⁷ From my review in randomly selected countries, the implementation methods can be grouped into three methods: (1) passing national secondary law, (2) referring to SARPs in national law and (3) reference in an ASA. These methods will be discussed in Section 1.6.5.2 to Section 1.6.5.4.

²²² Milde, *supra* n. 206, 180.

²²³ ICAO, *ICAO Template Air Services Agreement*, <http://www.icao.int/Meetings/AMC/MA/ICAN2009/templateairservicesagreements.pdf> (accessed 13 Jan. 2017), arts 8-9.

²²⁴ The 39th Assembly did not address the implementation specifically. Conversely, it addressed under the No Country Left Behind Initiative. See Resolution A36-6, para.3; Resolution A38-15, Appendix C, Resolution A39-23; See Huang, *supra* n. 208, 187.

²²⁵ *British Caledonian Airways Ltd v. Langhorne Bond*, Federal Aviation Administration and others, 665 F.2d 1153, 1162, C.A.D.C. (1981). See Section 4.6.1.1, Chapter 4.

²²⁶ Mendes de Leon, *supra* n. 208, 15.

²²⁷ Paul Stephen Dempsey, *Public International Air Law*, 53 (McGill University, 2008).

1.6.5.2 Implementation in national law

Article 90 of the Chicago Convention which stipulates a time period when Annexes become effective is not equated in national implementation because Article 90 concerns the adoption and entry into force of Annexes but it is not about self-executing in contracting States.²²⁸

SARPs can be implemented into domestic law in several ways due to a State's view towards a relationship between international law and national law.²²⁹ SARPs can be transformed into a national legal system through domestic secondary legislation as seen in the case of the UK,²³⁰ and Canada. The Canadian Aviation Regulations, a compilation of regulatory requirements concerning aviation safety, are adopted to implement SARPs.²³¹ In relation to SARPs on safety, the US Federal Aviation Administration is responsible for implementing SARPs and updating its regulations, orders and procedures.²³²

Implementation of SARPs can be done at a regional level. As in case of the EU, the Joint Aviation Requirements developed by the Joint Aviation Authorities annexed to the Community Council Regulation EEC No. 3922/91 harmonizes rules on aviation technical requirements among Member States of the EU.²³³

1.6.5.3 Treaty provisions of SARPs in national aviation act

States can refer to Annexes in their national aviation act, so the legal effect of SARPs is the same as that of provisions in domestic law.²³⁴ Certain States such as South Africa,²³⁵ Namibia,²³⁶ and Sudan²³⁷ refer to specific Annexes

228 Gerald F. FitzGerald, *The International Civil Aviation Organization – A Case Study in the Implementation of Decisions of a Functional International Organization*, 188 in *The Effectiveness of International Decisions*, Papers of a Conference of the American Society of International Law (Stephen Schwebel, A. W. Sijthoff 1971); Mendes de Leon, *supra* n. 208, 12. In 1999, the Lao People's Democratic Republic did not have primary aviation legislation and specific civil aviation regulations so ICAO concluded that Annexes to the Chicago Convention had not been implemented. See ICAO, *Audit Summary Report of the Department of Civil Aviation of the Lao People's Democratic Republic*, http://cfapp.icao.int/fsix/AuditReps/initial/lao_1999_en.pdf (accessed 13 Apr. 2017).

229 Huang, *supra* n. 208, 213-216; Mendes de Leon, *supra* n. 208, 14.

230 Huang, *ibid.*, 215.

231 ICAO, *Audit Summary Report of Transport Canada*, http://cfapp.icao.int/fsix/AuditReps/initial/canada_2000_en.pdf (accessed 13 Apr. 2017).

232 US Department of Transportation, *Order 1240.11 Assessing Compliance with ICAO Standards and Recommended Practices (SARPs) and Implementing their Provisions*, <https://www.faa.gov/documentLibrary/media/Order/1240.11.pdf> (accessed 13 Apr. 2017).

233 ICAO, *Audit Summary Report of the Civil Aviation Authority and Civil Aviation Department of the Czech Republic*, http://cfapp.icao.int/fsix/AuditReps/initial/czech_2000_en.pdf (accessed 13 Apr. 2017).

234 Mendes de Leon, *supra* n. 208, 14.

235 South Africa Civil Aviation Act, 13 of 2009, arts 12, 30(1)(f), 31, 42(2)(c), 103(a), 131, 142.

to the Chicago Convention in their national legislation. From a review of these national civil aviation acts, the Annexes that are mostly incorporated are Annex 2, Annex 13, Annex 17 and Annex 18. Therefore, other Annexes not mentioned in these domestic laws are subject to the implementation of secondary legislation.²³⁸

Before restructuring the civil aviation authority, Thailand used to apply a similar approach by making reference to Annexes to the Chicago Convention in its Regulation of Civil Aviation Board without any further details.²³⁹ For example, one provision reads ‘matters relating to aerodromes shall comply with Annex 14 to the Chicago Convention and any amendment thereof’.²⁴⁰

This implementation method saves States translation costs and time; however, it must be carefully performed because some of SARPs provisions are addressed to States or do not specify the duty holders; therefore, the national aviation act has to indicate the duty holders under SARPs.²⁴¹ Moreover, in the end, States have to make the referred Annexes available for duty holders to access in their official language free of charge; otherwise, the legality of the binding force is questionable.²⁴²

The ICAO Assembly resolved on the formulation of SARPs that the amendment of SARPs shall be made only if essential and no more frequently than once per calendar year to maintain stability in national regulation.²⁴³

236 Namibia Civil Aviation Safety Act, 6 of 2017, arts 2(3), 74, 75, 118. The provisions in the Namibia Civil Aviation Safety Act are similar to those of South Africa.

237 Sudan Civil Aviation Safety Act, 2010, arts 49, 52(1), 69(2), 82.

238 See The Republic of Sudan Sudan Civil Aviation Regulations (SUCARs), *Personnel Licensing*, <http://www.scaa.gov.sd/ar/images/Sucar/sucar%20part%202/SUCAR%20part%201.pdf> (accessed 9 May 2017); The Republic of Sudan Sudan Civil Aviation Regulations (SUCARs), *Rules of the Air*, <http://www.scaa.gov.sd/ar/images/Sucar/sucar%20part%202/SUCAR%20part%202.pdf> (accessed 9 May 2017).

239 The Civil Aviation Authority of Thailand, Regulation of Civil Aviation Board No. 4 (1957), Government Gazette, Ror. Jor. 1055, Part 53 11 June 1957.

240 *Ibid.*, rule 12.

241 See Annex 18, *supra* n. 220.

5.1 General requirements

Dangerous goods shall be packed in accordance with the provisions of this chapter and as provided for in the Technical Instructions.

9.3 Information to passengers

Each Contracting State shall ensure that information is promulgated in such a manner that passengers are warned as to the types of dangerous goods which they are forbidden from transporting aboard an aircraft as provided for in the Technical Instructions.

242 This situation is comparable to the advisory opinion rendered by the Swedish Supreme Court, *Högsta domstolen*, in March 2017 concerning access to electricity-related standards since the publication referred to a list maintained by the Swedish Electric Standard and payment was required to gain access to such list. The Swedish Supreme Court opined that legislation must be readily available to the public free of charge otherwise it violates the principle of legality. See Library of Congress, *Sweden: Court Rules Legislation Must Be Made Available Free of Charge*, <http://www.loc.gov/law/foreign-news/article/sweden-court-rules-legislation-must-be-made-available-free-of-charge/> (accessed 21 June 2017).

243 ICAO, Resolution A38-11, paras.3, 9.

A practice from Switzerland can be taken as an example. Even though it uniquely declares an exception to publish the technical regulations in English,²⁴⁴ it transposes SARPs into its regulations in its official languages.²⁴⁵ In my view, a transformation of SARPs into national law should come in a clear, predictable, accessible and intelligible format; hence, a legal provision to give effect to an Annex without contents is not sufficient.

1.6.5.4 Treaty provision of SARPs in air services agreements

As stated in Section 1.6.4 on an ASA, States often refer to SARPs on safety and security as minimum standards.²⁴⁶ It reads:

‘The responsible authorities of the Parties shall recognize as valid, for the purposes of operating the air transportation provided for in this Agreement, certificates of airworthiness, certificates of competency, and licenses issued or validated by each other and still in force, provided that the requirements for such certificates or licenses at least equal the minimum standards that may be established pursuant to the Convention...’²⁴⁷

One undeniable benefit of a reference to SARPs in the ASAs is to strengthen the legal force of SARPs because States owe an obligation towards the other party in the ASA. Failure to do so leads to revocation, suspension or limitation of the permission to designated airlines of the other States.²⁴⁸ By the logic of *argumentum a contrario*, this incorporation guarantees that when a State complies with SARPs, the other State Party to the ASA cannot revoke, suspend or limit the permission to the airspace above a territory. An example is seen in *British Caledonian*, where the US breached the Chicago Convention by failing to recognize the validity of an airworthiness certificate of a foreign Contracting

244 Bundesgesetz über die Luftfahrt (Luftfahrtgesetz, LFG), 748.0 vom 21. Dezember 1948, AS 1977 2110; BBl 1976 III 1232, art. 6A. See Huang, *supra* n. 208, 215-216.

245 ICAO, *Audit Summary Report of the Federal Office for Civil Aviation of Switzerland*, 1-8 Nov. 2000, sec. 3.2.1.4.

246 See The EU-US Air Transport Agreement, (2007) arts 8, 9; Agreement on Air Transport between Canada and the European Community and its Member States, (2009), arts 6, 7; Air Transport Agreement between the Government of the United States of America and the Government of Canada, (1995), arts 13, 14.

247 The EU-US Air Transport Agreement, *ibid.*, art. 8.

248 The EU-US Air Transport Agreement, *ibid.*, art. 5; Agreement on Air Transport between Canada and the European Community and its Member States, *supra* n. 246, art. 3; Air Transport Agreement between the Government of the United States of America and the Government of Canada, *supra* n. 246, art. 3.

The ICAO Assembly often strongly urged States to implement its model clause on aviation safety and aviation security but in the 39th Assembly it did not address the implementation specifically. Conversely, it addresses under the No Country Left Behind Initiative. See Resolution A36-6, para.3; Resolution A38-15, Appendix C, Resolution A39-23; ICAO *Template Air Services Agreement*, *supra* n. 223, 17-18.

State, which was issued in accordance with SARPs in Annex 8 to the Chicago Convention.

1.7 STRUCTURE OF THE STUDY

The research questions, methodology, terminology and key concepts in this study have been set out in this introductory chapter. In the following chapters, I will analyze and answer the research questions in Section 1.2.

Chapter 2 will begin with a search for the basis of the right to travel by air in international and domestic laws as applicable to every human being with the aim of adopting this right as a basis for PWDS' claim in the case of accessibility, personal mobility and discrimination on the basis of disability.

Chapter 3 will delve into the CRPD for specific obligations for States Parties as a framework to further examine the regional and national regulations, as well as to evaluate the contents provided by ICAO in Chapter 4.

Chapter 4 will compare accessibility standards provided by ICAO, the EU, the US and Canada through the lens of the CRPD. Chapter 5 also relies on the framework in Chapter 3 to assess the remedial measures for damage specifically sustained by PWDS when travelling by air.

Finally, Chapter 6 will answer the central research questions and propose solutions based on the principal findings.

2 | In search of the right to travel by air

2.1 INTRODUCTION

The notion that the Convention on the Rights of Persons with Disabilities (CRPD)¹ does not establish new rights for persons with disabilities (PWDs)² leads to a quest for a right to travel or, in particular, a right to travel by air. According to the capabilities approach and the definition of ‘travel by air’ in Section 1.3.1 and Section 1.4.2, respectively, the quest for such a right must focus on the recognition of an opportunity to go from one place to another by commercial aircraft. This Chapter explores how it is defined and to what extent it entails obligations for States. With this aim, it reviews international human rights law and international air law; thereafter, it explores national law with specific attention to the EU, the US and Canada.

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- 1 Convention on the Rights of Persons with Disabilities, (24 Jan. 2007), U.N. Doc. A/RES/61/106, (CRPD).
 - 2 UN Office of the High Commissioner for Human Rights, *Monitoring the Convention on the Rights of Persons with Disabilities: Guidance for Human Rights Monitors*, 24 (2010). For the side supporting that the CRPD does not create any new human rights, see UN Office of the High Commissioner for Human Rights, *From Exclusion to Equality Realizing the rights of persons with disabilities*, 5 (2007); Rosemary Kayess & Phillip French, *Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities*, 8:1 Hum. Rts. L. Rev. 1, 20 (2008); Michael Ashley Stein & Janet E. Lord, *Future Prospects for the United Nations Convention on the Rights of Persons with Disabilities*, 30 in *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian perspectives* (Oddnyl Mjøll Arnardóttir & Gerard Quinn, Martinus Nijhoff 2009). For the side viewing that there are new rights, see UN Department of Economic and Social Affairs Division for Social Policy and Development, *UN Convention on the Human Rights of People with Disabilities Sixth Ad Hoc Committee Daily Summaries 5 August 2005*, <http://www.un.org/esa/socdev/enable/rights/ahc6sum5aug.htm> (accessed 13 Jan. 2017); Aart Hendriks, *UN Convention on the Rights of Persons with Disabilities*, 14:3 Eur. J. Health L. 273, 277 (2007); Jean Allain, *Legal Reports No. 2 Treaty Interpretation and the United Nations Convention on the Rights of Persons with Disabilities*, 21, <http://www.disabilityaction.org/fs/doc/publications/legal-report-2-treaty-interpretation-and-the-un-convention-on-the-rights-of-persons-with-disabilities.pdf> (accessed 13 Jan. 2017).

2.2 INTERNATIONAL AND REGIONAL HUMAN RIGHTS LAW

The starting point of the search for the right to travel will begin with the Universal Declaration of Human Rights (UDHR). During the preparatory work for the UDHR, the closest provision to recognizing the right to travel was proposed by the US in draft paragraph 2 of Article 9 on Liberty of Movement within the Borders of a State, which reads:

‘every person shall, subject to equitable immigration and deportation laws, be free to enter, *travel through or over*, and remain temporarily in the territory of another state, provided always that he observes local laws and police regulations.’³

At first glance, the expression ‘travel... over... the territory’ appears to encompass air transport since the US recognized forms of transport in the right to travel before the time the UDHR was drafted.⁴ Moreover, this expression recalls the recognition of sovereignty over the airspace above a territory in the Convention on International Civil Aviation (Chicago Convention).⁵ However, the fact that there is no record of the discussion on this provision leads to uncertainty on whether the US proposal intended to cover means of transport or not.

The right to travel and modes of transport were raised in the context of non-discrimination. When the French delegate proposed curbing the limit of discrimination only to the rights recognized in the UDHR, the delegate from the Philippines expressed concern over whether this proposal would exclude the right to travel on railroads without discrimination.⁶ He further pointed out that, even though this right was not spelled out, it should certainly be covered.⁷ In the end, the protection against discrimination in the UDHR is restricted in accordance with the French delegate’s proposal and the concept that non-discrimination is not a stand-alone right is transposed to other human rights treaties. However, the term ‘right to travel’ is not directly mentioned in any UN human rights instruments or regional human rights conventions; therefore, this Section examines other human rights provisions to find elements that might constitute the right to travel.

3 William A. Schabas, *The Universal Declaration of Human Rights: The Travaux Préparatoires*, 713 (Cambridge University Press 2013) emphasis added.

4 For the US Constitution, see Section 2.4.1.

5 Convention on International Civil Aviation (Chicago, 7 Dec. 1944), 15 U.N.T.S. 295, 61 Stat. 1180, T.I.A.S. No. 1591, art. 1, (Chicago Convention).

6 Schabas, *supra* n. 3, 1689.

7 Schabas, *ibid.*, 1689.

2.2.1 Freedom of movement

The drafting history of the CRPD reveals that draft Article 20 on personal mobility is rooted in Article 5(d)(i) of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), Article 15(4) of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and Article 39 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, all of which are related to the right to freedom of movement.⁸ Interestingly, the drafting history does not refer to Article 12 of the International Covenant on Civil and Political Rights (ICCPR) but Article 18 of the CRPD on liberty of movement makes reference to all of the abovementioned articles, including Article 12 of the ICCPR.⁹

Freedom of movement covers the ability to move within a country, to leave any country and to enter one's own country.¹⁰ Air travel can certainly facilitate the ability to move from place to place. Nevertheless, the interpretation and application of the right to freedom of movement by the Human Rights Committee (HRC) only focus on immigration and travel documents, and not on means of transport.¹¹

2.2.2 Access to any place or service

In 2014, the Committee on the Rights of Persons with Disabilities (CRPD Committee), which has the authority to express how the CRPD should be interpreted,¹² affirmed that accessibility is not a new right but is rooted in Article 25(c) of the ICCPR and Article 5(f) of the International Convention on the

8 United Nations, Ad Hoc Committee, *Article 20 – Personal Mobility References*, <http://www.un.org/esa/socdev/enable/rights/ahcstata20refinthr.htm> (accessed 21 Mar. 2017).

9 United Nations, Ad Hoc Committee, *Article 18 – Liberty of movement References*, <http://www.un.org/esa/socdev/enable/rights/ahcstata18refinthr.htm> (accessed 21 Mar. 2017).

10 International Covenant on Civil and Political Rights (New York, 16 Dec. 1966) 999 U.N.T.S. 171 and 1057 U.N.T.S. 407, art. 12 (ICCPR).

11 Human Rights Committee, General Comment 27, Freedom of movement (Sixty-seventh session, 1999), U.N. Doc. CCPR/C/21/Rev.1/Add. 9, para. 9; Human Rights Committee, *Ory v. France* (Communication no. 1960/2010), CCPR/C/110/D/1960/2010. The HRC accepted the necessity to protect security and public order of the State; non-performance of military service leads to refusal of passport issuance. See Human Rights Committee, *Lauri Peltonen v. Finland* (Communication no. 492/1992), CCPR/C/51/D/492/1992, para. 8.4.

12 Jean Allain, *Legal Reports No. 2 Treaty Interpretation and the United Nations Convention on the Rights of Persons with Disabilities*, 4, <http://www.disabilityaction.org/fs/doc/publications/legal-report-2-treaty-interpretation-and-the-un-convention-on-the-rights-of-persons-with-disabilities.pdf> (accessed 13 Jan. 2017).

Elimination of All Forms of Racial Discrimination (CERD).¹³ From a review of the international and regional human rights conventions, the comparable right to access to any place or service is also expressly written down in the CEDAW and the African Charter on Human and Peoples' Rights (ACHPR).

2.2.2.1 *International Covenant on Civil and Political Rights*

Article 25(c) of the ICCPR deals with access to public service as detailed by the HRC.¹⁴ Nothing in the HRC General Comment on this Article deals with access to physical buildings, information and communication or goods and services, all of which are at the heart of Article 9 of the CRPD. The reference to Article 25(c) of the ICCPR is dubitable. Even Australia, which held that accessibility is not a new right, questioned its submission on the scope of Article 25(c).¹⁵ More support that a reference to the ICCPR is improper can be found in the *travaux préparatoires*. During the discussion of accessibility, no delegates referred to Article 25(C) of the ICCPR; on the contrary, the Chair of the Sixth Session pointed out that accessibility contained both an economic, social and cultural right, and a civil and political right.¹⁶ Therefore, it is unconvincing to interpret this Article as referring to access to any place or service.

13 Committee on the Rights of Persons with Disabilities, General Comment 2, Art. 9 (Eleventh session, 2014), U.N. Doc. CRPD/C/GC/2, para. 2.

A review of the draft General Comment on Article 9 – Accessibility discloses that the CRPD Committee was uncertain whether accessibility was an existing or a new right because it provided two alternative texts. One is that accessibility should not be perceived as a new right, while the other option is to interpret Article 9 of the CRPD by way of Article 31 of the VCLT, so that accessibility is in fact to be considered as a new right. Among the submissions responding to the draft General Comment on Article 9 – accessibility, there were three votes for the first alternative text, while only one delegate selected accessibility as a new right. This may be the reason why the final General Comment opted for the first alternative text. See Committee on the Rights of Persons with Disabilities, General comment on Article 9: Accessibility Draft prepared by the Committee (Eleventh session, 2014), CRPD/C/11/3, para. 11; UN Office of the High Commissioner for Human Rights, *Draft General Comment on Article 12 of the Convention – Equal Recognition before the Law & Draft General Comment on Article 9 of the Convention – Accessibility*, <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/DGCArticles12And9.aspx> (accessed 13 Jan. 2017). Australia, Denmark and the Swedish Disability Federation choose the first option while Hand In Hand Foundation (Kézenfogva Alapítvány) chooses the second text.

14 Human Rights Committee, General Comment 25, Art. 25 (Fifty-seventh session, 1996), U.N. Doc. CCPR/C/21/Rev.1/Add.7, para. 23.

15 UN Office of the High Commissioner for Human Rights, *Views of the Australian Government on the draft General Comment by the Committee on the Rights of Persons with Disabilities regarding Article 9 of the Convention – Accessibility*, para. 5, <http://www.ohchr.org/Documents/HRBodies/CRPD/GC/AustralianHRCart12.doc> (accessed 13 Jan. 2017).

16 UN Convention on the Human Rights of People with Disabilities Sixth Ad Hoc Committee Daily Summaries 5 August 2005, *supra* n. 2.

2.2.2.2 *International Convention on the Elimination of All Forms of Racial Discrimination*

Article 5(f) of the CERD, developed from Article 3(2) of the Declaration on the Elimination of All Forms of Racial Discrimination,¹⁷ does not have any comparable right to the UDHR.¹⁸ It recognizes the right of access to any place intended for use by the general public.¹⁹

No official criteria as to what constitutes “any place or service intended for use by the general public” are stipulated therein, but the CERD provides non-exhaustive examples by using the words ‘such as’.²⁰ Transport is directly mentioned in this Article and the General Recommendation published by the Committee on the Elimination of Racial Discrimination (CERD Committee).²¹ The CERD Committee also decided that a railway station is a public institution.²² Article 5(f) obliges States Parties to furnish legislation to guarantee access and to apply sanctions for any refusals of access.²³ The CERD mainly promotes access to eliminate racial discrimination, so it says nothing about physical or informational barriers which are within the scope of the CRPD.

2.2.2.3 *Convention on the Elimination of All Forms of Discrimination Against Women*

The CEDAW addresses the right to access public transport for rural women.²⁴ Similar to the CRPD and the CERD, the CEDAW targets a specific group that has

17 Declaration on the Elimination of all Forms of Racial Discrimination Resolution adopted by the General Assembly, 1904 (XVIII) G.A. Res. 1904, U.N. GAOR 18th Sess., U.N. Doc A/RES/18/1904 (1963).

18 Patrick Thornberry, *The International Convention on the Elimination of All Forms of Racial Discrimination: A Commentary*, 388, (Oxford University Press 2016).

19 International Convention on the Elimination of All Forms of Racial Discrimination (New York, 7 Mar. 1966) 660 U.N.T.S. 195, 5 I.L.M. 352 (1966), (CERD)
Article 5 In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

...

(f) The right of access to any place or service intended for use by the general public, such as transport hotels, restaurants, cafes, theatres and parks.

20 Natan Lerner, *The U.N. Convention on the Elimination of All Forms of Racial Discrimination: A Commentary*, 70 (Sijthoff 1970).

21 Committee on the Elimination of Racial Discrimination, General Recommendation XXX, Discrimination against Non-citizens (Sixty-fifth session, 2005), para. 38.

22 Committee on the Elimination of Racial Discrimination, *Miroslav Lacko v. Slovak Republic*, (Communication no. 11/1998), U.N. Doc. CERD/C/59/D/11/1998, para. 3.5.

23 Thornberry, *supra* n. 18, 389.

24 Convention on the Elimination of All Forms of Discrimination against Women (New York, 18 Dec. 1979) 1249 U.N.T.S. 13, 19 I.L.M. 33 (1980), (CEDAW). Article 14(2):

been oppressed by society. Nevertheless, while the CERD and the CEDAW are non-discrimination based conventions, the CRPD adopts the holistic approach.²⁵

2.2.2.4 African Charter on Human and Peoples' Rights

The ACHPR is the only regional human rights convention that recognizes the right to access to public property on an equal basis.²⁶ The objective of this novelty is to serve the special situation in South Africa, where public property was only enjoyed by some privileged groups.²⁷ It is obscure what constitutes public property or a service in this context. One author claims that because this right is bracketed under the right to participate in government, it cannot be universally applied to other contexts unrelated to government participation.²⁸ Another author broadly views that public property and services differ among States but in general indicate roads, parks, museums, hospitals, postal services and transport.²⁹ Limitations to this right are possible even though the Article does not explicitly prescribe these.³⁰

2.2.3 European Convention for the Protection of Human Rights and Fundamental Freedoms

The right to respect for private life and family life acknowledged in the European Convention for the Protection of Human Rights and Fundamental

States Parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right:

...

(h) To enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications.

Committee on the Elimination of Discrimination against Women, General Recommendation 34, the Rights of Rural Women (2016), U.N. Doc CEDAW/C/GC/34, paras 86-87.

25 Colm O'Conneide, *Extracting Protection for the Rights of Persons with Disabilities from Human Rights Frameworks: Established Limits and New Possibilities*, 167 in *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian perspectives* (Oddnyl Mjo'll Arnardottir & Gerard Quinn, Martinus Nijhoff 2009).

26 African Charter on Human and Peoples' Rights [Banjul Charter] (Nairobi, Kenya, 27 June 1981), 21 I.L.M. 59 (1981), art. 13 (3).

27 Evelyn A. Ankumah, *The African Commission on Human and Peoples' Rights: Practice and Procedures*, 141 (Martinus Nijhoff Publishers 1996).

28 Christof Heyns, *Civil and Political Rights in the African Charter*, 174 in *The African Charter on Human and Peoples' Rights: The System in Practice* (Malcolm D. Evans & Rachel Murray, Cambridge University Press 2002).

29 Fatsah Ougergouz, *The African Charter on Human and Peoples' Rights. A Comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa*, 182 (Martinus Nijhoff Publishers 2003).

30 Vincent O. Orlu Nmeihelle, *The African Human Rights System: Its Laws, Practice and Institutions*, 118-119 (Martinus Nijhoff Publishers 2001).

Freedoms (ECHR)³¹ has been broadly construed to cover the physical and psychological integrity of an individual 'to ensure the development without outside interference'.³² Under this interpretation, the Article has been applied to challenge a lack of access to public places. In *Botta v. Italy*, Mr. Botta, being physically disabled, alleged that he was unable to participate in community life since he could not access the beach and sea during his holidays.³³ However, the European Court of Human Rights (ECtHR) found that the alleged place was far from the applicant's normal place of residence so no direct obligation was established for the State to provide accessibility.³⁴ Later, the ECtHR made a decision in another case concerning a large number of public buildings and buildings open to the public in the applicants' hometown that were not accessible for persons with impaired mobility.³⁵ In *Zehnalová and Zehnal v. the Czech Republic*, the ECtHR noted that violation of the right to respect for private life under the ECHR occurs only in exceptional cases when lack of access to buildings interferes with the right to personal development and the right to establish and develop relationships with other human beings and the outside world.³⁶ Thus, even though the alleged buildings were in the applicants' hometown, the right to respect for private life was not applicable.³⁷ Since the right to respect for private life is not applicable in both these two cases, the non-discrimination provision, not being an independent provision, was not triggered.³⁸

Unlike in the two earlier cases, the applicant in *S.A.S. v. France* alleged a violation of various articles including Article 8 (right to respect for private and family life), Article 9 (freedom of thought, conscience and religion), and Article 10 (freedom of expression), taken separately and together with Article 14 (prohibition of discrimination) of ECHR concerning the ban on wearing clothing designed to conceal one's face in public places.³⁹ In this case, public places were understood to include airports and various other means of public transport.⁴⁰ However, the ECtHR found no violation of these Articles because the French government acted in accordance with the limitation provided in the ECHR.⁴¹

31 European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 Nov. 1950), 312 E.T.S. 5, art. 8.

32 *Botta v. Italy*, no. 21439/93 24 February 1998, para. 32.

33 *Ibid.*, para. 27.

34 *Ibid.*, para. 35.

35 *Zehnalová and Zehnal v. the Czech Republic*, no. 38621/97, ECHR 2002-V, 1.

36 *Ibid.*, 11.

37 *Ibid.*, 12.

38 *Botta*, *supra* n. 32, para. 39; *ibid.*, 13.

39 *S.A.S. v. France* [GC], no. 43835/11, 1 July 2014, ECHR 2014, 2.

40 *Ibid.*, 12.

41 *Ibid.*, 32-33, 45-58.

In short, this right to respect for private life is breached only when there is a certain interference in an individual's development and there are exceptions.

2.2.4 Non-discrimination under Article 26 International Covenant on Civil and Political Rights

Despite the fact that the ICCPR does not list access to public transport, the HRC once decided a case on access to public transport under a provision on non-discrimination. In *M. Schmitz-de-Jong v. the Netherlands*, the complaint was that the applicant, who was then 44 years old, was not entitled to a senior citizen's partner's pass which was exclusively meant for partners who are 60 years old or above.⁴² The applicant alleged being discriminated against on the grounds of age under Article 26 of the ICCPR, a standalone provision, because the State in question failed to legislate to prohibit any discrimination on the basis of age and to guarantee equality.⁴³ This case affirms that once a State enacts a law to guarantee a right not enumerated in the ICCPR, a person can claim protection under Article 26 of the ICCPR.

2.2.5 Other economic, social, and cultural rights

While the International Covenant on Economic, Social and Cultural Rights (ICESCR) does not declare the right to travel in writing, an obligation concerning access to travel is implicitly acknowledged in its General Comments which stress a better living environment through the provision of adequate means of transport to facilitate the mobility of PWDs⁴⁴ and older persons.⁴⁵ Later, the General Comment of the Committee on the Economic, Social and Cultural Rights (CESCR) expressed that health should not be a barrier to access to travel and ensured this in the context of non-discrimination in economic, social and

42 Human Rights Committee, *M. Schmitz de Jong v. The Netherlands*, (Communication No. 855/1999), U.N. Doc. CCPR/C/72/D/855/1999, para. 7.2.

43 *Ibid.* The HRC found that the age limitation was reasonable differentiation.

44 Committee on Economic, Social and Cultural Rights, General Comment 5, Persons with Disabilities (Eleventh session, 1994), U.N. Doc. E/1995/22, paras 15, 23.

45 Committee on Economic, Social and Cultural Rights, General Comment 6, The Economic, Social and Cultural Rights of Older Persons (Thirteenth session, 1995), U.N. Doc. E/1996/22, para. 33.

cultural rights.⁴⁶ In the concluding observations, the right to education is also a channel to address access to transportation.⁴⁷

For information relating to travel, the HRC under the ICCPR does not establish any link between freedom of opinion and expression and travel information, for its main concerns are the entities providing the information rather than the type of activities.⁴⁸ Conversely, the CESCR suggests that States provide accessible information on public services and goods for the minorities.⁴⁹

Remarkably, after the CESCR adopted the Availability, Accessibility, Acceptability & Quality structure to analyze the ICESCR rights, access to public places and access to information have been underscored in several general comments in the section concerning accessibility.⁵⁰ Unsurprisingly, none of them explicitly express modes of transportation and travel information because they focus on specifically asserted rights.

Adopting a holistic approach to the development of a child, the Committee on the Rights of the Child (CRC Committee) periodically pays attention to the ability to access public transport in the context of the highest attainable standard of health, the right to rest, leisure, play, recreational activities, cultural life and the arts and the right of children with disabilities.⁵¹ Even when a

46 Committee on Economic, Social and Cultural Rights, General Comment 20: Art. 2 para. 2 (Forty-second session, 2009), U.N. Doc. E/C.12/GC/20, para. 33.

47 See Committee on Economic, Social and Cultural Rights, *Concluding Observations on the initial report of Montenegro*, (Fifty-third session, 2014), U.N. Doc. E/C.12/MNE/CO/1, para. 25; Committee on Economic, Social and Cultural Rights, *Concluding Observations on the fourth periodic report of France*, (Fifty-eighth session, 2016), U.N. Doc. E/C.12/FRA/CO/4, para. 54.

48 Human Rights Committee, General Comment 34, Art. 19: Freedom of Opinion and Expression, (One hundred and second session, 2011), U.N. Doc. CCPR/C/GC/34, paras 7, 18-19.

49 CESCR General Comment 20, *supra* n. 46, para. 21.

50 See Committee on Economic, Social and Cultural Rights, General Comment 14, Art. 12 (Twenty-second session, 2000), U.N. Doc. E/C.12/2000/4, para. 12; Committee on Economic, Social and Cultural Rights, General Comment 18, The Right to Work (Thirty-fifth session, 2005), U.N. Doc. E/C.12/GC/18, para. 12; Committee on Economic, Social and Cultural Rights, General Comment 21, Right of Everyone to Take Part in Cultural Life (art. 15, para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights) (Forty-third session, 2009), U.N. Doc. E/C.12/GC/21, para. 16.

51 Committee on the Rights of the Child, General Comment 9, The Rights of the Children with Disabilities (Forty-third session, 2006), U.N. Doc. CRC/C/GC/9, paras. 20, 39, 51; Committee on the Rights of the Child, General Comment 14, The Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (art. 3, para. 1) (Sixty-second session, 2013), U.N. Doc. CRC/C/GC/14, para. 19; Committee on the Rights of the Child, General Comment 15, The Right of the Child to the Enjoyment of the Highest Attainable Standard of Health (art. 24) (Sixty-second session, 2013), U.N. Doc. CRC/C/GC/15, para. 63; Committee on the Rights of the Child, General Comment 17, The Right of the Child to Rest, Leisure, Play, Recreational Activities, Cultural Life and the Arts (art. 31) (Sixty-second session, 2013), U.N. Doc. CRC/C/GC/17, paras 17, 35, 44, 50, 58.

transport service is privatized, the CRC Committee emphasizes that States are not exempted from their obligations.⁵²

2.2.6 Sub-conclusions

The right to travel by air is not literally addressed in any of the UN human rights treaties. However, a review finds three ways to assert this right under international human rights law. First, it can be considered to be covered by the right to access to any place or service, but this presents a drawback in the fact that the right is addressed to specific vulnerable groups in the CERD, the CEDAW, the CRPD and the ACHPR. Children constitute another specific group with their own special human rights convention, but this convention contains no right to travel. The CRC Committee together with the CESCR takes another approach to guarantee the opportunity to travel on an equal basis, that is, by way of other existing human rights, since travel is a precondition for several activities. Interestingly, these rights are mostly economic, social and cultural rights, even though the claimed root of accessibility and personal mobility is on civil and political rights. Lastly, the right to travel can be blanketed under the non-discrimination context of Article 26 of the ICCPR; however, a claimant must argue that their right as recognized in the national legislation has been violated. In other words, States must additionally ensure the right to travel.

2.3 INTERNATIONAL AIR LAW

International human rights law provides no satisfactory recognition of the right to travel by air. The next promising branch of international law to search for the right to travel by air is international air law because of its specialization in air transport.

2.3.1 Public international air law

The Chicago Convention lays down the objectives of the International Civil Aviation Organization (ICAO) in Article 44. Its Subsection (g), which prescribes that ICAO avoids discrimination among contracting States, is different from a non-discrimination provision in human rights instruments because they focus on different subjects. The former deals with discrimination among States, while the latter concerns the relationship between States and individuals.

52 Committee on the Rights of the Child, General Comment 16, State Obligations Regarding the Impact of the Business Sector on Children's Rights (Sixty-second session, 2013), U.N. Doc. CRC/C/GC/16, paras 15, 33.

Instead, Abeyratne, a former senior legal officer at ICAO, connects consumer rights with Article 44(d) of the Chicago Convention which mandates ICAO to 'meet the needs of the people of the world for safe, regular, efficient and economical air transport.'⁵³ Arguably, this claim on consumer rights does not imply that Subsection (d) supports human rights *per se*. First, it is debatable whether consumer rights are human rights and this issue is still being developed and has not yet been settled.⁵⁴ Second, the language of this Article focuses mainly on air transport matters like safety, efficiency and economy. It contains no elements of human rights such as human dignity and non-discrimination against any individual. Thus, none of ICAO's objectives in the Chicago Convention mandates ICAO to deal with human rights.⁵⁵

Annex 9 on facilitation is constructed on the basis of Article 22 of the Chicago Convention concerning facilitating and expediting navigation by aircraft and Article 23 on customs and immigration procedures.⁵⁶ In other words, its origin is not human rights-based, although human rights elements have been added later on occasion.⁵⁷

At the Sixth Meeting of the Worldwide Air Transport Conference, ICAO paid attention to consumer protection⁵⁸ among other issues, and this resulted in the adoption of the Core Principles on Consumer Protection (Core Principles) by the ICAO Council in 2015.⁵⁹ Although the Core Principles are designed to be non-binding and non-prescriptive,⁶⁰ their value should not be overlooked because there is no other global aviation consumer protection instrument addressing similar issues. The ICAO Assembly even urges Member States to give regard to and apply the Core Principles and inform ICAO on their application.⁶¹ This resolution is relatively similar to the resolution calling on

53 Chicago Convention, art. 44(d); Ruwantissa Abeyratne, *Regulation of Air Transport*, 85, (Springer International Publishing 2014).

54 See Sinai Deutch, *Are Consumer Rights Human Rights?*, 32:3 Osgoode Hall L.J. 537 (1994).

55 However, it should not jump into a conclusion that ICAO does not have to oblige to human rights obligation. For relationship between ICAO and the observance of the CRPD, see Section 4.2.1, Chapter 4.

56 Annex 9, *Facilitation*, (14th ed. Oct. 2015), ix.

57 Chapter 5 of Annex 9 on inadmissible persons and deportees takes the ICCPR into account for treatment of an inadmissible persons and deportes. See *ibid.*, 5-1.

58 Karsten argued that the scope of the term 'consumer' covers area of shopping law but it does not cover B2B while the term 'passenger' is more preferable in the context of transport. For the discussion among the terms 'consumer', 'passenger' and 'traveller', see Jens Karsten, *Passenger, Consumers, and Travellers: The Rise of Passenger Rights in the EC Transport Law and its Repurcussions for Community Consumer Law and Policy*, 30 J. Consumer Pol'y, 117, 125-131 (2007).

59 ICAO, *Core Principles on Consumer Protection*, <http://www.icao.int/sustainability/Documents/ConsumerProtection/CorePrinciples.pdf> (accessed 13 Jan. 2017).

60 ICAO, Resolution A39-15, Appendix A, para. 9.

61 *Ibid.*

Member States to implement Standards and Recommended Practices (SARPs) and notify ICAO.⁶²

The scope of the Core Principles extensively encapsulates price transparency, assistance to passengers in the events of delays, cancellations and denied boarding, and, last but not least, proper accommodation of the needs of PWDs. For PWDs, the Core Principles underline non-discrimination and accessibility by stating that during travel, ‘persons with disabilities should, *without derogating from aviation safety*, have access to air transport in a *non-discriminatory* manner and to appropriate assistance’.⁶³

On top of these issues, the Core Principles emphasize the principle of proportionality and consistency between national and regional consumer protection and the existing international instruments on air carrier liability explored in Section 2.3.2 below.⁶⁴ The importance of consistency is to avoid any clash between public and private legal spheres and to observe pre-existing treaty obligations. Moreover, it mirrors the systemic integration rule of treaty interpretation, even though the Core Principles are not a treaty.

2.3.2 International air law on carrier liability

Both the Convention for the Unification of Certain Rules Relating to International Carriage by Air of 1929 (Warsaw Convention of 1929),⁶⁵ and the Convention for the Unification of Certain Rules for International Carriage by Air of 1999 (Montreal Convention of 1999)⁶⁶ cover only contractual rights to compensation. They are divided into three categories: (i) the death of or bodily injury to passengers, (ii) the destruction, loss of or damage to their baggage, and (iii) damage arising from delay.⁶⁷ However, the scope of these two Conventions does not extend to cover the booking period and no provision protects a person from refusal to carry. Conversely, the Warsaw Convention of 1929, and the Montreal Convention of 1999, also accept freedom of contract by not preventing an air carrier from refusing to enter into any contract of carriage.⁶⁸ Both Conventions do not further elaborate on the refusal criteria.⁶⁹

⁶² See ICAO, Resolution A39-20, Appendix A, paras1-2. For discussion on legal force of Recommended Practices, see Section 4.2.2.3, Chapter 4.

⁶³ *Supra* n. 59, emphasis added.

⁶⁴ *Ibid.*

⁶⁵ Convention for the Unification of Certain Rules Relating to International Transportation by Air (Warsaw, 12 Oct. 1929), T.S. 876, (Warsaw Convention of 1929).

⁶⁶ Convention for the Unification of Certain Rules for International Carriage by Air, (Montreal, 28 May 1999), ICAO Doc 9740, (Montreal Convention of 1999).

⁶⁷ Warsaw Convention of 1929, arts17-30; Montreal Convention of 1999, arts 17-37.

⁶⁸ Warsaw Convention of 1929, art. 33; Montreal Convention of 1999, art. 27.

⁶⁹ For national law, see Section 2.4.2.

2.3.3 Sub-conclusions

The right to travel is not laid down in the Chicago Convention, the Warsaw Convention of 1929, or the Montreal Convention of 1999. In an era of consumer protection, ICAO guarantees air passengers' rights in the form of non-binding Core Principles and connects them with the air carriers' liability in the Warsaw Convention of 1929, and the Montreal Convention of 1999. In my view, the contents in the Core Principles may signpost substantive requirements of the right to travel by air if this right exists.

2.4 NATIONAL LAW

In general, the duty holder of international human rights is a State. Even though neither international human rights law nor international air law delineates the right to travel by air, Article 26 of the ICCPR and the saving clause in human rights treaties⁷⁰ point out the possibility that States can provide higher protection. Therefore, the search for a right to travel will never be complete without an examination of national laws.

2.4.1 Constitutional right to travel by air

The freedom of movement in the UDHR is transcribed into national constitutions.⁷¹ Some States such as the Russian Federation and the Philippines employ the term 'right to travel' in the context of freedom of movement.⁷² Conversely, the US Constitution, which is much older than the UDHR, does

⁷⁰ See Section 1.3.2.4 Chapter 1.

⁷¹ Tim Cresswell, *The Right to Mobility; The Production of Mobility in the Courtroom*, 38:4, *Antipode*, 742 (2006); Vincent Chetail, *The Transnational Movement of Persons Under General International Law – Mapping the Customary Foundations of International Migration Law*, 23 in *Research Handbook On International Law And Migration* (Vincent Chetail, Edward Elgar 2014). For a recognition as a rule of law or in general practice, see Josei D. Ingleis, *Study of Discrimination in respect of the Right of Everyone to Leave any Country, Including His Own, and to Return to His Country*, 5 (United Nations 1963).

⁷² See e.g. St. 27 Konstitutsii Rossiiskoi Federatsii ot 12 dekabrya 1993 goda // Rossiiskaya Gazeta, 25 dekabrya 1993.

Article 27: Everyone who is legally present on the territory of the Russian Federation shall have the right to travel freely and freely to choose the place of temporary or permanent residence. Anyone may freely leave the Russian Federation. Citizens of the Russian Federation shall have the right freely to return to the Russian Federation. emphasis added.

The 1987 Constitution of the Republic of the Philippines. article III, Section 6: The liberty of abode and of changing the same within the limits prescribed by law shall not be impaired except upon lawful order of the court. Neither shall the right to travel be impaired except in the interest of national security, public safety, or public health, as may be provided by law. emphasis added.

not expressly provide the right to travel, but it is argued that the right to travel inherently precedes the Constitution.⁷³

The US jurisprudence developed the concept of the right to travel to encompass modes of transport. The court in 1831 held that all citizens are equally entitled to enjoy access to a new mode of transport when the technology becomes available.⁷⁴ This reasoning, despite being rendered before the first flight of the Wright brothers, does not bar the inclusion of air transport in its scope. However, this reasoning limits such enjoyment only to US citizens.

The tension between security reasons and the right to travel by air means that the US courts on a number of occasions had to ascertain whether the right to travel by air is specifically barred or not when other forms of transport are available. One approach of the so-called single mode doctrine agrees that the right to travel is not abridged if there are other modes of transport available.⁷⁵ In *Gilmore v. Gonzales*, the plaintiff, wishing to challenge the Security Directive on identification requirements of the Transportation Security Administration, refused to submit his identification document prior to boarding a domestic flight and accordingly was barred from boarding.⁷⁶ Under the single mode doctrine, the Ninth Circuit Court rejected the plaintiff's claim of a violation of the right to travel by commercial airline because 'the Constitution does not guarantee the right to travel by any particular form of transportation'.⁷⁷

Conversely, other courts, taking the air transport network and the distant travel into account, disfavor the single mode doctrine. Their reasoning is built upon the fact that travel by air is not about convenience, but it is the only practical mode.⁷⁸ In *United States v. Kroll*, concerning the right to travel on a domestic flight, the Eighth Circuit Court guaranteed the right to travel of a prospective airline passenger 'since in many situations flying may be the only practical means of transportation'.⁷⁹ The right to travel by air is upheld in two other cases challenging the due process of the no-fly list. The *Latif v. Holder* court rejected *Gilmore's* reasoning and held that the right to travel

73 Richard Sobel, *The Right to Travel and Privacy: Intersecting Fundamental Freedoms*, 30 J. Marshall J. Info. Tech. & Privacy L., 639, 640 (2014).

74 *Beckman v. Saratoga & Schenectady R.R., Co.*, 3 Paige Ch. 45, 45 (N.Y. 1831) cited in Sobel, *ibid.*, 642.

75 See Richard Sobel & Ramón L. Torres, *The Right to Travel: A Fundamental Right of Citizenship*, 80 J. Transp. L. Logistics & Pol'y, 1, 25-28 (2013); *Miller v. Reed* 176 F. 3d 1202 (9th Cir. 1999). The case concerns denial of a valid driver licenses does not violate the fundamental right to interstate travel.

76 *Gilmore v. Gonzales*, 435 F.3d 1125, (9th Cir. 2006), 1154, 1156. This case also challenged the due process of Transportation Security Administration identification requirement but the Court rejected the plaintiff's due process arguments.

77 *Ibid.*

78 Lindsey Ray Altmeyer, *Freedom to Fly: An Analysis of the Constitutional Right to Air Travel*, 80 J. Air L. & Com., 719, 734 (2015).

79 *United States v. Kroll*, 481 F.2d (8th Cir. 1973), 884, 886.

internationally by air was constitutionally protected.⁸⁰ The Northern District of California Court in *Ibrahim v. Department of Homeland Security, et al.* states as follows:

‘While the Constitution does not ordinarily guarantee the right to travel by any particular form of transportation, given that other forms of travel usually remain possible, the fact remains that for international travel, air transport in these modern times is practically the only form of transportation.’⁸¹

The Court further decides that the plaintiff’s right to travel has been violated. The *Ibrahim* judgment also demonstrates that the right to travel is expanded from the judgment in 1831 to cover non-citizens because the plaintiff is in the US under her student visa.⁸²

While the US courts interpret the no-fly list in both *Latif* and *Ibrahim* in the context of the right to travel by any means, the no-fly list can be related to the freedom of movement under the ICCPR in the context of the right to leave any country or the right to return. Nonetheless, the HRC has never interpreted this right to ensure any form of travel.⁸³

2.4.2 Human rights in contract law

The basic principle in the private law of contract is that each party has freedom to contract. This includes freedom to choose other parties to form a contract with. Thus, whether an air carrier can refuse to carry PWDs will be explored below.

2.4.2.1 Limitation on freedom of contract

The question of how private individuals’ freedom of contract is limited by human rights law has been discussed by a number of scholars.⁸⁴ Mostly, they discuss the direct and indirect effects of constitutional human rights on private law, because a constitution usually addresses the duties of a State, not of private individuals. Accordingly, it is unambiguous that if a private individual

⁸⁰ *Latif v. Holder*, NS-OR-0001. Docket / Court, 3:10-CV-00750-BR; 24 June 2014, 27.

⁸¹ *Ibrahim v. Department of Homeland Security, et al.*, Order denying motion to dismiss and motion to stay discovery No. C 06-00545 WHA, 2012 WL 6652362, at *7 (N.D. Cal., Dec. 20, 2012), 10.

⁸² See *Ibrahim*, *ibid.*

⁸³ See Section 2.2.1.

⁸⁴ See Jorg Fedtke & Dawn Oliver, *Human Rights and the Private Sphere: A Comparative Study*, (Routledge-Cavendish 2007); Chantal Mak, *Fundamental Rights in European Contract Law: A Comparison of the Impact of Fundamental Rights on Contractual Relationships in Germany, the Netherlands, Italy and England*, (Ph.D. thesis), (2007).

has a human rights duty under a specific law, a private individual can be in the wrong when breaching such a duty.

The principle of non-discrimination under human rights law plays a role in curbing the freedom of contract. The Study Group on a European Civil Code and the Research Group on EC Private Law, when preparing the Draft Common Frame of Reference (DCFR), acknowledged that non-discrimination can limit this freedom.⁸⁵ Disability is not explicitly mentioned as a reason to refuse to enter into a contract with a PWD.⁸⁶ However, the drafters of the DCFR apply the indirect horizontal effect to plug this loophole, because they state that discrimination on the grounds of disability can be claimed under the rules on good faith and fair dealing.⁸⁷

In the context of a contract of international air carriage, a contract guarantees that an air carrier agrees to carry a passenger with reasonable care to the destination within a reasonable time.⁸⁸ Dempsey and Milde argue that in practice an air carrier incorporates the refusal grounds in the conditions of carriage but these must comply with the applicable national law.⁸⁹ In Canada, prohibition of discrimination in goods, service, facilities or accommodation is generally promulgated in the Canadian Human Rights Act and covers sundry grounds including disability.⁹⁰ The US manifestly forbids national and foreign air carriers from discriminating against any person undergoing air transportation on the basis of race, color, national origin, religion, sex or ancestry.⁹¹ For PWDs, the EU and the US regulate air carriers on refusal to carry PWDs on the basis of disability under a public law.⁹²

85 Christian von Bar & Eric Clive (eds), Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group), *Principles, Definitions and Model Rules of European Private Law, Vol I*, 41 (European Law Publishers 2009).

86 The DCFR, however, limits itself only to some discriminatory grounds, namely sex, ethnic and racial origin. See Draft Common Frame of Reference, II.2-101.

87 Von Bar & Clive, *supra* n. 85, 166.

88 John M. Corrigan, *The Right of the Air Carrier to Refuse Carriage*, 3 *Annals Air & Space L.* 25, 27 (1978).

89 Paul Stephen Dempsey & Michael Milde, *International Air Carrier Liability: The Montreal Convention of 1999*, 203 (McGill University, 2005). See Section 2.4.2.

90 *Canadian Human Rights Act*, R.S.C., 1985, c. H-6, arts 3, 5.

91 49 U.S.C. § 40127. See 49 U.S.C. Code § 40103(2).

Section 40103(2) affirms the citizen right of transit through the navigable airspace; however, it does not recognize this right for every individual, as it is a domestic law. On the contrary, Section 40127 obliges all air carriers not to discriminate against any persons.

92 Regulation (EC) No 1107/2006 of the European Parliament and of the Council of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air, OJ L 204, 26.7.2006, p. 1-9 (Regulation 1107), art. 3; 14 C.F.R. § 382.19 (2009). See Section 4.3.2 and Section 4.4.2, Chapter 4.

2.4.2.2 Exception to limitation

Rigid rules with no exception can lead to an inequitable outcome. By this notion, there is room for justified reasons to refuse to conclude a contract. Under the DCFR, unequal treatment with a legitimate aim is acceptable provided that the adopted means are appropriate and necessary.⁹³ The refusal is legitimate if it is done to protect a core value of a society and it should not go against the main goal of non-discrimination.⁹⁴ Moreover, although only in exceptional cases, economic reasons may justify the unequal treatment of individuals.⁹⁵

By the same token, civil aviation is subject to technical regulations to ensure safety and security in air travel; accordingly, a pilot has the right to deny boarding or remove passengers based on reasonable grounds specified therein.⁹⁶ In practice, air carriers specify reasons of refusal in their conditions of carriage.⁹⁷ Under the International Air Transport Association (IATA) Recommended Practice 1724: General Conditions of Carriage (Passenger and Baggage) (IATA 1724), air carriers may refuse carriage of passengers due to safety, health, alcohol or drug consumption, or presenting a risk to himself or herself, to other passengers, to crew members or to property.⁹⁸

The balance between non-discrimination and safety and security has become a tightrope for courts and tribunals. The Canadian Human Rights Tribunal was requested to decide a case concerning the right of an observant Sikh to wear a ceremonial dagger on board, because an air carrier's policy disallows weapons or dangerous articles on board.⁹⁹ In relation to the defense of religious freedom, the Tribunal found the airline's policy to be neutral, so

⁹³ *Supra* n. 86, II.2-103.

⁹⁴ Von Bar & Clive, *supra* n. 85, 185.

⁹⁵ Von Bar & Clive, *ibid.*, 185.

⁹⁶ See Annex 9, 5-1; Protocol to Amend the Convention on Offences and Certain Other Acts Committed on Board Aircraft, done at Montréal on 4 April 2014 (ICAO Doc 10034).

⁹⁷ In some countries such as Canada, air carriers have to submit their conditions of carriage to the agency before they can come into force. See John M. Corrigan, *The Right of the Air Carrier to Refuse Carriage*, 3 *Annals Air and Space L.* 25, 29 (1978); Section 4.6.1 on the Canada Air Transport Regulations.

⁹⁸ IATA Recommended Practice 1724 General Conditions of Carriage, 25th edition June 2005 art. 7.1.3.

This non-binding model of conditions of carriage for international flights provides supplementary contractual clauses, that airline members usually follow. See I.H.Ph. Diederiks-Verschoor & Pablo Mendes de Leon, *An Introduction to Air Law*, 137, 143, (9th ed., Kluwer Law International 2012); European Commission, *Airline's Contracts with Passengers: Consultation paper of Directorate-General for Energy and Transport, with Directorate-General for Health and Consumer Protection*, 07.06.2002, 4. In case of carriage to or from Canada, the tariff is subject to the Air Transport Regulation in particular on waiver of limited liability for mobility aids. See Section 5.4.2.3, Chapter 5.

⁹⁹ *Nijjar v. Canada 3000 Airlines Ltd.*, 1999 CanLII 19861 (CHRT).

it applied the 'rational connection' test to evaluate indirect discrimination.¹⁰⁰ It found that there was a certain degree of risk to public safety owing to the presence of long kirpans and amending the policy to accommodate this might constitute undue hardship.¹⁰¹ In addition, an air carrier can refuse to carry a passenger on the ground of being unruly, while a passenger may argue that this refusal constitutes racial discrimination.¹⁰² If an air carrier's discrimination against a passenger happens on international flights, the remedies may be subject to the Warsaw Convention of 1929, or the Montreal Convention of 1999, which will be analyzed in Section 5.3, Chapter 5.

2.4.3 Sub-conclusions

At the national level, an opportunity to go from one place to another by commercial aircraft is not absolute, since it can be restricted for safety and security reasons by States or by air carriers through contract clauses. To balance the interests of all parties in an air carriage contract, any restriction, whether it is based on elements of human rights in contract law, must be justified in both its procedural and substantive dimensions as seen in the US judgments and the decision of the Canadian Human Rights Tribunal.

The rule on the due process of legislative procedure and the evaluation of the substance of the disputed rule by detrimental effect and objective justification, in my view, can be employed to reinterpret the single mode doctrine in *Gilmore*. By doing so, the result would be the same; however, the reasoning would not be established on the single mode doctrine but on the fact that the rule to check identification documents for security purposes is objectively justified. Consequently, the right to choose any available modes of travel will be upheld.

2.5 AN ATTEMPT TO IDENTIFY A HUMAN RIGHT TO TRAVEL

The demand for new human rights other than those listed in the human rights treaties has been foreseen since the time of the drafting of the UDHR. Eleanor Roosevelt stated that

¹⁰⁰ *Ibid.*

¹⁰¹ *Ibid.*

¹⁰² *Gibbs v. American Airlines*, 191 F.Supp.2d 144 (2002). There is another case dealing with a claim on disability. A passenger was panic due to her fear of flying but she was removed from the flight because a flight attendant viewed her behavior as unruliness. The Court dismissed the claim on the ACAA since it was preempted by the Warsaw Convention of 1929. See *Turturro v. Continental Airlines*, 128 F. Supp. 2d 170 (S.D.N.Y. 2001).

‘Therefore, we will have to bear in mind that we are writing a bill of rights for the world, and that one of the most important rights is the opportunity for development. As people grasp that opportunity, they can also demand new rights if these are broadly defined.’¹⁰³

From this, the UDHR was not intended to become an exhaustive source of rights.

In the case of the right to travel, some proposals to add the phrase ‘right to travel’ as a human right were made. One proposal was made in 1963 by the UN Conference on International Travel and Tourism, a non-human rights body, to recognize the freedom of travel from country to country as an inalienable right.¹⁰⁴ However, it is uncertain whether the proposed right to travel encapsulates transport which is the concern in this study. The other occasion was in 1997 during a discussion to adopt the Resolution on Freedom of Movement and Population Transfers.¹⁰⁵ A proposal to add ‘the right to freedom of travel’ under the bracket of the right to freedom of movement was withdrawn because it was remarked that this right was recognized in neither the UDHR nor other international instruments.¹⁰⁶

2.6 CONSEQUENCE OF NO EXPLICIT INTERNATIONAL HUMAN RIGHT TO TRAVEL

From the above sections, it can be seen that no international convention specifically mentions travel as a right. The uniqueness of human rights from other legal rights is their universality and non-contingency.¹⁰⁷ The following sections will deal with the effects of the lack of right to travel in order to assess the importance of this recognition.

103 Eleanor Roosevelt, *My Day*, February 6, 1947, The Eleanor Roosevelt Papers Digital Edition (2008), http://www2.gwu.edu/~erpapers/documents/myday/displaydoc.cfm?_y=1947&_f=md000567 (accessed 13 Apr. 2017).

104 United Nations, *Recommendations on International Travel and Tourism*, the United Nations Conference on International Travel and Tourism Rome 21 Aug – 5 Sep 1963, E/Conf.47/18, para. 45. It is noteworthy that the successor UN World Tourism Organization adopted the Global Code of Ethics for Tourism in 2001 did not mention ant right to travel. It recognized only the right to tourism. Alston used this right as an example of frivolous claim. See Philip Alston, *Conjuring up New Human Rights: A Proposal for Quality Control*, 78:3 Am. J. Int’l L. 607, 611 (1984).

105 United Nations Economic and Social Council, Commission on Human Rights, Sub-commission on Prevention of Discrimination and Protection of Minorities 49th session, Summary record of the 36th meeting, E/CN.4/Sub.2/1997/SR.36, 2 September 1997, paras 39-44.

106 *Ibid.*, paras. 40, 44.

107 William A. Edmundson, *An Introduction to Rights*, 154, (2nd ed., Cambridge University Press 2012).

2.6.1 Reliance on other recognized rights

In terms of the physical inaccessibility of public transport, there has been no case made to the international or regional tribunals. In the three aforementioned cases of *Botta*, *Zehnalová and Zehnal* and *S.A.S.*, the claimants all brought a case to court when their access to a place was barred based on other rights. It is remarked that if case was brought to the ECtHR, many articles, namely, Article 5 (right to liberty and security), Article 2 of Protocol 4 (freedom of movement), and Article 8 (right to private life), could be used as the basis of claims.¹⁰⁸ These rights are also comparable to the rights in the ICCPR, to wit, Article 9 (right to liberty), Article 12 (freedom of movement) and Article 17 (right to private life). Therefore, a person has to find a connection between their inability to travel and these rights to submit a claim of being violated. However, one complication is that the HRC general comments on these rights contain no obligation towards the provisions of transport.¹⁰⁹

2.6.2 Lack of clear obligations

When one person has a right, it entails obligations for one or more other parties.¹¹⁰ On the contrary, since there is no explicit right to travel, a person cannot be assigned as a right holder and States have no express obligation towards him or her. This is why human rights treaty bodies have to interpret existing recognized economic, social and cultural rights to cover means of transport.

2.6.3 Lack of clear protection for all groups

The CERD and the CRPD, as well as the CEDAW in relation to women in rural area, contain a specific right to protect vulnerable groups when means of transport are inaccessible. However, there appear to be other neglected grounds

108 Anna Lawson & Bryan Matthews, *Dismantling Barriers to Transport by Law: The European Journey*, 87-88 in *Disability Policy and Practice: Applying the Social Model* (Colin Barnes & Geof Mercer, Disability Press 2004).

109 Human Rights Committee, General Comment 8, Art. 9 (Sixteenth session, 1982); Human Rights Committee, General Comment 16, Art. 17 (Thirty-second session, 1988); Human Rights Committee, General Comment 27, Freedom of movement (Sixty-seventh session, 1999), U.N. Doc. CCPR/C/21/Rev.1/Add. 9.

110 The correlativity of rights and duties has been recognized by many legal scholars including Pufendorf, Austin and Hart. See Edmundson, *supra* n. 107, 21, 98.

such as sexual orientation and religion.¹¹¹ Also, the refusal to transport can occur to persons in general. In April 2017, a United Airlines passenger was forcefully dragged off the aircraft after being seated because the airline had to transport its employees.¹¹² While contract of carriage or tort can be a basis of claim in this case, if one wants to make a human rights claim, one can rely on the right to travel because this case happened in the US where this right is recognized. However, if this scenario happens in other States, there is no base for a claim under international human rights law and one will have to rely on other listed human rights as seen in Section 2.6.1.

2.7 CONCLUDING REMARKS

Having surveyed both international and national laws for the right to travel by air, it has to be concluded that in general there is no international human right to travel by air. A new proposal mentioned in Section 2.5 to codify this right is restricted since it has never been mentioned in the UDHR and other previous international human rights treaties. Yet, this examination reveals the following trends:

Travel including travel by air involves both civil and political rights as well as economic, social and cultural rights as previously summarized in Section 2.2.6.

Travel at the national law level in Section 2.4 can be restricted for reasons of safety and security which is, by the same token, also the case for the freedom of movement under the ICCPR. However, the freedom of movement in the ICCPR is not interpreted to cover modes of transport. On the contrary, the right to travel in the US case law, which has a comparable concept, is construed to encapsulate forms of transport.

The principle of non-discrimination plays a prominent role in both international and national laws. An argument on the lack of opportunity to travel or to access public transport on an equal basis with others is closely linked with the non-discrimination principle as seen in international human rights law. In contract law, non-discrimination is added to balance the contractual rights between air carriers and passengers.

111 See Center for American Progress, *Gay and Transgender Discrimination Outside the Workplace*, <https://www.americanprogress.org/issues/lgbt/reports/2011/07/19/9927/gay-and-transgender-discrimination-outside-the-workplace/> (accessed 13 Apr. 2017); Paul Weller, Alice Feldman & Kingsley Purdam, *Religious Discrimination in England and Wales*, 79, https://www.researchgate.net/profile/Marie_Parker-Jenkins/publication/265577360_Religious_discrimination_in_England_and_Wales/links/571a382608ae408367bc858e.pdf (accessed 13 Apr. 2017).

112 New York Times, *United Airlines Passenger Is Dragged From an Overbooked Flight*, https://www.nytimes.com/2017/04/10/business/united-flight-passenger-dragged.html?_r=0 (accessed 13 Apr. 2017).

Moreover, to the extent that there are entitlements to travel at the international level, the Core Principles can be a substantive example on contents of rights. The procedural and substantive due process of law should be applied when curbing the right.

3 | Conceptual framework on international human rights of persons with disabilities to travel by air

3.1 INTRODUCTION

Chapter 2 established that there is no international human right to travel by air. While the absence of a human right poses no real problem to most people, it constitutes a serious issue for persons with disabilities (PWDs) because their capability to travel by air may be questioned and services may need to be adjusted to meet their needs as seen in Section 1.1.

This Chapter is not going to explore which services need to be adapted for PWDs; on the contrary, it will examine whether there are other fundamental rights of PWDs to receive accessible air travel according to their needs and to explore to what extent such rights can be enforced. While this Chapter searches for the rights of PWDs in international human rights law, specifically the Convention on the Rights of Persons with Disabilities (CRPD),¹ the States Parties to the CRPD are the primary duty holder under international law. Certainly, the final service providers are airport operators and air carriers, not necessarily State bodies. Thus, this Chapter also questions how States Parties implement their obligations under the CRPD. To complete the whole picture of the study, this Chapter explores measures to support and accelerate implementation of the CRPD as well as the authority of the Committee on the Rights of Persons with Disabilities (CRPD Committee) to oversee the implementation of the rights under the CRPD.

The Chapter is divided into eight sections. The obligations of States Parties on air travel are derived from Articles 5, 9 and 20 of the CPRD as laid down in Chapter 1 as well as from Article 4 since the latter stipulates general obligations. State obligations under international human rights law are often assorted into three categories: the obligations to respect, fulfil and protect. While this typology is limited because these three obligations are so intertwined that a clear line is hard to be drawn, the typology classifies obligations in a practical way.² Section 3.2 – Section 3.4 follow this tripartite obligation and explain it further in the context of air travel. How these obligations are realized is

1 Convention on the Rights of Persons with Disabilities, (24 Jan. 2007), U.N. Doc. A/RES/61/106, (CRPD).

2 Frédéric Mégret, *Nature of Obligations*, 332 in *International Human Rights Law* (Daniel Moeckli, Sangeeta Shah, Sandesh Sivakumaran, & D. J. Harris, Oxford University Press 2010).

discussed in Section 3.5. Next, Section 3.6 questions the jurisdiction or scope of application of human rights obligations. The role of the CRPD Committee is examined in Section 3.7. Last, Section 3.8 contains the conclusions.

3.2 OBLIGATION TO RESPECT

The obligation to respect requires States to refrain from curtailing the enjoyment of human rights. In the context of the CRPD, States Parties shall abstain from any practice inconsistent with the enjoyment of the rights laid down in this document. From this obligation, creating new barriers after ratification of the CRPD can lead to discrimination against PWDs. In the case of built or produced objects, infrastructure, goods, products and services, States should adhere to the principle of universal design.³ The incorporation of universal design at the initial stage not only promotes equal opportunities but also saves costs on renovations thereafter.⁴

In *F v. Austria*, the central issue involved the lack of immediate access to real-time information at new tram stops while existing ones had been equipped with real-time information for PWDs.⁵ The CRPD Committee considered that Austria denied access and discriminated against PWDs because it must not create new barriers.⁶

3.3 OBLIGATION TO PROTECT

Airports and airlines can be operated either by State bodies or private entities. Under a duty to protect PWDs, States Parties must prohibit and eliminate all discrimination on the basis of disability by any person, organization or private enterprise.⁷ Therefore, States cannot avail themselves from any breach of disability rights by private airport operators or air carriers.

3 CRPD, arts 2, 4(1)(f); Committee on the Rights of Persons with Disabilities, General Comment 2, Art. 9 (Eleventh session, 2014), U.N. Doc. CRPD/C/GC/2, para. 28; Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Report Submitted by Serbia*, (Fifteenth session, 2016), U.N. Doc. CRPD/C/SRB/CO/1, para. 18.

4 CRPD, arts 9(2)(h); CRPD General Comment 2, *ibid.*, paras 15, 24; Tracy R. Justesen & Troy R. Justesen, *An Analysis of the Development and Adoption of the United Nations Convention Recognizing the Rights of Individuals with Disabilities: Why the United States Refuses to Sign this UN Convention*, 14:2 Hum. Rts. Brief, 36, 39 (2007).

5 Committee on the Rights of Persons with Disabilities, *F v. Austria* (Communication no. 21/2014), U.N. Doc. CRPD/C/14/D/21/2014, para. 8.7.

6 *Ibid.*, paras 8.5, 8.7.

7 CRPD, arts 4(1)(e), 5(2).

3.3.1 Monitoring the implementation of obligations

States Parties shall keep track of the implementation of minimum standards and guidelines pertaining to accessibility.⁸ Article 33 of the CRPD further mandates States Parties to establish at least one focal point to implement the CRPD as well as one or more independent mechanisms to promote, protect and monitor implementation of the CRPD. The measures suggested by the CRPD Committee through General Comment No. 2 and concluding observations are to incorporate dissuasive penalties for non-compliance,⁹ establish monitoring and complaint mechanisms,¹⁰ involve organizations of PWDs to oversee compliance,¹¹ and to train civil servants and experts in charge of oversight.¹²

3.3.2 Ensuring effective remedy

The right to an effective remedy is considered to be a human right.¹³ The obligation to make reparation reflects a principle of general international law as recognized by the Permanent Court of International Justice and the International Court of Justice (ICJ).¹⁴

While negotiating the draft text, several delegates, including Canada, Japan, Israel and Senegal, on behalf of the African Group, insisted on securing this right as a general obligation for States Parties to the CRPD.¹⁵ The Israeli

⁸ CRPD, art. 9(2)(a).

⁹ CRPD General Comment 2, *supra* n. 3, para. 28; Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Report Submitted by Belgium*, (Twelfth session, 2014), U.N. Doc. CRPD/C/BEL/CO/1, para. 22; Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Report Submitted by Mexico*, (Twelfth session, 2014), U.N. Doc. CRPD/C/MEX/CO/1, para. 20(e); Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Report Submitted by Guatemala*, (Sixteenth session, 2016), U.N. Doc. CRPD/C/GTM/CO/1, para. 28.

¹⁰ Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Report Submitted by Mexico*, *ibid.*, para. 20(b).

¹¹ Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Report Submitted by the Czech Republic*, (Thirteenth session, 2015), U.N. Doc. CRPD/C/CZE/CO/1, para. 18; Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Report Submitted by Uganda*, (Fifteenth session, 2016), U.N. Doc. CRPD/C/UGA/CO/1, para. 18.

¹² Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Report Submitted by the Czech Republic*, *ibid.*, para. 18.

¹³ Universal Declaration of Human Rights (10 Dec. 1948), U.N.G.A. Res. 217 A (III) (1948), art. 8.

¹⁴ See e.g. *Factory at Chorzow (Germ. v. Pol.)*, 1928 P.C.I.J. (ser. A) No. 17 (Sept. 13), para. 68; *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Compensation, Judgment, I.C.J. Reports 2012, para. 13.

¹⁵ UN Department of Economic and Social Affairs Division for Social Policy and Development, *Daily Summary of Discussion at the Seventh Session 30 January 2006*, <http://www.un.org/esa/socdev/enable/rights/ahc7sum30jan.htm> (accessed 13 Jan. 2017).

delegate even stated that a right without a remedy is no right at all.¹⁶ New Zealand pointed out that apart from the ICCPR, other international human rights conventions recognized remedies; hence, if there were a provision on remedy, the article on national implementation would probably be a suitable option.¹⁷ Nonetheless, no provision in the CRPD explicitly recognizes the right to an effective remedy, but the Office of the High Commissioner for Human Rights construes the obligation to monitor as an obligation to blanket the right to seek a remedy.¹⁸

The CRPD General Comment No. 2 affirms that PWDs should have effective legal remedies at their disposal when their access is denied.¹⁹ Nevertheless, De Schutter summed up that there are at least five arguments to limit the obligation to protect: (1) budgetary constraints, (2) unpredictability of human conduct in free societies, (3) deference to the will expressed by the parties to the private contract, (4) autonomy of the individual to waive one's right and (5) respect for other human rights.²⁰ These limitations bring about the question of to what extent a remedy is considered effective. This Section is going to explore two aspects of an effective remedy in order to provide an answer.²¹

3.3.2.1 Procedural effective remedy

At the international level, the Optional Protocol to the CRPD is equipped with an international channel for PWDs to redress. However, the number of States that ratified the Optional Protocol to the CRPD is relatively lower than those that ratified the CRPD.²² Thus, there may be a scenario when a PWD exhausts its local remedy and cannot submit a complaint to the CRPD Committee.

The right to an effective remedy at the national level should be read together with the right to access to justice. While the right to an effective remedy guarantees a substantive outcome, the right to access to justice guarantees the right in legal proceedings. Article 13 of the CRPD upholds the right

¹⁶ *Ibid.*

¹⁷ *Ibid.*

¹⁸ UN Office of the High Commissioner for Human Rights, *From Exclusion to Equality Realizing the rights of persons with disabilities*, 25 (2007). See Section 3.3.1 on Article 9(2)(a).

¹⁹ CRPD General Comment 2, *supra* n. 3, para. 29.

²⁰ Olivier de Schutter, *International Human Rights Law: Cases Materials, Commentary*, 493 (2nd ed. Cambridge University Press 2014).

²¹ Human Rights Council, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, 17th session, Principle 25, U.N. Doc. A/HRC/17/31, (2001).

²² United Nations Treaty Collection, *Status of Optional Protocol to the Convention on the Rights of Persons with Disabilities*, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-15-a&chapter=4&clang=_en (accessed 25 May 2017). As of 25 May 2017, there are 92 parties. United Nations Treaty Collection, *Status of the Convention on the Rights of Persons with Disabilities*, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&clang=_en (accessed 25 May 2017). As of 25 May 2017, there are 173 parties.

of PWDs in four elements: (1) effective access to justice on an equal basis with others; (2) effective access to justice at all phases of the administration of justice; (3) effective access to justice as both direct and indirect participants; and (4) procedural and age-appropriate accommodation to facilitate their right to access to justice.²³ Remedy mechanisms at domestic level consist of administrative mechanisms and judicial mechanisms.²⁴ According to the CESCR, judicial mechanisms for remedial obligations concerning, in particular, non-discrimination are indispensable because administrative mechanisms alone seem unable to provide an effective remedy.²⁵ The CRPD Committee finds an opportunity to address effective remedy in the procedural aspect when it recommends obligations on equality and non-discrimination to States Parties in the concluding observations. Particular attention is paid to human resources in national human rights institutes for the review of cases of non-compliance with disability policies,²⁶ and to empowering and raising awareness for the judiciary, PWDs and organizations of PWDs on how to bring complaints and access to justice.²⁷ These recommendations are in line with the CESCR General Comment on non-discrimination.²⁸

3.3.2.2 Substantive effective remedy

In *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, which involved consular protection and human rights law, the ICJ allowed the

23 CRPD, art. 13; Arlene S. Kanter, *The Development of Disability Rights Under International Law: From Charity to Human Rights*, 221 (Routledge 2015).

24 Human Rights Committee, General Comment 31, The Nature of the General Obligation Imposed on States Parties to the Covenant (Eightieth session, 2004), U.N. Doc. CCPR/C/21/Rev.1/Add.13, para. 15.

25 Committee on Economic, Social and Cultural Rights, General Comment 9, The Domestic Application of the Covenant (Nineteenth session, 1998), U.N. Doc. E/C.12/1998/24, para. 9.

26 Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Report Submitted by the Republic of Korea*, (Twelfth session, 2014), U.N. Doc. CRPD/C/KOR/CO/1, para. 12; Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Report Submitted by Portugal*, (Fifteenth session, 2016), U.N. Doc. CRPD/C/PRT/CO/1, paras 15-16.

27 Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Report Submitted by Ukraine*, (Fourteenth session, 2015), U.N. Doc. CRPD/C/UKR/CO/1, para. 10; Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Initial Report Submitted by Ethiopia*, (Sixteenth session, 2016), U.N. Doc. CRPD/C/ETH/CO/1, para. 12; Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Report Submitted by Italy*, (Sixteenth session, 2016), U.N. Doc. CRPD/C/ITA/CO/1, para. 12. Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Report Submitted by the Republic of Korea*, *ibid.*, para. 12; Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Report Submitted by Portugal*, *ibid.*, paras 15-16.

28 Committee on Economic, Social and Cultural Rights, General Comment 20: Art. 2 para. 2 (Forty-second session, 2009), U.N. Doc. E/C.12/GC/20, para. 40.

parties to settle on the amount of compensation.²⁹ Therefore, Judge Cançado Trindade in his separate opinion further addressed that the remedy for human rights violation should be assessed through a human rights lens, not other *lex specialis*, which reads:

‘...in order to provide adequate reparation to the victims of violated rights, we have to move into the domain of the international law of human rights; we cannot at all remain in the strict and short-sighted confines of diplomatic protection, as a result of not only its ineluctable discretionary nature, but also its static inter-State dimension. Reparations, here, require an understanding of the conception of the law of nations centred on the human person (*pro persona humana*).’³⁰

In addition to this systemic integration interpretation technique, the obligation to make reparation is governed by international law so domestic law can neither modify nor suspend compliance with this obligation.³¹ From this foundation, I will explore general types of remedy, and possible damages in relation to PWDs in air travel under international human rights law.

A. *Types of remedial measures*

The UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (UN Basic Principles), whose scope covers all violations of international human rights law,³² lists types of remedial measures including restitution, compensation, rehabilitation, satisfaction, guarantee of non-repetition and reviewing and reforming laws contributing to such violation.³³ The objectives of a remedy are to rectify the wrong done to the victim and to take the victim back to a position as if the violation had never happened.³⁴ Thus, when this restitution is not possible, reparation may take ‘the form of compensation or satisfaction or even both’.³⁵

29 *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Merits, Judgment, I.C.J. Reports 2010, para. 161.

30 Separate opinion of Judge Cançado Trindade, *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Merits, Judgment, I.C.J. Rep. 2010 (30 Nov. 2010), para. 220.

31 *Ibid.*, para. 212.

32 G.A. Res. 147, U.N. GAOR, 60th Sess., U.N. Doc. A/RES/60/147 (2006), principle 18.

33 *Ibid.*, principles 18-23.

34 Dinah Shelton, *Remedies in International Human Rights Law*, 19 (3rd ed., Oxford University Press 2015).

35 *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, I.C.J. Rep. 2010 (20 Apr. 2010), para. 273; Shelton, *ibid.*, 31, 316.

– *The Committee on the Rights of Persons with Disabilities (CRPD Committee) level*

As of 2017, there has been no case relating to access to air transport to the CRPD Committee. But a communication on an inaccessible tram in *F* can be an analogy that shows how a complaint on inaccessible air transport would be considered under the scope of the CRPD Committee.³⁶ When the CRPD Committee finds that a State Party has violated the CRPD, it often makes two orders, one is a general measure and the other is addressed to the author of the communication. The general measures include preventive measures for any future breach and positive action such as establishing minimum accessibility standards concerning the complaint and ensuring appropriate training for persons dealing with PWDs. Therefore, the CRPD Committee's order is in line with the effective remedies suggested by the UN Basic Principles.

For the remedy to the PWD, in addition to the remedy for the violation of obligation in the CRPD, the CRPD Committee also orders compensation for legal costs.³⁷ However, it does not address any material or moral damages.³⁸

– *National level*

In relation to air travel, the defendants are normally airport operators or air carriers while international human rights treaties including the CRPD do not oblige business entities straight away. States, on the other hand, have an obligation to protect PWDs from human rights abuse by business entities.³⁹ Thus, when implementing the CRPD, the secretariat for the CRPD recommends States Parties to ensure that effective legal remedies in the legislation consist of the following:

'compensation or damages, an order of reinstatement, an order to stop discriminatory acts and prevent them in the future, a requirement to afford reasonable accommodation of the individual's rights, an apology, an order to take wide-ranging remedial measures, including positive action, or other measures.'⁴⁰

³⁶ *F*, *supra* n. 5. See Section 3.2.

³⁷ Committee on the Rights of Persons with Disabilities, *Nyusti and Takács v. Hungary* (Communication no.1/2010), CRPD/C/9/D/1/2010, para. 10(1); *F*, *ibid.*, para. 9(a).

³⁸ In *Gröninger v. Germany*, the CRPD Committee ordered Germany to pay adequate compensation but it did not specify types of compensation. See Committee on the Rights of Persons with Disabilities, *Gröninger v. Germany* (Communication no. 2/2010), U.N. Doc. CRPD/C/D/2/2010, para. 7(a).

³⁹ Human Rights Council, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, 11th session, para. 87 U.N. Doc. A/HRC/11/13, (22 Apr. 2009).

⁴⁰ *Supra* n. 18, 71.

A set of effective remedies is in line with the UN Basic Principles.⁴¹

The CRPD Committee has not hesitated in scrutinizing the adequacy of the substantive aspect of remedies in the concluding observations. In relation to Austria and Belgium, the CRPD Committee urged ensuring that complainants are able to seek injunctions and other remedies that require a change in the behavior of people who discriminate against PWDs.⁴²

In Gaja's general course at the Hague Academy, he rightly indicates discrepancies in remedies among national courts owing to the national legal system and the attitude towards the application of rules of international law.⁴³ Shelton's survey strengthens Gaja's above remark because it shows that State practices of awarding compensation and types of compensable injury vary widely.⁴⁴ It is contestable whether moral damages are a pecuniary loss or not.⁴⁵ Skinner, McCorquodale and De Schutter opine that limited types of remedies in one forum may present a barrier to effective remedy in the case of human rights violations by a transnational corporate entity.⁴⁶ Probably the fragmented law provides forum shopping. In the case of limited types of remedies in one domestic law, States should examine and try to tackle such barriers because victims are entitled to effective remedies.⁴⁷ In relation to international air travel, compensation may fall under the private international law regime which will be discussed in Section 5.3, Chapter 5.

B. Material damage

Material damage includes loss or damage to personal property. In the case of mobility aids, devices, and assistive technologies, the CRPD Committee interprets an obligation to facilitate access as covering access to repaired items.⁴⁸ In relation to remedies, States Parties should ensure that compensation

⁴¹ *Supra* n. 32, principles 18-23.

⁴² Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Initial Report Submitted by Austria*, (Tenth session, 2013), U.N. Doc. CRPD/C/AUT/CO/1, para. 13; Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Report Submitted by Belgium*, *supra* n. 9, para. 12.

⁴³ Giorgio Gaja, *The Protection of General Interest in the International Community: General Course on Public International Law*, 364 *Recueil des Cours*, 162 (2011).

⁴⁴ Shelton, *supra* n. 34, 317, 319.

⁴⁵ Shelton, *ibid.*, 319.

⁴⁶ Gwynne Skinner, Robert McCorquodale & Olivier De Schutter, *The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business*, 12, <http://accountabilityroundtable.org/wp-content/uploads/2013/12/The-Third-Pillar-FINAL1.pdf> (accessed 13 Jan. 2017).

⁴⁷ *Supra* n. 21, Principle 26; *Ibid.*, 12.

⁴⁸ Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Report Submitted by Mongolia*, (Thirteenth session, 2015), U.N. Doc. CRPD/C/MNG/CO/1, para. 33.

covers reparation costs to the extent of the liability of air carriers or airport operators or that they are responsible for reparation.

C. *Non-material damage*

Attention is paid to an effective remedy for moral damage because, in the case of refusal of access to air travel, a PWD perhaps does not suffer any bodily harm, but does suffer humiliation and degradation of human dignity. The UN Basic Principles explicitly list monetary compensation for moral damage as one way to achieve remedy.⁴⁹ It is further suggested that remedy should be 'proportional to the gravity of violation and the circumstances of each case' and that forms of remedy are not limited to only financial compensation.⁵⁰

In *Diallo (Compensation)*, the ICJ noted that non-material injury can be established without specific evidence.⁵¹ The equitable considerations should be the foundation to evaluate compensation for non-material injury although there are different views towards quantification of moral damages.⁵² Judge Greenwood considered that compensation should be compared to other cases together with the facts of the case in question.⁵³ Judge Cançado Trindade insisted that an assessment of moral damages should go beyond a consideration of material goods and look into the 'human person's aspirations, freedom and integrity'.⁵⁴ By taking the aspirations into account, this view is more or less reflects the capabilities approach because both in a similar fashion go beyond the financial outlook or material goods.

The obligation to provide effective remedy is subject to an obligation of result so each State is free to impose measures.⁵⁵ Similarly, in the case of racial discrimination, when assessing whether a State Party renders effective remedies or not, the Committee on the Elimination of Racial Discrimination (CERD Committee) limits itself to review the interpretation of national law made by national courts only when such interpretation is manifestly arbitrary or when it amounts to a denial of justice, but it leaves States Parties a margin of appre-

49 *Supra* n. 32, principle 20. The UN Basic Principles use the term 'reparation'; however, in this study, the distinction appears to lack substance.

50 *Ibid.*, principle 26; Theo van Boven, *The United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, 5-6, http://legal.un.org/avl/pdf/ha/ga_60-147/ga_60-147_e.pdf (accessed 13 Jan. 2017).

51 *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Compensation, Judgment, I.C.J. Rep. 2012, para. 21.

52 *Ibid.*, para. 24.

53 Declaration of Judge Greenwood, *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Compensation, Judgment, I.C.J. Rep. 2012, para. 7.

54 Separate opinion of Judge Cançado Trindade, *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Compensation, Judgment, I.C.J. Rep. 2012, para. 78.

55 De Schutter, *supra* n. 20, 465, 817.

ciation on the type of remedies rendered to the victim.⁵⁶ Thus, it restrictively reviews only the compliance of the national remedy measures with the international principles, i.e., the UN Basic Principles.⁵⁷ Accordingly, in *L.A. et al. v. Slovakia*, when reviewing whether a letter of apology alone, without monetary compensation for diminution of human dignity, constituted an effective remedy or not in a case concerning refusal of access to the Slovak or Roma origin, the CERD Committee did not see any violation because a State had a margin of appreciation to apply any remedial order based on non-arbitrary law.⁵⁸ In addition, in the same communication, the CERD Committee further noted that the national law should provide sanctions such as financial fines to deter any possible discriminatory practice.⁵⁹

Monetary compensation does not reduce its important value. The CERD Committee also opined that a claim for compensation for moral damage has to be considered in every case, even though the victim may not be entitled to compensation.⁶⁰ The General Comment made by the CERD Committee stipulates that national courts and other competent authorities should award monetary compensation for material or moral damage.⁶¹ However, no comparable provision is mentioned in any of the CRPD general comments. Only in the concluding observations on the initial report of Belgium, did the CRPD Committee stress the importance of receiving damages once the claims for discrimination have been proven in court.⁶² Still, the CRPD Committee did not specify the types of compensable damages.

3.4 OBLIGATION TO FULFILL

The obligation to fulfill requires States to take measures to facilitate the enjoyment of human rights. The aim of this obligation is to uphold the rights of the disadvantaged to lead to the establishment of substantive equality.⁶³

56 Committee on the Elimination of Racial Discrimination, *L.A. et al. v. Slovakia* (Communication no. 49/2011), U.N. Doc. CERD/C/85/D/49/2011, para. 7.2.

57 *Ibid.*, para. 7.4.

58 *Ibid.*, para. 7.4.

59 *Ibid.*, para. 7.4.

60 Committee on the Elimination of Racial Discrimination, *B.J. v. Denmark* (Communication no. 17/1999), U.N. Doc. CERD/C/56/D/17/1999, para. 6.2.

61 Committee on the Elimination of Racial Discrimination, General Recommendation XXVI, Art. 6 (Fifty-sixth session, 2000), para. 2.

62 Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Report Submitted by Belgium*, *supra* n. 9, para. 12.

63 Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties*, 77 (Oxford University Press 2008).

3.4.1 Abolishing existing laws, regulations, customs and practices

States Parties are bound to abolish existing laws, regulations, customs and practices that constitute discrimination against PWDs.⁶⁴ How the CRPD Committee ascertains whether the existing law amounts to discrimination or not can be extracted from the meaning of non-discrimination on the basis of disability.⁶⁵ Due to the limited number of communications made by the CRPD Committee, there are only two cases where the CRPD Committee found the existing policy indirectly discriminatory.⁶⁶

By comparison with the widely-used two criteria to evaluate indirect discrimination, namely, the detrimental effect and the objective justification,⁶⁷ the CRPD Committee adopts an equivalent approach. First, a PWD must have directly or indirectly encountered an obstacle to enjoy a right in a discriminatory manner. Commonly, this detrimental effect can be tested either by statistic or non-statistic information.⁶⁸ In *H.M. v. Sweden*, while the central issue concerned reasonable accommodation, the CRPD Committee noted that a law may indirectly affect PWDs when 'the particular circumstances of the individuals to whom it is applied are not taken into consideration' and it evaluated the specific health conditions in the case.⁶⁹ Similarly, in *Nyusti and Takács v. Hungary*, the CRPD Committee tends to weigh the existing accessibility measure with the guarantee of accessibility of the authors of the communication and other persons in a similar situation.⁷⁰ In *Gröninger v. Germany*, the CRPD Committee found that an existing model for the provision of integration subsidies did not effectively promote the employment of PWDs without having considered any data or statistics.⁷¹ From these cases, it can be concluded that the CRPD seems to accept the non-statistic approach.

The last step is to justify the objective of such laws or policies. In *Gröninger*, an existing model for the provision of integration subsidies is based on the medical model of disability; so it is neither consistent with the CRPD, nor objectively justified.⁷² However, in *H.M.*, no explicit reason was given for why the development plan is indirect discrimination on the basis of disability.

64 CRPD, art. 4(1)(b).

65 See Section 1.5.3.1, Chapter 1.

66 *Gröninger*, *supra* n. 38, para. 6.2; Committee on the Rights of Persons with Disabilities, *H.M. v. Sweden* (Communication no. 3/2011), U.N. Doc. CRPD/C/7/D/3/2011, para. 8.3.

67 Human Rights Committee, General Comment 18, Art. 2 (Thirty-seventh session, 1989), para. 13; CESCR General Comment 20, *supra* n. 28, para. 13. See Dagmar Schiek, Lisa Waddington & Mark Bell, *Non-Discrimination Law*, 473-475 (Hart Publishing 2007).

68 Schiek, Waddington & Bell, *ibid.*, 473-474. The CA Agency applies both approaches. For statistical approach on an extra seat requirement, see Canadian Transportation Agency, Decision No. 6-AT-A-2008, (10 Jan. 2008).

69 *H.M.*, *supra* n. 66, paras 8.3, 8.5.

70 *F*, *supra* n. 5, para. 8.7; *Nyusti and Takács*, *supra* n. 37, paras 9.5-9.6.

71 *Gröninger*, *supra* n. 38, para. 6.2.

72 *Gröninger*, *ibid.*, para. 6.3.

The CRPD Committee solely stated that Ms. H.M.'s health condition was so critical that a departure from the development plan was required.⁷³ It seems that the CRPD Committee considers cases on an individual basis. Similarly, the objective test under the review of the HRC is a case-based basis.⁷⁴

The CRPD Committee also applies the proportionality test in a comparable manner to a recommendation to weigh up costs and obligations under the CRPD.⁷⁵ This approach is in line with the recommendation made by Schiek, Waddington and Bell after reviewing the indirect discrimination test in the EU and its Member States that the proportionality test should be applied to determine the objective justification.⁷⁶

3.4.2 Developing accessibility standards on air travel

States Parties should develop minimum 'standards and guidelines for the accessibility of facilities and services open or provided to the public'.⁷⁷ This obligation is in line with Article 4(1)(a) and (b) which requires States Parties to take appropriate legislative, administrative, budgetary, judicial and other actions towards the full realization of the right and to pass or modify the law. PWDs should be able to participate in the development of standards and guidelines.⁷⁸

The CRPD General Comment No. 2 describes that accessibility standards should be made broad and standardized.⁷⁹ Moreover, they should accommodate all types of impairment. This is reflected in the expression of the CRPD Committee in the concluding observations on accessibility standards which do not focus on persons with hearing, visual, intellectual or psychosocial disabilities.⁸⁰ According to the concluding observations, the initiatives to

⁷³ H.M., *supra* n. 66, para. 8.5.

⁷⁴ Sarah Joseph & Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary*, 781 (3d ed., Oxford University Press 2013). See Human Rights Committee, *Love et al. v. Australia* (Communication no. 983/2001), CCPR/C/77/D/983/2001, para. 8.3; Section 3.4.2.2.A on existing designed, built or produced objects, infrastructure, goods, products and services.

⁷⁵ The case does not involve with abolishing existing law but with accessible information in a new tram line. See *F*, *supra* n. 5, paras 2.4, 8.7; Section 3.4.2.2.B on costs.

⁷⁶ Schiek, Waddington & Bell, *supra* n. 67, 474.

⁷⁷ CRPD, art. 9(2)(a).

⁷⁸ CRPD, art. 4(3).

⁷⁹ CRPD General Comment 2, *supra* n. 3, para. 25.

⁸⁰ Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Report Submitted by Belgium*, *supra* n. 9, para. 21; Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Report Submitted by the Czech Republic*, *supra* n. 11, para. 19; Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Initial Report Submitted by Slovakia*, (Fifteenth session, 2016), U.N. Doc. CRPD/C/SVK/CO/1, para. 31.

ensure accessibility should not be charitable, but should be based on human rights.⁸¹

3.4.2.1 Contents of accessibility standards

As categorized in Section 1.5.1.1, Chapter 1, such measures have to cover three areas, namely, (1) physical environment and transportation, (2) information and communication and (3) services.

Applying these areas to air travel, physical environment means the airport and its facilities, and transportation means the aircraft, including public transport to and from the airport.

Information and communication cover not only the information and communication at an airport or on board an aircraft, but also when a PWD wishes to book an air ticket.⁸² Moreover, States Parties are required to ensure access to information in the form of signage in Braille and forms that are easy to read and understand as well as communication in the form of live assistance and intermediaries.⁸³ These obligations are certainly linked to obligations on freedom of expression and opinion and access to information, and the scope of the CRPD is broader than that of the ICCPR, as it covers information from private entities who provide services to the general public.⁸⁴ The CRPD Committee encourages an increase in the use of subtitling and sign language interpretation in the media.⁸⁵ Accordingly, the use of subtitling and sign language interpretation should be provided in airports and on aircraft. The Internet is not neglected from the scope of accessible information and communication,⁸⁶ as States Parties have to refer to international standards pertaining to website accessibility.⁸⁷ From this line of reasoning, online airport and flight information should be in an accessible form for persons with visual and other impairments.

81 Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Report Submitted by United Arab Emirates*, (Sixteenth session, 2016), U.N. Doc. CRPD/C/ARE/CO/1, para. 19.

82 See *F*, *supra* n. 5. Information and communication includes information and communication in the public transport vehicle.

83 CRPD, art. 9(2)(d)-(f). See Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Report Submitted by Italy*, *supra* n. 27, para. 24.

84 CRPD, art. 21.

85 Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Report Submitted by Serbia*, *supra* n. 3, para. 18.

86 CRPD, art. 9(g).

87 UN Department of Economic and Social Affairs Division for Social Policy and Development, *Accessibility to Information and Communication: perspectives of the visually impaired*, <http://www.un.org/esa/socdev/enable/rights/ahc7bkgrndaccess.htm> (accessed 13 Jan. 2017); Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Report Submitted by Denmark*, (Twelfth session, 2014), U.N. Doc. CRPD/C/DNK/CO/1, para. 27; Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Report Submitted by the Republic of Korea*, *supra* n. 26, para. 18.

Services include facilitating movement within the airport and the aircraft, carriage of mobility aids and service animals. When reading this obligation together with Article 20 of the CRPD, the manner, choice of PWDs and affordable cost for PWDs must be taken into account.⁸⁸ States Parties shall ensure that access generates the greatest possible independence for PWDs.⁸⁹ Thus, an obligation should not be limited only to access of PWDs; on the contrary, it should be interpreted to ensure PWDs access to live assistance to PWDs. However, in the concluding observations to Serbia, the CRPD Committee only recommends improving access to ‘trained guide dogs’.⁹⁰ There is no further recommendation for access to other service animals.

3.4.2.2 *Exceptions in accessibility standards*

While an obligation to reasonably accommodate PWDs can be exempted due to a disproportionate or undue burden, the CRPD fails to shed light on whether the contents of accessibility standards can contain exceptions or not.⁹¹

The accessibility standard of the International Telecommunication Union (ITU) made by the Telecommunication Standardization Sector, which has no legal force,⁹² is cited in the General Comment No. 2 as an example.⁹³ Yet, scrutiny of this standard finds no exception in its content;⁹⁴ hence, it cannot provide examples of exceptions.

The CRPD General Comment No. 2 recommends that an obligation to remove barriers to accessibility should be unconditional which means that the entity which is obliged to provide accessibility may not be excused from the omission to do so by referring to the burden of providing access for PWDs.⁹⁵ A further perusal of General Comments, jurisprudence and concluding observations made by the CRPD Committee and other human rights treaty bodies provides a list of what the CRPD Committee perceives to be justified and unjustified exceptions.

⁸⁸ CRPD, arts 9(1)(a), (b), 20(a).

⁸⁹ CRPD, arts 9(1)(a), (b) 20.

⁹⁰ Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Report Submitted by Serbia*, *supra* n. 3, paras 4, 42.

⁹¹ CRPD, art 2. *See* Section 1.5.3.3, Chapter 1.

⁹² International Telecommunication Union, *Telecommunications accessibility guidelines for older persons and persons with disabilities*, F.790 (01/2007), i-ii.

⁹³ CRPD General Comment 2, *supra* n. 3, para. 30.

⁹⁴ *Supra* n. 92.

⁹⁵ CRPD General Comment 2, *supra* n. 3, para. 25. This interpretation of the General Comment is in line with the obligation of gradual implementation. *See* Section 3.5.

A. *Justified exceptions*

- *Existing designed, built or produced objects, infrastructure, goods, products and services*

Before the CRPD was adopted in 2006,⁹⁶ countless airports and aircraft already existed. This brings into question whether an obligation applies retroactively to existing airports and aircraft and how obligations differ between new and existing airports and aircraft. During the sixth session of the Ad Hoc Committee, Canada and Japan shared the view that accessibility should be addressed not only to existing barriers but should also refrain from creating new barriers.⁹⁷

The CRPD Committee later differentiates between existing and newly-built airports and aircraft in General Comment No. 2. For existing ones, the obligation to remove existing barriers may require expenditure and time. General Comment No. 2, thus, allows States Parties to implement this obligation gradually with definite time frames and a clear allocation of duties among the various authorities due to costs involved.⁹⁸

According to a review of the CRPD Committee's concluding observations, for countries that have definite time frames, the CRPD Committee tends to urge them to shorten the time or meet the deadline.⁹⁹ Therefore, the exception to ensure access to existing airports and aircraft prior to the ratification of the CRPD is not permanent but subject to deadlines and resources.

- *Safety*

In *Nyusti*, the bank argued that retrofitting the ATMs would expose more safety risks for persons with visual impairment since they would use them unassisted.¹⁰⁰ The CRPD Committee did not rebut this argument explicitly but found that Hungary had breached its obligation. Lawson, supported by a study on accessible banking for PWDs, criticized this safety argument, stating that

96 The WPA encourages States to adopt policies to ensure access to existing and new public transport systems. See World Programme of Action Concerning Disabled Persons, GAOR, 37th Sess., para. 114, U.N. Doc. A/37/51 (1982).

97 UN Department of Economic and Social Affairs Division for Social Policy and Development, *UN Convention on the Human Rights of People with Disabilities Sixth Ad Hoc Committee Daily Summaries 5 August 2005*, <http://www.un.org/esa/socdev/enable/rights/ahc6sum5aug.htm> (accessed 13 Jan. 2017).

98 CRPD General Comment 2, *supra* n. 3, para. 24; *Nyusti and Takács*, *supra* n. 37, para. 9.5. For the realization of obligation, see Section 3.5.

99 Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Report Submitted by Peru*, (Seventh session, 2012), U.N. Doc. CRPD/C/PER/CO/1, para. 21; Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Initial Periodic Report of Hungary*, (Eighth session, 2012), U.N. Doc. CRPD/C/HUN/CO/1, paras 23-24; Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Initial Report Submitted by Austria*, *supra* n. 42, para. 24.

100 *Nyusti and Takács*, *supra* n. 37, para. 2.12.

it was not convincing and against the CRPD principles of equality, inclusion, and participation.¹⁰¹ However, given that in this case the safety argument is not well evidenced, will the result be different when safety is obviously jeopardized?

In *Love v. Australia*, the HRC found no discrimination in the limitation of the retirement age of pilots in order to maximize flight safety according to the regime of the International Civil Aviation Organization (ICAO).¹⁰² Admittedly, *Love* is not about accessibility standards, but it does illustrate that flight safety is an objective and a reasonable consideration to immunize States from being accused of human rights violation, especially when it is adopted by an international specialized organization. From this reasoning, safety with accredited evidentiary support can validate an exception.

B. Unjustified exceptions

– Types of ownership

During the draft of Article 9 of the CRPD, one of the central issues was whether privately owned buildings fall under the accessibility standards or not. The Ad Hoc Committee and the CRPD Committee agreed that the intention of accessibility is not based on ownership but on usage; hence, all buildings intended for public use are covered under the CRPD, whether they are owned or provided by public or private entities.¹⁰³ Airports and commercial air transport are certainly facilities and services open or provided to the public. From this concept, the minimum standards and guidelines concerning accessibility shall be applied to both public and private airport operators and air carriers.

101 Anna Lawson, *Accessibility Obligations in the UN Convention on the Rights of Persons with Disabilities: Nyusti and Takács v Hungary*, 30:2 S. Afr. J. on Hum. Rts., 380, 392 (2014).

102 CRPD, art. 9(2)(b). See Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Report Submitted by Argentina*, (Eighth session, 2012), U.N. Doc. CRPD/C/ARG/CO/1, para. 18; Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Report Submitted by Paraguay*, (Ninth session, 2013), U.N. Doc. CRPD/C/PRY/CO/1, para. 26; Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Report Submitted by Denmark*, *supra* n. 87, para. 27; Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Report Submitted by Germany*, (Thirteenth session, 2015), U.N. Doc. CRPD/C/DEU/CO/1, para. 21. *Love et al.*, *supra* n. 74, para. 8.3. See *Madsen v. Denmark* (dec.) no. 58341/00, 7 November 2002, (inadmissible). In *Madsen*, the ECtHR found the control measure to randomly conduct a urine test to crew members on board a vessel is proportionate in order to secure public safety and the rights of others.

103 *Supra* n. 97; CRPD General Comment 2, *supra* n. 3, para. 13. Yet, the CRPD Committee discovered from country reports that accessibility standards lack binding obligations to private entities. See e.g. Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Report Submitted by Germany*, *ibid.*, para. 21.

States Parties are obliged to ensure that public transport operated by either public or private entities is accessible for PWDs.¹⁰⁴ States Parties are held liable for failure to ensure access to information owned or operated by private entities as seen in *Nyusti*, where the claimant with visual impairments could not access ATMs owned by the private bank and no accessibility standards on banking services were available.¹⁰⁵ The CRPD Committee found that Hungary had failed to ensure that private entities provide accessible service to PWDs.¹⁰⁶ As a result, States Parties cannot claim that the duty to provide for accessibility in three aspects does not apply to private entities nor that it affects the contractual relationship between private sectors and PWDs.¹⁰⁷

– *Size of the operation*

At the seventh session of the Ad Hoc Committee, Austria, on behalf of the EU and Canada, raised the issue of undue burden on private small entities to provide access to PWDs, but there no feedback was available on the record.¹⁰⁸ It is worthy of comparison that the size of the operation is a permissible exception in the case of reasonable accommodation.¹⁰⁹ A careful consideration of country reports and concluding observations reveals that, with an accessibility standard that exempts some small premises from an accessibility plan, the CRPD Committee tends to request the discontinuance of the exemption.¹¹⁰ Despite having no legal binding, the concluding observation illustrates how the CRPD Committee interprets the CRPD so that it contains

104 CRPD, art. 9(2)(b). See Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Report Submitted by Argentina*, *supra* n. 102, para. 18; Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Report Submitted by Paraguay*, *supra* n. 102, para. 26; Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Report Submitted by Denmark*, *supra* n. 87, para. 27; Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Report Submitted by Germany*, *ibid.*, para. 21.

105 *Nyusti and Takács*, *supra* n. 37, para. 2.1. See Section 1.5.3.2 on Forms of discrimination on the basis of disability.

106 *Nyusti and Takács*, *ibid.*, para. 10.

107 *Nyusti and Takács*, *ibid.*, paras 9.3-9.4. See Section 1.5.3.2, Chapter 1.

108 UN Department of Economic and Social Affairs Division for Social Policy and Development, *Daily Summary of Discussion at the Seventh Session 17 January 2006*, <http://www.un.org/esa/socdev/enable/rights/ahc7sum17jan.htm> (accessed 13 Jan. 2017).

109 UN Department of Economic and Social Affairs Division for Social Policy and Development, *The Concept of Reasonable Accommodation in Selected National Disability Legislation*, <http://www.un.org/esa/socdev/enable/rights/ahc7bkgndra.htm> (accessed 13 Jan. 2017). See Section 1.5.3.1, Chapter 1.

110 Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Initial Report Submitted by Austria*, *supra* n. 42, para. 24; Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Initial Report Submitted by New Zealand*, (Twelfth session, 2014), U.N. Doc. CRPD/C/NZL/CO/1, para. 20; Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Report Submitted by the Republic of Korea*, *supra* n. 26, para. 18.

legal weight. The exemption due to the size of premises is also linked to rural airports where air carriers tend to use small aircraft.

– *Geography*

The volume of air services in rural areas tends to be smaller; accordingly, airports are not as large as those in urban areas and aircraft that land at these airports are likely to be smaller than those at urban airports. However, the CRPD ensures access in both urban and rural areas.¹¹¹ States Parties shall ensure geographic equity in particular in access to public transportation.¹¹² In other words, a location or a route cannot be an excuse for not providing accessibility.

– *Costs*

An accessible environment can require expenses as well as other resources. Yet, the CRPD Committee in *F*, noted that the installation costs of measures to ensure accessibility did not exceed the available budget; therefore, failure to implement accessibility measures amounted to discrimination.¹¹³ Moreover, under the General Comment made by the Committee on the Economic, Social and Cultural Rights (CESCR), a lack of available resources is not an objective and reasonable justification.¹¹⁴ But when the cost exceeds the budget, will it acquit States from an obligation? The CESCR leaves States Parties room to breathe if they have primarily taken every effort to use all resources to address and eliminate the discrimination.¹¹⁵ By comparing the CRPD obligation to the obligation under the CESCR, it appears that a lack of resources or high cost is not always a justified excuse for States to implement their obligations.

¹¹¹ CRPD, art. 9(1).

¹¹² Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Report Submitted by Turkmenistan*, (Thirteenth session, 2015), U.N. Doc. CRPD/C/TKM/CO/1, para. 18; Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Report Submitted by Brazil*, (Fourteenth session, 2015), U.N. Doc. CRPD/C/BRA/CO/1, paras 22-23; Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Report Submitted by Kenya*, (Fourteenth session, 2015), U.N. Doc. CRPD/C/KEN/CO/1, paras 17-18; Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Report Submitted by Guatemala*, *supra* n. 9, para. 28.

¹¹³ *F*, *supra* n. 5, paras 2.4, 8.7.

¹¹⁴ CESCR General Comment 20, *supra* n. 28, para. 13.

¹¹⁵ CESCR General Comment 20, *ibid.*, para. 13. The similar approach is taken by the DCFR. See Section 2.4.2.2, Chapter 2.

3.4.3 Setting accessibility as a prerequisite through public measures

The CRPD Committee urges States Parties to ensure that accessibility requirements are embraced in public procurement legislation and policies.¹¹⁶ According to the World Bank, private sector involvement at airports has been a global trend.¹¹⁷ Thus, adding accessibility requirements in this legal field plays a critical role in accessibility levels at airports.

A position to regulate in air transport can be extended to licensing. States Parties can curb private sectors from not providing access to PWDs by incorporating accessibility as a prerequisite when issuing licenses for the provision of public goods or services.¹¹⁸ In relation to air travel, this measure can apply to ticket agents and ground handling operators as well as airport and aircraft operators.

The obligation to encourage entities to produce mobility aids, devices and assistive technologies to take into account PWDs¹¹⁹ can be translated to cover aircraft manufacturers when they develop new aircraft models.

3.4.4 Eliminating obstacles and barriers to accessibility

This obligation is extracted from paragraph 1 of Article 9. The obstacles and barriers to accessibility are found in the contents of accessibility standards in Section 3.4.2.1. However, one should not mix up the obligation to publish accessibility standards and the obligation to eliminate barriers. States Parties cannot excuse themselves from this obligation by delaying establishing accessibility standards and claiming that since there are no accessibility standards, they do not know how to provide an accessible environment.

116 Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Report Submitted by Sweden*, (Eleventh session, 2014), U.N. Doc. CRPD/C/SWE/CO/1, para. 26; Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Report Submitted by Brazil*, *supra* n. 112, para. 23; Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Report Submitted by Gabon*, (Fourteenth session, 2015), U.N. Doc. CRPD/C/GAB/CO/1, para. 23.

117 World Bank, *Public-Private Partnerships in Airports*, <https://ppp.worldbank.org/public-private-partnership/sector/transportation/airports> (accessed 11 Feb. 2017).

118 Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Report Submitted by Columbia*, (Sixteenth session, 2016), U.N. Doc. CRPD/C/COL/CO/1, para. 23(c). See Section 4.6.2.3 Chapter 4.

119 CRPD, art. 20(d).

3.4.5 Providing reasonable accommodation

When an accessibility standard fails to accommodate PWDs, States are still obliged to reasonably accommodate PWDs.¹²⁰ The same holds true when existing laws, regulations, customs and practices discriminate against PWDs so States have to reasonably accommodate their needs.¹²¹

The entity to provide reasonable accommodation depends on the context. In air travel, air carriers, airport operators, or ground handling operators are considered to be providers. States Parties are obliged to oversee the implementation by public and private entities.¹²² Thus, States Parties have to acknowledge and define the concept of reasonable accommodation into its legislation as well as identify public and private duty holders.¹²³ States Parties can prevent PWDs from being denied reasonable accommodation by private entities by reducing undue or disproportionate arguments such as the provision of financial subsidies.¹²⁴

From the concluding observations of reports, it can be learned that the CRPD Committee consistently expressed concerns about the reasonable accommodation concept which has not been explicitly included in national discrimination law,¹²⁵ or which has not completely covered public transport.¹²⁶ Hence,

120 CRPD General Comment 2, *supra* n. 3, para. 9. See Section 1.5.3.3, Chapter 1.

121 *H.M.*, *supra* n. 66, para. 8.8.

122 UN Office of the High Commissioner for Human Rights, *Monitoring the Convention on the Rights of Persons with Disabilities*, 21, (2010). See Section 3.3.1.

123 CRPD, art. 5(1), (2); *supra* n. 18, 58.

124 Frédéric Mégret & Dianah Msipa, *Global Reasonable Accommodation: How the Convention on the Rights of Persons with Disabilities Changes the Way We Think about Equality*, 30:2 S. Afr. J. on Hum. Rts., 252, 270 (2014).

125 See Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Report Submitted by Tunisia*, (Fifth session, 2011), U.N. Doc. CRPD/C/TUN/CO/1, para. 13; Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Report Submitted by Argentina*, *supra* n. 102, para. 12; Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Report Submitted by Hungary*, *supra* n. 99, para. 16; Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Report Submitted by China*, (Eighth session, 2012), U.N. Doc. CRPD/C/CHN/CO/1, para. 12; Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Report Submitted by Paraguay*, *supra* n. 102, para. 14; Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Report Submitted by Azerbaijan*, (Eleventh session, 2014), U.N. Doc. CRPD/C/AZE/CO/1, para. 13; Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Report Submitted by Costa Rica*, (Eleventh session, 2014), U.N. Doc. CRPD/C/CRI/CO/1, para. 12; Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Report Submitted by New Zealand*, *supra* n. 110, para. 12.

126 See Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Report Submitted by Sweden*, *supra* n. 116, para. 10; Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Report Submitted by the European Union*, (Fourteenth session, 2015), U.N. Doc. CRPD/C/EU/CO/1, paras 18-19; Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Report Submitted by Denmark*, *supra*

it is uncertain how uniform each State Party enforces public and private entities.

3.4.6 Training and raising awareness

Training and raising awareness for persons dealing with PWDs is another measure to guarantee equivalent access to air travel between PWDs and persons without disabilities. In fact, staff that is untrained or unconfident in their skills pose grave obstacles in every phase of air transport owing to their reduced ability to provide safe and dignified service.¹²⁷

The contents on promoting awareness and training should cover accessibility¹²⁸ and reasonable accommodation. The CRPD Committee advises States Parties to ensure that public authorities issuing building permits receive training on accessibility and universal design.¹²⁹ It further recommends that States Parties provide training on legal obligations to provide reasonable accommodation and non-discrimination to public and private sectors.¹³⁰

3.5 REALIZATION OF OBLIGATIONS

Article 4(2) of the CRPD indicates that economic, social and cultural rights are subject to progressive realization;¹³¹ thus, States Parties must protect and promote civil and political rights immediately.¹³² A problem concerning accessibility and personal mobility is, as perceived in the *travaux préparatoires*, that obligations concerning accessibility and personal mobility, particularly regarding the physical environment, transportation and information blur the division between the civil and political right and the economic, social and

n. 87, para. 15; Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Report Submitted by the Czech Republic*, *supra* n. 11, para. 10.

127 Michael J. McCarthy, *Improving the United States Airline Industry's Capacity to Provide Safe and Dignified Services to Travelers with Disabilities: Focus Group Findings*, 33:25-26, *Disability Rehabil*, 2612, 2616 (2011).

128 CRPD, arts 4(1)(i), 8(2)(d), 9(2)(c).

129 Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Report Submitted by Belgium*, *supra* n. 9, para. 22.

130 Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Initial Report Submitted by Qatar*, (Fourteenth session, 2015), U.N. Doc. CRPD/C/QAT/CO/1, para. 12; Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Initial Report Submitted by Slovakia*, *supra* n. 80, para. 20; Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Initial Report Submitted by United Arab Emirates*, *supra* n. 81, para. 12(b).

131 CRPD, art. 4(2).

132 *Supra* n. 18, 19-20.

cultural right.¹³³ For example, freedom of access to information, which is generally a budgetary neutral right, requires expenditure for providing Braille, large print and sign language services, for example, as well as appropriate technologies to uphold this freedom of PWDS.¹³⁴

Moreover, the concept of reasonable accommodation blends civil and political rights with economic, social and cultural rights.¹³⁵ This mixture brings into question the types of realization of obligations entailed with accessibility, personal mobility and non-discrimination on the basis of disability.

3.5.1 Progressive realization or gradual implementation

Personal mobility is considered to be realized progressively even though the original right that was claimed is the right to freedom of movement which is a civil and political right.¹³⁶ The Chair of the sixth session concisely pointed out that assisting people to move was an economic, social and cultural right.¹³⁷ Thus, it is subject to progressive realization.

Despite its hybrid character, accessibility was concurrently viewed as being subject to progressive realization during the seventh session of the Ad Hoc Committee.¹³⁸ However, it appears that the CRPD Committee avoids categorizing accessibility as an economic, social and cultural right even though it recognizes the necessity of cost and resources to comply with the obligation of accessibility. Instead, the CRPD Committee in *Nyusti*, which was decided

133 *Supra* n. 97. Even though during drafting the CRPD, Israeli representative expressed the view that accessibility including access to information are rights subject to progressive realization. UN Department of Economic and Social Affairs Division for Social Policy and Development, *Daily Summary of Discussions Related to Article 4*, <http://www.un.org/esa/socdev/enable/rights/ahc4sumart04.htm> (accessed 13 Jan. 2017) Israeli representative referred to then articles 13 (freedom of access to information), 19 (accessibility) and 20(personal mobility).

134 Ida Elisabeth Koch, *From Invisibility to Indivisibility: The International Convention on the Rights of Persons with Disabilities*, 71-72 in *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian perspectives* (Oddnyl Mjøl Arnardóttir & Gerard Quinn, Martinus Nijhoff 2009).

135 Rosemary Kayess & Phillip French, *Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities*, 8:1 Hum. Rts. L. Rev. 1, 33 (2008); Anna Lawson, *People with Psychosocial Impairments or Conditions, Reasonable Accommodation and the Convention on the Rights of Persons with Disabilities*, 26:2 L. in Context, 62, 66 (2008); Janet Lord & Rebecca Brown, *The Role of Reasonable Accommodation in Securing Substantive Equality for Persons with Disabilities: The UN Convention on the Rights of Persons with Disabilities*, 281 in *Critical Perspectives on Human Rights and Disability Law* (Marcia H. Rioux, Lee Ann Bassar & Melinda Jones, Martinus Nijhoff 2011).

136 United Nations, Ad Hoc Committee, *Article 20 – Personal Mobility References*, <http://www.un.org/esa/socdev/enable/rights/ahcstata20refinthr.htm> (accessed 21 Mar. 2017). See Section 2.2.1, Chapter 2.

137 *Supra* n. 97.

138 *Supra* n. 108.

prior to the issuance of General Comment No. 2, and in General Comment No. 2 opts for the term 'gradual implementation' and does not refer to any guidance on progressive realization.¹³⁹

In addition, in my opinion, it would be impracticable to bind States to an immediate obligation without taking the level of development of each country into account. However, to make the obligation more concrete, the CRPD Committee further requires States Parties to set definite time frames and allocate resources to eliminate barriers.¹⁴⁰ This is more or less similar to the idea of progressive realization. An obligation to remove barriers to accessibility should be conducted 'in a continuous and systematic way, gradually yet steadily' and unconditionally.¹⁴¹

3.5.2 Immediate realization

According to the *travaux préparatoires* and scholarly articles, it is settled that non-discrimination on the basis of disability should not be subject to progressive realization.¹⁴² This is similar to the non-discrimination obligation in the International Covenant on Economic, Social and Cultural Rights (ICESCR), where 'non-discrimination is an immediate and cross-cutting obligation'.¹⁴³

Reasonable accommodation has to be implemented immediately because it is subject to available resources and reasonableness.¹⁴⁴ In other words, if an accommodation measure creates an undue or disproportionate burden, there is no duty to accommodate; therefore, it is not discriminatory.

139 CRPD General Comment 2, *supra* n. 3, paras 14, 33; Lawson, *supra* n. 101, 385.

140 CRPD General Comment 2, *ibid.*, para. 24; Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Report Submitted by Belgium*, *supra* n. 9, para. 22; Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Report Submitted by Lithuania*, (Fifteenth session, 2016), U.N. Doc. CRPD/C/LTU/CO/1, para. 22(a).

141 CRPD General Comment 2, *supra* n. 3, para. 27.

142 Report of the Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, 9, U.N. Doc. A/59/360 (2004); UN Department of Economic and Social Affairs Division for Social Policy and Development, *supra* n. 15; Anna Lawson, *The UN Convention on the Rights of Persons with Disabilities and European Disability Law: A Catalyst for Cohesion?*, 103-104 in *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian perspectives* (Oddnyl Mjøl Arnardóttir & Gerard Quinn, Martinus Nijhoff 2009).

143 CESCR General Comment 20, *supra* n. 28, para. 7.

144 *Supra* n. 84.

3.5.3 Realization of obligation when failure to ensure accessibility amounts to discrimination

One confusing concept is due to the interrelationship between accessibility and non-discrimination.¹⁴⁵ General Comment No. 2 recommends that denial of access should be considered discriminatory.¹⁴⁶ Once there is an accessibility standard and the inaccessible service of a facility has been established thereafter, it is disability-based discrimination and creating new barriers is considered disability-based discrimination.¹⁴⁷ However, obligations concerning non-discrimination on the basis of disability is not subject to gradual implementation.¹⁴⁸ Quinn also noted the problem on obligations concerning accessibility and concluded that most of the obligations in Article 9 are not subject to immediate realization. However, if failure to provide accessibility leads to discrimination, the manner of implementation remains questionable. His text reads:

‘there is some elusive line beyond which the non-discrimination principle will not generate the more robust obligations contained in Article 9. Put another way, failure to have an inaccessible [sic] environment is clearly a form of discrimination... But failure to achieve all the positive obligations outlined in Article 9 is probably not in itself a form of discrimination. By definition, many of these obligations will require resources and extensive systemic change – all subject to the overall obligation of progressive achievement contained in Article 4.2 with respect to socio-economic rights. Where this line falls is very hard to say – but it does exist.’¹⁴⁹

This problem was raised at the Ad Hoc Committee when accessibility was considered a progressive realization obligation. While Chile believed that lack of accessibility is a form of discrimination, a number of delegates, including Austria, on behalf of the EU, and Serbia and Montenegro, expressed cautious concern that if accessibility was connected with discrimination, the obligation on accessibility would be considered immediate.¹⁵⁰ China and India shared a similar view that making public building in their country accessible required a huge effort, a period of time and available resources; hence, this should not

¹⁴⁵ See Section 1.5.4, Chapter 1.

¹⁴⁶ CRPD General Comment 2, *supra* n. 3, para. 13.

¹⁴⁷ CRPD General Comment 2, *ibid.*, para. 31.

¹⁴⁸ See Section 3.5.2.

¹⁴⁹ Gerard Quinn, *The Interaction of Non-Discrimination with Article 9: Added Reasonment*, Unpublished Paper, (Sept. 2010) cited in Janet E. Lord, ‘Accessibility and Human Rights Fusion in the CRPD: Assessing the Scope and Content of the Accessibility Principle and Duty Under the CRPD’ *Presentation for the General Day of Discussion on Accessibility*, <http://www2.ohchr.org/SPdocs/CRPD/DGD7102010/submissions/JanetELord.doc> (accessed 13 Jan. 2017).

¹⁵⁰ *Supra* n. 108.

be considered as discrimination.¹⁵¹ In the end, Article 4(2) provides the conclusion of the Ad Hoc Committee that those economic, social and cultural obligations were not subject to immediate realization provided that they did not amount to discrimination.¹⁵²

According to Lawson, the interpretation of obligation by the CRPD Committee in *Nyusti*, showed conceptual confusion between the obligation of conduct, which should be an obligation on accessibility, and the obligation of result.¹⁵³ She pointed out that while the CRPD Committee noted ‘the gradual achievability of accessibility measures taken by Hungary due to costs involved’, it found that Hungary violated the CRPD immediately.¹⁵⁴

3.5.4 Prioritized obligations

Accessibility is a precondition for PWDs to enjoy other rights on an equal basis with others.¹⁵⁵ Yet, accessible air transport is only one small obligation under Article 9 of the CRPD, which deals with how to prioritize or share funds among areas that have to be made accessible. Although accessible air travel is linked to the Sustainable Development Goals (SDGs), they are not legally binding. Consequently, among the 17 goals and assorted 169 targets, choices and priorities have to be made when resources are limited.

The list of central human capabilities presented by Nussbaum cannot answer this problem since it contains no hierarchy.¹⁵⁶ Can a pre-condition status for recognition of other rights and its connection to many capabilities in the list do justice to the priority of accessibility? There are several attempts to prioritize the list of central human capabilities by relying on the importance of some functionings or by connecting with the foundation of rights.¹⁵⁷ However, any hierarchy is rebuttable by the interrelated nature of human rights, as also argued by Nussbaum.¹⁵⁸

151 UN Department of Economic and Social Affairs Division for Social Policy and Development, *Daily Summary of Discussions Related to Article 19 Accessibility*, <http://www.un.org/esa/socdev/enable/rights/ahc3sum19.htm> (accessed 13 Jan. 2017); UN Department of Economic and Social Affairs Division for Social Policy and Development, *supra* n. 15.

152 CRPD, art. 4(2); UN Department of Economic and Social Affairs Division for Social Policy and Development, *ibid.*

153 Lawson, *supra* n. 101, 385.

154 Lawson, *ibid.*, 385.

155 CRPD General Comment 2, *supra* n. 3, para. 1.

156 Martha Nussbaum, *Capabilities, Human Rights, and the Universal Declaration*, 28, in *Human Rights in the World Community: Issues and Action* (Burns H. Weston & Anna Gear, 4th ed., University of Pennsylvania Press 2016). See Section 1.3.1, Chapter 1.

157 Caroline Harnacke, *Disability and Capability: Exploring the Usefulness of Martha Nussbaum's Capabilities Approach for the UN Disability Rights Convention*, 41(4) J. Law Med Ethics., 768, 778 (2013).

158 CRPD, preamble (c); Nussbaum, *supra* n. 156, 28.

The Office of the High Commissioner for Human Rights, although holding that all rights are equally valuable, suggested that in the context of poverty reduction, States can give precedence to certain rights over others when they have been under achieved compared to other rights or when they can catalyze the fulfillment of other rights.¹⁵⁹ By this comparison, States should prioritize obligations concerning accessibility as this is a precondition for PWDs to enjoy equal rights.

Nevertheless, States may defend not realizing their obligation due to a lack of resources. The concluding observations of country reports show that the CRPD Committee is concerned about sufficient financial and human resources for implementation, promotion and achieving compliance with national accessibility legislation.¹⁶⁰ In relation to Belgium, the CRPD Committee stressed its concern that accessibility is not a priority.¹⁶¹ Accessible public and private transportation are expressly mentioned in the concluding observations made to Croatia, where the CRPD Committee recommends that Croatia allocates sufficient resources to accomplish accessibility levels.¹⁶²

The comparison to the rights in the ICESCR and its progressive realization obligation appears to provide a lesson. The CESCR establishes the minimum core obligation concept that a State Party should reach the minimum essential levels of each right without disregarding the resource constraints in an application within the concerned country.¹⁶³ However, this interpretation is not free from controversy especially on the meaning of 'core contents of rights'.¹⁶⁴ Posner was critical that this CESCR General Comment is silent on the extent to which resource constraints affect the obligation and States disregard in this interpretation.¹⁶⁵

This constraint may be solved by conducting analysis of public budgets in three areas: sufficiency of government investment, the equity of patterns

159 UN Office of the High Commissioner for Human Rights, *Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies*, 2006, HR/PUB/06/12, Guideline 4, para. 59.

160 Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Report Submitted by Tunisia*, *supra* n. 125, para. 21; Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Report Submitted by Spain*, (Sixth session, 2011), U.N. Doc. CRPD/C/ESP/CO/1, para. 28; Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Report Submitted by Sweden*, *supra* n. 116, para. 26; Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Report Submitted by Costa Rica*, *supra* n. 125, para. 20.

161 Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Report Submitted by Belgium*, *supra* n. 9, para. 21.

162 Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Report Submitted by Croatia*, (Thirteenth session, 2015), U.N. Doc. CRPD/C/HRV/CO/1, para. 16.

163 Committee on Economic, Social and Cultural Rights, General Comment 3, Art. 2, para. 1, (Fifth session, 1990), U.N. Doc. E/1991/23, paras 1, 10.

164 De Schutter, *supra* n. 20, 572.

165 Eric A. Posner, *The Twilight of Human Rights Law*, 88-89 (Oxford University Press 2014).

of expenditure and the efficiency of spending.¹⁶⁶ Fredman gave an example that the World Health Organization proposed a minimum percentage of health expenditure in government investment and she reached the conclusion that a State which fails to reach that minimum budget ratio constitutes a violation of the duty to utilize the maximum available resources.¹⁶⁷

3.6 JURISDICTION

The CRPD obliges States Parties to adopt legislation and accessibility standards, but it is silent on the scope of application of these standards. Hence, this gives rise to the question of which State should exercise its jurisdiction over activities concerning PWDs and air travel because air transport is not static and a flight may involve more than one country. Does an air carrier have to comply with regulations of the State of departure when it leaves the territory of that State?

3.6.1 Jurisdiction under the CRPD

The legislative history of the CRPD does not yield a satisfactory answer. In the preparatory works, States Parties' obligations are restricted only to all individuals 'within their jurisdiction' and this phrase is taken from Article 2 of the Convention on the Rights of the Child (CRC).¹⁶⁸ The discussion was mainly involved with concerns on leaving out non-citizens with disabilities but there was no negotiation on the extraterritorial jurisdiction of human rights obligations.¹⁶⁹

3.6.2 Jurisdiction under the Chicago Convention

Since the CRPD is silent on the scope of application in the case of air travel, the next source to find an answer is in public international air law. Territorial jurisdiction forms the basis of jurisdiction under public international air

¹⁶⁶ Fredman, *supra* n. 63, 82; De Schutter, *supra* n. 20, 571-572.

¹⁶⁷ Fredman, *ibid.*, 82.

¹⁶⁸ Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities Working Group, *Report of the Working Group to the Ad Hoc Committee*, 10, U.N. Doc. A/AC.265/2004/WG.1 (2004).

¹⁶⁹ UN Department of Economic and Social Affairs Division for Social Policy and Development, *Article 4 – General Obligations Third Session*, <http://www.un.org/esa/socdev/enable/rights/ahcstata4tscompilation.htm> (accessed 13 Jan. 2017).

law.¹⁷⁰ This is in line with the *Lotus* case where international law permits States equal power to adopt legal norms, but when enforcing them, territorial jurisdiction overrides the other two jurisdictions, i.e. quasi-territorial jurisdiction and personal jurisdiction.¹⁷¹

Applying this principle of territorial jurisdiction to a case of PWDs and air travel, it certainly does not make sense for an air carrier to change the applicable law once an aircraft leaves a State, especially when the destination State's accessibility standards are dissimilar. The Chicago Convention recognizes complete and exclusive sovereignty over the airspace above the territory of every State.¹⁷² As a result, scheduled international air services are subject to bilateral or multilateral ASAs among States in order to grant permission to operate above or in the territory of said State.¹⁷³ States sometimes exercise their domestic law as a condition for foreign persons to gain market access to their territory.¹⁷⁴ Therefore, ASAs can incorporate a clause on the provision of services to PWDs in order to settle the applicable law.

3.6.3 Extraterritorial application of human rights

The HRC expressed the opinion that States bear obligations to respect and to ensure the ICCPR rights to all persons subject to their jurisdiction, not only within their territory.¹⁷⁵ Petersmann and Bhuta concurringly observed that the jurisprudence of human rights courts and treaty bodies tends to hold that States have human rights obligations over a territory or a person that States factually control, such as in an armed conflict or a situation of military occupation.¹⁷⁶ Similarly, an extension of obligations on economic, social and cultural rights going beyond the territory of States is proposed by a group of experts in international law and human rights which can be considered as the teach-

170 I.H.Ph. Diederiks-Verschoor & Pablo Mendes de Leon, *An Introduction to Air Law*, 14, (9th ed., Kluwer Law International 2012).

171 *Lotus Case*, (1927), P.C.I.J. Series A, No. 10, 18-19.

172 Convention on International Civil Aviation (Chicago, 7 Dec. 1944), 15 U.N.T.S. 295, 61 Stat. 1180, T.I.A.S. No. 1591, arts 1-2, (Chicago Convention). For the discussion on the connection of sovereignty and jurisdiction, see Pablo Mendes de Leon, *The Dynamics of Sovereignty and Jurisdiction in International Aviation Law*, 489 in *State, Sovereignty and International Governance* (Gerard Kreijen, Oxford University Press, 2002).

173 Chicago Convention, art. 6.

174 Chicago Convention, art. 6; Cedric Ryngaert, *Jurisdiction in International Law*, 94 (2nd ed., Oxford University Press 2015).

175 HRC General Comment 31, *supra* n. 24, para. 10.

176 Ernst-Ulrich Petersmann, *Human rights require 'cosmopolitan constitutionalism' and cosmopolitan law for democratic governance of public goods*, 13, <http://cadmus.eui.eu/handle/1814/27155> (accessed 13 Jan. 2017); Nehal Bhuta, *The Frontiers of Extraterritoriality – Human Rights Law as Global Law*, 10-11 in *Frontier of Human Rights: Extraterritoriality and Its Challenge* (Nehal Bhuta, Oxford University Press 2016).

ings of the most highly qualified publicists of the various nations.¹⁷⁷ They adopted the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights (Maastricht Principles) which also include relevant obligations in the CRPD.¹⁷⁸ Under these Principles, an extension of obligations on economic, social and cultural rights applies to obligations of a global character in the UDHR.¹⁷⁹ Principle 24 states an obligation to regulate and bases an extension on two grounds: (1) the active personality principle to regulate its nationals abroad or (2) a reasonable link between the State and the conduct to be regulated.¹⁸⁰ For instance, adding human rights requirements to the public procurement system can be a lawful means to exercise obligations and set requirements extraterritorially when States are in a position to influence non-State actors.¹⁸¹

In short, it is possible to apply human rights obligations extraterritorially provided that a State has a causal link to a person and the conduct being regulated.

3.6.4 Territorial extension

The phenomenon to apply domestic standards to foreign activities beyond a State territory occurs in areas other than PWDs and air travel as well.¹⁸² One argument to this unilateral approach is the good intention to protect global value.

In an article dealing with the rise of the EU as a global regulatory power, Scott distinguished between extraterritoriality and the new concept called territorial extension. Whereas the former is an application of a measure irrelevant to a territorial connection, the territorial extension is an application of a measure connected with territory; however, 'in applying the measure the regulator is required, as a matter of law, to take into account conduct or

177 Statute of the International Court of Justice, art. 38(1)(d).

178 FIAN International, *Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights*, (2013) http://www.etoconsortium.org/nc/en/main-navigation/library/maastricht-principles/?tx_drblob_pi1%5BdownloadUid%5D=23 (accessed 13 Jan. 2017).

179 *Ibid.*, Principle 8(b).

180 *Ibid.*, Principles 24-25.

181 *Ibid.*, Principle 26.

182 They are international trade, maritime transport, air transport. In air transport, they are climate change, gambling restrictions, and smoking restrictions. See Joanne W. Young, *Globalism versus Extraterritoriality Consensus versus Unilateralism: Is there a Common Ground? A US Perspective*, 24:4-5 *Air & Space L.*, 211 (1999); Jol A. Silversmith, *The Long Arm of the DOT: The Regulation of Foreign Air Carriers Beyond US Borders*, 38 *Air & Space L.*, 173 (2013). See Comments of Saudi Arabian Airlines, docket DOT-OST-2004-19482, at 2.

circumstances abroad'.¹⁸³ She further argued the legitimacy to apply the territorial extension, which is compatible with the territoriality principle in public international law, if it fits two criteria. First, the content deals with the enforcement of international standards or towards objectives that have been internationally agreed.¹⁸⁴ Second, the measure leaves room for other States to waive their compliance if they have a comparable effective measure.¹⁸⁵

However, this proposal is not free from controversy. First, while a unilateral action concerning global value may in the end become an international action and formulate global public good, a unilateral action disregards the perspectives and other values of the affected entities.¹⁸⁶ An obligation *erga omnes*, which is the result of attaining a global value, does not confer universal jurisdiction on a bystander State, as it should rely on treaty or customary international law to declare such jurisdiction.¹⁸⁷ It is contestable whether it is fair to apply high regulatory standards to developing countries in the application of the territorial extension.¹⁸⁸

In relation to the exercise of jurisdiction, when there is a conflict in regulations between two States, the Restatement of the Law places an authority on the State that has a greater interest in exercising jurisdiction.¹⁸⁹ But who will measure which State possesses more interest is an issue that has not been settled. Moreover, this so-called 'rule of reason' is viewed by the EU as a discretionary concept and has not yet crystallized into an international norm.¹⁹⁰

3.7 SUPPORTING MECHANISMS TO GUARANTEE IMPLEMENTATION BY THE CRPD COMMITTEE

The language in the CRPD itself softens the enforcement mechanism. First, the CRPD uses the term 'shall' to oblige States Parties, giving the obligations weight. The drafters further weaken the obligations by adding the term 'appro-

183 Joanne Scott, *Extraterritoriality and Territorial Extension in EU Law*, 62 Am. J. Comp. L. 87, 90 (2014).

184 *Ibid.*, 116.

185 *Ibid.*, 121-122.

186 Gregory Shaffer, *International Law and Global Public Goods in a Legal Pluralist World*, 23:3 Eur. J. Int'l L. 669, 691 (2012).

187 Cedric Ryngaert, *Unilateral Jurisdiction and Global Values*, 45 (Eleven International Publishing 2015).

188 Ryngaert, *supra* n. 174, 96-97.

189 American Law Institute, *Restatement (Third) of Foreign Relations Law of the United States*, Vol. 1, § 403 (1987), 244-245.

190 Ryngaert, *supra* n. 174, 168, 179-180.

appropriate'.¹⁹¹ This term is found in provisions on general obligation, non-discrimination on the basis of disability and accessibility.¹⁹² Besides, the ambiguous term 'gradual implementation' is also problematic. Accordingly, it will be difficult to assess the effective implementation of the principles and substantive human rights for PWDs laid down in the CRPD without the supporting mechanisms and the role of the CRPD Committee. The CRPD provides venues and entrusts the CRPD Committee with several arrangements to monitor and implement the CRPD at the national and international level.¹⁹³

3.7.1 Monitoring the implementation

The CRPD Committee can monitor States Parties through the country reports. In the country report, the CRPD Committee requires States Parties to specify the ways and means by which the State Party defines and understands the requirement of disproportionate and undue burden as well as the legislative measures taken in relation to access to the physical environment, transportation, information and communication, as well as technical standards and guidelines for accessibility and measures to urge private entities to provide an accessible environment.¹⁹⁴ These mechanisms enhance the uniformity of interpretation as well as accessibility.

In order to supervise the implementation of obligations concerning accessibility, States Parties have to set up national accessibility plans with targets and deadlines to implement obligations and report these to the CRPD Committee in a country report.¹⁹⁵ As seen from the concluding observations, the CRPD Committee urges countries that have an accessibility plan to move up deadlines or meet them.¹⁹⁶ For an accessibility plan that exempts some small premises,

191 Jean Allain, *Legal Reports No. 2 Treaty Interpretation and the United Nations Convention on the Rights of Persons with Disabilities*, 11, <http://www.disabilityaction.org/fs/doc/publications/legal-report-2-treaty-interpretation-and-the-un-convention-on-the-rights-of-persons-with-disabilities.pdf> (accessed 13 Jan. 2017).

192 CRPD, arts 4, 5, 9.

193 Kayess & French, *supra* n. 135, 31. The Optional Protocol also offers two additional avenues of enforcement for the Convention: (1) an individual complaints procedure and (2) a process that allows the CRPD to investigate a State party for severe or systematic violations of the CRPD.

194 Committee on the Rights of Persons with Disabilities, *Guidelines on treaty-specific document to be submitted by states parties under article 35, paragraph 1, of the Convention on the Rights of Persons with Disabilities*, (Second session, 2009) U.N. Doc. CRPD/C/2/3, 7, 8, 12. The Guidelines uses the term "disproportionate and undue burden" instead of "disproportionate or under burden" as stated in the CRPD, emphasis added.

195 *Ibid.*, 8.

196 Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Report Submitted by Peru*, *supra* n. 99, para. 21; Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Initial Periodic Report of Hungary*, *supra* n. 99, paras 23-24;

the CRPD Committee tends to request discontinuance of the exemption.¹⁹⁷ The lacuna is that the CRPD Committee fails to further clarify the timespan to be achieved and the criteria to justify the length of time.

Article 31 obliges States Parties to collect statistics and data for the formulation and implementation policies in relation to the CRPD. This can reinforce the supervision on the accessibility standards on air travel. In the concluding observations to Germany, the CRPD Committee urged States Parties to systematically collect data and apply human rights indicators to provide information on the implementation of the CRPD and the removal of barriers.¹⁹⁸ The monitoring authority of the CRPD Committee follows other existing human rights treaty bodies. However, when comparing to the Optional Protocol to the Convention against Torture, the CRPD Committee seems to play a less active role since it is not authorized to conduct field visits but relies only on a country report.¹⁹⁹

3.7.2 Cooperating with States parties

The CRPD provides two channels for the CRPD Committee to coordinate with States Parties. A Conference of States Parties under Article 40 allows States to meet and consider any matter relevant to the implementation of the CRPD. It can be a venue to exchange best practices and discuss topics relevant to access to air travel. The name of the conference may be misleading in implying that only States Parties are eligible to participate. Actually NGOs are not barred from joining subject to registration with the UN.²⁰⁰

The other is the international cooperation under Article 32, which aims to build cooperation not only among States but also between relevant international and regional organizations. The international cooperation measures

Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Initial Report Submitted by Austria*, *supra* n. 42, para. 24.

197 See *supra* n. 110, Section 3.4.2.2.B on size of the operation.

198 See Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Report Submitted by Germany*, *supra* n. 102, para. 58.

198 Nyusti and Takács, *supra* n. 37, para. 2.12.

199 Tom Pegram, *Regulatory Stewardship and Intermediation: Lessons from Human Rights Governance*, 670 Ann. Am. Acad. Polit. SS. 225, 229 (2017). While the CRPD does not authorize the CRPD Committee to initiate any field visit, a State can render an invitation. In 2017, North Korea, after ratifying the CRPD, unusually agreed to a visit by the UN special rapporteur on the rights of persons with disabilities in May 2017. See UN Office of the High Commissioner for Human Rights, *UN Disability Rights Expert Announces First Visit to North Korea*, <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21538&LangID=E> (accessed 25 May 2017).

200 United Nations, *List of Non-Governmental Organization Accredited to the Conference of States Parties*, <https://www.un.org/development/desa/disabilities/conference-of-states-parties-to-the-convention-on-the-rights-of-persons-with-disabilities-2/list-of-non-governmental-organization-accredited-to-the-conference-of-states-parties.html> (accessed 13 Jan. 2017).

are not only about funding and research programmes.²⁰¹ This provision is interpreted to also cover the harmonization of standards providing for accessibility that have an international dimension, and civil aviation is one of the standards that ought to be harmonized.²⁰²

3.7.3 Cooperating with other international organizations

Innovative international cooperation allows international organizations to participate as well. Benvenisti pointed out an adverse effect of a large number of specialized international organizations because it leads to fragmented and isolated policies as well as restraining the negotiation power of weaker actors.²⁰³ Therefore, international cooperation will defragment laws and policies and create a channel to voice PWDS' needs.

Article 38 of the CRPD aims to foster cooperation between the CRPD Committee and other UN specialized agencies, including ICAO. According to the provision, ICAO is entitled to be represented or invited to provide expert advice on the implementation of the CRPD relevant to ICAO's mandates.²⁰⁴

The CRPD Committee realizes that air transport needs accessibility standards.²⁰⁵ Moreover, because international air transport involves more than one country, the standards must be in line with other States Parties so as to ensure the interoperability of the liberty of movement in Article 18 of the CRPD.²⁰⁶ The CRPD General Comment No. 2 refers to the accessibility standards in relation to telecommunication established by the ITU as a reference tool.²⁰⁷ Even though the CRPD Committee is silent on standards of air travel, it is possible, and it ought to be, that States Parties make reference to the accessibility standards established by an international organization such as ICAO.

201 CRPD, art. 32.

202 Kayess & French, *supra* n. 135, 32.

203 Eyal Benvenisti, *The Law of Global Governance*, 368 Recueil des Cours, 61-62 (2014).

204 CRPD, art. 38(a).

205 CRPD General Comment 2, *supra* n. 3, para. 29.

206 CRPD General Comment 2, *ibid.*, para. 18. See Kayess & French, *supra* n. 135, 32.

207 CRPD General Comment 2, *ibid.*, para. 30. See UN Office of the High Commissioner for Human Rights, *ITU's Comments on the CRPD Draft General Comment on Article 9*, <http://www.ohchr.org/Documents/HRBodies/CRPD/GC/ITUArt9.doc> (accessed 13 Jan. 2017). The ITU suggested the CRPD Committee to add its accessibility standards in the General Comment.

3.8 CONCLUDING REMARKS: SYNTHESIS OF A CONCEPTUAL FRAMEWORK

Before and after the adoption of the CRPD, the UN has recognized accessibility and non-discrimination on the basis of disability as principles which, it is argued here, are also relevant with respect to access to air travel for PWDs. The CRPD is indispensable in its refinement on State obligations to ensure accessibility and not to discriminate on the basis of disability including reasonably accommodating PWDs. The CRPD additionally recognizes the personal mobility of PWDs which closely supports accessibility and non-discrimination on the basis of disability.

The research question of this Chapter on the extent to which PWDs can enforce entitlements with respect to air travel can be answered conversely by looking into State obligations towards them. The tripartite typology portrays obligations in levels because States are required not only to reform the law and to create an accessible environment but also to monitor private entities responsible for serving PWDs. The criteria of these obligations will be applied to assess ICAO, the EU, the US and Canada in Chapter 4 and Chapter 5. The research answer can be divided as follows.

3.8.1 Scope of application of obligations under the CRPD

The CRPD does not clearly mention the scope of application though territorial jurisdiction is applied in public international air law. States tend to apply human rights obligations beyond their territory. The justification is to connect with their nationals and their conduct. The other option that is questionable due to its unilateral approach is known as the territorial extension. Air travel can involve more than one country and States tend to use a domestic law as a condition for foreign entities to gain market access. As a result, there may be concurrent jurisdictions. Chapter 4 will explore whether selected accessibility standards on air travel overlap their scope of application and whether there is a clause in ASAs to settle this problem or not.

3.8.2 Obligations concerning accessibility standards

As emphasized a number of times, the essence of accessibility lies in its precondition to enjoy other rights. To develop and publish accessibility standards on air travel is, thus, essential since they will play a role in plans for PWDs to evaluate their rights and for airport operators and air carriers to serve PWDs. However, a review of the CRPD Committee concluding observations reveals that not all States Parties' initial reports and concluding observations specify precisely accessibility standards in air transport. Those that do refer to access-

ibility standards mostly mention their national law or regional law,²⁰⁸ and only one country, Slovenia, names both Annex 9 to the Chicago Convention and Regulation 1107.²⁰⁹ Chapter 4 will explore these two laws together with the accessibility standards of the US and Canada in detail.

The next Chapter will focus on the completeness of accessibility standards which should contain (1) access to the physical environment and transportation i.e. airports and aircraft; (2) access to information and communication from bookings, including online bookings to the airport of destination, and (3) access to services such as movement within airports and aircraft, acceptance of accompanying persons, carriage of mobility aids and service animals other than trained dogs. The contents should cover training. Any exceptions in accessibility standards will be evaluated on their justification based on Section 3.4.2.2. In short, exceptions are permissible for existing airports and aircraft in the case of the protection of a core value of society i.e. safety. In exceptional cases economic reasons are justifiable.

It is possible that the selected accessibility standards are silent in some aspects of air travel for PWDs so Chapter 4 will check whether reasonable accommodation has been applied when there is no applicable accessibility standard. Moreover, I will also explore whether a license application incorporates accessibility as a requirement or not.

3.8.3 Evaluation of different accessibility standards

After examining the contents of the selected accessibility standards, it is possible that their contents are dissimilar. In that case, there may be a discriminatory provision. In other words, it may lead to a violation of an obligation to abolish existing laws, regulations, practices and customs. Thus, the

208 See *Initial Report on the Implementation of the Provisions of the Convention on the Rights of Persons with Disabilities submitted by the Canada*, (7 July 2015), U.N. Doc. CRPD/C/CAN/1, paras 48-49; *Initial Report on the Implementation of the Provisions of the Convention on the Rights of Persons with Disabilities submitted by Sweden*, (18 Sept. 2012), U.N. Doc. CRPD/C/SWE/1, para. 87; *Initial Report on the Implementation of the Provisions of the Convention on the Rights of Persons with Disabilities submitted by the European Union*, (3 Dec. 2014), U.N. Doc. CRPD/C/EU/1, para. 53; *Initial Report on the Implementation of the Provisions of the Convention on the Rights of Persons with Disabilities submitted by the Czech Republic*, (27 June 2013), U.N. Doc. CRPD/C/CZE/1, para. 210; *Initial Report on the Implementation of the Provisions of the Convention on the Rights of Persons with Disabilities submitted by Germany*, (7 May 2013), U.N. Doc. CRPD/C/DEU/1, para. 163; *Initial Report on the Implementation of the Provisions of the Convention on the Rights of Persons with Disabilities submitted by Thailand*, (30 Jan. 2015), U.N. Doc. CRPD/C/THA/1, para. 32. See Section 4.6.2.1, Chapter 4.

209 *Initial Report on the Implementation of the Provisions of the Convention on the Rights of Persons with Disabilities submitted by Republic of Slovenia*, (17 July 2014), U.N. Doc. CRPD/C/SVN/1, para. 117.

criteria in Section 3.4.1 will be applied to assess the contents of selected accessibility standards.

Moreover, the CRPD Committee, when finding that the existing provision discriminates against PWDS, further evaluates the feasibility for a State to reasonably accommodate PWDS.²¹⁰

3.8.4 Enforcement of obligations under the CRPD

The obligation to protect applies not only to government bodies of States Parties but also to their private entities. Obligations under Article 9 and Article 20 of the CRPD are not subject to immediate realization so States can set a time span and a deadline for themselves and private entities to implement obligations. Moreover, this Chapter points out that the ambiguous language in the CRPD leads to difficulties in enforcement. Therefore, an obligation to establish at least one focal point to implement the CRPD is significant in ensuring that implementation will be monitored. Chapter 4 will strictly focus on the air travel sector.

3.8.5 Remedial measures

As for remedy, the criteria are developed from the two factors of an effective remedy, namely procedure and substance. In short, attention is paid to the effectiveness of both administrative mechanisms and judicial mechanisms in relation to their obligation to prevent future violations and rectify PWDS.

From this perspective, the two aspects of effective remedy correlate to the focal point mentioned in Section 3.8.4 above. First, a focal point which has the authority to handle a complaint is without doubt an administrative body from a procedural perspective. A sanction ordered by this focal point is considered as one type of substantive effective remedy. Therefore, I will examine them together in Chapter 5 dealing with remedial measures.

3.8.6 Relationship between the CRPD Committee, ICAO, and States

Traditionally, the CRPD Committee is like other human rights treaty bodies in that it can monitor States Parties through a country report. In relation to air travel, in addition to checking compliance with the obligations mentioned in Section 3.2 – Section 3.4, the statistics and data can be used to scrutinize such compliance. Other than a country report, a Conference of States Parties

²¹⁰ *H.M.*, *supra* n. 66, para. 8.8. See Section 3.4.5.

can be a place to exchange opinions on matters relevant to PWDs including air travel.

It is acknowledged that civil aviation is one of the areas where accessibility standards should be harmonized. One way to achieve harmonization is by referring to accessibility standards published by an international organization. Moreover, States can cooperate with others. International cooperation which combines States, international organizations and civil society or, in short, all stakeholders in collaborations to implement obligations in the CRPD can be a mechanism for generating this outcome. Hence, in Chapter 4, I will explore further how this has been performed by ICAO, the EU, the US and Canada.

4 | International, regional and national accessibility standards with respect to air travel

4.1 INTRODUCTION

In Chapter 3, I concluded that accessibility standards in air transport should be determined by States Parties through domestic law, using accessibility standards of the International Civil Aviation Organization (ICAO) as a reference. In this Chapter, an attempt will be made to find answers as to how the obligations in Chapter 3 have been implemented by the EU, the US and Canada, and how ICAO assists or regulates implementation.

The present Chapter is divided into eight sections. Sections 4.2-4.5 discuss the accessibility standards of ICAO, the EU, the US and Canada. Section 4.6 comparatively analyzes them pursuant to the conceptual framework in Chapter 3, except for remedies which will be discussed in Chapter 5. The contents of these selected accessibility standards are tabulated in Table 3. A second research question is examined in Section 4.7 and Section 4.8 contains concluding remarks.

4.2 ICAO

As earlier concluded in Section 2.3.1, Chapter 2, the Convention on International Civil Aviation (Chicago Convention)¹ does not deal with human rights. This gives rise to the question of whether ICAO is bound by the Convention on the Rights of Persons with Disabilities (CRPD)² through other channels and on the human rights elements in its accessibility standards.

4.2.1 Observance of the CRPD

Like other intergovernmental organizations, ICAO cannot become a party to the CRPD because no provision therein permits it. Yet, ICAO is a specialized

1 Convention on International Civil Aviation (Chicago, 7 Dec. 1944), 15 U.N.T.S. 295, 61 Stat. 1180, T.I.A.S. No. 1591, (Chicago Convention).

2 Convention on the Rights of Persons with Disabilities, (24 Jan. 2007), U.N. Doc. A/RES/61/106, art. 3(e), (CRPD).

agency of the UN. According to the Agreement between the UN and ICAO,³ and the ICAO Assembly resolution,⁴ ICAO is obliged to comply with Article 55 of the UN Charter and one of the obligations is to promote 'universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion'.⁵

Strictly speaking, a subsequent question concerning the CRPD, is how to prove that the rights contained in this Convention correspond to the term 'human rights and fundamental freedoms' since the UN Charter is neither defined nor detailed therein.⁶ Buergenthal suggested that the UN has the authority to define and codify these human rights.⁷ Schermers and Blokker further elaborate that the General Assembly is competent to interpret the UN Charter and enumerate human rights obligations.⁸ From these viewpoints, the adoption of the CRPD by the UN General Assembly can be deemed as an enumeration of human rights obligations. In that resolution, the Assembly even requests UN agencies to undertake efforts to disseminate information and promote understanding of the CRPD and its Optional Protocol.⁹

On the basis of this provision, observance of human rights becomes one of the obligations of ICAO.¹⁰ From these undertakings, ICAO, as part of the UN family, has recognized and referred to the CRPD and its principles in resolutions adopted by the ICAO Assembly and publications concerning persons with disabilities (PWDs). Yet, not every Contracting State in the Chicago Convention is the State Party to the CRPD.¹¹ These resolutions led to the revision of Annex 9 and publication of the Manual on Access to Air Transport by

3 Agreement between the United Nations and the International Civil Aviation Organization, (31 May 1948), ICAO Doc 7970, art. V(1).

4 ICAO, Resolution A2-24, para. 3.

5 Charter of the United Nations (San Francisco, 26 June 1945), T.S. No. 993, art. 55(3).

6 International organizations can be bound by customary international law and general principles of law. But I do not rely on these sources since they pose limits on no detailed obligation, unlike a treaty. See Henry G. Schermers & Niels Blokker, *International Institutional Law: Unity within Diversity*, paras 1336-1339, 1574-1575 (5th rev. ed., Martinus Nijhoff 2011); Christine Chinkin, *International Human Rights Law*, 112 in *International Human Rights Law* (Daniel Moeckli, Sangeeta Shah, Sandesh Sivakumaran, & D. J. Harris, Oxford University Press 2010).

7 Thomas Buergenthal, *The Normative and Institutional Evolution of International Human Rights*, 19 Hum. Rts. Q. 703, 708 (1997).

8 Schermers & Blokker, *supra* n. 6, para. 1255.

9 G.A. Res. 106, U.N. GAOR, 60th Sess., U.N.Doc. A/RES/61/106 (2007), para. 6.

10 Human rights often connect with aviation security, particularly in regards to the protection of civil aircraft. To name a few, the UN General Assembly recognized aerial hijacking or interference with civil air travel as a violation of the human rights of the passengers and crew, so it endorsed ICAO to convene an extraordinary session of the ICAO Assembly on aviation security and even called upon States to ratify any conventions relating to aviation security. See G.A. Res. 1914, U.N. GAOR, 25th Sess., U.N. Doc. A/RES/1914 (XXV 1970) [Aerial Hijacking or Interference with Civil Air Travel].

11 The US is not a party to the CRPD. See Table 1; Section 4.4.1. For the different States Parties between the CRPD and the Montreal Convention of 1999, see Table 4.

Persons with Disabilities (PWD Manual) with a reference to the CRPD and the general principle of accessibility, details of which are discussed in Section 4.2.3.¹² Moreover, the Core Principles on Consumer Protection (Core Principles) incorporate non-discrimination and accessibility as a bedrock to protect PWDs.¹³

To conclude, ICAO observes non-discrimination on the basis of the disability principle and accessibility principle in the CRPD through the agreement between ICAO and the UN and the UN General Assembly resolutions as evidenced by a number of instances in which ICAO referred to the CRPD and these two principles. This practice promotes consistency in the interpretation of Standards and Recommended Practices (SARPs) and the PWD Manuals in light of the CRPD.

4.2.2 Legal force of Annex 9 and the Manual on Access to Air Transport by Persons with Disabilities (PWD Manual)

4.2.2.1 Norms on persons with disabilities laid down in ICAO measures

ICAO publishes accessibility standards in air travel in three forms: (1) Standards, (2) Recommended Practices and (3) the PWD Manual. SARPs on PWDs are incorporated in Subchapter H of Annex 9 while the PWD Manual is additionally published as a guideline to implement SARPs.¹⁴

4.2.2.2 Legal force of SARPs in Annex 9

Similar to the development of safety regulations, the development of SARPs on facilitation is periodically done through the Facilitation Panel or the Facilitation Division and adopted by the Council.¹⁵ A definition of Standard in Annex

12 ICAO, Resolution A37-20: Consolidated Statement of Continuing ICAO Policies in the Air Transport Field, Appendix D, para. 2; ICAO, Resolution A38-11: Consolidated Statement of Continuing ICAO Policies in the Air Transport Field Appendix A, paras 1-2; ICAO, Resolution A39-20, Appendix A, paras 1-2; ICAO, *Manual on Access to Air Transport by Persons with Disabilities*, ICAO Doc 9984 (2013), foreword, (PWD Manual). The PWD Manual also refers to the principle of full and effective participation and inclusion in society and general obligations in Article 4(1)(f)(h) and (i) to promote universal design, to provide accessible information, and to promote the training of professionals and staff working with PWDs. But the PWD Manual does not refer to Articles 5 and 9 of the CRPD).

13 See Section 2.3.1, Chapter 2. ICAO, Core Principles on Consumer Protection, <http://www.icao.int/sustainability/Documents/ConsumerProtection/CorePrinciples.pdf> (accessed 13 Jan. 2017).

14 PWD Manual, *supra* n. 12, foreword.

15 ICAO, Annex 9, <http://www.icao.int/Security/FAL/Pages/Annex9.aspx> (accessed 13 Jan. 2017).

9 differs from the definition of Standard in other Annexes,¹⁶ because it does not deal with safety of air navigation as it reads:

‘any specification, the *uniform observance* of which has been recognized as *practicable and as necessary to facilitate and improve some aspect of international air navigation*, which has been adopted by the Council pursuant to Article 54 (1) of the Convention, and in respect of which non-compliance must be notified by Contracting States to the Council in accordance with Article 38.’¹⁷

In spite of a slightly different definition, Standards in Annex 9 have a similar level of legal force as other Standards generally.¹⁸

In the case of Standards concerning PWDs in Annex 9, there are three standards. The first two Standards were formulated similarly, which read:

‘8.27 Contracting States shall take the necessary steps to ensure that airport facilities and services are adapted to the needs of persons with disabilities.

8.34 Contracting States shall take the necessary steps to ensure that persons with disabilities have equivalent access to air services.’¹⁹

Explicitly, the adaptation to meet the needs of PWDs in Standard 8.27 and the equivalent access in Standard 8.34 mirror accessibility and non-discrimination on the basis of disability in the CRPD. However, these two Standards, as a matter of formulation,²⁰ are drafted so broadly that States could believe that they have already fulfilled the highest practicable degree of uniformity.²¹ Plus, obligations concerning accessibility under the CRPD can be implemented gradually;²² therefore, States could continuously implement them to reach the level of full accessibility and accordingly, under their sole authority, decide not to report ICAO.

¹⁶ See Section 1.6.2.

¹⁷ Annex 9, *Facilitation*, (14th ed. Oct. 2015), foreword, emphasis added.

¹⁸ The ICAO Regional Seminar on Facilitation sums up that international Standards have a conditional binding force to the extent that a State has not notified any differences under Article 38. See ICAO, *ICAO Regional FAL Seminar, Annex 9 Compliance Issue*, 6 <http://www.ICAO.int/ESAF/Documents/meetings/2014/FAL-FEB/Annex%209%20%20-Compliance%20Issues.pdf> (accessed 13 Jan. 2017).

¹⁹ Annex 9, *supra* n. 17.

²⁰ ICAO, Resolution A39-22, para. 4.

²¹ For example, Thailand has the Persons with Disabilities Empowerment Act, B.E. 2550 (2007) (PDEA), the Ministerial Regulation on prescription of characteristics and provision of equipment, facilities or services in buildings, places, vehicles and transportation services for access of persons with disabilities. The contents are not as comprehensive as those of the EU, the US and Canada because it focuses only on physical accessibility. However, it has never notified ICAO any deviation from SARPs. The US used this reason to argue its legitimacy to apply its regulation to foreign air carriers. See Section 4.6.1.1.

²² See Section 3.5.1, Chapter 3.

A review of the Supplement to Annex 9 shows, not surprisingly, no information on departure from these two Standards.²³ Nevertheless, non-notification does not implicate that States fully comply with these Standards. This matter will be evaluated and answered after an examination of the contents of selected accessibility standards in Section 4.7.

Standard 8.38 differs from the other two because it relates to safety and links to Annex 18 and Doc 9284, which reads:

‘8.38 Contracting States that restrict the transport of battery-powered devices, including mobility aids containing spillable batteries, shall notify ICAO promptly of such restrictions so that they can be included in Doc 9284, Technical Instructions for the Safe Transport of Dangerous Goods by Air and ensure that aircraft operators make such information publicly available and in accordance with Chapter 2, 2.5 of Annex 18.’²⁴

From this text, Standard 8.38 appears to be in line with Huang’s suggestion on the *erga omnes* status of Standards due to its nexus to safety.²⁵ As a result, States cannot deviate from this Standard to jeopardize the safety of the flight, so there is no submission of departure from this Standard.²⁶

4.2.2.3 Legal force of Recommended Practices pertaining to persons with disabilities in Annex 9

The compulsory force of Recommended Practices in Annex 9 is no different from those in other Annexes.²⁷ The blurred division between Standards and Recommended Practices in Annex 9 is also found in the ICAO Assembly when it adopted the following resolution to ask Member States to ‘give special attention to increasing their efforts to implement Annex 9 Standards and Recommended Practices’.²⁸

However, in reality, no State has filed any difference from Recommended Practices in Annex 9 concerning PWDs.²⁹ Similar to my conclusion in Section

23 ICAO, Supplement to Annex 9 (12th ed. Apr. 2011), (iv)-(v).

24 Annex 9, *supra* n. 17.

25 Huang explained that Doc 9284 has a *sui generis* status. See Jiefang Huang, *Aviation Safety and ICAO*, 64 (Kluwer Law International 2009). See Section 1.6.2.

26 The EU, the US and Canada all incorporate Doc 9284 into their law. See Regulation (EU) No 965/2012 of 5 October 2012 laying down technical requirements and administrative procedures related to air operations pursuant to Regulation (EC) No 216/2008 of the European Parliament and of the Council, OJ L 296 25.10.2012, p. 1-148; 49 C.F.R. § 171.22, 175.10 (2009); *Transportation of Dangerous Goods Regulations*, SOR/2008-34. For extraterritorial application of the US law on hazardous materials, see Jol A. Silversmith, *The long arm of the DOT: The regulation of foreign air carriers beyond US Borders*, 38 Air & Space L., 173, 216-218 (2013).

27 Annex 9, *supra* n. 17, foreword. See Section 1.6.2.

28 ICAO, Resolution A39-20, Appendix A, paras 1-2.

29 *Supra* n. 23.

1.6.2, the physical acts of States have to be taken into consideration together with this hortatory resolution in order to conclude on the changing legal force of Recommended Practices.

4.2.2.4 *Legal force of the PWD Manual*

In general, ICAO manuals including the PWD Manual lack mandatory legal force but constitute guidance material.³⁰ However, without the explanation in the PWD Manual, it is difficult to imagine how contracting States to the Chicago Convention can reach the degree of uniformity. For instance, Recommended Practice 8.29 suggests flight service-related information in accessible formats for persons with hearing and vision impairment at airports to ensure the duty in Standard 8.27 on the adaptation of airport facilities and services.³¹ Still, this Recommended Practice falls short of further details on how to attain accessibility. The PWD Manual fulfills this gap by explaining various measures such as information desks, automated kiosks, accessible communications systems, etc. which should be taken to ensure accessibility for PWDs.³²

Owing to the essence of the PWD Manual, the ICAO Assembly requested its Member State to give due regard to the PWD Manual.³³ However, the emphasis of the wording in the resolution differs from that of SARPs.

4.2.2.5 *The role of ICAO and the ICAO Facilitation Panel*

The ICAO Facilitation Panel is also aware of the different practices among States. According to the ICAO Regional Facilitation Seminar in 2014, non-compliance with Annex 9 is due to insufficient communication between ICAO and the States, insufficient resources within the States, costs of implementation, difficulties in identifying the responsible party within the States, difficulty in

30 PWD Manual, *supra* n. 12, foreword. The ICAO manuals are developed to specify detail of SARPs. Their importance cannot be underestimated because they explicate how to implement SARPs in a uniform manner among States. *See* Huang, *supra* n. 25, 63-64.

31 Annex 9, *supra* n. 17.

8.29 Recommended Practice.— Measures should be taken to ensure that the hearing- and vision-impaired are able to obtain flight service-related information in accessible formats.

32 PWD Manual, *supra* n. 12, chapter 4, 4.3, chapter 5. The PWD Manual is essential for implementing accessibility standards because its contents have not been mentioned in other documents published by ICAO. The ICAO Airport Planning Manual only describes physical facilities but does not thoroughly cover facilities and services for accessible information. *See* ICAO, *Airport Planning Manual*, ICAO Doc 9184-AN/902 Part 1, (2nd ed. 1987).

33 ICAO, Resolution A39-20, Appendix A, paras1-2. It urges Member States to give due regard to Doc 9984, Manual on Access to Air Transport by Persons with Disabilities, in their implementation of the relevant provisions of Annex 9. ICAO also urges States to implement SARPs to the attainment of the SDGs. *See* ICAO, Resolution A39-25, para. 3.

comprehending and interpreting Annex material, and differing interpretations.³⁴

Except for Standard 8.38, the other two Standards on PWDs in Annex 9 do not have any straightforward link to safety. Confirmation is seen in the above-quoted definition of Standards since it contains no reference to ‘safety or regularity of air navigation’.³⁵ Thus, Standards in Annex 9 that have no link to safety-related Standards in other Annexes are not audited.³⁶ Also, Standard 8.27 and Standard 8.34 contain no security elements, so they are left unaudited by the Universal Security Audit Programme Continuous Monitoring Approach (USAP-CMA).³⁷

From this lack of clarity on compliance with Standards in Annex 9, the ICAO Facilitation Panel has proposed establishing an Annex 9 Audit Working Group to study the feasibility of including all Standards of Annex 9 in the USAP-CMA.³⁸ As a result, the auditing of Annex 9 is one of the plans included in the ICAO Operating Plan 2017-2019, but ICAO mentions that this audit may be subject to the governing bodies’ decision without further providing any details on this.³⁹

Unlike SARPs relating safety or security, the ICAO Assembly has not adopted a resolution urging States to incorporate SARPs on PWDs into any air services agreements (ASAs). On the contrary, in a hortatory manner, it calls on States to implement SARPs.⁴⁰

34 ICAO, *ICAO Regional FAL Seminar, Annex 9 Compliance Issue*, <http://www.icao.int/ESAF/Documents/meetings/2014/FAL-FEB/Annex%209%20%20Compliance%20Issues.pdf> (accessed 13 Jan. 2017), 12-13.

35 Annex 9, *supra* n. 17, foreword, emphasis added. See ICAO, Resolution A36-13, Appendix A.

36 Annex 9 is not included in the discussion on Annexes relevant to safety as well as the scope of safety audit. See Michael Milde, *International Air Law and ICAO*, 179, 183 (3rd ed., Eleven International Publishing 2016); Paul Stephen Dempsey, *Public International Air Law*, 152-153 (McGill University 2008); Ruwantissa Abeyratne, *Rulemaking in Air Transport: A Deconstructive Analysis*, 203, (Springer International Publishing 2016).

37 See Annex 17, *Security*, (9th ed. Mar. 2011), Att-6 – Att-9; ICAO, *Summary Minutes with Subject Index*, (206th session, 2015), ICAO Doc 10065-C/1182 C-Min. 206/1-10, 21. Only the security-related Standards and communicable disease processes contained in Annex 9 – Facilitation are audited under, respectively, the Universal Security Audit Programme Continuous Monitoring Approach (USAP-CMA) and the Universal Safety Oversight Audit Programme Continuous Monitoring Approach (USOAP-CMA).

38 ICAO, *Facilitation Panel, 8th Meeting Annex 9 Audits*, 3.1 <http://www.icao.int/Meetings/FALP/Documents/FalP8-2014/FALP8.WP12.Annex9Audits.Final.13Nov2014.pdf> (accessed 13 Jan. 2017).

39 ICAO, *ICAO Business Plan 2017 – 2019*, 31 <http://www.icao.int/Meetings/a39/Documents/Business%20Plan%202017-2019.pdf> (accessed 13 Jan. 2017).

40 ICAO, Resolution A39-20, Appendix A, paras1-2. See Section 4.2.2.3.

4.2.2.6 Implementation of SARPs

A. *Implementation in national law*

As discussed above, concerning the impotence of SARPs notification system, how States implement Annex 9 SARPs into their national legal system cannot be tracked via the notification system. From a country report to the Committee on the Rights of Persons with Disabilities (CRPD Committee), Slovenia accepts the legally binding force of Annex 9 without further explanation of how it is bound by Annex 9, as follows:

‘The field of the construction and arrangement of airports is regulated by Annex 9 of the Chicago Convention of the International Civil Aviation Organization (ICAO), which is also binding on Slovenia.’⁴¹

Because foreign air carriers do not fall under Canadian law, the Canadian Transportation Agency (CA Agency) once referred to a Recommended Practice to support its reasoning to a foreign air carrier in a case pertaining to refusal to carry a guide dog in the cabin.⁴² But this decision does not refer to the implementation or binding force of the Recommended Practice in particular. The implementation of SARPs in Annex 9, as well as the PWD Manual on regional and national legal systems, will be further examined in Sections 4.6.1-4.6.4.

B. *Treaty provisions of SARPs in national aviation act*

From the examples in Section 1.6.5.3, among certain States, only Namibia refers to Annex 9 in its civil aviation act on a matter concerning civil aviation security to assign the Namibia Civil Aviation Authority to develop strategies in accordance with Annex 9.⁴³ However, this legal provision does not give immediate effect to SARPs in Annex 9; it requires the publication of a secondary law and is mainly concerned with security-related SARPs. Thailand takes an in-between approach by making reference to Annexes to the Chicago Convention in its Regulation of Civil Aviation Board.⁴⁴ In other words, it passes a secondary law to refer to Annexes without any particular contents. Nevertheless, the three Standards on PWDs assign duties to States, so this implementation might not

⁴¹ *Initial Report on the Implementation of the Provisions of the Convention on the Rights of Persons with Disabilities submitted by Republic of Slovenia*, (17 July 2014), U.N. Doc. CRPD/C/SVN/1, para. 49. See Section 3.8.2, Chapter 3 and Section 4.6.2.1

⁴² Canadian Transportation Agency, Decision No. 521-AT-A-1999, (7 Sept. 1999).

⁴³ Namibia Civil Aviation Safety Act, 6 of 2017, art. 118(n).

⁴⁴ The Civil Aviation Authority of Thailand, Regulation of Civil Aviation Board No. 4 (1957), Government Gazette, Ror. Jor. 1055, Part 53 11 June 1957.

be fruitful. In the end, Thailand has passed secondary laws to regulate each matter.⁴⁵

C. *Treaty provisions of SARPs in air services agreements*

ASAs, as a means to enforce the incorporation of SARPs, yield differing results in relation to Annex 9. The ICAO Template Air Services Agreements contain no clause on human rights or PWDs specifically.⁴⁶ A novelty clause on consumer protection in the ASA is initiated by the EU in its ASAs with the US and Canada.⁴⁷ However, the way these two ASAs elaborate on the protection of passengers is dissimilar because accessibility is spelled out in the ASA between the EU and Canada but not so in the EU-US agreement.⁴⁸ Unlike the case of safety or security-related SARPs, neither of these ASAs refers to SARPs; thus, the incorporation of SARPs and the PWD Manual through the ASAs has not yet been implemented.⁴⁹

4.2.2.7 *Sub-conclusions*

The different mechanisms used for the enforcement of SARPs laid down in Annex 9 and other Annexes of ICAO stem from a lack of connection to safety or security. An obvious instance is a difference between Standard 8.38, which is linked to safety, and the other two Standards on PWDs in Annex 9. ICAO conducts an audit on compliance with the former and States implement its provisions in their legislation; no audit, however, is done on the latter. This situation raises the question why SARPs, where PWDs are concerned, have less

45 Thailand has the Persons with Disabilities Empowerment Act, B.E. 2550 (2007) and the Ministerial Regulation on prescription of characteristics and provision of equipment, facilities or services in buildings, places, vehicles and transportation services for access of persons with disabilities to govern air travel of PWDs. None of them deals with booking process, refusal to carry PWDs, security screening procedure and damage on mobility and assistive device.

46 International Civil Aviation Organization, *ICAO Template Air Services Agreement*, 3, <http://www.icao.int/Meetings/AMC/MA/ICAN2009/templateairservicesagreements.pdf> (accessed 13 Jan. 2017); I.H.Ph. Diederiks-Verschoor & Pablo Mendes de Leon, *An Introduction to Air Law*, 48, (9th ed., Kluwer Law International 2012).

47 The EU-US Air Transport Agreement, (2007) art. 16; Agreement on Air Transport between Canada and the European Community and its Member States, (2009), art. 10. See Erwin von den Steinen, Claude Probst & the Association of European Airlines, *An Overview of the Air Services Agreements Concluded by the EU*, [http://www.europarl.europa.eu/RegData/etudes/note/join/2013/495849/IPOL-TRAN_NT\(2013\)495849_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/note/join/2013/495849/IPOL-TRAN_NT(2013)495849_EN.pdf) (accessed 24 Feb. 2017), 15.

48 The EU-US Air Transport Agreement, *ibid.*, art. 16; Agreement on Air Transport between Canada and the European Community and its Member States, *ibid.*, art. 10(g). See von den Steinen, Probst & the Association of European Airlines, *ibid.*, 39.

49 The EU-US ASA provision is written in one sentence and referred to the meeting of the Joint Committee. See Section 4.6.1.1.

legal force than safety or security-related SARPs, even though the human rights of PWDs and safety are similarly connected to global public interests. Perhaps, ICAO is institutionally mandated to prioritize technical and economical air transport over human rights.

4.2.3 Accessibility standards in air travel

A provision concerning PWDs in air transport is found for the first time in the sixth edition of Annex 9 to the Chicago Convention in 1969 which states in Recommended Practice 6.24 that:

‘Direct transfer from one aircraft to another of passengers, particularly *invalid passengers*, should be authorized, where possible, whenever this is warranted by deadlines in making connecting flights or by other circumstances.’⁵⁰

The principal objectives of Annex 9 at that time were mainly the regularity and efficiency of air navigation.⁵¹ So it is not conclusive that the objective of this provision is to enhance access or to uphold the rights of PWDs.

Annex 9 has been regularly updated and in the fourteenth edition in October 2015, it contains three Standards and 17 Recommended Practices dealing with PWDs. Terms like ‘accessible’ have been included in Annex 9 since the ninth edition in 1990.⁵² In the fourteenth edition, accessibility is consolidated in SARPs either explicitly or implicitly.⁵³ Standard 8.34 ensures ‘equivalent’ access to air services.⁵⁴ In general, in regard to human dignity, another general principle in the CRPD,⁵⁵ it is stated in Recommended Practice 8.22 that ‘assistance should be provided in a manner that respects the dignity of the individual’.⁵⁶ Respecting inherent dignity means accepting human diversity and differences.⁵⁷ Thus, it guarantees equality and non-discrimination and likewise PWDs have become more protected in terms of SARPs and contents.

⁵⁰ Annex 9, *Facilitation*, (6th ed. Apr. 1969), Recommended Practices 6.24, emphasis added.

⁵¹ *Ibid.*, foreword.

⁵² Annex 9, *Facilitation*, (9th ed. July 1990), 45.

⁵³ Annex 9, *supra* n. 17. SARPs with the terms ‘accessible’, ‘access’ and ‘accessibility’ are Standard 8.34, Recommended Practices 8.23, 8.24, 8.25, 8.29, 8.30, 8.31, and 8.35. SARPs with an implication to accessibility are Standard 8.38 and Recommended Practices, 8.26, 8.27, 8.28, 8.32, 8.33, 8.36, 8.37, 8.39, 8.40, 8.40.1)

⁵⁴ Annex 9, *ibid.*

8.34 Contracting States shall take the necessary steps to ensure that persons with disabilities have equivalent access to air services.

⁵⁵ CRPD, art. 3(a).

⁵⁶ Annex 9, *supra* n. 17, Recommended Practice 8.22

⁵⁷ Lee Ann Bassier, *Human Dignity*, 20 in *Critical Perspectives on Human Rights and Disability Law* (Marcia H. Rioux, Lee Ann Bassier & Melinda Jones, Martinus Nijhoff 2011).

The key question is its comprehensiveness compared to the requirement in the CRPD. Recommended Practice 8.23 and Recommended Practice 8.24 advise States to cooperate with other stakeholders and to establish minimum uniform standards of accessibility.⁵⁸ However, both Recommended Practices cover only the moment ‘from arrival at the airport of departure to leaving the airport of destination’. This scope is in line with the Core Principles, which mention merely access to air travel of PWDs during travel.⁵⁹ The Core Principles discuss ‘access to clear and transparent information’ in the principles concerning the period before travel.⁶⁰ One may argue that this phrase implies accessible information in the period before travel. Another piece of supporting evidence to include booking in the scope of Annex 9 is found in Recommended Practice 8.25,⁶¹ because travel agencies and information in accessible formats are articulated and travel agencies deal with PWDs in relation to ticket reservations. Explicit mention of accessible information during the pre-travel period is only included in the PWD Manual, which has the status of guidance material.⁶² Access to a physical environment, information and communication and services are referred to generally in the SARPs but the PWD Manual elaborates further on these.

Subchapter H of Annex 9 assigns States to prescribe facilitation measures but it does not precisely designate matters to either airport operators or air carriers.⁶³ Except for duties on board aircraft, airport facilities and security screening, duties to facilitate mobility of PWDs at airports are assigned to both airport operators and air carriers.⁶⁴

58 Annex 9, *supra* n. 17.

8.23 Recommended Practice – Contracting States should cooperate with a view to taking the necessary measures to make accessible to persons with disabilities all the elements of the chain of the person’s journey, from arrival at the airport of departure to leaving the airport of destination.

8.24 Recommended Practice – Contracting States should take the necessary steps with aircraft, airport and ground handling operators to establish and publish minimum uniform standards of accessibility with respect to transportation services for persons with disabilities, from arrival at the airport of departure to leaving the airport of destination.

59 ICAO, *supra* n. 13.

60 ICAO, *ibid.*

61 Annex 9, *supra* n. 17.

8.25 Recommended Practice.– Contracting States should take the necessary steps with aircraft, airport and ground handling operators and travel agencies to ensure that persons with disabilities are given the information they need, in formats that are accessible to those with cognitive or sensory disabilities, and should take the necessary steps to ensure that airlines, airports and ground handling operators are in a position to give those passengers the assistance necessary for them, depending on their needs, to help them in their travel.

62 PWD Manual, *supra* n. 12, chapter 3.

63 Annex 9, *supra* n. 17, subchapter H.

64 PWD Manual, *supra* n. 12, chapters 4, 10.

4.3 THE EU

4.3.1 Observance of the CRPD

The CRPD is the first UN human rights convention that allows regional integration organizations to become a party.⁶⁵ The EU, which actively negotiated the CRPD, has ratified the CRPD,⁶⁶ under its authority from Article 13 (disability discrimination) and Article 95 (internal market) of the Treaty Establishing the European Community (TEC).⁶⁷

The TEC and the Treaty on the Functioning of the Union (TFEU) do not establish the legal status of international norms but the Court of Justice of the European Union (CJEU) has affirmed that the EU must respect international law in the exercise of its powers.⁶⁸ Ferri, by reviewing the contents and rationale of the CRPD, noted that the status of the CRPD could be part of the fundamental constitutional core of EU law.⁶⁹ The CJEU has authority to refer to international agreements for the purpose of determining the validity and interpretation of acts of the EU.⁷⁰ Craig and de Búrca observed that ‘international agreements and other provisions of international law have also been held to be amongst the rules of law to be taken into account in assessing the validity of EU measures’.⁷¹ This also holds true with respect to the CRPD. Before the ratification, the European Court of Justice (ECJ) overlooked the interaction between impairment and society and based the definition on the medical model of disability.⁷² After the EU became a party to the CRPD, the CJEU, in *Fag og Arbejde (FOA) v. Kommunernes Landsforening*, recognized the

⁶⁵ CRPD, art. 42.

⁶⁶ United Nations Treaty Collection, *Status of the Convention on the Rights of Persons with Disabilities*, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&clang=_en (accessed 25 May 2017). As of 25 May 2017, all of its Member States have signed the CRPD while Ireland has not yet ratified. See Delia Ferri, *The Conclusion of the UN Convention on the Rights of Persons with Disability by the EC/EU*, 2, Eur. Y.B. Disability L., 47, 63 (2010). It is not compulsory that all of the Member States have to ratified the CRPD before the EU can deposit its instrument.

⁶⁷ Now they are Articles 19 and 114 of the Treaty on European Union and the Treaty on the Functioning of the European Union respectively.

⁶⁸ See Case C-286/90 *Poulsen and Diva Navigation Corp.* [1992] ECR, I-6019, paras 9-10; Case C-162/96, *Racke v. Hauptzollamt Mainz* [1998] ECR I-3655, para. 45.

⁶⁹ Ferri, *supra* n. 66, 64-65.

⁷⁰ Treaty on the Functioning of the European Union, art. 267.

⁷¹ Paul Craig & Gráinne de Búrca, *EU Law: Text, Cases and Materials*, 353 (5th ed., Oxford University Press 2011); Ferri, *supra* n. 66, 64-67.

⁷² Case C-13/05 *Chacón Navas v. Euresit Colectividades SA* [2006], para. 43. See Lisa Waddington, *Case C-13/05, Chacón Navas v. Euresit Colectividades SA, judgment of the Grand Chamber of 11 July 2006*, *nyr*, 44, *Common Mkt. L. Rev.*, 487, 491 (2007).

ratification of the CRPD and adjusted its definition of disability to be in line with the social model of disability enshrined in the CRPD.⁷³

Under EU law, the CRPD is considered a mixed agreement because the EU shares competencies with its Member States in parts of CRPD.⁷⁴ Air transport also falls in the area of shared competences.⁷⁵ Thus, the EU shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States.⁷⁶ Nevertheless, Waddington remarked that the area of shared competence can be changed to exclusive competence when the EU sets common rules, not minimum standards, from which Member States cannot deviate.⁷⁷ She further surveyed existing EU laws and concluded that the EU Regulation (EC) No. 1107/2006 of the European Parliament and of the Council of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air (Regulation 1107)⁷⁸ gave the EU exclusive competence in air transport.⁷⁹

4.3.2 Accessibility standards in air travel

Regulation 1107, by virtue of Article 80(2) of the TEC, is the key instrument dealing with accessibility standards, since it is binding in its entirety and is directly applicable and effective in all Member States.⁸⁰ Article 1 of Regulation 1107 lays down the scope to PWDS:

73 Case C-354/13 *Fag og Arbejde (FOA) v Kommunernes Landsforening (KL)* [2014]. Waddington and Schiek argue that the ECJ definition of disability does not comply with the CRPD. See Lisa Waddington, *Saying All the Right Things and Still Getting It Wrong: The Court of Justice's Definition of Disability and Non-Discrimination Law*, 22, M.J. 576 (2015); Dagmar Schiek, *Intersectionality and the Notion of Disability in EU Discrimination Law*, 53 C.M.L. Rev. 35 (2016).

74 Council Decision of 26 November 2009 concerning the Conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities, OJ L 23, 27.1.2010, p. 35–61, art 4; Ferri, *supra* n. 66, 56; Lisa Waddington, *The European Union and the United Nations Convention on the Rights of Persons with Disabilities: A Story of Exclusive and Shared Competences*, 18 Maastricht J. Eur. & Comp. L. 431, 438 (2011).

75 Treaty on the Functioning of the European Union, art. 4(g); Council Decision of 26 November 2009 concerning the Conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities, *ibid.*, Annex II.

76 Treaty on European Union, art 5(3).

77 Waddington, *supra* n. 74, 445.

78 Regulation (EC) No 1107/2006 of the European Parliament and of the Council of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air, OJ L 204, 26.7.2006, p. 1-9 (Regulation 1107).

79 Waddington, *supra* n. 74, 449.

80 Treaty on the Functioning of the European Union, art. 288.

‘using or intending to use commercial passenger air services on departure from, on transit through, or on arrival at an airport, when the airport is situated in the territory of a Member State to which the Treaty applies.’⁸¹

Thus, PWDs who have not yet been a passenger but wish to reserve a flight to, from or transit through an airport situated in the territory of the Member States of the EU are covered by Regulation 1107. All air carriers operating in the EU, tour operators, ground handlers, travel agents and managing bodies of airports in the territory of a Member State are duty holders under this Regulation 1107.⁸²

The shared competence concept gives rise to an issue on whether each EU Member State is able to pass its own law on other areas which are not mentioned in the Regulation 1107 such as obligations to provide accessible service in relation to a flight departed from airports situated in a third country. In *Janice Campbell v. Thomas Cook Tour Operations Limited*,⁸³ the plaintiff who was a PWD requested wheelchair assistance at airports in England and Tunisia. Due to civil unrest, before her booked return date the claimant was transported to Monastir Airport, Tunisia, but was not provided with wheelchair assistance; accordingly, the claimant suffered pain and claimed unlawful discrimination against the defendant.⁸⁴ The defendant contended that Regulation 1107 overrode national laws in relation to the subject matter and Regulation 1107 did not oblige a tour operator to provide assistance to PWDs at an airport in Tunisia.⁸⁵ The UK Court of Appeal held that Regulation 1107 would override a national law that covered the same subject matter, but that Member States could additionally pass legislation in other non-overridden areas.⁸⁶ Thus, in this case, Regulation 1107 does not cover an airport in Tunisia so the defendant as a service provider under the UK Equality Act 2010 has an additional duty to provide assistance and to make reasonable adjustments at airports in non-Member States.⁸⁷ The judgment does not explicitly refer to the CRPD but the UK Equality Act as an implementation of the CRPD,⁸⁸ was interpreted as laying down a duty on the defendant to facilitate access at a foreign airport.⁸⁹ In short, Regulation 1107 constitutes a common rule or exclusive competence in the prescribed scope but Member States are not barred from expanding their

⁸¹ Regulation 1107, art. 1(2).

⁸² Anna Konert & Hans Ephraïmon, *Passengers with Reduced Mobility in the EU, Canada and the US*, 33:3 Air & Space L., 233, 234 (2008).

⁸³ [2014] EWCA Civ 1668.

⁸⁴ *Ibid.*, para. 13.

⁸⁵ *Ibid.*, para. 14.

⁸⁶ *Ibid.*, paras 19-20.

⁸⁷ *Ibid.*, para. 25.

⁸⁸ *Initial Report on the Implementation of the Provisions of the Convention on the Rights of Persons with Disabilities submitted by the United Kingdom*, (3 July 2013), U.N. Doc CRPD/C/GBR/1, paras 93, 95.

⁸⁹ *Campbell*, *supra* n. 83, para. 23.

protection to PWDs provided that their national law does not contradict with Regulation 1107.

Article 1 of Regulation 1107 also proclaims its purpose to protect PWDs 'against discrimination and to ensure that they receive assistance'.⁹⁰ PWDs have the right not to be refused carriage on grounds of disability;⁹¹ the right to be assisted at airports and on board without charge; and the right to carry an assistance dog, medical equipment and two items of mobility aid without charge.⁹² Regulation 1107 was designed to let an airport operator provide services and, in return, levy charges from air carriers based on all departure passengers in order to deter airlines from carrying less PWDs if a charge was multiplied by the number of PWDs.⁹³ Obligations addressed to air carriers are exclusively those involved with services on board and air carriage.⁹⁴

In addition, Regulation (EC) 261/2004 of the European Parliament and Council of 11 February 2004, establishing common rules on compensation and assistance to passengers in the event of boarding refusal and the cancellation or long delay of flights; and the repeal of Regulation (EEC) No 295/91 (Regulation 261)⁹⁵ is of relevance. As the first EU regulation to link PWDs and air transport, it deals with the right to care of PWDs in the event of being denied boarding, flight cancellations and flight delays.⁹⁶

4.4 THE US

4.4.1 Observance of the CRPD

The US has only signed the CRPD but not ratified it.⁹⁷ The obligation of a signatory State not to defeat the object and purpose of a treaty is recognized

⁹⁰ Regulation 1107, art. 1(1).

⁹¹ For a contract law aspect, see Section 2.4.2, Chapter 2.

⁹² Regulation 1107, art. 10, Annex II.

⁹³ Regulation 1107, art. 8(3)-(5); European Commission, *Evaluation of the application of Regulation 1107/2006 by Steer Davies Gleave on the application and enforcement of the regulation concerning the rights of disabled people and persons with reduced mobility when travelling by air*, http://ec.europa.eu/transport/sites/transport/files/themes/passengers/studies/doc/2010_06_evaluation_regulation_1107-2006.pdf (accessed 13 Jan. 2017), para. 3.34; European Commission, *Proposal for a Regulation of the European Parliament and of the Council concerning the Rights of Persons with Reduced Mobility When Travelling by Air*, COM(2005) 47 final 07/2005 (COD), 16.2.2005, para. 18.

⁹⁴ Regulation 1107, arts 3, 4, 7, 10, Annex II.

⁹⁵ Regulation (EC) 261/2004 of the European Parliament and Council of 11 February 2004, establishing common rules on compensation and assistance to passengers in the event of boarding refusal and the cancellation or long delay of flights; and the repeal of Regulation (EEC) No 295/91, OJ L 46 17.02.2004, p. 1-8 (Regulation 261).

⁹⁶ Regulation 261, *ibid.*, arts 9, 11.

⁹⁷ United Nations Treaty Collection, *supra* n. 66. See Rochelle Jones, *U.S. Failure to Ratify the Convention on the Rights of Persons with Disabilities*, <http://www.awid.org/news-and-analysis/>

as customary international law, which the US has not denied.⁹⁸ Thus, it is obliged not to defeat the object and purpose of the CRPD. The purpose of the CRPD as enshrined in Article 1 is 'to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity'.⁹⁹ Hence, the US must refrain from diminishing the accessibility of PWDs and discriminating against PWDs because it will hinder the equal recognition of all human rights and fundamental freedoms.

4.4.2 Accessibility standards in air travel

Many years before the adoption of the CRPD, in 1986, Congress passed the Air Carrier Access Act (ACAA)¹⁰⁰ to regulate all commercial airlines. This was in response to the US Supreme Court judgment in *Transportation v. Paralyzed Veterans of America et. al.* where the Supreme Court decided that the former regulations did not apply to non-federally financially assisted airlines since they did not directly receive subsidies.¹⁰¹

The ACAA itself is brief but it authorizes the US DOT to pass regulations, and enforce the law and take action in case of any violation, which it has done through the regulations known as the Nondiscrimination on the Basis of Disability in Air Travel (Part 382) and other final rules which fulfill any conceptual provision with extensive details.¹⁰² The airport facilities that do not fall under Part 382 are not left unregulated; instead, they fall under the Americans with Disabilities Act (ADA) and the ADA Accessibility Guidelines as well as other regulations under the ADA.¹⁰³

us-failure-ratify-convention-rights-persons-disabilities (accessed 13 Jan. 2017). On December 4, 2012 the US Senate failed to ratify the CRPD in five votes short of the required two-thirds (61-38).

98 Vienna Convention on the Law of Treaties (Vienna, 23 May 1969) 1155 U.N.T.S. 331, art. 18. The US only signed but not ratified the Vienna Convention on the Law of Treaties 1969. This principle in Article 18 of the Vienna Convention on the Law of Treaties reflects customary international law and the US has not denied so it binds the US. For more information, see Curtis A. Bradley, *Unratified Treaties, Domestic Politics, and the U.S. Constitution*, 48:2 Harv. Int'l L.J., 307, 308 (2007).

99 CRPD, art. 1.

100 49 U.S.C. § 41705 (1986).

101 *Department of Transportation v. Paralyzed Veterans of America et. al.*, 477 US 597, 106 S. Ct. 2705, 91 L.Ed. 2d 494 (1986).

102 Constance O'Keefe, *Air Travel for the Disabled: Isn't it Time for a Harmonized Approach?*, 31:6 Air & Space L., 408, 409 (2006); James S. Strawinski, *Where is the ACAA today? Tracing the law developing from the Air Carrier Access Act of 1986*, 68 J. Air L. & Com. 385, 390 (2003).

103 42 U.S.C. § 12181(7)(G), (10) (1990); Department of Transportation, *New Horizons: Information for the Air Traveler with a Disability*, <http://airconsumer.ost.dot.gov/publications/horizons.htm> (accessed 13 Jan. 2017).

The protection in Part 382 begins when a PWD attempts to purchase an air ticket.¹⁰⁴ With the intention of the ACAA to cover all commercial airlines, since 13th May 2009, foreign air carriers have to comply with the ACAA for flights that begin or end at a US airport.¹⁰⁵ For the two non-US points in a codeshare flight operated by a foreign carrier, the Department of Transportation (US DOT) places the responsibility on the US carrier.¹⁰⁶ The US DOT argues that application will ensure the achievement of the ACAA objectives.¹⁰⁷ The application to foreign air carriers will be discussed comparatively in Section 4.6.1. In addition, authorized agents of air carriers, namely, ticket agents and indirect carriers that provide facilities or services for other carriers, have to comply with the provisions in relation to such facilities or services as well.¹⁰⁸

Other purposes of the ACAA are to address the unique difficulties faced by PWDs in air travel and to balance between discrimination against PWDs and the safety of all passengers.¹⁰⁹ Non-discrimination against PWDs is omnipresent in the ACAA and Part 382. The first paragraph of the ACAA and Part 382 disallow an air carrier to discriminate against PWDs on the basis of disability.¹¹⁰ Discrimination includes providing any special service without a request from a PWD.¹¹¹ In *Deterra v. America West Airlines*, asking a wheelchair user to advance to the front of a ticket line was held to be discriminatory conduct unless the PWD had requested it.¹¹² Part 382 bans the notion of separate but equal.¹¹³ An air carrier cannot take any adverse action because a PWD claims a right under Part 382.¹¹⁴

104 A meaning of a 'qualified individual with a disability' covers a person who attempt to purchase a ticket. See 14 C.F.R. § 382.3.

105 14 C.F.R. § 382.7(b) (2009).

106 14 C.F.R. § 382.7(c) (2009).

107 Nondiscrimination on the Basis of Disability in Air Travel, 73 FR 27614, 27615, 13 May 2008.

108 14 C.F.R. § 382.11(b) (2009); see *Wilson v. United Airlines*, No. 94 C 54:1, 1995 WL 530653 (N.D. Ill. 7 Sept. 1995); Department of Transportation, *What Airline Employees, Airline Contractors, and Air Travelers with Disabilities Need to Know About Access to Air Travel for Persons with Disabilities A Guide to the Air Carrier Access Act (ACAA) and its Implementing Regulations*, 14 CFR Part 382 (Part 382), airconsumer.ost.dot.gov/legislation/aca/TAM-07-15-05.doc? (accessed 13 Jan. 2017), 15.

109 Erin M. Kinahan, *Despite the ACAA, Turbulence is not just in the Sky for Disabled Travelers*, 4:2&3 DePaul J. Health Care L. 397, 397 (2001).

110 49 U.S.C. § 41705(a); 14 C.F.R. § 382.11(a)(1) (2009).

111 14 C.F.R. § 382.11(a)(2) (2009).

112 *Deterra v. America West Airlines*, 226 F.Supp. 2d 298, 299 n.6 (D. Mass. 2002). See *Theresa Purcell v. American Airline, Inc.*, District of Hawaii, Case 1:15-cv-00211-LEK-RLP Document 82, 31 Aug. 2016.

113 14 C.F.R. § 382.11(a)(3) (2009).

114 14 C.F.R. § 382.11(a)(4) (2009).

4.5 CANADA

4.5.1 Observance of the CRPD

Canada is bound by the obligations under the CRPD because it ratified the CRPD in 2010 without reservation on obligations concerning accessibility, personal mobility and non-discrimination.¹¹⁵

4.5.2 Accessibility standards in air travel

Canada's attention to PWDs in air transport can be traced back as early as the 1980s.¹¹⁶ The National Transportation Act of 1987 guaranteed accessibility for PWDs.¹¹⁷ This was later incorporated in the Canada Transportation Act (CTA) as one of the Canadian transportation policies.¹¹⁸ The CTA devotes its Part V to dealing with PWDs. Similar to the ACAA, the CTA is brief and contains only three provisions which authorize the CA Agency, the body administering air transport, to pass detailed subordinate laws, to coordinate with the Canadian Human Rights Commission and to determine obstacles to the mobility of PWDs on a case-by-case basis.¹¹⁹

The CA Agency's power to pass laws concerning transportation of PWDs covers four aspects.¹²⁰ First, the design, construction or modification of airports and aircraft including equipment used in them are governed by (1) the Code of Practice: Passenger Terminal Accessibility,¹²¹ (2) the Code of Practice: Accessibility of Non-National Airports System Air Terminals,¹²² (3) the Code of Practice: Aircraft Accessibility of Persons with Disabilities¹²³ and (4) the Accessibility Guidelines for Small Aircraft.¹²⁴ The second aspect deals with the training of airport and aircraft personnel under the Personnel Training for the Assistance of Persons with Disabilities Regulations (Training Regula-

115 United Nations Treaty Collection, *supra* n. 66.

116 Barbara Reukema, *Discriminatory Refusal of Carriage in North America*, 107 (Kluwer 1982).

117 David Baker & Sarah Godwin, *ALL ABROAD!: The Supreme Court of Canada Confirms that Canadians with Disabilities Have Substantive Equality Rights*, 71 Sask. L. Rev., 39, 43 (2008).

118 *Canada Transportation Act*, S.C. 1996, c. 10, s. 5(d).

119 *Ibid.*, ss 170-172.

120 *Ibid.*, s. 170(1)(a)-(d).

121 Canadian Transportation Agency, *Code of Practice: Passenger Terminal Accessibility*, (2007).

122 Canadian Transportation Agency, *Code of Practice: Accessibility of Non-National Airports System Air Terminals*, (2013).

123 Canadian Transportation Agency, *Code of Practice: Aircraft Accessibility for Persons with Disabilities*, (2010).

124 Canadian Transportation Agency, *Accessibility Guidelines for Small Aircraft*, (2005); Canadian Transportation Agency, *Code of Practice: Removing Communication Barriers for Travellers with Disabilities*, (2014).

tions).¹²⁵ Third, the tariffs, rates, fares, charges and terms and conditions of carriage applicable to the transportation of PWDs come under the Air Transportation Regulations.¹²⁶ These Regulations specifically prescribe the content of the terms and conditions of carriage for PWDs.¹²⁷ Last, the CA Agency passed the Code of Practice: Removing Communication Barriers for Travellers with Disabilities (Communication Code) to protect PWDs regarding the aspect of communication and information.

Operators of airports located in Canada and Canadian air carriers are subject to the subordinate laws; thus, they are subject to complaints for non-compliance with such laws under the jurisdiction of the CA Agency. While on domestic routes, air carriers are responsible for services to PWDs at airports such as proceeding to the boarding area and the general public area, the Air Transportation Regulations do not mention anything on international air services.¹²⁸ Besides, like the US Part 382, Canadian air carriers are subject to the jurisdiction of the CA Agency over any activity taking place outside Canada, including a codeshare flight in a segment operated by a foreign air carrier.¹²⁹

The accessibility standards are provided in the form of Codes of Practice and the CA Agency makes it straightforward that the Codes aim to provide the minimum standards so airport operators and air carriers are free, and encouraged, to exceed these standards.¹³⁰ The concepts of accessibility and of universal design are recalled in two Codes of Practice on airport terminals and on aircraft.¹³¹ The contents cover the whole process of air travel, namely from making travel arrangements to disembarkation and leaving the airport of destination. In addition, the Supreme Court of Canada views that Part V of the CTA falls under human rights legislation.¹³² Relying on this judgment, the CA Agency interprets the CTA to protect human rights and prevent discrimination.¹³³

125 *Personnel Training for the Assistance of Persons with Disabilities Regulations*, SOR/94-42 (Training Regulations).

126 *Air Transportation Regulations*, SOR/88-58.

127 *Ibid.*, ss 145-156.

128 *Ibid.*, s. 147.

129 Canadian Transportation Agency, Decision No. 173-AT-A-1999, (16 Apr. 1999). See Canadian Transportation Agency, Decision No. 547-AT-A-2004, (18 Oct. 2004). The CTA has a jurisdiction over a national air carrier on a codeshare flight in a segment operated by a foreign air carrier. See Section 4.6.1.

130 *Code of Practice: Passenger Terminal Accessibility*, *supra* n. 121, 2; *Code of Practice: Aircraft Accessibility for Persons with Disabilities*, *supra* n. 123, 1; *Communication Code*, *supra* n. 124, 2.

131 *Code of Practice: Passenger Terminal Accessibility*, *ibid.*, 7-8, 10, 14; *Code of Practice: Aircraft Accessibility for Persons with Disabilities*, *ibid.*

132 *Council of Canadians with Disabilities v. VIA Rail Canada Inc.* [2007] 1 S.C.R. 650, paras 115, 292-293.

133 Canadian Transportation Agency, Decision No. 299-AT-A-2008, (30 May 2008), para. 9; Decision No. 520-AT-A-2008, (16 Oct. 2008), para. 10.

4.6 ANALYSIS ON THE ACCESSIBILITY STANDARDS IN AIR TRAVEL

4.6.1 Scope of application of accessibility standards

The EU, the US and Canada assign the duties to facilitate PWDs in air travel differently. The US and Canada substantially impose obligations on air carriers. The US explicitly extends its scope to foreign air carriers of flights to and from the US.¹³⁴ Canadian laws are not, *prima facie*, applicable to any foreign air carrier but the Canada Air Transport Regulations require foreign air carriers operating international air services to or from Canada to file tariffs that are clear, reasonable and not duly discriminatory against any persons and other air carriers.¹³⁵ The CA Agency also recommends sampling rules on the carriage of PWDs in international air services by deriving from its domestic regulations, Annex 9 and the PWD Manual.¹³⁶ Although these rules are non-binding, from a perusal of the CA Agency decisions on accessible air transport, the CA Agency indirectly applies a comparable existing Canadian legal provision as a standard to foreign air carriers when the related incident took place in Canada.¹³⁷ Unlike the US and Canada, the EU assigns most of the duties to airport operators in the territory of EU Member States. By doing so, this should not pose any problem to air carriers who have only on board duties towards PWDs. Nonetheless, under the shared competence, EU Member States

134 14 C.F.R. § 382.7(b) (2009). Before Part 382 extends its scope to foreign air carriers, the US DOT took enforcement action against foreign air carriers. This is viewed as extraterritorial application. See Joanne W. Young, *Globalism versus Extraterritoriality Consensus versus Unilateralism: Is there a Common Ground? A US Perspective*, 24:4-5 Air & Space L., 211 (1999).

135 *Air Transportation Regulations*, *supra* n. 126, ss 110-111.

136 Canadian Transportation Agency, *Sample Tariff 2014*, rules 70, 71.

137 Canadian Transportation Agency, *Accessibility complaints*, <https://services.otc-cta.gc.ca/eng/accessibility-complaints> (accessed 13 Jan. 2017); Canadian Transportation Agency, Decision No. 173-AT-A-1999, *supra* n. 129. The case dealt with a flight between Toronto, Ontario and Amsterdam, Netherlands with Martinair Holland N.V.; Canadian Transportation Agency, Decision No. 256-AT-A-2002, (15 May 2002); Canadian Transportation Agency, Decision No. 685-AT-A-2002, (20 Dec. 2002); Canadian Transportation Agency, Decision No. 593-AT-A-2004, (1 Nov. 2004); Canadian Transportation Agency, Decision No. 70-AT-A-2013, (28 Feb. 2013). The limitation of the scope of application to non-national air carriers outside of Canada also holds true in the case of services offered by a foreign airport operator, a foreign company contracted to provide services on the airport authority's behalf, and a travel agent. Even though the CA Agency cannot regulate foreign air carriers on PWDs issue taking place outside of Canada, the Agency sometimes actively mentions in its decisions that it will bring the problem to a foreign air carrier in question.; Canadian Transportation Agency, Decision No. 386-AT-A-2009, (10 Sept. 2009), para. 48, concerning applying a provision on stowing a mobility aid in domestic flight to an international flight.; Canadian Transportation Agency, Decision No. 597-AT-A-2004, (3 Nov. 2004), para. 33, concerning the lack of TTY for persons who are deaf or hard of hearing to Singapore Airline's Canadian reservation system.

can additionally pass legislation in other areas that do not overlap Regulation 1107 as reasoned in *Janice Campbell*.¹³⁸

This transnational jurisdiction nature of international civil aviation gives rise to the question of which regulatory regime an air carrier should comply with. When combining this present scope of application in the three jurisdictions, air carriers may be subject to more than one regulatory regime, i.e. laws of a departure State and of an arrival State. To illustrate this, British Airways once informed the US DOT that it is subject to at least three regulatory regimes, the ACAA, the UK Code of Practice and the EU legislation.¹³⁹

Pursuant to the Restatement of the Law – The Foreign Relations Law of the United States, an exercise of jurisdiction by each of two States is possible if it is reasonable.¹⁴⁰ But as demonstrated in Section 4.6.1.4 and Section 4.6.2.2.H below, the contents of these three regulatory regimes are dissimilar. To answer this query, I will look into the legitimacy of the exercise of jurisdiction, with particular attention to the US since its law expressly governs foreign air carriers.

4.6.1.1 The argument on conflict with SARPs

The disparity in legislative content raises in turn a question as to whether each State should respect a regulation prescribed by other States or not. O’Keefe compares this undertaking to *British Caledonian Airways Ltd. v. Bond*¹⁴¹ with respect to Article 33 of the Chicago Convention concerning recognition of certificates of airworthiness issued by other Contracting States when they were issued in accordance with SARPs.¹⁴² Following the same line of reasoning, the long arm of Part 382 extending to foreign air carriers is a failure to recognize the law of foreign States in the same way.¹⁴³

In the US DOT’s view, this is a fallacy because Part 382 has nothing to do with Article 33, but concerns Article 37 of the Chicago Convention instead.¹⁴⁴ The US DOT affirmed its conformity with Article 37 and Standards concerning PWDS in Annex 9.¹⁴⁵ In this matter, the US DOT does not see any conflict with its obligations under the Chicago Convention but is of the view that its regulations actually support them. According to the *British Caledonian* Court, Article

138 *Campbell*, *supra* n. 83, paras 19-20, 25. See Section 4.3.2.

139 Department of Transportation, Order 2006-8-7 *British Airways*, PLC Docket OST 2006-23528, (7 Aug 2006).

140 American Law Institute, *Restatement (Third) of Foreign Relations Law of the United States*, Vol. 1, § 403 (1987), 244.

141 *British Caledonian Airways Ltd v. Langhorne Bond*, Federal Aviation Administration and others, 665 F.2d 1153, C.A.D.C. (1981). The case also mentioned that Article 33 of the Chicago Convention is self-executing. See Section 4.6.1.1.

142 O’Keefe, *supra* n. 102, 124. See Section 1.6.5.4, Chapter 1.

143 O’Keefe, *ibid.*, 124.

144 *Supra* n. 107, 27618.

145 For detailed contents on accessibility standards, see Table 3.

22 of the Chicago Convention which is a basis of Annex 9 was non-self-executing, unlike Article 33 thereof.¹⁴⁶ Therefore, it requires legislation to make SARPs in Annex 9 operative.

Standard 8.27 and Standard 8.34 on PWDs in Annex 9 are positive provisions, so ICAO assumes that they are nothing but the minimum requirements and States, if possible, can furnish more than the requirements.¹⁴⁷ Thus, each State is not only entitled to prescribe its own accessibility standards for PWDs but is also welcomed to set higher standards.

Actually, if any State finds any disagreement between itself and the US in relation to the interpretation of Annex 9, such State can submit the case to the ICAO Council pursuant to Article 84 of the Chicago Convention. However, no State has ever done so. In addition, ICAO has recognized the existence of Part 382 and has never discussed any issue on the conflict with Article 37 of the Chicago Convention.¹⁴⁸

4.6.1.2 *The argument on application to an airport situated in territory of another State*

The different assignment of duties between airport operators and air carriers between the EU and others are not viewed as problematic by the US DOT and the CTA in asserting their jurisdiction over air carriers.¹⁴⁹ The US and Canada also apply their law to their national air carriers on a codeshare segment operated by foreign air carriers. Inevitably, this enforcement applies indirectly to foreign air carriers through a national air carrier.

Conversely, from a scholar's viewpoint, the application of one domestic law to foreign air carriers at foreign airports is extraterritoriality.¹⁵⁰ The US law requires the Secretary of Transportation to observe international treaties as well as consider the applicable laws and requirements of a foreign coun-

146 *British Caledonian*, *supra* n. 141, 1162. It is unclear how States implement Annex 8 in relation to airworthiness into national law. See Pablo Mendes de Leon, *The Legal Force of ICAO SARPs in a Multilevel Jurisdiction Context*, 12: 2-3 J. LuchtRecht, 11, 14 (2013).

147 Annex 9, *supra* n. 17, foreword.

148 See ICAO, *Facilitation Panel (FALP) Sixth Meeting, Report of the Persons with Disabilities Working Group*, http://www.icao.int/Meetings/FALP/Documents/falp6_2010/FALP6_WP06_en.pdf (accessed 13 Jan. 2017); ICAO, *Achieving Compatibility in Consumer Protection Regulations*, Worldwide Air Transport Conference (ATCONF) Sixth Meeting, ATConf/6-WP45.

149 For the US, air carriers can let airport operators be responsible and supplement the rest of the assistance so air carriers cannot waive their compliance with the ACAA. See Silver-smith, *supra* n. 26, 204. The CA Agency accepts no jurisdiction over foreign airport operators which provide wheelchair assistance under Regulation 1107; nevertheless, it maintains jurisdiction over Canadian air carriers which involve in the process to ensure the provision of the service. See Canadian Transportation Agency, Decision No. 211-AT-A-2012, (7 June 2012), paras 4-6.

150 David Heffernan, *The US Government Prepares to Make Non-US Airlines Subject to New Rules Regarding the Transportation of Disabled Passengers*, 29:4-5 Air & Space L., 245, 248-249 (2004).

try.¹⁵¹ International treaties in this sense include the ASAs so foreign carriers claimed the US breached the ASAs made with their national States because the US can regulate a non-US carrier when it enters or departs the US or within the US solely.¹⁵²

An application of the criteria on extraterritorial application of human rights in Section 3.6.3, Chapter 3 to Part 382 results in the US having no grounds to legislate on foreign air carriers outside its territory since it has no national nexus with foreign air carriers. Moreover, the reasonable link can be established only when there is human rights abuse.¹⁵³ In the case of PWDs in air travel, other States also have their own regulations, and they can apply Annex 9.

4.6.1.3 *The argument on protection of global values*

It appears that there are two values. One is the recognition of sovereignty, and the other is a global value. Perhaps the territorial extension concept can be raised as a defense. The first criterion on the protection of global value is not easy to attain because accessibility has been qualified as a global public good.¹⁵⁴ Second, the US Part 382 incorporates a waiver system for non-national air carriers that find conflict between two national or regional regulations,¹⁵⁵ so it appears to match with the second criterion. Thus, with this line of reasoning, the US does not assert extraterritorial jurisdiction, but it lawfully applies territorial extension.

However, apart from the question concerning the legitimacy of the unilateral authority to render a waiver as discussed in Section 3.6.4, the waiver request process poses limitations on the proof of direct conflict with foreign legal mandates and the length of time for review.¹⁵⁶ The US DOT has seldom

151 49 U.S.C. Code § 40105(b). See Heffernan, *ibid.*, 253.

152 Silversmith, *supra* n. 26, 202. See Comments of Saudi Arabian Airlines, docket DOT-OST-2004-19482, 2.

153 FIAN International, *Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights*, (2013), principle 25, http://www.etoconsortium.org/nc/en/main-navigation/library/maastricht-principles/?tx_drblob_pi1%5BdownloadUid%5D=23 (accessed 13 Jan. 2017).

154 Department of Economic and Social Affairs (DESA) of the United Nations Secretariat, *Accessibility and Development Mainstreaming Disability in the Post-2015 Development Agenda*, ST/ESA/350, http://www.un.org/disabilities/documents/accessibility_and_development.pdf (accessed 25 May 2017), 27. See Section 1.5.1.2, Chapter 1.

155 14 C.F.R. § 382.9 (2009); *supra* n. 107, 27618. The EU and Canada do not provide any conflict of law waivers. This explicit waiver system in the US may be due to the fact that the US, unlike the other two jurisdictions, intentionally extends its domestic law to foreign air carriers. See Regulation 1107, art. 13; Email communication to Manager, Accessible Transportation Complaints and Industry Standards, Canadian Transportation Agency / Government of Canada on 26 May 2016. From the scope of these subordinate laws, the CA Agency views that there is no need for conflict of law waivers because these laws are not applicable to any foreign air carrier.

156 Silversmith, *supra* n. 26, 204.

granted a waiver. Since September 2008, two Community air carriers, Thomas Cook Airlines and Finnair, have filed a conflict of laws waiver request to the US DOT, but the US DOT has not posted an answer concerning the requirement of advanced notice and the capped number, and the carriers have received no clarification to date.¹⁵⁷ Hence, it appears that the US DOT is exclusively responsible for reviewing the level of interest and mostly takes the view that US law has more interest than other foreign laws. In this author's opinion, this territorial extension concept does not entitle the US authorities to apply its regulation to non-US air carriers.

4.6.1.4 Accessibility clause in air services agreements

Since the one-sided waiver process cannot wholly guarantee fairness to applicants, I now turn to another option: a provision in an ASA which allows States to negotiate any conflict in an equivalent manner.

Concerning the provision of access to air travel for PWDs, it is concluded that the ASA between the EU and the US and the ASA between the EU and Canada contain a clause for consumer protection including PWDs. This provision allows the parties to discuss their legislation and settle any conflict on legal provisions.¹⁵⁸ At the thirteenth meeting of the US-EU Joint Committee, there was a discussion on rulemaking regarding passengers with disabilities in order to harmonize EU and US legislation, but there was no record on whether the parties had discussed authority concerning rulemaking or not.¹⁵⁹ However, when there is no comparable clause in an ASA, there is no channel for States to mutually discuss any difference.

4.6.2 Conformity with obligations concerning accessibility standards

The examination of conformity can be viewed using four areas: (1) completeness of contents, (2) exceptions to accessibility standards, (3) imposition of a prerequisite and (4) an application of reasonable accommodation.

157 Thomas Cook Airlines Ltd, Docket No. DOT-OST-2008-0272; Part 382 Conflict Waiver Requests, (10 Sept. 2008); Finnair, Docket No. DOT-OST-2008-0272; Part 382 Conflict Waiver Requests, (10 Sept. 2008). The DOT responded to Finnair's waiver application on 19 May 2009, but it did not answer a request on Section 382.17 number limits and Section 382.25 advance notice.

158 The EU-US Air Transport Agreement, *supra* n. 47, art. 16; Agreement on Air Transport between Canada and the European Community and its Member States, *supra* n. 47, art. 10(g). See Section 4.6.2.1.

159 US Department of State, *Thirteenth Meeting of the U.S.-EU Joint Committee Record of Meeting June 5, 2013*, <https://www.state.gov/e/eb/rls/othr/ata/e/eu/220539.htm> (accessed 13 Jan. 2017).

4.6.2.1 Completeness of contents

At first glance, ICAO, the US and Canada appear to cover access to physical environment, transportation, information and communication technologies, and facilities and services, while the EU lacks an enforceable provision on physical environment in airports and aircraft.

A. *Physical environment and transportation*

Regulation 1107 only mentions physical accessibility in its Recitals.¹⁶⁰ The lack of an enforceable provision on physical accessibility is acknowledged in the initial report of the EU submitted to the CRPD Committee,¹⁶¹ and provides the reason why Slovenia refers to Annex 9 in the field of airport construction in its report to the CRPD Committee.¹⁶² It is perplexing why no such regulation exists concerning air transport while there are three specific EU regulations on rail transport, waterborne transport, and bus and coach transport that contain physical accessibility standards.¹⁶³ The reason could be due to the fact that Regulation 1107 was passed before other comparable regulations in other modes of transport and before the CRPD.

A review of preparatory drafts of Regulation 1107 found that the Recital on physical accessibility was added to the October 2005 draft as follows:

‘(8a) All airports and air carriers have a clear duty to ensure that airports and aircraft are planned, designed, built and refurbished in consultation with organiza-

160 Regulation 1107, recital 11; European Parliament, List of Titles of Written Questions by Members of the European Parliament Indicating the Number, Original Language, Author, Political Group, Institution Addressed, Date Submitted and Subject of the Question, E-2654/2010, OJ C 138 E, 7.5.2011. The Regulation only recommends that air carriers should adapt the toilets facilities to meet the requirements of persons with reduced mobility, but does not impose on them an obligation to do so.

161 Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Report Submitted by the European Union*, (Fourteenth session, 2015), U.N. Doc. CRPD/C/EU/CO/1, paras 28-29.

162 *Supra* n. 41, para. 49. See Section 4.2.2.2.A.

163 Committee on the Rights of Persons with Disabilities, *Replies of the European Union to the List of Issues*, 8 July 2015), U.N. Doc. CRPD/C/EU/Q/1/Add.1, para. 50. For rail, see Regulation (EC) No 1371/2007 of the European Parliament and of the Council of 23 October 2007 on rail passengers' rights and obligations OJ L 315, 03.12.2007, p. 14–41. For sea and inland waterway, see Regulation (EU) No 1177/2010 of the European Parliament and of the Council of 24 November 2010 concerning the rights of passengers when travelling by sea and inland waterway and amending Regulation (EC) No 2006/2004 OJ L 334, 17.12.2010, p. 1–16. For bus and coach, see Regulation (EU) No 181/2011 of the European Parliament and of the Council of 16 February 2011 concerning the rights of passengers in bus and coach transport and amending Regulation (EC) No 2006/2004 OJ L 55, 28.02.2011, p. 1–12.

tions representing disabled people and people with reduced mobility and in a way which respects their access needs.¹⁶⁴

The reason for adding this Recital as shown in the report is that ‘appropriate consultation is needed to ensure successful design’.¹⁶⁵ Also, the European Parliament added an article requiring the Commission to prepare a Community code based on Doc 30 Part I on the facilitation of transport of persons with reduced mobility (ECAC Doc 30) of the European Civil Aviation Conference (ECAC), of which all EU Member States are members.¹⁶⁶ But the final Regulation 1107 requires only operators of airports whose annual traffic is not less than 150,000 commercial passengers to set quality standards for assistance by referring to ECAC Doc 30.¹⁶⁷ This reference is limited because the scope covers merely types of assistance mentioned in Regulation 1107, so physical accessibility in airport and aircraft is not covered.

Comparing this to waterborne transport, Directive 2009/45/EC refers to and exhorts Member States to follow the guidelines of the International Maritime Organization (IMO),¹⁶⁸ to which the EU has a permanent observer status.¹⁶⁹ Although the relationship between the EU and ICAO is only as an ad-hoc observer in the Assembly and technical bodies,¹⁷⁰ at the time of the negotiation for Regulation 1107, there could have been a direct reference to Annex 9 analogous to the waterborne sector since Annex 9 contains SARPs on physical accessibility.¹⁷¹

164 European Parliament, Report on the Proposal for a Regulation of the European Parliament and of the Council Concerning the Rights of Persons with Reduced Mobility when Travelling by Air, Robert Evans (Rapporteur), A6-0317/2005, 27.10.2005, 8.

165 *Ibid.*, 8.

166 *Ibid.*, 25.

167 Regulation 1107, art. 9.

168 Directive 2009/45/EC of the European Parliament and of the Council of 6 May 2009 on safety rules and standards for passenger ships, OJ L 163, 25.6.2009, p. 1–140, Annex III.

169 International Maritime Organization, *Intergovernmental Organizations which have concluded agreements of cooperation with IMO*, <http://www.imo.org/en/About/Membership/Pages/IGOsWithObserverStatus.aspx> (accessed 13 Jan. 2017).

170 European Commission, *The European Union at ICAO*, http://ec.europa.eu/transport/modes/air/international_aviation/european_community_ICAO/ (accessed 13 Jan. 2017); European Commission, *Co-operation with ICAO*, http://ec.europa.eu/transport/modes/air/single_european_sky/co-operation_ICAO_en.htm (accessed 13 Jan. 2017). The EU signed a Memorandum of Cooperation with ICAO on 4 May 2011 to cooperate in the areas of aviation safety, aviation security, air traffic management and environmental protection. There is no information on any cooperation on facilitation.

171 See Annex 9, *supra* n. 17.

8.35 Recommended Practice.— Contracting States should introduce provisions by which aircraft coming newly into service or after major refurbishment should conform, where aircraft type, size, and configuration permit, to minimum uniform standards of accessibility with respect to equipment on board aircraft which would include movable armrests, onboard wheelchairs, accessible washrooms and suitable lighting and signs.

As of 2016, Regulation (EU) No. 1315/2013 prescribes that the design and construction of airport infrastructure shall be accessible for PWDs but it contains no detail and does not cover aircraft design.¹⁷² To fill in this loophole on airport and aircraft design, on 2nd December 2015, the EC proposed a Directive of the European Parliament and of the Council on the approximation of the laws, regulations and administrative provisions of the Member States as regards accessibility requirements for products and services (European Accessibility Act).¹⁷³ It is necessary to wait for the European Accessibility Act to be adopted to see how sufficiently its provisions reinforce the accessibility of PWDs in air transport and comply with the obligations in the CRPD.

B. Information and communication technologies

Regarding accessible information, ICAO and the US have not set guidelines on languages to be provided in accessible formats, unlike the EU and Canada where information is provided either in all the official languages or in the same language as used in-flight.¹⁷⁴

Under the CRPD, the Internet is one of the means by which States are obliged to promote access to information for PWDs.¹⁷⁵ Online booking is a convenient mode to book a flight, as it can be done either through an air carrier's own website or via a booking agency's website. It appears that the EU's Regulation 1107 lack details concerning website accessibility standards,¹⁷⁶ while ICAO, the US and Canada rely on the same standard of the World Wide Web Consortium. Accordingly, there should be no conflict in the contents of the relevant laws. However, jurisdiction regarding accessible websites is also questionable in the case of a foreign airline's website. Comparable to the case concerning telephone-teletype devices for persons who are deaf or hard of hearing, the CA Agency's jurisdiction covers non-national air carriers purely in relation to foreign air carriers' Canadian reservation systems.¹⁷⁷ Thus, it

172 Regulation (EU) No 1315/2013 of the European Parliament and of the Council of 11 December 2013 on Union guidelines for the development of the trans-European transport network and repealing Decision No 661/2010/EU, OJ L 348, 20.12.2013, p. 1–128, arts 24, 37.

173 European Commission, *Proposal for a Directive of the European Parliament and of the Council on the approximation of the laws, regulations and administrative provisions of the Member States as regards the accessibility requirements for products and services*, COM(2015) 615 final, 2015/0278 (COD), 2.12.2015.

174 Regulation 1107, art. 4(3); Communication Code, *supra* n. 124, 12.

175 CRPD, art. 9(2)(g).

176 European Parliament, *European Parliament Resolution of 23 October 2012 on Passenger Rights in All Transport Modes*, (2012/2067(INI)), para. 19.

177 Canadian Transportation Agency, Decision No. 597-AT-A-2004, *supra* n. 137, para. 33, concerning the lack of TTY for persons who are deaf or hard of hearing to Singapore Airline's Canadian reservation system; Decision No. 211-AT-A-2005, (12 Apr. 2005, concerning Cathay Pacific Airways's Canadian reservation system.

seems that if there is ever a case concerning a foreign air carrier's website accessibility, a civil aviation authority will be able to review no more than the part that deals with its jurisdiction.

The CRPD does not differentiate types of information that should be accessible. ICAO, the US and Canada ensure that public announcements concerning delays, flight information, gate assignment, etc. should be provided visually and verbally.¹⁷⁸ However, neither Regulation 1107 nor Regulation 261 explicitly mentioned these services. Therefore when the European Commission proposed amending Regulation 261, it obliged airport operators and air carriers to inform passengers on rules in relation to compensation and assistance under Regulation 261 concerning visual formats and other means for passengers with visual impairment.¹⁷⁹

One remark on accessible information is that in-flight entertainment information is left unregulated in ICAO, the EU, the US and Canada. However, one of the central human capabilities is 'play' which means being able to enjoy recreational activities.¹⁸⁰ In November 2016, the US DOT through its ACCESS Advisory Committee, comprising of representatives from air carriers, airports and disability groups, reached an agreement on accessible in-flight entertainment to propose a rule based on the agreement of 2017.¹⁸¹ While this will guarantee more equality, a concern on an expansion of extraterritoriality is noted.

C. Facilities and services

Training is mentioned in all selected accessibility standards. ICAO recommends the establishment of training programmes.¹⁸² The contents should cover all

178 PWD Manual, *supra* n. 12, para. 5.16; 14 C.F.R. § 382.53 (2009); Communication Code, *supra* n. 124, 16.

179 European Commission, *Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation of long delay of flights and Regulation (EC) No 2027/97 on air carrier liability in respect of the carriage of passengers and their baggage by air*, COM/2013/0130 final – 2013/0072 (COD), 13.3.2013, art. 1(13).

180 Martha Nussbaum, *Capabilities, Human Rights, and the Universal Declaration*, 30, in *Human Rights in the World Community: Issues and Action* (Burns H. Weston & Anna Grear, 4th ed., University of Pennsylvania Press 2016).

181 Access Committee, *Resolution of the US Department of Transportation Access Committee*, <https://www.transportation.gov/access-advisory-committee> (accessed 13 Jan. 2017). For a development and legal issues on in-flight entertainment, see Michael A. Schwartz, *Propelling Aviation to New Heights: Accessibility to In-flight Entertainment for Deaf and Hard Hearing Passengers*, 77 J. Air L. & Com., 151 (2012).

182 Annex 9, *supra* n. 17.

8.26 Recommended Practice.– Contracting States should take all necessary steps to secure the cooperation of aircraft, airport and ground handling operators in order to establish and coordinate training programmes to ensure that trained personnel are available to assist persons with disabilities. PWD Manual, *supra* n. 12, chapter 2.

types of impairments and include handling of mobility aids as mentioned in the CRPD.¹⁸³ Apart from training on services to PWDs, ICAO also states that employees and contractors should receive training on the legal obligations in national and international legislation and regulations.¹⁸⁴ International legislation can be translated to cover the CRPD, the Warsaw Convention and the Montreal Convention. Training is mentioned in the EU, the US and Canada accessibility standards.¹⁸⁵ The length and detail of contents are disparate. The US and Canada enumerate details on the handling of mobility aids and a mechanism to record and monitor the completion of training; on the other hand, the EU assigns air carriers and airport operators similar duties without providing details on recording and monitoring.¹⁸⁶ None of them explicitly refers to training on the legal obligations under the CRPD, the Warsaw Convention and the Montreal Convention.

Common services mentioned in accessibility standards are services provided to persons with visual impairment, hearing impairment or mobility impairment. A scrutiny of the selected accessibility standards finds that contents differ among ICAO, the EU, the US and Canada. These differences in content will be evaluated in relation to compliance with non-discrimination on the basis of disability in Section 4.6.3.

Specific services for persons with intellectual impairment or other types of impairment are unclear. The provision concerning accompanying persons and emotional support animals can be applicable to them. In the US, rules on emotional support animals can ease the lives of persons with a diagnosed mental or emotional disorder.¹⁸⁷ In December 2016, the UK Civil Aviation Authority published the Guidance for Airports on Providing Assistance to People with Hidden Disabilities.¹⁸⁸ It covers assistance at the airport and training to staff providing services to persons with dementia, autism, learning disabilities, anxiety issues, mental health conditions, visual impairment and hearing loss.¹⁸⁹

183 PWD Manual, *ibid.*, paras 2.5, 2.13.

184 PWD Manual, *ibid.*, para. 2.6.

185 Regulation 1107, art. 11; 14 C.F.R. Subpart J – Training and Administrative Provisions (2009); Training Regulations, *supra* n. 125.

186 Regulation 1107, art. 11; 14 C.F.R. § 382.141, 145 (2009); Training Regulations, *ibid.*, Regulations 6, 11; Steer Davies Gleave, *supra* n. 93, paras 3.74-3.75, 4.86-4.87.

187 *Supra* n. 107, 27636. There was a case to the Southern District of New York concerning a plaintiff who lost a medicine to soothe her from her fear of flying. The Court dismissed the claim on the ACAA so it did not touch whether the plaintiff is a PWD or not. *See Turturro v. Continental Airlines*, 128 F. Supp. 2d 170 (S.D.N.Y. 2001). For an issue concerning discrimination among persons with different types of service animals, *see* Section 4.6.3.2.

188 UK Civil Aviation Authority Guidance for Airports on Providing Assistance to People with Hidden Disabilities, (CAP 1411).

189 *Ibid.*

How to handle conflicts between types of impairment is not explicitly mentioned in ICAO, the EU, the US and Canada.¹⁹⁰ Other unregulated issues mostly concern extra payment for services for PWDs such as an extra seat,¹⁹¹ and on-board medical oxygen. Even though they are not touched on in the accessibility standards of ICAO, the EU, the US and Canada, nothing implies that States Parties to the CRPD can disregard these services to PWDs. Besides, more information, facts and data should be collected and studied on these unregulated issues before passing accessibility standards. Meanwhile, reasonable accommodation as defined in the CRPD has to be applied to these services when they are not mentioned in the accessibility standards.¹⁹²

4.6.2.2 Exceptions with respect to the adoption of accessibility standards

A regulatory review reflects that these duties are prescribed based on the belief that they balance duty and hardship duly and proportionately. Accordingly, they contain exceptions and restrictions.

A. Existing airports and aircraft

ICAO, the EU, the US and Canada have recognized the obligation concerning gradual implementation of accessibility as declared in the CRPD. All of distinguish between existing obligations and new obligations, so the existing ones will become accessible when they are amended.¹⁹³

There are no exceptions for newly built airports or aircraft concerning compliance with accessibility standards. An air carrier cannot argue that a PWD can opt for another available accessible flight in an air carrier's existing

190 The US only gives an example when there is a conflict between a person allergic to someone else's service animal; however, the US DOT also safeguards itself that not every allergy rise to the level of disability. See *supra* n. 107, 27660. The CA Agency decided on a case concerning refusal to carry a PWD with a guide dog due to the pilot's allergy to dogs does not constitute an undue burden. See Canadian Transportation Agency, Decision No. 528-AT-A-2004, (5 Oct. 2004).

191 See Section 4.6.3.3.

192 See Section 4.6.2.4

193 Annex 9, *supra* n. 17.

8.35 Recommended Practice.— Contracting States should introduce provisions by which aircraft coming newly into service or after major refurbishment should conform, where aircraft type, size, and configuration permit, to minimum uniform standards of accessibility with respect to equipment on board aircraft which would include movable armrests, onboard wheelchairs, accessible washrooms and suitable lighting and signs.

Regulation 1107, recitals 11; 14 C.F.R. § 382.61(e) (2009); *Code of Practice: Passenger Terminal Accessibility*, *supra* n. 121, 10; *Code of Practice: Aircraft Accessibility for Persons with Disabilities*, *supra* n. 123, 25; Communication Code, *supra* n. 124, 7. The CA Agency sets a time frame to install automated self-service kiosks by 31 December 2022.

fleet so it can buy cheaper inaccessible aircraft since this excuse contradicts the obligation not to create new barriers.¹⁹⁴

B. Safety

An exception due to safety is justified *prima facie* because the safety of an airport and of the flight affects the right to life of a PWD and others. As in *Love* and in *Nyusti*, only a well-evidenced safety-related argument is acceptable and ICAO SARPs can be taken as a reference.¹⁹⁵ Thus, aviation safety as a whole should not be jeopardized through the provision of equal access to PWDs. For instance, a safety-related matter that affects the accessibility level of PWDs is the limitation on the transport of mobility aids with wet-cell batteries due to an increased fire risk.¹⁹⁶

C. Airline business model

No exception is granted on the basis of airline business models, such as being a low-cost carrier.¹⁹⁷ This is why Regulation 1107 assigns the duty to assist PWDs to the airport and levy charges from air carriers.¹⁹⁸ In practice, this charge is specifically and separately collected to fund the cost of services rendered to PWDs.¹⁹⁹ So it is not against the Chicago Convention and ICAO's policies on airport charges, which articulate that air carriers 'should not be charged for facilities and services they do not use'.²⁰⁰

D. Size of the operation of airports

The size of the operation of airports is another exception to accessibility standards. The PWD Manual does not mention this exception, but the EU, the

194 There is no case concerning aircraft but the Supreme Court of Canada's judgment in *VIA Rail* can be used as an analogy since the case deals with purchasing inaccessible trains for one route. The Supreme Court of Canada rejected this argument and stated that there is a duty to prevent new exclusionary barriers and failure to do so leads to discrimination. See *VIA Rail*, *supra* n. 132, para. 186.

195 See Section 3.4.2.2.A., Chapter 3 on safety.

196 Annex 9, *supra* n. 17, Standard 8.38; 14 C.F.R. § 382.127 (2009); Canadian Transportation Agency, Decision No. 336-AT-A-2008, (26 June 2008).

197 The UK Court of Appeal held that the air carrier's charging an extra fee for wheelchair assistance at an airport was discriminatory. See *Ross v Ryanair Ltd and Stansted Airport Ltd* [2004] EWCA Civ 1751.

198 See Section 4.3.2.

199 Steer Davies Gleave, *supra* n. 93, para. 3.35, For cost of assistance in airports in the Member States of the EU, see Roberto Castiglioni, *Cost of assistance for the disabled at European airports revealed*, <http://www.reducedmobility.eu/20141122536/The-News/cost-of-assistance-for-the-disabled-at-european-airports-revealed.html> (accessed 13 Jan. 2017).

200 Chicago Convention, art. 15; ICAO, *ICAO's Policies on Charges for Airports and Air Navigation Services*, ICAO Doc 9082 (8th ed. 2009) para. 30.

US and Canada base their exceptions on annual traffic with different measurements.²⁰¹ This reflects the same concern of the EU and Canada in the drafting history of the CRPD but the CRPD Committee interprets an obligation in an opposite manner as evidenced in the concluding observations.²⁰²

E. Aircraft type, size, and configuration

Aircraft type, size and configuration can limit the level of accessible aircraft.²⁰³ A business model of low-cost carriers is to use a young and homogenous fleet, with high-density seating and fewer toilets to reduce costs.²⁰⁴ Therefore, when they cannot accommodate PWDs in one aircraft due to aircraft configuration, it is likely that PWDs cannot travel with them on other routes.

While the PWD Manual does not enumerate any details, the US and Canada provide similar details on accessible washrooms and on-board wheelchairs because their configuration and space may not permit doing so even in new aircraft.²⁰⁵ In the US, the justification for exempting small aircraft is due to excessive cost and burden to air carriers even though representatives from the PWDs prefer accessible levels irrespective of aircraft size.²⁰⁶ An exception due to size of aircraft may comparably contradict with the CRPD Committee's view in country reports to request that States Parties discontinue the exemption of accessibility standards on small premises.²⁰⁷

201 PWD Manual, *supra* n. 12; Regulation 1107, art. 9; *Code of Practice: Passenger Terminal Accessibility*, *supra* n. 121, 4; 14 C.F.R. § 382, 399 (2009); 49 C.F.R. § 27 (2013); *supra* n. 122, 2.

202 See Section 3.4.2.2.B, Chapter 3 on size of operation.

203 Several contracts of carriage limit a maximum number of wheelchair users due to aircraft types. See Singapore Airlines Limited, *Airline Tariff International Passenger Rules and Fares*, rule 20(B) (2 May 2000); All Nippon Airways Company, *International passenger rules and fares tariff*, rule 21 (2 Apr. 2010); Lufthansa German Airlines, *Airline Tariff International Passenger Rules and Fares*, rule 21(B) (20 Aug. 1999); KLM, *Published fares, charges and related terms and conditions of carriage applicable to air services of KLM*, rule 57 (5 July 2013).

204 European Commission, *Topical Reports: Airline Business Models by DLR*, 8, https://ec.europa.eu/transport/sites/transport/files/modes/air/doc/abm_report_2008.pdf (accessed 13 Jan. 2017).

205 Annex 9, *supra* n. 17.

8.35 Recommended Practice.— Contracting States should introduce provisions by which aircraft coming newly into service or after major refurbishment should conform, *where aircraft type, size, and configuration permit*, to minimum uniform standards of accessibility with respect to equipment on board aircraft which would include movable armrests, onboard wheelchairs, accessible washrooms and suitable lighting and signs. *emphasis added*; 14 C.F.R. § 382.63 (2009). (Only aircraft with more than one aisle must have an accessible lavatory); 14 C.F.R. § 382.65 (2009). In aircraft with more than 60 passenger seats, carriers must provide an on-board wheelchair if the aircraft has an accessible lavatory. *Code of Practice: Aircraft Accessibility for Persons with Disabilities*, *supra* n. 123, 7-8.

206 *Supra* n. 107, 27625.

207 Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Initial Report Submitted by Austria*, (Tenth session, 2013), U.N. Doc. CRPD/C/AUT/CO/1, para. 24; Committee on the Rights of Persons with Disabilities, *Concluding Observations on the*

Despite this size exception, States Parties are still required to provide accessible air travel to PWDs. The duty not to create new barriers implicates that States need to monitor air carriers as well as aircraft manufacturers when they purchase or build new aircraft.

F. Restriction on number of persons with disabilities on board

Problems occur in the implementation of a rule that is not asserted in ICAO SARPs. In the EU, the number of PWDs permitted on board is correlated to evacuation safety requirements such as evacuation time, and the number of able-bodied passengers who are able to assist PWDs in the event of an emergency, and this number is usually calculated based on the number of cabin crew members.²⁰⁸ A controversial matter lies in the assumption that a PWD is unable to rely on him or herself in times of emergency because it contradicts the equal recognition of legal capacity under Article 12 and living independently under Article 19 of the CRPD. No comparable provision is contained in either Annex 9 or the PWD Manual. However, Annex 6 to the Chicago Convention obliges States to set the number of cabin crew members based on seating capacity or the number of passengers for the purpose of a safe and expeditious evacuation. This rule serves the purpose of safety but its language does not precisely refer to PWDs.²⁰⁹

On the contrary, the US prohibits the fixing of the number of PWDs on board per flight owing to the fact that there has been no proof that safety has been jeopardized by the absence of number limits.²¹⁰

Initial Report Submitted by New Zealand, (Twelfth session, 2014), U.N. Doc. CRPD/C/NZL/CO/1, para. 20.

208 Regulation 1107, art. 4; European Commission, *Report from the Commission to the European Parliament and the Council on the Functioning and Effects of Regulation (EC) No 1107/2006 of the European Parliament and of the Council of 5 July 2006 concerning the Rights of Disabled Persons and Persons with Reduced Mobility When Travelling by Air*, Com(2011) 166 final, 11.4.2011, 5-6; European Commission, *Minutes of the Making Regulation 1107/2006 a success: 1st NEB meeting*, 3 Dec. 2008, 5.

209 Annex 6, *Operation of Aircraft, Part I International Commercial Air Transport – Aeroplanes*, (9th ed. July 2010).

Standard 12.1 Assignment of emergency duties

An operator shall establish, to the satisfaction of the State of the Operator, the minimum number of cabin crew required for each type of aeroplane, based on seating capacity or the number of passengers carried, in order to effect a safe and expeditious evacuation of the aeroplane, and the necessary functions to be performed in an emergency or a situation requiring emergency evacuation. The operator shall assign these functions for each type of aeroplane.

210 14 C.F.R. § 382.121(b) (2009); *supra* n. 107, 27621-27622. This practice was once acceptable in the US during the 1970s. See Reukema, *supra* n. 116, 125.

G. *Weight of mobility aids*

The weight of mobility aids constitutes another limitation to their accommodation on board due to size of baggage compartments, which is linked to safety requirements.²¹¹ Neither Annex 9 nor the PWD Manual specifies a detailed kilogram of mobility aids per types of aircraft, but the European Commission declares that weight limitations do not apply to mobility aids.²¹² In practice, air carriers still set weight limits on the carriage of electric wheelchairs.²¹³

This may be compared to the case of Canada, where a policy banning wheelchairs that exceed the weight limit can be considered reasonable if an air carrier can establish a link to safety and space on board an aircraft.²¹⁴ However, such air carrier has to clearly state safety constraints in its policy and provide reasonable alternative accommodation.²¹⁵

H. *Foreign air carriers*

Since Part 382 extends to enforce foreign carriers after it has been made applicable to national carriers, the US DOT exempts non-US air carriers from several provisions. A provisional period for provisions concerning the duty on physical accessibility is granted, and a foreign air carrier has a longer provisional period than a US carrier.²¹⁶

211 Annex 9, *supra* n. 17.

8.36 Recommended Practice.– Disability aids required by persons with disabilities should be carried free of charge in the cabin where space, weight and safety requirements permit or should be carried free of charge and designated as priority baggage.

14 C.F.R. § 382.133 (2009).

212 European Commission, *Interpretative Guidelines on the application of Regulation (EC) N° 1107/2006 of the European Parliament and of the Council of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air*, SWD (2012) 171 Final, 11.6.2012, 14.

213 In mid 2015, Jet2, a UK registered carrier, was found to impose weight limits on carriage of electric wheelchairs, while other EU air carriers waived weight limits. As of May 2017, Jet2 declares on its website that it will not accept any mobility device with an unladen weight in excess of 100 kilograms. See Roberto Castiglioni, *Jet2 ban to include disabled electric wheelchair users*, <http://www.reducedmobility.eu/20150723638/TheNews/jet2-ban-to-include-disabled-electric-wheelchair-users> (accessed 13 Jan. 2017); Roberto Castiglioni, *US Authorities investigating Jet2 disability rules*, <http://www.reducedmobility.eu/20151006654/TheNews/us-authorities-investigating-jet2-disability-rules> (accessed 13 Jan. 2017); Jet2, *Terms and Conditions*, <http://www.jet2.com/terms> (accessed 1 May 2017).

214 Canadian Transportation Agency, Decision No. 175-AT-A-2008, (11 Apr. 2008), para. 28.

215 Canadian Transportation Agency, Decision No. 175-AT-A-2008, *ibid.*, para. 37. United Airlines clearly states in its tariff that it reserves the right to refuse to transport large mobility aids due to physical size of an aircraft compartment and safety risk. It further declares to exercise reasonable efforts to accommodate such mobility aids. See United Airlines, *Contract of Carriage Document*, rule 28(K)(2) (17 Feb. 2017).

216 14 C.F.R. § 382.61(f) (2009).

Also, Part 382 does not require non-national air carriers to carry service animals other than dogs because of safety and sanitation in long-haul flights and differences in airport terminals.²¹⁷ The sanitation and airport terminal problems are reasonable according to the US DOT.²¹⁸ However, some international flights are not longer than US domestic flights.²¹⁹ Thus, it is questionable whether the sole flight duration can be justified in all circumstances.

I. Sub-conclusions

In my view, accessibility standards in civil aviation contain exceptions. There is no doubt about the legitimacy of exceptions concerning existing airports and aircraft and safety-related provisions which are in accordance with ICAO SARPs because they are consistent with the interpretation of the CRPD Committee.

The size of the operation of airports is unjustified since PWDs should be able to access every airport on an equal basis to others. Obligations on accessibility are gradually implemented; hence, there should be no permanent exception for airport operators not to provide accessible airports. Moreover, if these airports are to be renovated, airport operators should take the accessibility standards into account so as not to create any new barriers.

The aircraft type, size and configuration are incomparable to the size of operation which is indispensable under the CRPD Committee's viewpoint. The limitation to install accessibility in the former, arguably, is due not only to disproportionate investment but also the limited space of the cabin while the size of operation does not relate to the configuration of the aircraft. Therefore, in my view, these exceptions are justified subject to conformity with ICAO publications.

It is difficult to justify a restriction on the number of PWDs on board and weight of mobility aids because there is no solid connection with ICAO SARPs.

I discussed in Section 4.6.1 that the US legitimacy to apply its domestic law to the conduct of non-US air carriers abroad is questionable. The consideration on the justification of certain exceptions is irrelevant because, in my opinion, what the US should exempt is all activities of foreign air carriers outside of its territory. However, this may be plausible only in theory since it may be contradictory to seamless air travel in reality.

217 14 C.F.R. § 382.117(f) (2009). *Supra* n. 107, 27635-27636. Thus, foreign air carriers are required to carry emotional support dog. See Canadian Transportation Agency, Letter Decision No. LET-AT-A-82-2013, (5 June 2013), para. 64, Air Canada submitted that it carried emotional support dog on flights to and from the US.

218 14 C.F.R. § 382.117(f) (2009). *Supra* n. 107, 27635-27636.

219 A non-stop flight from New York City to Toronto takes less than two hours. A non-stop flight from New York City to London is around seven hours while the non-stop US domestic flight from Miami to Seattle is six hours and 35 minutes.

In any case, reasonable accommodation plays its role in fulfilling the gap of accessibility standards, details of which will be explored in Section 4.6.2.4.

4.6.2.3 *Imposition of a prerequisite*

The level of ensuring accessibility through legislation on a public procurement procedure applicable to airports and that on an air operating license are different. Accessibility criteria for PWDs or universal design are incorporated in the technical specifications of public procurement procedures on airport construction.²²⁰ On the contrary, conditions to grant an air operating license do not contain any criteria concerning PWDs and accessibility in the EU and the US.²²¹ Canada devotes one part of the Air Transport Regulations to specify terms and conditions of the carriage of PWDs for air carriers operating domestic air services to comply with.²²² Unsatisfactorily, Annex 9, the PWD Manual and the Airport Planning Manual contain nothing on urging accessibility as a condition in public procurement or license issuance. Moreover, the ASAs can be another means to ensure accessibility.

4.6.2.4 *Provision of reasonable accommodation*

SARPs in Annex 9 ask States to take ‘necessary’ steps by ‘adapting services’ to ensure access to airports and to air services.²²³ There is no interpretative guideline on the term ‘necessary’; however, in this author’s opinion, if the measures to accommodate PWDs are a disproportionate or undue burden, they

220 See Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC, OJ L 94, 28.3.2014, p. 243–374, arts 12, 60, 81; *supra* n.121, 11.

221 See Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community (Recast), OJ L 293, 31.10.2008, p. 3–20; Department of Transportation, *U.S. Air Carriers*, <https://www.transportation.gov/policy/aviation-policy/licensing/US-carriers> (accessed 13 Jan. 2017).

222 *Air Transportation Regulations*, *supra* n. 126, Part VII. Even though Canada requires foreign air carriers to file their tariffs for international air services, a closer look at selected tariffs illustrates different air carriers’ policies on PWDs. See Section 4.6.3.

223 Annex 9, *supra* n. 17.

8.27 Contracting States shall take the necessary steps to ensure that airport facilities and services are adapted to the needs of persons with disabilities.

8.31 Recommended Practice. – Where access to public services is limited, every effort should be made to provide accessible and reasonably priced ground transportation services by adapting current and planned public transit systems or by providing special transport services for people with mobility needs.

8.34 Contracting States shall take the necessary steps to ensure that persons with disabilities have equivalent access to air services.

can be considered unnecessary. Therefore, this concept is similar to the reasonable accommodation in the CRPD.

Dubiously, reasonable accommodation is not explicitly mentioned in the Regulation 1107 and Part 382, while there is a provision concerning reasonable accommodation in the Employment Equality Directive (2000/78/ec) and the ADA.²²⁴ Under the CRPD, reasonable accommodation applies when accessibility standards are not sufficient.²²⁵ Part 382 considers that an air carrier that promises a PWD provision of a special service that is not under Part 382, but then fails to do so, violates a duty on flight-related information due to providing inaccurate information.²²⁶ This application implies that the service agreed upon by an air carrier is considered due and reasonable, and failure to provide such service results in denial of reasonable accommodation.

In Canada, when reviewing a case concerning accessible air travel, if the CA Agency finds an air carrier's policy or practice to be discriminatory to PWDs, it further examines whether to accommodate PWDs is undue or not.²²⁷ The obstacle is not undue if the transport service providers can prove, on the balance of probabilities, that such obstacle is rationally connected to a legitimate objective such as those found in the CTA, and that it was adopted in good faith.²²⁸ Moreover, such obstacles cannot be eliminated without incurring undue hardship.²²⁹ Undue hardship can be established when there are no reasonable means of accommodation and the costs would threaten the essential character of the duty holder.²³⁰ This step is, in other words, a pro-

224 Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303, 2.12.2000, p. 16-22, art. 5; 42 U.S.C. § 12112. (1990); UN Department of Economic and Social Affairs Division for Social Policy and Development, *The Concept of Reasonable Accommodation in Selected National Disability Legislation*, <http://www.un.org/esa/socdev/enable/rights/ahc7bkgrndra.htm> (accessed 13 Jan. 2017).

225 Committee on the Rights of Persons with Disabilities, General Comment 2, Art. 9 (Eleventh session, 2014), U.N. Doc. CRPD/C/GC/2, para. 25.

226 14 C.F.R. § 382.41 (2009); *supra* n. 107, 27650.

227 See Canadian Transportation Agency, Decision No. 263-AT-A-2000, (13 Apr. 2000). The air carrier's service at the check-in counters is available so the obstacle of the inaccessible check-in kiosks is not undue. Canadian Transportation Agency, Decision No. 126-AT-A-2001, (21 Mar. 2001). Advanced seat selection fee for selecting the seat to meet the need of a PWD is undue. On the other hand, see Canadian Transportation Agency, Decision No. 682-AT-A-2002, (20 Dec. 2002). The obstacle is due when an air carrier cannot provide services not requested in advance of travel. According to the Supreme Court of Canada, an undue obstacle under the CTA is similar to an undue hardship in other human rights laws and includes potential obstacles which have not yet occurred. See *VIA Rail*, *supra* n. 132, para. 8.

228 Canadian Transportation Agency, Decision No. 6-AT-A-2008, (10 Jan. 2008), para. 172.

229 Canadian Transportation Agency, *Accessible Transportation Complaints: A Resource Tool for Service Providers*, (Oct. 2012), 9.

230 Baker & Godwin, *supra* n. 117, 57.

portionality test.²³¹ Justified arguments under the CA Agency's series of decisions on undue hardship in air transport are constraints relating to safety,²³² operational realities,²³³ financial and economic implications²³⁴ and physical or structural limitations.²³⁵ This undue hardship test is examined when there is no regulation applicable to the case, so it mirrors the CRPD reasonable accommodation.²³⁶

4.6.3 Conformity with non-discrimination on the basis of disability

An analysis of accessibility standards illustrates that their contents are varied which gives rise to questions concerning compliance with the prohibition of discrimination on the basis of the disability principle. In view of the varying content of standards, Section 4.6.3.1 to Section 4.6.3.5 will discuss issues which either the EU, US and Canada practice differently.

4.6.3.1 Accompanying persons

PWDs have to pay more than individuals without disabilities due to the cost of having to buy an extra ticket for an accompanying person. On the contrary, the carriage of mobility aids, service animals or provision of wheelchairs at airports must be free of charge to prevent discrimination on the basis of disability and to let PWDs travel on an equal basis in terms of price as other

231 Dagmar Schiek, Lisa Waddington & Mark Bell, *Non-Discrimination Law*, 474 (Hart Publishing 2007). The CA Agency applies both approaches. For statistical approach on an extra seat requirement, see Canadian Transportation Agency, Decision No. 6-AT-A-2008, *supra* n. 228.

232 See Canadian Transportation Agency, Decision No. 194-AT-A-2007, (20 Apr. 2007), para. 58. The level of wheelchair and baggage assistance at airports does not constitute an undue burden because an air carrier has to balance with an obligation to provide a safe environment for travellers. Decision No. 528-AT-A-2004, *supra* n. 190. Refusal to carry a PWD with a guide dog due to the pilot's allergy to dogs does not constitute an undue burden.

233 See Canadian Transportation Agency, Decision No. 525-AT-A-2004, (4 Oct. 2004). Air Canada was in the process of integrating its reservation system with that of Canadi*n so the applicant did receive the seat type she had requested in advance. The CTA finds that this obstacle is not undue. Canadian Transportation Agency, Decision No. 674-AT-A-2001, (28 Dec. 2001). A high demand of wheelchair assistance is not an excuse for not providing a wheelchair.

234 See Canadian Transportation Agency, Decision No. 450-AT-A-2005, (13 July 2005); Canadian Transportation Agency, Decision No. 648-AT-A-2006, (27 Nov. 2006), on costs implications on online reservation for PWDs.

235 See Canadian Transportation Agency, Decision No. 515-A-1997, (19 Aug. 1997). Aisles which are not wide enough to accommodate an "ordinary wheelchair" and washrooms which are not capable of accommodating passengers using such a mobility aid do not constitute an undue obstacle.

236 Canadian Transportation Agency, Decision No. 386-AT-A-2009, *supra* n. 137, para. 48, concerning applying a provision on stowing a mobility aid in domestic flight to an international flight.

passengers.²³⁷ The assumed objective is that an accompanying person receives services on board such as a seat and food, so their presence affects the operational cost and opportunity cost.

ICAO recommends that States respect the determination of PWDs on the need of an assistant and to require an assistant only when travelling solo could pose a risk to the safety or the wellbeing of a PWD or of other passengers.²³⁸ This suggestion mirrors the individual autonomy of PWDs to make their own choices.²³⁹ Therefore, an air carrier's inflexible policy in prohibiting persons with specific types of impairment from travelling alone is considered discrimination because it fails to assess the capability of each PWD.²⁴⁰

In support of equal opportunity, ICAO further requests air carriers to offer discounts to an accompanying person.²⁴¹ The EU correspondingly encourages an air carrier either to offer a discounted rate or a free ticket.²⁴² The CA Agency, after analyzing cost and safety constraints to assess the proportionality of the policy, also ruled that in domestic air services, air carriers cannot charge ticket fares for an accompanying person because the fare policies to charge a ticket fare for an accompanying person constitute an undue obstacle to PWDs.²⁴³ The US Part 382 strikes the balance by forbidding an air carrier from charging for the transportation of a person assigned to assist a PWD against the PWD's will.²⁴⁴

237 Annex 9, *supra* n. 17.

8.36 Recommended Practice.— Disability aids required by persons with disabilities should be carried free of charge in the cabin where space, weight and safety requirements permit or should be carried free of charge and designated as priority baggage.

8.37 Recommended Practice.— Service animals accompanying persons with disabilities should be carried free of charge in the cabin, on the floor at the person's seat, subject to the application of any relevant national or aircraft operator regulations.

Regulation 1107, arts 3, 4, 7, 10, Annex II; 14 C.F.R. § 382.31; section 149; section 10, *Code of Practice: Aircraft Accessibility for Persons with Disabilities*, section 2.6, *supra* n. 123. See e.g. Ross, *supra* n. 197.

238 Annex 9, *supra* n. 17.

8.40 Recommended Practice.— In principle, persons with disabilities should be permitted to determine whether or not they need an assistant. If the presence of an assistant is required, Contracting States should encourage aircraft operators to offer discounts for the carriage of that assistant. Aircraft operators should require an assistant only when it is clear that the person with a disability is not self-reliant and this could pose a risk to safety or the well-being of such person or that of other passengers

PWD Manual, *supra* n. 12.

3.18 Consideration should be given to offering discounted rates or a free seat to assistants.

239 CRPD, arts 3(a), 19.

240 See Section 5.2.2.2, Chapter 5 on the decisions in Spain, France and Canada.

241 Annex 9, *supra* n. 17, Recommended Practice 8.40; PWD Manual, *supra* n. 12, para. 3.18.

242 European Commission, *supra* n. 212, 9.

243 Canadian Transportation Agency, Decision No. 6-AT-A-2008, , *supra* n. 228, paras 168, 913.

244 14 C.F.R. § 382.27(c)(1), 382.29 (2009).

4.6.3.2 Service animals

As mentioned in Section 1.4.4, Annex 9 and the PWD Manual permit each State to prescribe types of service animals freely.²⁴⁵ While the EU and Canada restrictively permit merely ‘recognized’ assistance dogs to travel without charge,²⁴⁶ Part 382 uniquely and liberally allows a variety of animals regardless of where the animals were trained and the types of service such animals render.²⁴⁷ It allows a passenger with mental or emotional disorder to travel with an emotional support or psychiatric service animal subject to the safeguard of conditions such as recent documentation from a health professional to affirm the necessity of an animal on board.²⁴⁸

The controversy concerning service animals lies in the restriction to dogs only as officially recognized service animals in the EU and Canada though the legislative history of the CRPD shows that the types of animal should not be restricted.²⁴⁹

Refusing access to PWDs accompanied by service animals other than recognized dogs amounts to detrimental effect to these PWDs.²⁵⁰ The issue lies on the justification of this policy. The EU’s justification on the matter is

²⁴⁵ See Annex 9, *supra* n. 17, Recommended Practice 8.37; PWD Manual, *supra* n. 12, xiii.

²⁴⁶ Regulation 1107, art. 7, Annex II; Training Regulations, s. 2; Air Transportation Regulations, s. 149. Canada binds a condition for carriage of a service animal with a written certification on training to assist a PWD by a professional service animal institution.

²⁴⁷ 14 C.F.R. § 382.117 (2009). Compare with the ADA, Service animals are defined as dogs that are individually trained to do work or perform tasks for people with disabilities and miniature horses. See U.S. Department of Justice, *Service Animals*, https://www.ada.gov/service_animals_2010.htm (accessed 13 Jan. 2017). In 2016, the US DOT wished to amend the meaning of service animal concerning the documentation of service animals and types of service animal but its Access Committee did not reach consensus on whether or how to amend the definition of service animals. See Access Committee, *Resolution of the US Department of Transportation on 22 November 2016*, <https://www.transportation.gov/sites/dot.gov/files/docs/ACCESS%20Committee%20Final%20Resolution.11.21.16.pdf> (accessed 13 Jan. 2017).

²⁴⁸ 14 C.F.R. § 382.117(e) (2009). See Curtis D. Edmons, *When Pigs Fly: Litigation under the Air Carrier Access Act*, 78 N.D. L. Rev., 687 (2002); Susan D. Semmel, *When Pigs Fly, They Go First Class: Service Animals in the Twenty-First Century*, 3 Barry L. Rev., 39 (2002); John J. Ensminger, *Service and Therapy Dogs in American Society*, 204 (Charles C Thomas Publisher 2010).

²⁴⁹ See Section 1.4.4, Chapter 1, Section 3.4.2.1, Chapter 3.

²⁵⁰ Comparing to refusal a guide dog to access to public place, Waddington found the court in Slovenia, Ireland, Finland and Hungary unanimously ruled that a denial of entry of a guide dog amounted to discrimination on the basis disability and the dog and its owner is an inseparable unit. See Lisa Waddington, *Fine-tuning Non-discrimination Law: Exceptions and Justifications Allowing for Differential Treatment on the Ground of Disability*, 15:1-2 Int’l J. Discrimination & L., 11, 28-29 (2015).

obscure.²⁵¹ One reason may be the perception that a dog is the most popular service animal. Canada accepts that professional service animal institutions in Canada train exclusively dogs and there are other types of service animals which may not need to be trained, but the CA Agency does not issue any legal binding standard on service animals other than dogs.²⁵² A concern from air carriers is chiefly on a phony emotional support animal because this type of service does not require training and accordingly no recognized certificate from an accredited institute.

A denial based on emotional support animal fraud is not convincing because it is against the principle of inclusion and participation in the CRPD. Air carriers should find measures to prevent fraud rather than reject accommodating PWDs.²⁵³ A regulation to limit the types of service animals can be comparable to an air carrier's policy to prohibit persons with specific types of impairment from travelling alone in Section 4.6.3.1. Therefore, in my opinion, the acceptance should be assessed on a case-by-case basis and based on a reasonable, non-discriminatory safety standard. A thorough study on the proportionality to accommodate PWDs who need an emotional support animal as well as a service animal other than dogs needs to be conducted.

4.6.3.3 Extra seats

In the same ruling on the ticket cost for an accompanying person, the CA Agency found that PWDs who require two seats due to obesity were placed at an economic disadvantage as well.²⁵⁴ Apart from Canada, the rest seem to take a different approach.²⁵⁵ Neither Annex 9 nor the PWD Manual touches on persons with obesity. Perhaps, it must be settled whether a person with

251 *Proposal for a Regulation of the European Parliament and of the Council concerning the Rights of Persons with Reduced Mobility When Travelling by Air*, *supra* n. 93; *supra* n. 164; Opinion of the European Economic and Social Committee on the Proposal for a Regulation of the European Parliament and of the Council concerning the Rights of Persons with Reduced Mobility When Travelling by Air (COM(2005) 47 final – 07/2005 (COD)), OJ C 24, 31.1.2006, p. 12-14.

252 Canadian transportation Agency, *Travelling with Animals that Provide Disability-Related Assistance*, (Sept. 2014), 3.

253 This is comparable to Lawson who argued in case of safety-risk concern to avoid retrofitting ATMs for persons with visual impairment. She suggested financial institutions to take more secured measures instead of refusal to accommodate. See Anna Lawson, *Accessibility Obligations in the UN Convention on the Rights of Persons with Disabilities: Nyusti and Takács v Hungary*, 30:2 S. Afr. J. on Hum. Rts., 380, 391-392 (2014).

254 Canadian Transportation Agency, Decision No. 6-AT-A-2008, , *supra* n. 228, paras 15, 22, 76. For an argument, see Tanveer Ahmad, *One Passenger, One Fare: A Policy Which Neither Benefits The Air Carriers Nor The Disabled Population*, 36 *Annals Air & Space L.*, 377 (2011).

255 The US DOT clarified that any person who requires two seats either for obesity or disability reasons can be charged for two seats. See *supra* n. 107, 27628. KLM offers discount for persons requiring an extra seat. KLM, *Published fares, charges and related terms and conditions of carriage applicable to air services of KLM*, rule 550 (15 Oct. 1987).

obesity can be qualified as a PWD in air travel or not, prior to examining whether this practice is discriminatory or not.²⁵⁶

4.6.3.4 Advance notice

Recommended Practice 8.40.1 suggests that ‘advance notice should strongly be encouraged where assistance or lifting is required’.²⁵⁷ However, no enumerated types of assistance are found in Annex 9 and the PWD Manual. The EU, the US and Canada require PWDs to inform their needs to air carriers or travel agents in advance but, as one can foresee, the dissimilarity lies in the scope of services required for notification.²⁵⁸

The US views this practice as discriminatory, since PWDs should be treated like all other passengers so only in exceptional cases specified by Part 382, can an air carrier require a medical certificate or advance notice.²⁵⁹ Looking across the Atlantic, the pre-notification under Regulation 1107 covers a wider scope of services than those in the US Part 382 because air carriers have to communicate the adjustment of services to airport operators.²⁶⁰ The objective is based on an operational reason to prepare services to meet the needs of PWDs; however, there is no information on the proportionality of this measure.

4.6.3.5 Restriction pertaining to mobility aids

The general practice among ICAO, the EU, the US and Canada is that mobility aids are not counted as baggage to check in, so PWDs will not lose their baggage allowance quota. This does not amount to reverse discrimination, as the measure does not affect the baggage allowance quota of other passengers. However, Regulation 1107 limits the amount of mobility equipment to be carried free of charge even though the number has been increased from one piece in the proposal draft.²⁶¹ ICAO, the US and Canada have no comparable provision. A fixed number inevitably constitutes discrimination against a PWD who has more than two pieces of mobility aids. An assumption is to balance the operational cost and opportunity cost of air carriers.²⁶² Justifica-

²⁵⁶ See Section 1.4.1.

²⁵⁷ Annex 9, *supra* n. 17.

²⁵⁸ Annex 9, *ibid.*, Recommended Practice 8.40.1; Regulation 1107, art. 6; 14 C.F.R. § 382.23, 382.27 (2009); Air Transportation Regulations, *supra* n. 126, s. 151(1).

²⁵⁹ 14 C.F.R. § 382.23, 382.27 (2009).

²⁶⁰ Regulation 1107, art. 6(2).

²⁶¹ Regulation 1107, Annex II; *Proposal for a Regulation of the European Parliament and of the Council concerning the Rights of Persons with Reduced Mobility When Travelling by Air*, *supra* n. 93.

²⁶² Lorenzo Casullo, *The Economic Benefits of Improved Accessibility to Transport Systems: Roundtable Summary and Conclusions*, <http://www.itf-oecd.org/economic-benefits-improved-accessibility-transport-systems-roundtable-summary-and-conclusions> (accessed 6 Mar. 2017), 17; Deborah Ancell & Anne Graham, *A framework for Evaluating the European Airline Costs of Disabled*

tions cannot be made, owing to no indication in the preparatory draft as to why the drafters chose to fix the numbers of equipment.²⁶³

4.6.4 Enforcement

In a similar vein to Article 33 of the CRPD, Annex 9 requires States to establish a national air transport facilitation programme, a national air transport facilitation committee and airport facilitation committees.²⁶⁴ The national air transport facilitation committee, according to the PWD Manual and ICAO Doc 10042, is responsible for developing best practices, handling complaints and enforcing compliance in respect of accessible air transport for PWDs.²⁶⁵

All EU Member States, the US and Canada have their own specific agency to enforce accessibility standards.²⁶⁶ The measures to enforce accessibility standards vary from an annual disability-related report to on-site inspection.²⁶⁷ All enforcement bodies have the authority to handle a complaint and order sanctions, which will be discussed in Chapter 5 as it is relevant to remedy.²⁶⁸

Persons and Persons with Reduced Mobility, 50(C), JATM, 41, 43 (2016). See Section 1.1.2, Chapter 1.

263 *Proposal for a Regulation of the European Parliament and of the Council concerning the Rights of Persons with Reduced Mobility When Travelling by Air*, *supra* n. 93; *supra* n. 164; Opinion of the European Economic and Social Committee, *supra* n. 251.

264 Annex 9, *supra* n. 17.

8.17 Each Contracting State shall establish a national air transport facilitation programme based on the facilitation requirements of the Convention and of Annex 9 thereto.

265 PWD Manual, *supra* n. 12, chapter 13; ICAO, *Model National Air Transport Facilitation Programme*, ICAO Doc 10042, chapters 5-6.

266 Regulation 1107, art. 14.

267 The US monitors air carriers' activities through an annual report on disability-related complaints. Canada has various measures to enforce accessibility standards such as a periodic facility inspection, discussion with terminal operators, and specific focus on service providers that have a high risk of non-compliance and in respect of whom the impact of accessibility is pivotal. The Periodic Facility Inspection of Winnipeg Airport Authority conducted on 9 March 9 2015 found the contravention of the Personnel Training for the Assistance of Persons with Disabilities Regulations; Greater Moncton International Airport contravened sections 8 and 9 of the Personnel Training for the Assistance of Persons with Disabilities Regulations on or about 28 February 2014. See 14 C.F.R. § 382.157(d) (2009); *Code of Practice: Passenger Terminal Accessibility*, *supra* n. 121, 7; Canadian Transportation Agency, *Summary of Enforcement Actions Taken by the Agency*, <https://www.otc-cta.gc.ca/eng/summaries-enforcement-actions>, (accessed 13 Jan. 2017); Email communication to Manager, Accessible Transportation Complaints and Industry Standards, Canadian Transportation Agency / Government of Canada on 24 February 2016.

268 Regulation 1107, art. 15; 14 C.F.R. § 382.159 (2009); *Canada Transportation Act*, *supra* n. 118, s. 172.

4.7 THE EFFECTIVENES OF ICAO ON INTERNATIONAL ACCESSIBILITY STANDARDS ON AIR TRAVEL FOR PERSONS WITH DISABILITIES

A broad scope of applications and measures to provide access to PWDs in air travel exists in the EU, the US and Canada according to the analysis above in Section 4.6.1 – Section 4.6.4. With the consideration of both sovereignty and human rights as a backdrop, a suggestion for compliance with ICAO SARPs may be a convincing solution in relation to the procedural aspect since ICAO is entrusted to develop international standards.²⁶⁹ However, no hasty conclusion should be drawn before reviewing the role of ICAO in providing a reference tool. I will ascertain ICAO's role in three areas. One is the substance of SARPs and the PWD Manual. Next is the measures to accelerate the implementation of SARPs and the PWD Manual and the last aspect pays attention to the consideration of the CRPD and cooperation with the CRPD Committee by ICAO.

4.7.1 Contents of SARPs and the PWD Manual as a reference tool

The US and Canada cover aspects untouched by ICAO such as in-flight entertainment information, conflicts between types of impairment, an extra seat requirement and specific services for persons with mental impairment. An argument that ICAO publishes SARPs as a minimum standard so that ICAO can disregard certain issues is objectionable. As a reference tool for States Parties to the CRPD to implement accessibility standards, ICAO should embrace issues on accessibility standards as comprehensively as possible.

The PWD manual elaborates more details but it was published after the adoption of Regulation 1107, Part 382 and the CTA and its subordinate laws, except for the Accessibility Guidelines for Small Aircraft. Therefore, there is a shadow of doubt concerning the implementation of the PWD Manual, which does not legally bind States.

SARPs and the PWD Manual permit States to exercise their discretion so broadly that differences are found in selected accessibility standards. Difference leads to questions on discrimination among routes or air carriers as evidenced in the case of service animals and advance notice.

Annex 9 and the PWD Manual are formulated in a descriptive way to address operational aspects. By doing so, central legal criteria to evaluate lawfulness upon deviation from accessibility standards are not explicitly established. For instance, while encouraging a discounted ticket for an accompanying person, ICAO leaves States or air carriers to determine the reduction freely.

²⁶⁹ See Young, *supra* n. 134, 215.

An obligation to impose a prerequisite on accessibility in a license and an obligation to provide reasonable accommodation under the CRPD are not transposed in Annex 9 and the PWD Manual.

To put it bluntly, ICAO is no leader when it comes to qualitative and quantitative contents.

4.7.2 Acceleration of the implementation of SARPs and the PWD Manual

It is settled that how States implement Standard 8.27 and Standard 8.34 concerning ensuring equivalent access to airports and air services remains unaudited by ICAO. Moreover, ICAO has not yet generated any model clause on accessibility in ASAs and it has never urged States to incorporate this clause into ASAs.

The language of these two Standards is rather vague with the phrase ‘necessary steps’ without any definition or element on what constitutes necessary, so it leaves States to exercise their own discretion. Accordingly, the level of implementation among States is disparate. The CRPD concluding observations from country reports indicate that a handful of States Parties do not publish an accessibility plan on air transport, at least when they submitted the initial report to the CRPD Committee.²⁷⁰ It is uncertain on how they ensure equivalent access without having accessibility standards and they have not filed any difference to these two Standards to ICAO.²⁷¹ Different measures on accompanying persons, advance notice and restrictions on mobility aids, to name a few, support the conclusion that the absence of a submission on any

270 Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Report Submitted by Bolivia*, (Sixteenth session, 2016), U.N. Doc. CRPD/C/BOL/CO/1, para. 21; Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Report Submitted by Costa Rica*, (Eleventh session, 2014), U.N. Doc. CRPD/C/CRI/CO/1, para. 20; Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Report Submitted by El Salvador*, (Tenth session, 2013), U.N. Doc. CRPD/C/SLV/CO/1, para. 23; Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Initial Report Submitted by Ethiopia*, (Sixteenth session, 2016), U.N. Doc. CRPD/C/ETH/CO/1, para. 12; Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Report Submitted by Gabon*, (Fourteenth session, 2015), U.N. Doc. CRPD/C/GAB/CO/1, para. 23; Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Report Submitted by Mauritius*, (Fourteenth session, 2015), U.N. Doc. CRPD/C/MUS/CO/1, para. 18; Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Report Submitted by Paraguay*, (Ninth session, 2013), U.N. Doc. CRPD/C/PRY/CO/1, paras 25-26; Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Initial Report Submitted by Qatar*, (Fourteenth session, 2015), U.N. Doc. CRPD/C/QAT/CO/1, para. 19; Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Report Submitted by Uganda*, (Fifteenth session, 2016), U.N. Doc. CRPD/C/UGA/CO/1, para. 17a.

271 *Supra* n. 23.

difference to these two Standards cannot guarantee uniform practice among contracting States to the Chicago Convention.²⁷²

While dissimilarities are observed in the EU, the US and Canada, none of the Member States of the EU, the US and Canada have informed ICAO on any differences to Recommended Practices despite a request in the ICAO Assembly resolution. This non-notification may be due to the broad language in Recommended Practices as seen in the case of service animals which permit States to specify types of service animals themselves, so States deem their practices to be consistent with the Recommended Practices.²⁷³

Since there is no information filed on any deviations to Recommended Practices pertaining to PWDs, it is inappropriate to draw a conclusion that the legal force of Recommended Practices has been raised to the same status as Standards. Rather, a conclusion would be that the legal force of Standard 8.27 and Standard 8.34 is similar to that of Recommended Practices pertaining to PWDs. This stems from their differences to other safety-related Standards which are strengthened by the ICAO audit, a model clause in an ASA and incorporation into an ASA by States.

4.7.3 Utilization of the provisions in the CRPD

The CRPD provides channels for ICAO to enhance the implementation of SARPs on PWDs. International cooperation under Article 32 of the CRPD has led to the establishment of the UN Partnership to Promote the Rights of Persons with Disabilities (UNPRPD), a collaboration between various UN entities, governments and disabled people's organizations with the aim to advance disability rights. Neither ICAO nor other international aviation associations have joined this UNPRPD. Therefore, no scope on air travel is discussed in this collaboration.

Under Article 38 of the CRPD, ICAO is entitled to be represented or invited to provide expert advice on the implementation of the CRPD relevant to ICAO's mandates.²⁷⁴ An examination of the draft CRPD General Comment No. 2 shows that two UN specialized agencies, namely, the ITU and the United Nations Children's Emergency Fund (UNICEF) submitted comments on the draft CRPD General Comment No. 2 and there is no indication why ICAO did not

²⁷² See Section 4.6.2 and Section 4.6.3.

²⁷³ The US DOT argues its conformity with SARPs when it published Part 382. See Section 4.6.1.1.

²⁷⁴ CRPD, art. 38(a). Actually, the Agreement between the UN and ICAO also allows ICAO to coordinate with the UN. It actively works with other UN specialized agencies but none of them are human rights treaty bodies. See Agreement between the United Nations and the International Civil Aviation Organization, (31 May 1948), ICAO Doc 7970, art. V; Ludwig Weber, *International Civil Aviation Organization (ICAO)*, 127-128 (Kluwer Law International, 2012).

respond.²⁷⁵ General Comment No. 2 was adopted in 2014 and the PWD Manual was published in 2013. Both would support each other, if there had been cooperation between the CRPD Committee and ICAO.

4.8 CONCLUDING REMARKS

ICAO, the EU, the US and Canada are all bound by the provisions in the CRPD to a different degree. While the EU and Canada ratified the CRPD, the US signed it. ICAO is bound because of an agreement with the UN. A perusal based on the framework in Chapter 3 indicates both similar and dissimilar implementation and interpretation concerning four issues: (1) scope of application (2) conformity with obligations concerning accessibility standards (3) conformity with non-discrimination on the basis of disability and (4) enforcement. These differences consequently reflect the weak legal force of SARPs in Annex 9.

The scope of application of the EU, the US and Canada on accessibility standards shows concurrent jurisdiction because of the application of domestic laws to foreign air carriers that have already been subjected to the law of the place of business. This appears problematic to let a random place of arrival or departure determine which law is applicable to an air carrier and a passenger.

The level of conformity to accessibility in the CRPD is disparate. The US, which is not a State Party to the CRPD, has more comprehensive accessibility standards than the EU and Canada. The EU lacks content concerning physical accessibility for airports and aircraft. The service animal in the EU and Canada is restricted only to dogs.

Where exceptions are concerned, safety reasons as referred to by ICAO, the EU, the US and Canada may be justified because they are linked to the right to life of all people and this should not be jeopardized. However, they are not released from the obligation to provide reasonable accommodation. This has to be done through States implementation of the reasonable accommodation concept in their domestic law. The exception related to the size of the operation, which is not mentioned by ICAO, is evident in the EU, the US and Canada. However, if such grounds were acceptable, it would harm the core of access-

²⁷⁵ See UN Office of the High Commissioner for Human Rights, *Draft General Comment on Article 12 of the Convention – Equal Recognition before the Law & Draft General Comment on Article 9 of the Convention – Accessibility*, <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/DGCArticles12And9.aspx> (accessed 13 Jan. 2017). ICAO involved with the drafting of the CRPD when it was asked to review the draft CRPD in relation to Annex 9. However, at that moment, ICAO viewed that there is no requisite to provide for further international legislation in this respect. See Ad Hoc Committee on an International Convention, *Response by the International Civil Aviation Organization (ICAO)*, <http://www.un.org/esa/socdev/enable/rights/uncontrib-icao.htm> (accessed 13 Jan. 2017).

ibility. PWDS would not be able to equally gain access to these exempted airports.

Among the four issues, enforcement is the least problematic since all accessibility standards contain sanctions and there is an enforcement body to enforce such sanctions. Admittedly, the contents vary among the EU, the US and Canada but the CRPD and ICAO leave States room to exercise their own discretion.

With regard to the second research question concerning the ICAO accessibility standards as a reference tool for States, it is accepted that an extraterritorial application can be solved at an international venue and ICAO may be a good option. However, the contents in SARPs are less extensive and are imprecise. ICAO does not have monitoring and enforcement functions at its disposal because there is no audit for SARPs for PWDS except for Standard 8.38. ICAO has not made the most of the implementation of SARPs through the ASA, the license requirement and cooperation with the CRPD Committee. Therefore, in my opinion, at this *status quo*, ICAO has not had recourse to all tools it employs.

The upshot is that the implementation of SARPs and the provision of accessible air travel to PWDS are subject to each State's jurisdiction. Dissimilar practice can lead to conflict between PWDS, on the one side, and airport operators and air carriers, on the other side; as a result, the unavoidable question concerning remedies comes into focus.

5 Remedies for persons with disabilities in respect to air travel

5.1 INTRODUCTION

When an air carrier or an airport operator has duties as explained in Chapter 4, the implication is that a person with disabilities (PWD) has rights in relation to them and where there is a right, there should be a remedy – *ubi jus ibi remedium* being the basic principle.¹ Accessibility standards in Chapter 4 concern public law, while the contract of carriage by air provides another remedial channel through private law. Strictly focusing on international carriage by air, remedies may fall under the Convention for the Unification of Certain Rules Relating to International Carriage by Air of 1929 (Warsaw Convention of 1929),² and the Convention for the Unification of Certain Rules for International Carriage by Air of 1999 (Montreal Convention of 1999)³ which govern the liability of air carriers.⁴ The Montreal Convention of 1999, forms the basis for this discussion, because the EU Member States and the EU,⁵ the US⁶ and Canada⁷ have ratified the Montreal Convention of 1999,⁸ so it prevails

1 Jonathan Law, *A Dictionary of Law*, (8th ed., Oxford University Press, 2015) <http://www.oxfordreference.com/view/10.1093/acref/9780199664924.001.0001/acref-9780199664924-e-4078?rskey=oW0xsh&result=4422> (accessed 23 May 2017).

2 Convention for the Unification of Certain Rules Relating to International Transportation by Air (Warsaw, 12 Oct. 1929), T.S. 876, (Warsaw Convention of 1929).

3 Convention for the Unification of Certain Rules for International Carriage by Air, (Montreal, 28 May 1999), ICAO Doc 9740, (Montreal Convention of 1999).

4 Both Conventions apply to all international carriage of persons, luggage or goods performed by aircraft for reward subject to the condition that the place of departure and the place of destination are situated in the territories of two States Parties or within the territory of a single State Party if there is an agreed stopping place within the territory of another State, even if that State is not a State Party. See Warsaw Convention of 1929, art. 1; Montreal Convention of 1999, art. 1.

5 In the EU, the Montreal Convention of 1999 was implemented by Regulation 2027/97, as amended by Regulation 889/2002. Regulation 889/2002 extends the scope of application of the Montreal Convention of 1999 to carriage by air within a single Member State. See Regulation (EC) No 889/2002 of the European Parliament and of the Council of 13 May 2002 amending Council Regulation (EC) No 2027/97 on air carrier liability in the event of accidents, OJ L 140, 30.5.2002, p. 2-5, (Regulation 889) art. 1.

6 On 5 September 2003, the US was the 30th State to deposit its instrument of ratification of the Montreal Convention of 1999 so the Montreal Convention of 1999 entered into force sixty days later. Domestic baggage liability in the US is subject to 14 CFR Part 254.

over the Warsaw Convention of 1929, under the conditions laid down in Article 55 of the Montreal Convention of 1999.⁹ Nevertheless, a reference to the Warsaw Convention of 1929, is inevitable when its contents are relevant to the discussion. This Chapter puts forward two questions: (1) how remedies to PWDs under these two regimes support each other or are in conflict and (2) whether such remedies are in line with the right to an effective remedy as discussed in Chapter 3.

7 Canada incorporated the Warsaw Convention of 1929 and the Montreal Convention of 1999 into the Carriage by Air Act. *See Carriage by Air Act*, R.S.C., 1985, c. C-26. However, the CA Agency has an authority to determine the applicability of the principles of the Montreal Convention of 1999 to a domestic tariff provision on a case-by-case basis. *See* Canadian Transportation Agency, Decision No. 313-C-A-2010, (27 June 2010); Canadian Transportation Agency, Decision No. 309-C-A-2010, (21 July 2010); Canadian Transportation Agency, Decision No. 483-C-A-2010, (24 Nov. 2010); Canadian Transportation Agency, Letter Decision No. LET-C-A-129-2011, (2 Dec. 2011); Canadian Transportation Agency, Decision No. 249-C-A-2013, (26 June 2013).

8 International Civil Aviation Organization, Current lists of parties to multilateral air law treaties, <http://www.icao.int/secretariat/legal/lists/current%20lists%20of%20parties/allitems.aspx> (accessed 25 May 2017).

9 Montreal Convention of 1999, art. 55.

This Convention shall prevail over any rules which apply to international carriage by air:

1. between States Parties to this Convention by virtue of those States commonly being Party to

- a) the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929 (hereinafter called the Warsaw Convention);

- b) the Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929, Done at The Hague on 28 September 1955 (hereinafter called The Hague Protocol);

- c) the Convention, Supplementary to the Warsaw Convention, for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person Other than the Contracting Carrier, signed at Guadalajara on 18 September 1961 (hereinafter called the Guadalajara Convention);

- d) the Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929 as Amended by the Protocol Done at The Hague on 28 September 1955 Signed at Guatemala City on 8 March 1971 (hereinafter called the Guatemala City Protocol);

- e) Additional Protocol Nos. 1 to 3 and Montreal Protocol No. 4 to amend the Warsaw Convention as amended by The Hague Protocol or the Warsaw Convention as amended by both The Hague Protocol and the Guatemala City Protocol Signed at Montreal on 25 September 1975 (hereinafter called the Montreal Protocols); or

2. within the territory of any single State Party to this Convention by virtue of that State being Party to one or more of the instruments referred to in sub-paragraphs (a) to (e) above.

5.2 REMEDIES UNDER INTERNATIONAL, REGIONAL, AND NATIONAL ACCESSIBILITY STANDARDS WITH RESPECT TO AIR TRAVEL

5.2.1 Scope of this Section

Containing procedural and substantive aspects, an effective remedy should provide both administrative and judicial mechanisms, and compensation may be a suitable option when no other restitution is possible. This Section explores the abovementioned elements in accessibility standards published by the International Civil Aviation Organization (ICAO), the EU, the US and Canada.¹⁰

5.2.2 Procedural aspects of an effective remedy in selected jurisdictions

In relation to procedural factors, complaint processes are different among EU Member States,¹¹ the US and Canada. In the US, a PWD must file a complaint within six months, which is relatively shorter than comparable provisions in other US laws.¹² Conversely, there is no limitation period for the filing of applications to the Canadian Transportation Agency (CA Agency), but a PWD has to contact a transportation service provider and allow a 30-day response as a pre-condition.¹³ Another difference is that the US DOT complaint process is not judicially reviewable.¹⁴ On the contrary, the CA Agency is a quasi-judicial tribunal, so its decisions are enforceable as rulings of the Federal Court of Canada.¹⁵

With regard to judicial mechanisms, international flights are subject to any applicable conventions.¹⁶ In the seminal case of *Stott v. Thomas Cook Tour*

10 See Section 1.3.3, Chapter 1 for the selection of comparisons.

11 See European Commission, *Evaluation of the application of Regulation 1107/2006* by Steer Davies Gleave on the application and enforcement of the regulation concerning the rights of disabled people and persons with reduced mobility when travelling by air, http://ec.europa.eu/transport/sites/transport/files/themes/passengers/studies/doc/2010_06_evaluation_regulation_1107-2006.pdf (accessed 13 Jan. 2017), chapter 5.

12 Raina Urton, *Trouble in the Skies: The ACAA's Failure to Protect Passengers with Disabilities*, 21:2 Law & Ineq. J., 437, 460-461 (2013).

13 Canadian Transportation Agency, Decision No. 335-AT-A-2007, (29 June 2007).

14 Stuart A. Hindman, *The Air Carrier Access Act: It is Time for an Overhaul*, 9:2 Issues Aviation L. & Pol'y, 365, 372 (2010).

15 Hence, the decisions are subject to an appeal process and, once they are final, those who do not comply with the decisions will be subject to administrative monetary penalties. See *Canadian Transportation Agency Designated Provisions Regulations*, SOR/99-244, schedule item 13.1; *Canada Transportation Act*, S.C. 1996, c. 10, ss 40-41; Canadian Transportation Agency, *Accessible Transportation Complaints: A Resource Tool for Service Providers*, (Oct. 2012), 26-27.

16 ICAO, *Manual on Access to Air Transport by Persons with Disabilities*, ICAO Doc 9984 (2013), foreword, (PWD Manual), para. 10.5; Regulation (EC) No 1107/2006 of the European Parliament and of the Council of 5 July 2006 concerning the rights of disabled persons and

Operators Ltd.,¹⁷ the UK Supreme Court decided that compensation for injury to PWDs comes under the rules of applicable international law.¹⁸

In the US, three circuit courts view that a PWD cannot bring the case to court under the Air Carrier Access Act (ACAA)¹⁹ and other state laws because the ACAA provides no private right of action and the ACAA as a federal law preempts other state laws on the same subjects.²⁰ On the contrary, the Ninth Circuit Court, in *Gilstrap v. United Air Lines, Inc.*, ruled that state-law remedies were not preempted by the ACAA even when state-law accessibility standards were preempted by the ACAA.²¹ Scholars and NGOs have proposed adding the private right of action to deter any further discriminatory practices by air carriers for a number of reasons.²² Congress has not integrated this in the ACAA.²³ Despite the lack of a private right of action, the Nondiscrimination on the Basis of Disability in Air Travel (Part 382) confirms and elaborates upon the liability of air carriers concerning mobility aids, and in the case of an international flight, compensation is calculated in accordance with any applicable international law.²⁴

In Canada, the Air Transport Regulations govern only domestic services, so no international convention is referred to. As a result, in the case of compensation in international air services, reference is made to any applicable international conventions in Section 5.3.

persons with reduced mobility when travelling by air, OJ L 204, 26.7.2006, p. 1-9 (Regulation 1107), art. 12. See Section 5.3.

17 [2014] UKSC 15. (Stott). See Section 5.3.2.

18 *Ibid.*, paras 20-21.

19 49 U.S.C. § 41705 (1986).

20 See *Love v. Delta Airlines*, 310 F.3d 1347, 1359 (11th Cir. 2002); *Boswell v. Skywest Airlines, Inc.*, 361 F.3d 1263, 1265 (10th Cir. 2004); *Lopez v. Jet Blue Airways*, 662 F.3d 593, 596 (2d Cir. 2011). Before the US Supreme Court decided in *Alexander v. Sandoval*, several Circuit Courts opined that the ACAA provided an implied private right of action. See *Tallarico v. Trans World Airlines, Inc.*, 881 F.2d 566 (8th Cir. 1989); *Shinault v. American Airlines, Inc.*, 936 F.2d 796 (1991); *Squire v. United Airlines, Inc.*, 973 F. Supp. 1004, 1006 (D. Colo. 1997); *Segalman v. Southwest Airlines Co.*, 603 Fed.Appx. 595, (9th Cir. 2015); *National Federation of the Blind v. United Airlines Inc.*, No. 11-16240, (9th Cir. 2016). On the contrary, the Ninth Circuit Court ruled that state law remedy was not preempted by the ACAA even when accessibility standards were preempted. See *Gilstrap v. United Air Lines, Inc.*, 709 F.3d 995 (9th Cir. 2013).

21 *Gilstrap*, *ibid.*

22 National Council on Disability, *Position Paper on Amending the Air Carrier Access Act to Allow for Private Right of Action*, 7, http://www.ncd.gov/rawmedia_repository/eec5d1a8_daeb_4a65_bd8b_4399a40c5496.pdf (accessed 13 Jan. 2017); Urton, *supra* n. 12, 451-457.

23 Carol J. Toland, *Overview of the Air Carrier Access Act*, Congressional Research Service, 8, <http://research.policyarchive.org/19925.pdf> (accessed 13 Jan. 2017).

24 Nondiscrimination on the Basis of Disability in Air Travel, 73 FR 27614, 27656, 13 May 2008.

In the EU, Directive 2013/11/EU on Alternative Dispute Resolution for Consumer Disputes,²⁵ adds an option for a PWD to settle a dispute arising from EU Regulation (EC) No. 1107/2006 of the European Parliament and of the Council of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air (Regulation 1107) by an alternative dispute resolution (ADR) provider.²⁶ However, there are different levels of development of ADR in relation to the aviation sector among EU Member States.²⁷ In the UK, the ADR applies to national and foreign air carriers whose flights arrived or departed from an airport on its territory on a voluntary basis while Germany requires all air carriers operating from or to a German airport to join the ADR.²⁸ Moreover, in the UK, air carriers cannot review the ADR decisions but passengers can, so air carriers may not give consent to using ADR.²⁹

5.2.3 Substantive aspects of an effective remedy in selected jurisdictions

In relation to substantive elements of an effective remedy,³⁰ several types of measures are provided under the accessibility standards in the EU, the US and Canada.

5.2.3.1 Compensation for personal injury

Theoretically, compensation schemes may be applied on domestic routes or international routes, since the latter come under any applicable international

25 Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR), OJ L 165, 18.6.2013, p. 63–79.

26 Tom van der Wijngaart & Sarah Pearson, *Alternative Dispute Resolution for Aviation Consumer Claims – UK Update*, 13, http://www.clydeco.com/uploads/Files/Newsletters/Aviation_Newsletter_June_2016.pdf (accessed 13 Jan. 2017). See Luftverkehrsgesetz (LuftVG) v. 01.08.1922, BGBl. I S. 698, § 57b(1); UK Civil Aviation Authority, Information for ADR entities approved by the CAA (including guidance on regulatory and additional information requirements), (CAP 1390), 6.

27 Naomi Creutzfeldt & Christof Berlin, *ADR in Aviation: European and National Perspectives*, 35:2 C.J.Q., 148, 161 (2016).

28 See UK Civil Aviation Authority, *Alternative Dispute Resolution*, <https://www.caa.co.uk/Passengers/Resolving-travel-problems/How-the-CAA-can-help/Alternative-dispute-resolution/> (accessed 18 May 2017); Swiss Re and University of Oxford, *Consumer Dispute Resolution – Implementing the Directive*, https://www.law.ox.ac.uk/sites/files/oxlaw/conference_report.pdf (accessed 18 May 2017).

29 US Department of State, *Eighteenth Meeting of the U.S.-EU Joint Committee Record of Meeting April 19, 2016*, <https://www.state.gov/e/eb/rls/othr/ata/e/eu/264796.htm> (accessed 13 Jan. 2017).

30 See Section 3.3.2.2, Chapter 3.

convention in order to avoid the exclusivity principle discussed in Section 5.3. On an international route, if either the Warsaw Convention of 1929, or the Montreal Convention of 1999, is applicable, compensation is considered under such convention. For example, in *Soltesz*, the plaintiff and his late wife booked a round-trip flight from New York to Budapest via Amsterdam operated by KLM, but booked and purchased through Delta.³¹ On a return trip from Budapest, the wife, who was a wheelchair user due to her health issues was unable to maneuver from her wheelchair into her assigned seat because the backs of two seats in her row were broken; as a result, she was disembarked from the flight, and air carriers were unable to accommodate her on other flights.³² Thereafter, she passed away.³³ The plaintiff did not allege any breach of Regulation 1107 or the ACAA, but he referred to the Montreal Convention of 1999.³⁴ Later the parties agreed to settle and the court dismissed the case.³⁵

Among EU Member States, only the UK allows compensation to a PWD including compensation for injury to feelings.³⁶

Across the Atlantic, the US DOT does not compel air carriers to retribute any damages suffered by a PWD on both domestic and international flights.³⁷ Yet, some courts follow *Gilstrap* and generously apply a State law to compensate PWDs and this issue will be discussed in Section 5.5.1.1.³⁸ The CA Agency is authorized to award compensation to a PWD for any expenses arising from an undue obstacle, and it does not differentiate authority between domestic and international routes;³⁹ however, for damage to feelings or pain,

31 *The Estate of Vilma Soltesz et al., v. Delta Air Lines, Inc. et al.*, 2014 WL 2452488 (S.D.N.Y.), paras 16-17.

32 *Ibid.*, paras 24-29.

33 *Ibid.*, para. 42.

34 *Ibid.*, paras 44-47.

35 *The Estate of Vilma Soltesz et al., v. Delta Air Lines, Inc. et al.*, 1:14-cv-03893-RJS, (S.D.N.Y. dismissed 4 Apr. 2016).

36 Steer Davies Gleave, *supra* n. 11, para. 5.28; Civil Aviation (Access to Air Travel for Disabled Persons and Persons with Reduced Mobility) Regulations 2007, SI 2007/1895, reg. 9. It is repealed by Civil Aviation (Access to Air Travel for Disabled Persons and Persons with Reduced Mobility) Regulations 2014, SI 2014/2833. See Section 5.3.2.

37 See Department of Transportation, Order 2013-12-4, Docket OST 2013-0004, (6 Dec. 2013). The complainant's wheelchair was loaded incorrectly and on his way home he was thrown face first out of the wheelchair and sustained physical injury. The US DOT ordered American Airlines to pay civil penalties but not compensation.

38 *Adler et al v. WestJet Airlines, Ltd.*, 31 F.Supp.3d 1381 (S.D.Fla. 2014). In *Gilstrap*, *supra* n. 20, the claimed damage happened at an airport but the court did not examine whether it happened within a temporal scope of the Montreal Convention of 1999 or not.

39 *Canada Transportation Act*, *supra* n. 15, s. 172(3). See Canadian Transportation Agency, Decision No. 108-AT-A-1998, (19 Mar. 1998). The flight was from Toronto to Halifax; Canadian Transportation Agency, Decision No. 635-AT-A-1998, (22 Dec. 1998). The flight was from Thunder Bay to Ottawa via Toronto; Canadian Transportation Agency, Decision No. 246-AT-A-1999, (17 May 1999). The CTA ruled that the additional cost to travel with another air carrier has to be compensated (round trip between Calgary and Regina); Canadian Transportation Agency, Decision No. 312-AT-A-1999, (4 June 1999). A flight was

it has no jurisdiction.⁴⁰ According to the Canada Transportation Act Review Panel Report in 2001, compensation for loss of dignity or hurt feelings arising from discrimination in the transportation system should be under the review of the CHRC.⁴¹ In sum, each jurisdiction deals with monetary compensation differently.

5.2.3.2 Penalties for personal injury

Penalties for breach of duty to ensure access to PWDs are stipulated in regulations of the EU Member States, the EU, the US and Canada.⁴² The monetary penalties are in line with Article 9(2)(a) and (b) of the Convention on the Rights of Persons with Disabilities (CRPD) as well as the Committee on the Rights of Persons with Disabilities (CRPD Committee) General Comment, which recommends that States impose sanctions on those who fail to apply accessibility standards.⁴³ The ICAO Manual on Access to Air Transport by Persons with Disabilities (PWD Manual) is silent on penalties. By way of comparison to compliance to safety-related SARPs, ICAO leaves each State discretion on the amount of a penalty.⁴⁴

between Toronto, Ontario and Deer Lake, Newfoundland and the costs of the tickets were not an expense incurred by a PWD as a result of an undue obstacle; Canadian Transportation Agency, Decision No. 560-AT-A-2004, (22 Oct. 2004). A flight was from Toronto, Ontario to Deer Lake, Newfoundland, compensation which is irrelevant to undue obstacle to a PWD cannot be given; Canadian Transportation Agency, Decision No. 426-AT-A-2003, (23 July 2003). A flight was from Vancouver, Canada to London, England but the air carrier had compensated already.

40 See Canadian Transportation Agency, Decision No. 106-AT-A-1999, (16 Mar. 1999). No award is rendered for lost enjoyment; Canadian Transportation Agency, Decision No. 452-AT-A-1999, (29 July 1999). No award is rendered for loss of dignity and independence; Canadian Transportation Agency, Decision No. 675-AT-A-1999, (2 Dec. 1999). The CTA cannot award for humiliation suffered.

41 David Baker & Sarah Godwin, *ALL ABROAD!: The Supreme Court of Canada Confirms that Canadians with Disabilities Have Substantive Equality Rights*, 71 Sask. L. Rev., 39, 74 (2008).

42 Regulation 1107, art. 16. See Department of Transportation, Order 2016-4-7, Docket OST-2016-0002 (14 Apr. 2016); Department of Transportation, Order 2016-4-8, Docket OST-2016-0002 (14 Apr. 2016); Department of Transportation, Order 2016-4-9, Docket OST-2016-0002 (14 Apr. 2016). In April 2016, three foreign air carriers, Lufthansa, Air France and British Airways, were fined in an amount ranging from 150,000-200,000 US dollars due to not adequately responding to complaints filed by PWDs between 2012-2015.; *Canadian Transportation Agency Designated Provisions Regulations*, *supra* n. 15, schedule items 100-124; Canadian Transportation Agency, Decision No. 127-AT-A-2002, (20 Mar. 2002).

43 Convention on the Rights of Persons with Disabilities, (24 Jan. 2007), U.N. Doc. A/RES/61/106, art. 9(2)(a)(b), (CRPD); Committee on the Rights of Persons with Disabilities, General Comment 2, Art. 9 (Eleventh session, 2014), U.N. Doc. CRPD/C/GC/2, para. 28.

44 ICAO, *Safety Oversight Manual*, ICAO Doc 9734 AN/959, Part A, The Establishment and Management of a State's Safety Oversight System, (2nd ed. 2006) para. 3.3.

In the EU, there are great variations in the amount of penalties among the Member States because the economic level of each Member State is dissimilar.⁴⁵ This brings up the question of how the European Commission evaluates the effectiveness of such sanctions. Similarly, the CRPD Committee is concerned about variations in practice of NEBs and urges the EU to monitor and harmonize these differences to ensure the rights of PWDs.⁴⁶ In my view, a more important factor than variations in the sum of a penalty is its effectiveness in discouraging any wrongdoers from non-compliance with accessibility standards. The elements in Article 16 of Regulation 1107 have already provided an answer, stating that penalties should be effective, proportionate and dissuasive.⁴⁷ Thus, the European Commission should monitor the EU Member States on this matter.

The civil penalty in the US can amount to more than thousands of US dollars.⁴⁸ But the US DOT allows an air carrier to partially offset the civil penalty – a financial penalty imposed by a government agency to enforce regulations – by measures to improve services or facilities to meet the needs of PWDs in the future.⁴⁹

5.2.3.3 Remedial measures

Remedial measures in the EU also vary among its Member States according to the two reports submitted to the European Commission by Steer Davies Gleave and by Philippe & Partners.⁵⁰

The remedial measures ordered by the US DOT range from an order to compel compliance to a fine, or even revocation of an air carrier's certificate.⁵¹ The CA Agency not only requires the respondent in question to accommodate a PWD in that case, but it also proactively orders appropriate corrective measures including amendments to the air carrier's policy or training to accommodate PWDs in other similar situations.⁵² In this respect, the orders

45 European Commission, *Report on the assessment on rules on penalties applicable to infringements to Regulation (EC) 1107/2006, concerning the rights of disabled persons and persons with reduced mobility when travelling by air, prepared by the law firm Philippe & Partners*, para. 151, https://ec.europa.eu/transport/themes/passengers/air/european_case_law_en (accessed 13 Jan. 2017).

46 Committee on the Rights of Persons with Disabilities, Concluding observations on the initial report of the European Union, CRPD/C/EU/CO/1, 2 October 2015, paras 52-53.

47 Regulation 1107, art. 16. The CRPD Committee also provides similar criteria on penalties. See Section 3.3.1, Chapter 3.

48 Department of Transportation, Order 2006-8-7, Docket OST 2006-23528 (7 Aug. 2006); Department of Transportation, Order 2016-1-3, Docket OST-2016-0002, (7 Jan. 2016).

49 *Ibid.*

50 See Steer Davies Gleave, *supra* n. 11, paras 27, 5.16-5.18, 5.25-5.28, 8.19; Philippe & Partners, *supra* n. 45, paras 150-151.

51 Urton, *supra* n. 12, 446.

52 For a decision on peanut buffer zone, see Canadian Transportation Agency, Decision No. 134-AT-A-2013, (28 Mar. 2013).

of the US and Canada are in line with the meaning of effective remedy under human rights law concerning the prevention of future discrimination. Yet, their effect to create a systemical change is dubious since the orders solely bind the parties in the case and not third parties; therefore, a PWD has to challenge each air carrier in order to correct the same policy among a number of air carriers.⁵³

An example of different sanctions is illustrated in a case concerning an air carrier's rigid policy to prohibit persons with specific types of impairment from travelling alone. The Spanish court ordered the air carrier to change the discriminatory flight operation manual and to compensate PWDs according to their request for a symbolic amount of one euro.⁵⁴ In France, a similar case was considered as a criminal case and an air carrier was fined for a discriminatory act.⁵⁵

The CA Agency orders an air carrier to correct its action and inform its staff about an assessment procedure for self-reliance which must provide an opportunity for a person to self-determine their independence and 'must be based on a reasonable, non-discriminatory safety standard'.⁵⁶

These judgements and decisions are proof of a non-systemical change because a careful look at selected tariffs shows that some air carriers, which

53 For decisions on peanut buffer zones to different air carriers, see Canadian Transportation Agency, Decision No. 228-AT-A-2011, (16 June 2011), on Air Canada; Canadian Transportation Agency, Decision No. 134-AT-A-2013, (28 Mar. 2013), on Air Canada Jazz, Jazz and Jazz Air.

54 Steer Davies Gleave, *supra* n. 11, para. 4.19; Alldeaf, *Deaf passengers refused on board a plane to be compensated by Iberia*, <http://www.alldeaf.com/showthread.php?p=1346346> (accessed 13 Jan. 2017).

55 The French courts have decided several times on a discrimination claim against Easyjet's accompanying person policy. The TGI Bobigny and Paris Court of Appeal decided in *Gianmartini et al vs. Easyjet* that Easyjet's policy on an accompanying persons discriminated against PWDs and fined Easyjet 70,000 Euro. In 15 December 2015, the Criminal Chamber of the Court of Cassation affirmed the ruling. See Cass.crim., 15 décembre 2015, Bull crim. 2015, n° 286., <https://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000031658282> (accessed 14 Mar. 2017). In 19 January 2017, it was reported that the Criminal Court in Bayonne (*Tribunal correctionnel de Bayonne*) fined Easyjet 60,000 Euro for discrimination against a wheelchair user who was refused to board without an accompanying person. See French court fines easyJet over refusal to let disabled passenger board, <https://www.theguardian.com/business/2017/jan/20/french-court-fines-easyjet-over-refusal-to-let-disabled-passenger-board> (accessed 14 Mar. 2017).

56 Canadian Transportation Agency, Decision No. 354-AT-A-2015, (16 Nov. 2015) paras 9-11. Remarkably, this decision is different from a very similar CA Agency case in 2005. See Canadian Transportation Agency, Decision No. 435-AT-A-2005 (8 July 2005); *Canadian Transportation Agency v. Morten*, [2010] F.C. 1008; *Canadian Human Rights Commission v. Canadian Transportation Agency*, [2011] F.C.A. 332 (under the review).

operate flights to Spain, France or Canada, still disallow persons with specific type of impairments from solo flying.⁵⁷

5.2.3.4 Remedial measures for mobility aids

The US and Canada differentiate between domestic and international routes. In domestic services, an air carrier cannot limit its civil liability to the current value of mobility aids and other assistive devices.⁵⁸ US law is more elaborative because it explains that calculation is based on the original purchase price of the device, while Canada is silent in this area.⁵⁹

In international services, again, under EU Regulation 1107 and US Part 382, compensation is calculated in accordance with any applicable international law, which will be discussed in Section 5.3.6.3.⁶⁰

Canada takes an opposite approach. According to the report of the European Commission, Canada exercises its exclusive sovereignty over the airspace above its territory as a condition, so foreign air carriers landing on its territory have to break the liability ceiling under the Warsaw Convention of 1929, or the Montreal Convention of 1999.⁶¹ However, a review of selected tariffs of foreign air carriers operating to or from Canada does not reveal any consistent practice on liability for mobility aids.⁶²

57 Cathay Pacific, ANA and KLM require an accompanying person for a person with vision and hearing impairment without specifying the self-reliance criteria while Qatar differentiates between self-reliant and non self-reliant ones. See Cathay Pacific, *International Passengers Rules and Fares Tariff*, rule 20(B) (16 Oct. 1999); All Nippon Airways Company, *International passenger rules and fares tariff*, rule 21 (2 Apr. 2010); KLM, *Published fares, charges and related terms and conditions of carriage applicable to air services of KLM*, rule 57 (5 July 2013); Qatar Airways, *Airline Tariff International Passenger Rules and Fares*, rule 21(B) (15 Oct. 2014).

58 14 C.F.R. § 382.131 (2009); Air Transportation Regulations, s. 155(3)(b).

59 14 C.F.R. § 382.131 (2009). See Section 5.5.3.2.

60 Regulation 1107, art. 12; *supra* n. 24, 27656.

61 Commission of the European Communities, *Communication on the scope of the liability of air carriers and airports in the event of destroyed, damaged or lost mobility equipment of passengers with reduced mobility when travelling by air*, 7.8.2008, COM (2008) 510 final, 8. See Canada Air Transportation Regulations, SOR/88-58, s. 111. This application to foreign air carriers triggers a question on jurisdiction, see Section 4.6.1, Chapter 4; This may not be the case for the EU Community air carriers since the ASA between the EU and Canada contains a clause on accessibility measures that air carriers have to comply. See Agreement on Air Transport between Canada and the European Community and its Member States, (2009), art. 10.

62 Airlines following Canada's initiative are Qatar Airways and Cathay Pacific. The rest do not explicitly say so. See Qatar Airways, *Airline Tariff International Passenger Rules and Fares*, rule 21(B) (15 Oct. 2014); Cathay Pacific, *International Passengers Rules and Fares Tariff*, rule 20(B) (16 Oct. 1999). For further discussion, see Section 5.3.6.3 and Section 5.4.2.3.

5.2.4 Sub-conclusions

On domestic routes, remedial measures differ between the EU, the US and Canada particularly in relation to compensation. Compensation is in accordance with the Community law and national law.⁶³ The penalty amount is not uniform. The US and Canada also fine and revoke an air carrier's license if they fail to comply with accessibility standards.

For international flights, judicial mechanisms and compensation, both of which are indispensable for an effective remedy, are subject to the scope of international conventions, namely, the Warsaw Convention of 1929, as amended, and especially the Montreal Convention of 1999, as further explained in Section 5.3 below.

5.3 REMEDIES UNDER INTERNATIONAL CONVENTIONS ON INTERNATIONAL CARRIAGE BY AIR

5.3.1 Purpose and scope of international conventions

One shared objective of the Warsaw Convention of 1929, and the Montreal Convention of 1999, to establish uniformity of law governing liability of air carriers precludes other claims which fit into the temporal scope and substantive scope of their application. However, when a cause of action for compensation falls within these scopes of the Conventions, it does not automatically guarantee that a passenger will receive the claimed amount of damages. Compensation is subject to types of damages and limitation of the amount.

5.3.2 The application of the exclusivity principle

The exclusivity principle is enshrined to preside over any action for damages under any other law when a person can establish a recourse within a temporal scope and a substantive scope of the Warsaw Convention of 1929, or the Montreal Convention of 1999.⁶⁴ This exclusive cause of action is affirmed by the Supreme Court in the UK, the US and Canada as well as other jurisdictions.⁶⁵

63 See Regulation 1107, art. 12. For the implementing law of the EU, the US and Canada, see Section 5.1.

64 Warsaw Convention of 1929 art. 24; Montreal Convention of 1999, art. 29.

65 See *Sidhu v. British Airways Plc.* [1997] AC 430; *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng* 525 US 155 (1999); *Thibodeau v. Air Canada*, [2014] SCC 67; George N. Tompkins, Jr., *Summary of MC99 Judicial Updates 2013*, 39 Air & Space L., 91, 92 (2014).

5.3.2.1 *The exclusivity principle in relation to the rights of persons with disabilities*

The basis of claims by PWDs is non-discrimination on the basis of disability or failure to provide accessible air travel in compliance with the accessibility standards mentioned in Chapter 4. Both are rooted in human rights law. The key issue is whether a claim on human rights is barred by the Warsaw Convention of 1929, and the Montreal Convention of 1999.

In *Stott*, the plaintiff claimed damages for discomfort and injury to feelings as a result of a breach of the UK Disability Regulations, which implemented EU Regulation 1107. There was no dispute that the defendant had breached its obligations to accommodate a seat as requested by the plaintiff, who was a permanent wheelchair user. Since the plaintiff's claimed injury occurred on board an aircraft, the defendant argued that the exclusivity principle in the Montreal Convention of 1999, preempted this claim.⁶⁶ The UK Supreme Court examined cases dealing with this principle in the UK and other jurisdictions and regrettably affirmed that the plaintiff's claim under the UK Disability Regulations was barred since the case had occurred within the temporal scope of the Montreal Convention of 1999.⁶⁷ In short, the uniformity of liability of air carriers under international law is more crucial than human rights values.

Similar to *Stott*, most of the private claims made under the ACAA and state laws are preempted by either the Warsaw Convention of 1929, or the Montreal Convention of 1999.⁶⁸ They follow the complete preemption, a binding precedent in *Sidhu v. British Airways Plc.*,⁶⁹ and *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*,⁷⁰ both of which were decided under the Warsaw Convention of 1929. The judgments of some lower US courts which deviate from the mainstream view will be further explored in Section 5.5.1.1.

5.3.2.2 *The exclusivity principle and other claims on human rights*

Not only the rights of PWDs based on domestic law are preempted by the Conventions, but also other rights recognized in domestic law but not incorpor-

⁶⁶ *Stott*, *supra* n. 17, para. 60.

⁶⁷ *Stott*, *ibid.*, para. 61. See Section 5.3.3.

⁶⁸ *Brandt v. American Airlines*, 2000 U.S. Dist. LEXIS 3164; *Waters v. Port Authority of New York & New Jersey*, 158 F. Supp. 2d 415 (D.N.J. 2001); *Turturro v. Continental Airlines*, 128 F. Supp. 2d 170 (S.D.N.Y. 2001), as plaintiff lost Xanax, to help her cope with her fear of flying. The state-law claim is preempted. See *Fazio v. Northwest Airlines, Inc.*, Not Reported in F.Supp.2d (2004), a plaintiff claims on the failure of airline to provide a wheelchair to the boarding area is barred by the time prescription under the Warsaw Convention of 1929; *Duay v. Continental Airlines, Inc.*, Not Reported in F.Supp.2d (2010), a state-law claim on damage to wheelchair is preempted by the Montreal Convention of 1999.; *Ramos v. American Airlines, Inc.*, Not Reported in F.Supp.2d (2011), the defendant let the plaintiff sit down in the wheelchair and caused her to fall on the floor.

⁶⁹ *Sidhu*, *supra* n. 65.

⁷⁰ *Tseng*, *supra* n. 65.

ated in the Conventions are precluded, such as protection against racial discrimination in *King v. American Airline Inc et al*,⁷¹ and language rights in *Thibodeau v. Air Canada*.⁷² However, all of these assertions are based on domestic laws so they should not be interpreted to conflict with a State's obligation to observe international law, in this case the Warsaw Convention of 1929, or the Montreal Convention of 1999.⁷³

As a consequence, one might ask, if the holding would have been different had the claim in *Stott* based on the CRPD, would the judgment be different? In *Sidhu*, the plaintiff's argument for the ECHR as another basis for a claim was rebutted since not all the parties to the Warsaw Convention of 1929, were party to the ECHR.⁷⁴ Despite no reference to the Vienna Convention on the Law of Treaties (VCLT), the House of Lords implicates that the treaty that can become the 'relevant rules of international law' for interpretation must be applicable between all of the parties to the Warsaw Convention of 1929. An analogy from *Sidhu* renders a similar result because the parties to the CRPD are not the same as the parties to the Montreal Convention of 1999.⁷⁵

5.3.2.3 The exclusivity principle in relation to obligations *erga omnes*

Interestingly, if a claim were to be based on an obligation *erga omnes*, would the result be different because all States are bound by this obligation? No case has ever challenged the exclusivity principle by raising an obligation *erga omnes* as another competing value. Lady Hale noted in *Stott* that protection against racial discrimination as a peremptory norm voids any conflicting provision in any treaty.⁷⁶ Even though a central basis of the claim in *King* is racial discrimination, the plaintiff claimed under domestic law, despite protection from racial discrimination being an obligation *erga omnes*.⁷⁷

This obligation binds a State as an actor in international law,⁷⁸ so Lady Hale further placed an obligation only on State airlines.⁷⁹ While Lady Hale's

71 *King v. American Airline Inc et al*, 284 F.3d 352 (2002). See *Gibbs v. American Airlines*, 191 F.Supp.2d 144 (2002). Section 2.4.2.2, Chapter 2.

72 *Thibodeau*, *supra* n. 65.

73 Vienna Convention on the Law of Treaties (Vienna, 23 May 1969) 1155 U.N.T.S. 331 (VCLT), art. 27.

74 *Sidhu*, *supra* n. 65. See Section 1.3.2.1.B.

75 See Table 4 The US, Ireland, Tonga, Belarus, etc. signed the CRPD but ratified the Montreal Convention of 1999. Botswana and Equatorial Guinea did not sign the CRPD but ratified the Montreal Convention of 1999.

76 *Stott*, *supra* n. 17, para. 68.

77 *King*, *supra* n. 71; See *Gibbs*, *supra* n. 71. Both cases happened after the ICJ had ruled that protection from racial discrimination is an obligation *erga omnes* in 1970. See Section 6.3, Chapter 6.

78 *Barcelona Traction, Light and Power Company, Limited (New Application: 1962) (Belgium v. Spain)*, Judgment, I.C.J. Rep. 1970 (5 Feb. 1970), paras 33-34.

79 *Stott*, *supra* n. 17, para. 70.

obiter dictum provides a solution to racial discrimination carried out by State airlines, it creates different results for other types of discrimination as well as for racial discrimination done by private airlines.⁸⁰

In relation to transport, the Committee on the Rights of the Child (CRC Committee) expressly affirms States obligations even when transport services are privatized.⁸¹ This *obiter dictum* also contradicts views rendered by all UN human rights treaty bodies concerning private sector discrimination.⁸² The opinion of the Committee on the Elimination of Racial Discrimination (CERD Committee) states that protection from racially discriminatory practices obliges States to adopt measures to inhibit such acts by private entities.⁸³ Thus, applying the CERD Committee's viewpoint to Lady Hale's *dictum*, a State must curb private entities, in this case, air carriers and their agents, from carrying out racial discrimination.

5.3.3 Temporal scope of application international conventions on international carriage by air

5.3.3.1 Application of conventions in international carriage by air

Both Conventions apply to a journey between two Contracting States or within a Contracting State if there is an agreed stopping place within the territory of another State.⁸⁴ However, the Conventions do not apply once a contract of carriage has been formed, but only when the situation takes place in a specified temporal scope as dealt with under case law.

80 Mark Andrew Glynn, *Case Comment Stott v. Thomas Cook Tour Operators Ltd* [2014] UKSC 15 & *Thibodeau v. Air Canada* [2014] SCC 67, 39 *Annals Air & Space L.*, 683, 692 (2014).

81 Committee on the Rights of the Child, General Comment 16, State obligations regarding the impact of the business sector on children's rights (Sixty-second session, 2013), U.N. Doc. CRC/C/GC/16, paras 15, 33. See Section 2.2.5, Chapter 2. For the argument on human rights obligation of States when a public function is privatized in case of the UK, Palmer gives examples of cases in the UK argues that governments should not contract out human rights obligations by privatization. See Stephanie Palmer, *Privatization and Human Rights in the United Kingdom*, 233 in *Boundaries of State, Boundaries of Rights: Human Rights, Private Actors, and Positive Obligations* (Tsvi Kahana & Anat Scolnicov, Cambridge University Press 2016).

82 Wouter Vandenhoe, *Non-discrimination and Equality in the View of the UN Human Rights Treaty Bodies*, 85, 213, 230, 246, (Intersentia 2005); Committee on the Rights of Persons with Disabilities, *Nyusti and Takács v. Hungary* (Communication no.1/2010), CRPD/C/9/D/1/2010. See Section 1.5.3.2, Chapter 1, Section 3.3.2.2 B. a., Section 3.3.5 Chapter 3.

83 Committee on the Elimination of Racial Discrimination, General Recommendation XXVII, Discrimination against Roma (Fifty-seventh session, 2000), U.N. Doc. A/55/18, Annex V, paras 12-16.

84 Warsaw Convention of 1929 art. 1; Montreal Convention of 1999, art. 1.

5.3.3.2 Persons with disabilities

For a passenger to claim damages, the locational requirement is that an accident takes place 'on board the aircraft or in the course of any of the operations of embarking or disembarking'.⁸⁵ The term 'on board the aircraft' is not as debatable as 'in the course of any of the operations of embarking or disembarking'. The US Court of Appeals for the Second Circuit adopted the criteria to examine embarking or disembarking, namely, the activity of passengers at the time of the accident, the air carrier's control or restrictions of movement, the imminence of passengers' actual boarding and the physical proximity to the gate.⁸⁶

In the case of PWDs, especially those requiring assistance after check-in, their control over their own movements may be limited by airport or airline staff who assist them at the airport. Case law reveals that the control aspect is not a standalone factor in assessing the temporal scope, but courts tend to take other aspects such as location and type of activity, into account.⁸⁷

In *Phillips v. Air New Zealand Ltd.*, the case involved personal damage to a person in a wheelchair on a moving escalator going to the departure gate.⁸⁸ The UK Queen's Bench Division adjudicated that there might be a number of operations of embarkation and the process of embarkation did not have to be a continuous one, so embarkation is not limited only to the point close to a departure gate, but it also includes other points such as security checks.⁸⁹ The same holds true in the case of disembarkation. A passenger who falls in a corridor in the terminal while being escorted by airline staff to the customs area is in the course of disembarkation.⁹⁰ However, this is inconclusive since case law provides different interpretations on whether an injury to a wheelchair

⁸⁵ Warsaw Convention of 1929 art. 17; Montreal Convention of 1999, art. 17(1).

⁸⁶ *Day v. Trans World Airlines, Inc.*, 528 F.2d 31 (1975).

⁸⁷ *Dick v. American Airlines, Inc.*, 476 F.Supp.2d 61 (2007); *Pacitti v. Delta Air Lines, Inc.*, Not Reported in F.Supp.2d (2008), the plaintiff fell down from a wheelchair between Gate 3 and 4 approximately ninety to ninety-five yards away from Gate 9. The Court decided that the case happened in a common area of the terminal used by various airlines for both domestic and international flights, and was not engaged in an activity that was imposed by Delta as a condition of embarkation; *Fazio, supra* n. 68, the defendant breached the contract by failing to provide wheelchair within an airport so the plaintiff's husband suffered a serious and significant fall and injury in the course of trying to transport himself through the terminal. The injury happened during an operation of embarking.

⁸⁸ *Phillips v. Air New Zealand Ltd.*, [2002] C.L.C. 1199 (2002), para 1.

⁸⁹ *Ibid.*

⁹⁰ *Lyons v. American Trans Air, Inc.*, 647 N.Y.S. 2d 845 (N.Y.A.D. 2d Dep't 1996); *Gabra v. Egyptair*, 27 Avi. 18,119 (S.D.N.Y. 2000) cited in George N. Tompkins, Jr., *Liability Rules Applicable to International Air Transportation as Developed by the Courts in the United States*, 190 (Kluwer Law International 2010).

user during a transfer from one gate to another gate falls within the category of embarkation or not.⁹¹

When a gravamen happens outside the temporal scope such as a passenger being refused to check-in,⁹² and a passenger whose ticket has been cancelled,⁹³ such passenger can claim under local laws since it is not preempted by the Conventions.

From this fact, there may be an artful pleading to argue that a cause of action occurring within the temporal scope can be traced back to a poorly-executed operation or miscommunication during the booking stage, check-in or any period before the applicable temporal scope. A PWD whose hip broke during a transfer from a wheelchair to a seat on board by a flight attendant may argue that it resulted from lack of training or from the management of the airline, which is not a part of the embarkation process. If a court finds this argument reasonable, then a uniformity purpose of the two Conventions will be jeopardized. This reason is affirmed by the Supreme Courts of the UK and of Canada because they must focus on the time when the accident occurred.⁹⁴

5.3.3.3 Checked mobility aids and service animals

The Warsaw Convention of 1929, and the Montreal Convention of 1999, do not contain any specific provisions on mobility aids and service animals. In my view, they can be considered as baggage.⁹⁵ An air carrier is liable when checked baggage is in the charge of an air carrier, while it is fault-based for unchecked baggage.⁹⁶

91 *Dick, supra* n. 87, a person was injured during transfer from an arrival gate to a departure gate is not close to the physical activity of getting on the aircraft. So a person can claim a state law negligent claim; *Seidenfaden v. British Airways* 83-5540 (N.D. Cal. 1984) cited in *The Twentieth Annual Journal of Air Law and Commerce Air Law Symposium*, A-18. http://smulawreview.law.smu.edu/getattachment/Symposia/Air-Law/Collected-Air-Law-Symposium-Papers/Complete_Volume_1986.pdf (accessed 13 Jan 2017), a passenger injured while being pushed in a wheelchair by personnel employed by the carrier to another terminal for purposes of departing on a domestic flight is in the course of the operations of embarking or disembarking; *Moss v. Delta Airlines, Inc., et al.*, No. 1-04-CV-3124-JOF (N.D. Ga. 2006), falling down from a wheelchair van was in a process of disembarkation.

92 *Aquino v. Asiana Airlines Inc.*, 105 Cal.App.4th 1272 (CAApp. 2003).

93 Canadian Transportation Agency, Decision No. 170-AT-A-1998, (16 Apr. 1998). Compensation is granted to a passenger who was refusal to carry in an international flight.

94 *Stott, supra* n. 17, para. 60; *Thibodeau, supra* n. 65, paras 83-85.

95 For an example of application on the Montreal Convention of 1999 on baggage to mobility aids, see *Steer Davies Gleave, supra* n. 11, para 8.45. However, it does not mention anything about service animal.

96 Warsaw Convention of 1929 art. 18; Montreal Convention of 1999, art. 17(2); *Dillon v. United Air Lines, Inc.*, 162 F.Supp.2d 380 (2001), a wheelchair was damaged while in the control of the air carrier; *Kabbani v. International Total Services*, 805 F. Supp. 1033, 1039 (D.D.C. 1992); the defendant is liable for theft carry-on baggage when it was temporarily in charge of the carrier's agent in the terminal.

5.3.4 Substantive scope of application international conventions on international carriage by air

In the case of baggage, the substantial scope of liability is less problematic than that of passengers. It covers an event within the temporal scope.⁹⁷

Where passengers are concerned, the Warsaw Convention of 1929, and the Montreal Convention of 1999, cover an 'accident' that happened within the abovementioned temporal scope, but neither Convention defines the term 'accident'.⁹⁸ The US Supreme Court in *Air France v. Saks*,⁹⁹ interpreted Article 17 of the Warsaw Convention of 1929, and held that injury itself cannot be an accident; rather, an accident must be 'an unexpected or unusual event or happening that is external to the passenger' and 'should be flexibly applied after assessment of all the circumstances surrounding a passenger's injuries'.¹⁰⁰ Hence, Saks, who lost her hearing in one ear after a normal operation of an aircraft, cannot recover under this provision since it was the result of an internal reaction in her, which therefore could not constitute an accident.

The phrase 'external to the passenger' brings to bear an issue concerning PWDs because a combination of a normal operation of an aircraft with an impairment of a PWD may trigger an injury solely to a PWD. This is the reason that special adjustments are made, in order to meet PWD's needs. This concern about external factors was raised in the Montreal Conference to draft the Montreal Convention of 1999. The last sentence of Article 16 of the draft text, which would be Article 17 of the Montreal Convention of 1999, excludes an air carrier's liability from any injury due to the passenger's health, and reads 'the carrier is not liable if the death or injury resulted solely from the state of health of the passenger'.¹⁰¹ However, this text was opposed by delegates from Norway and Sweden because the text was detrimental to PWDs and contrary to the draft's objective to protect consumers.¹⁰² Hence, this sentence was deleted. Yet, if *Saks*' interpretation is strictly adhered to, PWDs will not be able to make a claim for their injury.¹⁰³

Almost twenty years after *Saks*, the US Supreme Court interpreted the phrase 'external to the passenger' under the same Warsaw Convention of 1929. In *Olympic Airways v. Husain*, Dr. Abib Hanson, who was allergic to smoke,

⁹⁷ Warsaw Convention of 1929, art 18; Montreal Convention of 1999, art 17(2).

⁹⁸ Warsaw Convention of 1929, art 17; Montreal Convention of 1999, art.17(1).

⁹⁹ *Air France v. Saks*, 470 U.S. 392, 405 (1985).

¹⁰⁰ *Saks*, *ibid.*

¹⁰¹ ICAO, *International Conference on Air Law*, ICAO Doc 9775 Vol. II, 18.

¹⁰² ICAO, *International Conference on Air Law*, ICAO Doc 9775 Vol. I, 86; ICAO Doc 9775 Vol. II, *ibid.*, 76-77.

¹⁰³ See *Hipolito v. Northwest Airlines, Inc.*, 15 Fed.Appx. 109 (2001). Asthma attack was not an accident as it was not caused by an event external to a passenger. Airline's failure to provide a full bottle of oxygen is not the type of external, unusual event.

and his wife, Rubina Husain, asked to be seated far away from the smoking section but a flight attendant repeatedly refused, even though there were free seats available.¹⁰⁴ Two hours into the flight, Dr. Hanson fell ill and later he passed away. The US Supreme Court expanded the meaning of ‘accident’ and concluded that the inaction of a flight attendant could be considered as one of the injury-producing events that constitute an accident.¹⁰⁵ Although the causes of death and loss of hearing in *Husain* and *Saks* are both internal to the passengers, *Husain* differs from *Saks* in that a flight attendant’s thrice refusal in *Husain* was an unexpected and unusual event in light of an industry standard which was an external factor, while there is no unexpected external factor in *Saks*.

Husain’s broad meaning of accident is not free from controversy, however. In his dissenting opinion, the late Justice Scalia relied on the uniformity of law and rebutted the majority view, because the reasoning that an inaction cannot be an accident deviates from the interpretation in the UK and Australian jurisdictions.¹⁰⁶ Dempsey, furthermore, finds *Husain*’s holding troubling for airlines.¹⁰⁷ When the reasoning in *Husain* is applied to the case governed by the Montreal Convention of 1999, a strict liability regime will lead to air carriers having to insure a higher amount for compensation to passengers.¹⁰⁸ On a positive note, the insertion of duty of care encourages air carriers to keep up with industry standards,¹⁰⁹ and invest in training its cabin crew.¹¹⁰

In relation to cases concerning PWDs, although the *Husain* case does not apparently involve disability,¹¹¹ its reasoning in assessing an unexpected and unusual event using the industry standards can be applied to the case of PWDs. As evidenced in judgments rendered by lower courts in the US and Canada, if an air carrier has duties to provide accessible travel and not to discriminate against PWDs, the air carrier’s inaction or failure to provide

¹⁰⁴ 540 U.S. 644 (2004) (*Husain*).

¹⁰⁵ *Husain*, *ibid.* Other cases concerning smoking on board were not brought under the Warsaw Convention of 1929. In Australia, Qantas Airways Limited was sued under the Trade Practices Act 1974. See *Leonie Cameron v Qantas Airways Limited* [1995] FCA 1304; (1995) 41 FTR 417 (1995) 55 FCR 147 (16 June 1995). In the US, the Supreme Court of IOWA decided on a State law since the dispute happened in a domestic route. See *Ravreby v. United Airlines, Inc.*, 293 N.W.2d 260 (1980).

¹⁰⁶ *Husain*, *ibid.*, 663. See *Deep Vein Thrombosis and Air Travel Group Litigation*, [2003] EWCA Civ. 1005; *Qantas Ltd. v. Povey*, [2003] VSCA 227.

¹⁰⁷ Paul Stephen Dempsey, *Olympic Airways v. Husain: The US Supreme Court Gives the Term ‘Accident’ a Whole New Meaning*, 28 *Annals of Air and Space L.* 333, 341 (2003).

¹⁰⁸ Andrei Ciobanu, *Saving the Airlines: A Narrower Interpretation of the Term “Accident” in Article 17 of the Montreal Convention*, 31 *Annals of Air and Space L.* 1, 25 (2006).

¹⁰⁹ Ann Cornett, *Air Carrier Liability under Warsaw: The Ninth Circuit Holds that Aircraft Personnel’s Failure to Act in the Face of Known Risk is an “Accident” When Determining Warsaw Liability – Husain v. Olympic Airways*, 68 *J. Air L. & Com.* 163, 169 (2003).

¹¹⁰ George Leloudas, *Risk and Liability in Air Law*, 119 (Informa, 2009).

¹¹¹ See Section 1.4.1, Chapter 1 for a discussion on allergy and disability.

accessible travel for a PWD will constitute an accident.¹¹² Yet, when an air carrier is not legally bound to provide accommodation, not doing so does not trigger an accident.¹¹³

5.3.5 Compensation for damages to persons with disabilities

Both the Warsaw Convention of 1929, and the Montreal Convention of 1999, allow for compensation for 'bodily' injury.¹¹⁴ With the term 'bodily', the question is whether purely emotional distress, with no connection to bodily injury, is recoverable.

5.3.5.1 The term 'bodily injury' under the Warsaw Convention of 1929

Exclusion of mental injury may have been practiced in the early days of the commercial airline industry in order to foster acceptance for the new airline industry.¹¹⁵ The Chairman of the First Meeting of the Montreal Conference accepted that pure psychological injury had not been contemplated during the drafting history of the Warsaw Convention of 1929.¹¹⁶

Remarkably, international conventions and legislation for other modes of transportation adopt the expression 'personal injury' instead of 'bodily injury', so their scope is broader than that of air transport.¹¹⁷ There were attempts

112 *McCaskey v. Continental Airlines, Inc.*, 159 F. Supp. 2d 562 (S.D. Tex. 2001), the lack of crew training and responsiveness after the onset of a stroke is an accident.; *Prescod v. AMR*, 383 F.3d 861, 868 (9th Cir. 2004), an air carrier's failure to comply with a health-based request also triggered an accident under the Warsaw Convention of 1929.; *Bunis v. Isair GSA, Inc.*, 511 F.Supp.2d 319 (2007), failure to provide a wheelchair as request is an unusual or unexpected event.; *Balani v. Lufthansa German Airlines Corp.*, 2010 ONSC 3003, 2010 CarswellOnt 8357, failure to provide a wheelchair as requested by a passenger who was later fell down leading to an accident.

113 *Dogbe v. Delta Air Lines, Inc.*, 969 F.Supp.2d 261 (E.D.N.Y. 2013), 272, an air carrier was not obligated to allow a plaintiff to sit in the empty seat even if plaintiff's leg pain constitute a disability because no law prescribes such duty.; *Tinh Thi Nguyen v. Korean Air Lines Co., Ltd.*, 807 F.3d 133 (2015), an air carrier did not refuse requested wheelchair and an air carrier was not required to give personalized instructions in passenger's native language. Airline's failure to identify passenger as wheelchair passenger did not constitute unexpected or unusual event leading to accident under Warsaw Convention of 1929.

114 Warsaw Convention of 1929, art. 17; Montreal Convention of 1999, art. 17.

115 Andrew Field, *Air Travel, Accidents and Injuries: Why the New Montreal Convention is Already Outdated*, 28 Dalhousie L.J. 69, 96 (2005).

116 ICAO Doc 9775 Vol. I, *supra* n. 102, 110.

117 See Athens Convention relating to the Carriage of Passengers and Their Luggage by Sea, (Athens, 13 Dec. 1974) (Athens Convention); Protocol of 2002 to the Athens Convention Relating to the Carriage of Passengers and Their Luggage by Sea, 1974 (1 Nov. 2002), art. 3; Convention concerning International Carriage by Rail, (3 June 1999), Uniform Rules concerning the Contract of International Carriage of Passengers by Rail, Appendix A, art. 26 (COTIF); Regulation (EU) No 181/2011 of the European Parliament and of the Council

to change the term to 'personal injury' such as the Guatemala City Protocol of 1971 in order to cover mental injury, but none was successful.¹¹⁸ The report of the Rapporteur on the Modernization and Consolidation of the Warsaw System evidently proves that a claim for discrimination would be allowed by the term 'personal injury' and States did not want to incorporate this term because it reads:

'The expression 'personal injury' would open the door to non-physical personal injuries such as slander, libel, *discrimination*, fear, fright and apprehension and this would clearly be neither desirable nor acceptable.'¹¹⁹

5.3.5.2 The term 'bodily injury' under the Montreal Convention of 1999

The Montreal Conference charged with drafting the Montreal Convention of 1999 differed from the drafting process of the Warsaw Convention of 1929 because the delegates at the Montreal Conference acknowledged the possible preclusion of purely emotional injury by the expression 'bodily injury'. Concern about mental injury and possible claims arising from discrimination were raised by the delegate of Namibia, who relied on constitutional guarantees of non-discrimination on the basis of *inter alia* status and asked whether this exclusion would be constitutionally permissible in a number of jurisdictions.¹²⁰

Apart from this point, during the long discussion on mental injury, the delegates did not consider mental injury in discrimination claims. Even though the delegates of Norway and Sweden pointed out that the potential lack of remedy for mental injury would amount to discrimination among victims, their intention was to protect young passengers who may not easily overcome trauma.¹²¹

The delegate of France affirmed the statement of the delegate of Germany that the expression '*lésion corporelle*' in the authentic text of the Warsaw Con-

of 16 February 2011 concerning the rights of passengers in bus and coach transport and amending Regulation (EC) No 2006/2004 OJ L 55, 28.02.2011, p. 1–12, art. 7. The House of Lords in *King v. Bristow Helicopters Ltd.*, compared this term in the Warsaw Convention of 1929 and in the COTIF. See *King v. Bristow Helicopters Ltd.*, [2002] UKHL 7, para. 17.

118 Bin Cheng, *A New Era in the Law of International Carriage by Air: From Warsaw (1929) to Montreal (1999)*, 53 Int'l & Comp. L.Q., 833, 850 (2004); Michael Milde, *The Warsaw System of Liability in International Carriage by Air: History, Merits and Flaws... and the New "non-Warsaw" Convention of 28 May 1999*, 24 Annals Air & Space L., 155, 177 (1999); Thomas J. Whalen, *The New Warsaw Convention: The Montreal Convention*, 25 Air & Space L., 12, 17 (2000); Pablo Mendes De Leon & Werner Eyskens, *The Montreal Convention: Analysis of Some Aspects of the Attempted Modernization and Consolidation of the Warsaw System*, 66 J. Air L. & Com., 1155, 1167 (2000-2001).

119 ICAO, *International Conference on Air Law*, ICAO Doc 9775 Vol. III, 65. emphasis added

120 ICAO Doc 9775 Vol. I, *supra* n. 102, 72.

121 ICAO Doc 9775 Vol. I, *ibid.*, 71; ICAO Doc 9775 Vol. II, *supra* n. 101, 97.

vention of 1929, covers both physical and mental injury, so the problem lies on the English term usage.¹²² A proposal to add 'mental injury' in the draft Article 16 (Article 17 of the Montreal Convention of 1999) by the delegate from Sweden was fully supported by the delegates from Chile, Denmark, the UK and the Dominican Republic.¹²³ Yet, the debate continued on whether to include mental injury only in certain cases, such as mental injury significantly impairing the health of the passenger, but none was relevant to the discrimination claim.¹²⁴

The fear that allowing mental injury would lead to fraudulent claims and impact the cost of insurance was raised by the observer from the International Union of Aviation Insurers.¹²⁵ The balance between passenger protection and air carrier's liability was expressed by the Chairman in the "Friends of the Chairman" Group that the issue of mental injury could not be viewed alone but rather considered in the whole picture of the draft Convention.¹²⁶ However, this Group comprised a selected and limited group of delegates so its view may not reflect the entire views of the other delegates at the Montreal Conference.¹²⁷

In the end, the Montreal Conference conceded that under certain circumstances, some States included damages for mental injuries under the 'bodily injury' umbrella, and that 'jurisprudence in this area is developing'.¹²⁸

5.3.5.3 The term 'bodily injury' in case law under the Montreal Convention of 1999

The courts in the UK and the US follow the interpretation of this term under the Warsaw Convention of 1929, so purely emotional distress from damage to PWDs is not recoverable.¹²⁹ From this line of reasoning, a PWD who is discriminated against and who sustained only emotional distress cannot get

122 ICAO Doc 9775 Vol. I, *ibid.*, 68.

123 ICAO Doc 9775 Vol. I, *ibid.*, 67-68.

124 ICAO Doc 9775 Vol. I, *ibid.*, 167, 175-176.

125 ICAO Doc 9775 Vol. I, *ibid.*, 69.

126 ICAO Doc 9775 Vol. I, *ibid.*, 111.

127 *Ehrlich v. American Airlines Inc.*, 360 F.3rd 366 (2nd Cir. 2004).

128 ICAO Doc 9775 Vol. I, *supra* n. 102, 243.

129 See *Morris v. KLM Royal Dutch Airlines*, [2002] UKHL 7; *Eastern Airlines, Inc. v. Floyd* 499 U.S. 530 (1991); George N. Tompkins, Jr., *Summary of MC99 Judicial Decisions 2012*, 38 Air & Space L., 123, 133 (2013); George N. Tompkins, Jr., *2015 Summary of MC99 Court Decisions*, 41 Air & Space L., 129, 134 (2016). The Advocate General in *Simone Leitner v. TUI Deutschland GmbH & Co KG*, reviewed the term 'damage' in the Warsaw Convention of 1929 including other international conventions on transport to support the claim on compensation for non-material damage from the Package Travel Directive and opined that the Warsaw Convention of 1929 does not preclude non-material damage. It is uncertain whether the Advocate General intended to cover purely emotional distress or not since the plaintiff in the case suffered physical injury too. See Case C-168/00 *Simone Leitner v TUI Deutschland GmbH & Co KG* [2001] ECR, I-2631, Opinion of Advocate General Tizzano, para. 39.

any compensation under both Conventions.¹³⁰ In other words, even though courts interpret ‘accident’ as covering an air carrier’s failure to perform a duty under accessibility standards, mental anguish alone is non-compensable.

The courts in *Stott* and *Thibodeau* follow the reasoning in *King*, which was decided under the Warsaw Convention of 1929, and all concurred that there are other possible means of enforcement.¹³¹ In *Stott*, Thomas Cook was not prosecuted, but it was found guilty of an offense with a possible maximum fine of 5,000 Pound Sterling.¹³²

Similarly, in *Thibodeau*, Air Canada failed to provide service on board in French, but the majority ruling granted no financial compensation for moral damage under the quasi-constitutional Official Language Act. In this five-to-two decision, the majority observed that overlapping remedial provisions between the Official Language Act and the Montreal Convention of 1999, did not conflict since they had different purposes and aspects.¹³³ Furthermore, the majority viewed that an appropriate and just remedy must not violate Canada’s international obligations, i.e. the Montreal Convention of 1999, so the declaration, apology and cost of the application without monetary compensation fitted with appropriate and just remedies.¹³⁴ By way of comparison to the CERD Committee’s reasoning in *L.A.*, determination of remedial measures is a matter of national law unless the national decision is manifestly arbitrary or amounts to a denial of justice.¹³⁵ The *Thibodeau* judgment perfectly follows the line of reasoning in *L.A.* to award other remedial measures. However, it appears that both *Stott* and *Thibodeau* disregard the opening for developing a concept for the term ‘bodily injury’ concluded at the Montreal Conference.

5.3.6 Compensation for damage to mobility aids and service animals

5.3.6.1 Scope of compensation

For PWDs, damaged or lost mobility aids amount to a loss of independence and dignity.¹³⁶ The same holds true for service animals since PWDs rely on their assistance. Substitution of mobility aids and service animals is not as simple as that of clothing or general baggage because of price, specification and familiarity; therefore, this Section examines unique limitations for com-

¹³⁰ See *Stott*, *supra* n. 17.

¹³¹ *Stott*, *ibid.*, para. 64; *Thibodeau*, *supra* n. 65, paras 110, 132; *King*, *supra* n. 71, para 38.

¹³² *Stott*, *ibid.*, para. 12.

¹³³ *Thibodeau*, *supra* n. 65, paras 98-100.

¹³⁴ *Thibodeau*, *ibid.*, paras 110, 132.

¹³⁵ Committee on the Elimination of Racial Discrimination, *L.A. et al. v. Slovakia* (Communication no. 49/2011), U.N. Doc. CERD/C/85/D/49/2011, para. 7.1. See Section 3.3.2.2.C., Chapter 3.

¹³⁶ Commission of the European Communities, *supra* n. 61, 2.

pensation related to mobility aids and service animals under the general regime.

5.3.6.2 Types of compensable damage

Neither the Warsaw Convention of 1929, nor the Montreal Convention of 1999, define the expression 'damange'. Whether compensation for damage to baggage includes non-material damage or not is decided upon in an inconsistent way by courts. Damage to baggage in the US also excludes emotional distress damages.¹³⁷

On the other hand, in *Walz v. Clickair* the European Court of Justice (ECJ), referred to by the Barcelona Court, ruled that under the Montreal Convention of 1999, damages for baggage covered both material and non-material damage.¹³⁸ The European Commission further interpreted *Walz* to cover claims pertaining to checked wheelchairs or other mobility equipment or assistive devices as defined in Regulation 1107.¹³⁹

A Brazilian court also generously acknowledges compensation for moral damage to baggage, but the reasoning is based on its Constitution.¹⁴⁰

5.3.6.3 Limited amount of compensation

In domestic air services, US and Canada spell out unlimited liability for mobility aids as mentioned in Section 5.2.3 of this Chapter.

In the case of international services, the Warsaw Convention of 1929, and the Montreal Convention of 1999, limit recovery for checked baggage, except where it concerns willful misconduct of the air carriers.¹⁴¹ The ceiling of baggage liability is considerably below the value of typical baggage. Similarly, in the case of PWDs, the cost of mobility aids could reach 20,000 Euro, which

¹³⁷ 2015 Summary of MC99 Court Decisions, *supra* n. 129, 134.

¹³⁸ Case C-63/09 *Walz v. Clickair SA* [2010], para. 40. Abeyratne and Bokareva commented on the authority of the ECJ to interpret substantive provisions of the Montreal Convention of 1999 without any concern on the application of the EU law. See Ruwantissa Abeyratne, *Rulemaking in Air Transport: A Deconstructive Analysis*, 164, (Springer International Publishing 2016); Olena Bokareva, *Air Passengers' Rights in the EU: International Uniformity versus Regional Harmonization*, 41 *Air & Space L.*, 3, 15 (2016). The CJEU also interpret 'damage' in Regulation 261 in accordance with *Walz* to cover the non-material damage in case of flight cancellation. See Case C-83/10 *Aurora Sousa Rodríguez and Others v Air France SA* [2011].

¹³⁹ European Commission, *Interpretative Guidelines on Regulation (EC) No 261/2004 of the European Parliament and of the Council establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights and on Council Regulation (EC) No 2027/97 on air carrier liability in the event of accidents as amended by Regulation (EC) No 889/2002 of the European Parliament and of the Council*, OJ C 214, 15.6.2016, p. 5–21.

¹⁴⁰ See Section 5.3.6.3.

¹⁴¹ Warsaw Convention of 1929, arts 22, 25; Montreal Convention of 1999, art. 22.

is far higher than the maximum limited amount of 1,131 SDR or around 1,450 Euro under the Montreal Convention of 1999, for checked baggage according to the European Commission.¹⁴²

Article 20 of the CRPD ensures PWDs access to mobility aids at an affordable cost, and the CRPD Committee interprets this provision as covering repaired mobility aids.¹⁴³ Both the Warsaw Convention of 1929, and the Montreal Convention of 1999, allow passengers to make a special declaration with additional payment to break a limited liable amount.¹⁴⁴ In practice, it is not common for air carriers to offer a special declaration and passengers have to arrange insurance themselves for lost or damage to baggage.¹⁴⁵ A review of selected tariffs shows that some airlines limit a maximum amount which passengers can declare.¹⁴⁶ This holds true in case of PWDs and their mobility aids according to the survey by the advocate group.¹⁴⁷

It is questionable how this provision can be implemented when PWDs are unable to receive the full amount of compensation from the actual damage. Thus, to guarantee full compensation in the case of damage to mobility aids, PWDs have to pay an additional fee. The extra payment seems to be indirectly discriminatory against PWDs because while this practice appears to be neutral, it disadvantages PWDs who have to pay more for their mobility aids, which they have to depend on, to reach an equal level of mobility as that of other passengers.

While moral damages for baggage can be claimed in, for instance, Spain and Brazil, the Spanish and Brazilian courts differ on the reasoning. As the Spanish court respects the limit of liability of the Montreal Convention of 1999,

142 European Commission, *Minutes of the Making Regulation 1107/2006 a success: 1st NEB meeting*, 3 Dec. 2008, 4. See Section 5.4.2.3.

143 CRPD, art. 20(b); Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Report Submitted by Mongolia*, (Thirteenth session, 2015), U.N. Doc. CRPD/C/MNG/CO/1, para. 33. See Section 3.3.2.2.B., Chapter 3.

144 Warsaw Convention of 1929, art. 22(2); Montreal Convention of 1999, art. 22(2); Paul Stephen Dempsey & Michael Milde, *International Air Carrier Liability: The Montreal Convention of 1999*, 197 (McGill University, 2005).

145 Dempsey & Milde, *ibid.*, 197.

146 KLM and United Airlines limit the maximum amount of declared baggage unless special arrangement has been made in advance. See KLM, *Published fares, charges and related terms and conditions of carriage applicable to air services of KLM*, rules 55(C), 115(A)(8)(a), 115(B)(9) (5 July 2013); United Airlines, *Contract of Carriage Document*, rule 23(C)(9) (17 Feb. 2017).

147 Airlines do not publish information about special declaration on their website. From a random review of airline's website, CityJet mentions about this special declaration in its webpage. See Roberto Castiglioni, *Airlines Drop The Ball On Wheelchair Insurance*, <http://www.reducedmobility.eu/20140704481/The-News/airlines-drop-the-ball-on-wheelchair-insurance.html> (accessed 1 Mar. 2017); CityJet, *Special Assistance*, <https://www.cityjet.com/flying-with-us/travel-information/special-assistance/> (accessed 1 Mar. 2017).

material and non-material damages, as a whole, must not exceed such a limit.¹⁴⁸ Conversely, because in Brazil the right for non-material compensation in proportion to the offense is upheld in the Constitution, the court adheres to this provision and not to the Warsaw or the Montreal Convention of 1999, and does not cap the liable amount.¹⁴⁹ Although Brazil's approach renders passengers proportional redress, its observance of a treaty is doubtful since it invokes a domestic legal provision to depart from a treaty provision.

5.3.7 Liable parties

Broadly speaking, when PWDs sustain damage from an action or inaction by airport operators or ground handlers, if the damage falls outside the temporal scope of the Conventions, it falls under national tort law because they have no contractual relationship to each other.¹⁵⁰ On the other hand, when the damage occurred within a temporal scope of the Conventions, a person cannot escape from the Conventions by claiming that the damage was caused by airport operators or ground handlers, because they may be held liable as an agent of an air carrier under the Conventions when they perform part of an air carrier's duty.¹⁵¹

The situation becomes more problematic because of the diverse interpretations on the temporal scope of application and the different responsible persons among jurisdictions. The temporal scope for PWDs who in particular are also accompanied by airport staff at the airport is construed differently.¹⁵² Moreover, duties to assist PWDs at airports are not always provided by air carriers.

148 International Law Office, *Court rules on moral and material damages for missed flights and lost baggage*, <http://www.internationallawoffice.com/Newsletters/Aviation/Spain/Ura-Menn-dez/Court-rules-on-moral-and-material-damages-for-missed-flights-and-lost-baggage> (accessed 1 Mar. 2017).

149 Air France appeals to the Supreme Court on the issue whether the Warsaw Convention of 1929 preempts the national law. Because of the general repercussion, the effects on this case will be applied to every future case including ones awaiting judgment. See RExt. 636.331, STF, em 24.06.2016, https://www.jusbrasil.com.br/diarios/documentos/355588629/andamento-do-processo-n-636331-recurso-extraordinario-29-06-2016-do-stf?ref=topic_feed (accessed 1 Mar. 2017); Ap. 2007.001.42990, 11a. Câmara Cível do TJ/RJ, em 2007, <http://www1.tjrj.jus.br/gedcacheweb/default.aspx?UZIP=1&GEDID=00035829E8729D280C86783A06165E0C3165389FC35D0A4F> (accessed 1 Mar. 2017); RExt 127.720-9, STF, em 06.02.96; Constituição Federal de 1988, artigo 5(V), (X), (XXXII).

150 Commission of the European Communities, *supra* n. 61, 6. See Guisepppe Guerrieri, *Airport Operator as Independent Contractor – Clear Guidelines from the Court of Cassation*, 28 Air & Space L., 97, 99 (2003); Parliamentary questions, P-1331/2008, 31 March 2008, OJ C 291, 13/11/2008; Berin Riðanoviæ, *Legal effects and Review of Regulation 1107/2006 (disabled persons and persons with reduced mobility when travelling by air)*, XVI:1 Aviation & Space J., 53, 72-73 (2017).

151 Warsaw Convention of 1929, arts 20, 25; Montreal Convention of 1999, arts 17(2), 19, 30; European Commission, European Commission, *supra* n. 139, 19.

152 See Section 5.3.3.2.

As discussed in Chapter 4, the EU legislator also assigns these tasks to airport operators. In practice, air carriers sometimes contract out their duties to airport operators or ground handlers. Therefore, a liable person for a damaged wheelchair may differ from route to route even though the fact of a case is similar. In the case of a wheelchair that can be stored in a cabin, a PWD may choose to use his or her wheelchair until reaching an aircraft door.¹⁵³ For a journey within the EU, an airport operator is responsible for storing baggage on the aircraft, so a wheelchair is not the responsibility of an air carrier.¹⁵⁴

On the contrary, for a domestic route in the US or a trip from the EU to the US, the applicable US law, namely Part 382 assigns a duty to an air carrier. Even though an airport employee performs this service, a liable person is an air carrier since a wheelchair is under its control. Accordingly, the applicable law for civil liability differs.

5.3.8 Sub-conclusions

The Warsaw Convention of 1929, and the Montreal Convention of 1999, provide an exclusive cause of action when a case happens within the temporal scope of these Conventions. The interpretation of liability regime for air carriers and their agents or remedial measures for passengers is not wholly uniform pertaining to non-material damage and a limited amount of compensation. Nevertheless, the majority view of case law in the Warsaw Convention of 1929, and the Montreal Convention of 1999, interprets the term ‘bodily injury’ as excluding moral damage to passengers. Both Conventions limit liability to baggage unless air carriers waive such limit.

5.4 AN EFFECTIVE REMEDY

5.4.1 Procedural aspect

A combination of remedies in public and private laws yields administrative mechanisms and judicial mechanisms. Nevertheless, the EU Member States, the US and Canada do not have a harmonized view on which option leads to compensation.

While the ACAA grants no monetary compensation, the CA Agency authorizes ordering reimbursement for damage from undue obstacles faced by PWDs but not for moral damage. On top of this, the compensation awarded to PWDs, including injury to feelings, is excluded under UK law by the Montreal Conven-

¹⁵³ The PWD Manual allows PWDs to use own wheelchairs to move to and from an aircraft door if possible. See PWD Manual, *supra* n. 16, para. 7.4.

¹⁵⁴ Regulation 1107, Annex I.

tion of 1999. The various practices bring up the question of the effectiveness of the substantial aspect of remedies in Section 5.4.2.

5.4.2 Substantial aspect

Before analyzing the effectiveness of remedial measures under the Montreal Convention of 1999, I must refute arguments of States to restrict their obligation as a State to protect. In Section 3.3.2, Chapter 3, the freedom of contract and the private autonomy to waive one's right are two claims for States to refrain from intervening in the private contractual relationship. It is permissible when two parties possess roughly equal bargaining power. However, in relation to liability in international carriage by air, I am skeptical on the freedom of passengers to negotiate the matters which will be elaborated from Section 5.4.2.2 to Section 5.4.2.4, since the liability regime has been set by the international convention which was negotiated among States and trade associations in relation to civil aviation.¹⁵⁵

5.4.2.1 The term 'accident'

Obstacles in the substantial aspect are related to compensation for PWDs and their mobility aids because of the application of either the Warsaw Convention of 1929, or the Montreal Convention of 1999. As indicated in the Core Principles on Consumer Protection (Core Principles), adopted by the ICAO Council, national and regional accessibility standards should be consistent with the Warsaw Convention of 1929, and the Montreal Convention of 1999. Also, domestic laws should observe international laws.¹⁵⁶

Following the broad interpretation by the US Supreme Court in *Husain*,¹⁵⁷ the term 'accident' covers any failure to perform a duty under the accessibility standards;¹⁵⁸ otherwise, the claim will be precluded by the exclusivity principle. However, the types and amounts of compensation are circumscribed as discussed in Section 5.3.5 and Section 5.3.6.

5.4.2.2 Moral damage for discrimination claims

In Section 3.3.2.2.C., Chapter 3, States can exercise their margin of appreciation on remedial measures. In order to exercise their discretion, the first condition is that there should be several measures available to choose from. Measures to inhibit discrimination and measures to ensure enforcement or an effective

¹⁵⁵ ICAO Doc 9775 Vol. I, *supra* n. 102, 5-35.

¹⁵⁶ VCLT, art. 27.

¹⁵⁷ *Husain*, *supra* n. 104, 654. See Section 5.3.4.

¹⁵⁸ See *supra* n. 112.

remedy may overlap but they are not identical. Penalties can be a remedial measure and an enforcement mechanism, while raising awareness prevents discrimination but does not deal with remedies directly. Invariably, exclusion of purely emotional damage under the Montreal Convention of 1999, also means that States, either courts or other competent bodies, cannot exercise their discretion to choose financial compensation for moral damage regardless of how outrageous the discrimination is against PWDs.

Monetary compensation of moral damage is outstanding because other possible remedies for victims of human rights violation can be found under administrative mechanisms and do not provide any monetary compensation to them.¹⁵⁹ Moreover, even though the preclusion of compensation to moral damage neutrally applies to all passengers, damage based on failure to reach accessibility standards or non-discrimination on the basis of disability may be emotional distress without any bodily injury.¹⁶⁰ Accordingly, this gives rise to questions whether a law lacking compensation for moral damage and a preclusion of claims under other laws ensure effective remedy and whether this *status quo* is equal to discrimination or denial of justice.

The objective of the Montreal Convention of 1999, has shifted from the Warsaw Convention of 1929, to protecting consumers and ensuring equitable compensation based on the principle of restitution.¹⁶¹ An indication in the *travaux préparatoires* that an interpretation of the term 'bodily injury' is open to further development means that courts can take subsequent technical, economic or legal developments into account and that it is a State obligation to develop a meaning.¹⁶² Thus, with due respect, it appears to me that the exclusion of moral damage to PWDs lies in a treaty interpretation, not a treaty itself.

5.4.2.3 *Reparation or replacement of mobility aids and limited compensation*

The Warsaw Convention of 1929, and the Montreal Convention of 1999, do not contain a specific provision on mobility aids and service animals but Canada and the EU require the repair or replacement of delayed, damaged or lost mobility aids accepted for carriage on international flights.¹⁶³ This can conflict with the exclusivity principle and a limited amount for compensa-

¹⁵⁹ See Section 3.3.2.2.C., Chapter 3.

¹⁶⁰ See Stott, *supra* n. 17.

¹⁶¹ Montreal Convention of 1999, Preamble; Whalen, *supra* n. 118, 14.

¹⁶² International Law Commission, *Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission. A/CN.4/L.702 (18 July 2006) para. 23.

¹⁶³ Canada Air Transportation Regulations, *supra* n. 61, s. 155; Regulation 1107, Annex I.

tion in the Warsaw Convention of 1929, and the Montreal Convention of 1999, unless air carriers waive the limit.¹⁶⁴

In Canada, remarkably, unless an air carrier raised an issue of limited liability, the CA Agency, when reviewing a complaint on accessible air travel, has not mentioned the Warsaw Convention of 1929, or the Montreal Convention of 1999.¹⁶⁵ Reasons include that the amount did not reach the limit,¹⁶⁶ and air carriers have waived such limit.¹⁶⁷ In one case even though the replacement costs of the prosthetic device exceeded the limits of liability of a foreign air carrier at that moment, the air carrier agreed to reimburse the full replacement cost according to the invoice.¹⁶⁸ Normally, air carriers agree to pay the full amount of expenses.¹⁶⁹

In the EU, Regulation 1107 also obliges airport operators to provide temporary replacement of damaged or lost mobility equipment.¹⁷⁰ The European Commission correctly declared that the Montreal Convention of 1999, does not deal with PWDs but Regulation 1107 involves determining the person

164 Warsaw Convention of 1929, art. 22; Montreal Convention of 1999, arts 22, 25; Regulation 889, *supra* n. 5, art. 1(4).

165 See Canadian Transportation Agency, Decision No. 123-AT-A-2003 (6 Mar. 2003); Canadian Transportation Agency, Decision No. 653-AT-A-2003 (21 Nov. 2003). A flight was operated by KLM and Air Transat respectively. Canadian Transportation Agency, Decision No. 295-AT-A-2006, (19 May 2006). The delayed delivery of a powered wheelchair between Denver and Ottawa via Toronto operated by Air Canada.

166 Canadian Transportation Agency, Decision No. 386-AT-A-2009, (10 Sept. 2009), para. 47. The case is in relation to compensation to a damaged wheelchair in a flight between Montreal and Cancun, Mexico operated by Air Canada in an amount of CAD\$286.10.

167 Airlines follow Canada's initiative are Qatar Airways and Cathay Pacific. The rest do not explicitly say so. See Qatar Airways, *Airline Tariff International Passenger Rules and Fares*, rule 21(B) (15 Oct. 2014); Cathay Pacific, *International Passengers Rules and Fares Tariff*, rule 20(B) (16 Oct. 1999). See Section 5.2.3.

168 Canadian Transportation Agency, Decision No. 387-AT-A-2003, (30 June 2003). The case is about compensation to loss of prosthetic device contained in checked baggage in a flight between Glasgow, Scotland and Toronto, Canada operated by KLM. KLM states that it will reimburse in full, including the replacement cost of the prosthetic device (USD\$1162.00) and other items. At that time of the case, the Netherlands and the EU did not ratified the Montreal Convention of 1999. However, KLM tariff does not waive the limit. See KLM, *Published fares, charges and related terms and conditions of carriage applicable to air services of KLM*, rule 55(C) (5 July 2013).

169 See Canadian Transportation Agency, Decision No. 63-AT-A-2003 (12 Feb. 2003). Canadi*n issued a cheque in the amount of \$127.50 to cover the cost of the repair and delivery and offered Mr. Leger a travel credit in the amount of \$150 as a gesture of goodwill. Canadian Transportation Agency, Decision No. 3-AT-A-2004 (5 Jan. 2004) in the matter of Decision No. 542-AT-A-2001 dated October 25, 2001- Air Transat A.T. Inc. Air Transat subsequently confirms that a cheque in the amount of E\$2,047.22 was sent to Rebecca Rehaili on behalf of Faycal Fedjkhi. This amount represents the expenses incurred for the repair of the wheelchair and the additional transportation costs for the return trip to France.

170 Regulation 1107, Annex I.

responsible for dealing with mobility equipment.¹⁷¹ Yet, there is an interaction between these two regimes because Regulation 1107 does not deal with civil liability but the Montreal Convention of 1999, does.¹⁷² Hence, the Core Principles call for consistency. Anyhow, as stated in Section 5.3.7, an airport operator can become an agent of an air carrier when it performs part of an air carrier's duty within the temporal scope of the Warsaw Convention of 1929, or the Montreal Convention of 1999. This appears to be a defect on compliance with Regulation 1107.

The UK Equality and Human Rights Commission reported that in October 2015, because an electric wheelchair worth over 25,000 Pound Sterling was damaged and London City Airport failed to provide the wheelchair user with a temporary replacement, the air carrier offered to pay the maximum damage for checked baggage set forth by the Montreal Convention of 1999.¹⁷³ Thereafter, the air carrier paid up the amount after there had been legal proceedings.¹⁷⁴ In addition to non-compliance to Regulation 1107, this event shows that an air carrier strictly follows the Montreal Convention of 1999, instead of a voluntary waiver of the limited amount as suggested by the European Commission. Remarkably, under Regulation 1107, the duty of an airport operator is to offer a 'temporary' mobility aid, not a permanent one, so this cannot be considered as the full compensation amount under the Warsaw Convention of 1929, or the Montreal Convention of 1999.

In Canada and the UK, the lawsuit seems to be a strategy for claimants to gain full compensation; otherwise, an air carrier relies on the limited liability for baggage.¹⁷⁵ Perhaps, the existing limited amount is not in line with a remedial measure that would be able to render a change in the behavior of people who discriminate against PWDs.

171 European Parliament, List of Titles of Written Questions by Members of the European Parliament Indicating the Number, Original Language, Author, Political Group, Institution Addressed, Date Submitted and Subject of the Question, E-3184/10 (DA) by Britta Thomsen (S&D) to the Commission (7 May 2010). Mr. Kallas on behalf of the Commission answered in French that La Convention de Montréal n'intervient pas dans la détermination des personnes chargées du traitement des équipements de mobilité. C'est le règlement 1107/2006 qui a créé une répartition des responsabilités juridiques entre les entités gestionnaires des aéroports et les transporteurs aériens concernant l'assistance aux personnes handicapées et à mobilité réduite (PMR) et aussi concernant la prise en charge des équipements de mobilité. Subject: Interpretation of Regulation (EC) No 1107/2006 Answer from the Commission (30 June 2010), OJ C 138 E, 7.5.2011.

172 See Stott, *supra* n. 17; Section 5.3.2.1.

173 Equality and Human Rights Commission, *Pay for damaged wheelchairs, leading Paralympian tells airlines*, <https://www.equalityhumanrights.com/en/our-work/news/pay-damaged-wheelchairs-leading-paralympian-tells-airlines> (accessed 13 Jan. 2017).

174 The Guardian, *How Disabled Travellers Still Face Discrimination by Airlines*, <https://www.theguardian.com/money/2017/apr/24/disabled-traveller-airlines-flying-discrimination-damaged-property> (accessed 27 Apr. 2017).

175 For limited compensation for baggage, see Section 5.3.6.3.

5.4.2.4 Liability regime for service animals

In the case of accommodating service animals in a cabin, an air carrier may be under the same fault-based liability as in relation to unchecked baggage.¹⁷⁶ There is a chance that service animals other than dogs are carried as checked baggage. However, only in Canada, does the CA Agency recommend that air carriers undertake in their tariffs to 'provide expeditiously, and at its own expense, medical care for or replacement of the service animal'.¹⁷⁷

5.4.3 Sub-conclusions

From the review, it is unfair towards a PWD, whose rights under accessibility standards are breached by an air carrier, to receive no compensation if a cause of action does not fit within the scope of the Conventions or to receive a limited amount compared to the actual damage they sustained to their mobility aids and service animals. Hence, the combination of accessibility standards with the provisions of the Warsaw Convention of 1929, or of the Montreal Convention of 1999, yields no effective remedy for PWDs in cases of (1) moral damage and (2) damage to mobility aids and service animals.

5.5 ASSESSING THE POSSIBLE SOLUTIONS TO PROVIDE EFFECTIVE REMEDY

5.5.1 Purpose and scope

In *Turturro v. Continental Airlines*, concerning the exclusion of a private claim under the ACAA by the Warsaw Convention of 1929, the court opined that

'The Convention massively curtails damage awards for victims of horrible acts such as terrorism; the fact that the Convention also abridges recovery for the lesser offense of discrimination should not surprise anyone.'¹⁷⁸

Acceptably, the sole private right of action has been long standing, but the unsurprising feeling should not lead to apathy towards non-recovery from injury. This Section presents and appraises several possible solutions proposed by States, judges, scholars and different stakeholders as well as myself.

¹⁷⁶ Warsaw Convention of 1929, art. 18; Montreal Convention of 1999, art. 17.

¹⁷⁷ Canadian Transportation Agency, *Sample Tariff 2014*, rule 121. From the selected tariffs, Air Canada and Cathay Pacific follow this recommendation. See Cathay Pacific, *International Passengers Rules and Fares Tariff*, rule 56(C) (11 Dec. 2016), Air Canada, *International Tariff General Rules Applicable to the Transportation of Passengers and Baggage*, rule 55(E) (15 Dec. 2016).

¹⁷⁸ *Supra* n. 68.

5.5.2 Solutions for moral damage caused to persons with disabilities

5.5.2.1 Confining the exclusivity principle

As the exclusivity principle aims to standardize rules on the liability of air carriers, it is necessary to maintain this provision in the self-contained Montreal Convention of 1999. Nonetheless, the age of consumer protection and human rights protection has given rise on to how to properly interpret Article 29 of the Montreal Convention of 1999 because both *Sidhu* and *Tseng* were decided under the Warsaw Convention of 1929, and their reasoning is followed by the courts in *Stott* and *Thibodeau*.

One proposal is to weaken the exclusivity and permit a concurrence of claims within the scope of the Montreal Convention of 1999.¹⁷⁹ This proposal is in line with an interpretation of the Montreal Convention of 1999, by the Court of Justice of the European Union (CJEU),¹⁸⁰ and a few US lower courts. The latter distinguish Article 29 of the Montreal Convention of 1999, from Article 24 of the Warsaw Convention of 1929, because the Montreal Convention of 1999, adds a clause which reads:

‘In the carriage of passengers, baggage and cargo, *any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and such limits of liability as are set out in this Convention...*’¹⁸¹

Although these US lower courts do not refer to the treaty interpretation technique explicitly, they apply the inter-temporality¹⁸² to interpret the clause ‘any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise’ to mean ‘partial preemption’. They allow a plaintiff to claim under any state law subject to the Convention’s limitations on liability if a plaintiff successfully establishes liability set forth by the Convention.¹⁸³

This reasoning is followed in *Adler et al v. WestJet Airlines, Ltd.*, decided only four months after *Stott*. The US District Court Southern District of Florida found that the Adlers, who were deplaned because a flight attendant felt

179 Ingrid Koning, *The Disabling of the EC Disability Regulation: Stott v. Thomas Cook Tour Operators Ltd in the Light of the Exclusivity Doctrine*, 22 Eur. Rev. of Private L., 769, 785-786 (2014).

180 See Section 5.5.4.1.

181 Montreal Convention of 1999, art. 29, emphasis added; See Whalen, *supra* n. 118, 20; George N. Tompkins, Jr., *Are the Objectives of the 1999 Montreal Convention in Danger of Failure?*, 39 Air & Space L. 203, 207 (2014).

182 International Law Commission, *supra* n. 162, para. 22.

183 See *Constantino v. Continental Airlines, Inc.*, Not Reported in F.Supp.2d (2014); *Summary of MC99 Judicial Decisions 2012*, *supra* n. 129, 137; *Summary of MC99 Judicial Updates 2013*, *supra* n. 65, 91-92, 96; George N. Tompkins, Jr., *2014 Summary of MC99 Court Decisions*, 40 Air & Space L., 147, 158-160 (2015).

uncomfortable with their service animal, could file a state-law claim for being humiliated if their claim was within the scope of the Montreal Convention of 1999.¹⁸⁴ In the *Adler* case, the US District Court nevertheless, referred neither to the CRPD owing to non-ratification to the CRPD by the US nor having any human rights value.

Certainly, the criticism that the total preemption is too broad,¹⁸⁵ can be reduced by this partial preemption. In *Tseng*, Justice Ginsburg argued that if there was no preemption, it would be unfair for a person who sustained a physical injury to be entitled to a limited amount under the Warsaw Convention of 1929, while a person who sustained mental anguish alone is entitled to an unlimited liability scheme under local law.¹⁸⁶ This reasoning can be rebutted by subjecting a compensable amount within the scope of the Montreal Convention of 1999, so that all injured persons are subject to the same limit. Yet, the interpretation in *Adler* goes against the *travaux préparatoires*.¹⁸⁷ Besides, by opening a state-law claim, it is doubtful whether harmonization under the Montreal Convention of 1999, is disrupted because it is likely that a state law grants different types of compensable damage. Consequently, this leads to forum shopping since the plaintiff for claims for damages under the Warsaw Convention of 1929, and the Montreal Convention of 1999, have more than one option on jurisdiction.¹⁸⁸

5.5.2.2 Re-interpreting 'accident' while confining the exclusivity principle

The dissenting opinion in *Thibodeau* also advances another way to interpret Article 29 of the Montreal Convention of 1999. Justice Abella, who wrote the dissenting opinion, observed that while courts typically interpret domestic rules in the light of broader international human rights law, in the *Thibodeau* case, rather contrarily, a commercial treaty was interpreted to diminish human rights protected by domestic law.¹⁸⁹ She applied a treaty interpretation under the VCLT to interpret the shift in language of Article 29 of the Montreal Convention of 1999, and the shift from being objective to becoming consumer-centered and rebutted a restriction to protect passengers.¹⁹⁰ By this interpretation, she reached a similar conclusion that the phrase 'in the carriage of passengers,

184 *Adler et al*, *supra* n. 38, 1389-1390.

185 Ingrid Koning, *Liability in Air Carriage. Carriage of Cargo Under the Warsaw and Montreal Conventions*, 33 *Air & Space L.*, 318, 341 (2008).

186 *Tseng*, *supra* n. 65, 171.

187 *Tompkins, Jr.*, *supra* n. 90, 51.

188 Foreign air carriers can become a defendant in a national court of other States. *See* Warsaw Convention of 1929, art. 28; Montreal Convention of 1999, art. 33

189 *Thibodeau*, *supra* n. 65, paras 134, 170. *See* Separate opinion of Judge Cançado Trindade, *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Merits, Judgment, I.C.J. Rep. 2010 (30 Nov. 2010), p. 758, para. 89. *See* Section 1.3.2.4.

190 *Thibodeau*, *supra* n. 65, paras 150, 161.

baggage and cargo' under Article 29 restricts the type of action to be brought subject to the Montreal Convention of 1999, only to that for damage incurred in such carriage.¹⁹¹

This dissenting opinion differs from *Adler* on how 'accident' has been interpreted. Instead of applying *Husain's* flexible interpretation to the term 'accident', Justice Abella analyzed that Article 17(1) of the Montreal Convention of 1999, required (1) an accident, (2) which caused, (3) death or bodily injury, and (4) while the passenger was within the temporal scope of the Convention.¹⁹² She further considered that failure to provide service in French was not an accident at all, so she did not discuss the meaning of bodily injury.¹⁹³ Thus, the Montreal Convention of 1999 was not applicable because there was no 'accident' even though the breach happened on board.¹⁹⁴ By this way of interpretation, courts can recognize the moral damage caused by the violation of accessibility standards, but liability for mobility aids still falls under the purview of the Montreal Convention of 1999.

Both *Adler* and *Thibodeau's* dissenting opinions present flaws. Despite the possibility to obtain restitution for PWDs, both interpretations offer no convincing explanation as to why they deviate from the *stare decisis* in the UK, the US and Canada as well as other jurisdictions,¹⁹⁵ and circumvent the uniformity purpose of the Montreal Convention of 1999. The dissenting opinion in *Thibodeau* is persuasive due to the link with human rights and the rules on treaty interpretation. However, the sole cause of action has been acknowledged in the Warsaw Convention of 1929, and followed by the Montreal Convention of 1999. As reasoned in *Sidhu* about the different States Parties between the ECHR and the Warsaw Convention of 1929,¹⁹⁶ it is questionable how a language right trumps over a treaty agreed by more than a hundred States without breaching Article 27 of the VCLT. Unfortunately, the proper way to interpret the Montreal Convention of 1999, is to neither rewrite the law nor to differ from States Parties' expectations, even though the result renders the injured person no compensation because the authority to amend the Convention is a matter for the contracting parties.¹⁹⁷

5.5.2.3 Re-interpreting 'bodily injury'

Another possibility is to interpret the expression 'bodily injury' as covering non-material damage. This interpretation is permissible under the rules of

191 *Thibodeau, ibid.*, paras 141-142, 165.

192 *Thibodeau, ibid.*, para. 175.

193 *Thibodeau, ibid.*, para. 176.

194 *Thibodeau, ibid.*, para. 177.

195 See *Sidhu, supra* n. 65; *Tseng, supra* n. 65; *Thibodeau, ibid.*; *Summary of MC99 Judicial Updates 2013, supra* n. 65, 92.

196 *Sidhu, ibid.* See Section 5.3.2.

197 See *Stott, supra* n. 17, paras 63, 70; *King, supra* n. 71.

treaty interpretation since, according to the drafting history, this term is subject to evolutive interpretation. Supporting reasons are the consumer-oriented policy in the Montreal Convention of 1999, the confirmation from the French delegate in the preparatory draft and support from several States.¹⁹⁸ One author relied on the reasoning in *Walz* because the ECJ, despite not directly ruling on bodily injury, interpreted that ‘damage’ in the whole Chapter III of the Montreal Convention of 1999, must be construed to include both types of damage.¹⁹⁹

One possible argument is that this interpretation will open the floodgates to litigation for moral damage. In reality, this fear can be prevented because courts can exercise their margin of appreciation which is affirmed by the CERD Committee in *L.A.* Moreover, I agree with the statement made by the delegate of Denmark at the Montreal Conference that a passenger must always prove that he or she had been mentally injured due to the accident.²⁰⁰

5.5.3 Solutions for damage caused to mobility aids and service animals

5.5.3.1 Making a special declaration for mobility aids

When damage for mobility aids and service animals is not subject to limitation, it also solves an issue on a different liable party because all liable parties will be under the fault-based regime.

Among several amendments proposed by the European Commission for protecting passengers’ rights, one is to require air carriers to offer a PWD a free-of-charge special declaration when a PWD checks in a mobility aid.²⁰¹ This proposal for a Regulation was approved by Members of the European Parliament with amendments on the first reading in 2014 and the European Commission partially agreed in May 2014.²⁰² From the proposal, this special

198 McKay Cunningham, *The Montreal Convention: Can Passengers Finally Recover for Mental Injuries?*, 41 Vand. J. Transnat’l L., 1043, 1073, 1081 (2008).

199 Walz, *supra* n. 138, para. 29. See Marc McDonald, *The Montreal Convention and the Preemption of Air Passenger harm Claims*, 44 The Irish Jurist, 203, 237 (2010).

200 ICAO Doc 9775 Vol. I, *supra* n. 102, 68.

201 European Commission, *Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation of long delay of flights and Regulation (EC) No 2027/97 on air carrier liability in respect of the carriage of passengers and their baggage by air*, COM/2013/0130 final – 2013/0072 (COD), 13.3.2013, art. 2(4).

202 EUR-Lex, *Procedure 2013/0072/COD*, <http://eur-lex.europa.eu/legal-content/EN/HIS/?uri=celex:52013PC0130> (accessed 1 Mar. 2017). Lord Holmes, the then Disability Commissioner of the UK Equality and Human Rights Commission interviewed that the European Council prevented the proposal becoming law. See Disability News Service, *Airlines have ‘moral duty’ on wheelchair damage*, <http://www.disabilitynewsservice.com/airlines-have-moral-duty-on-wheelchair-damage/> (accessed 1 Mar. 2017).

declaration can be made from the time of booking until when the equipment is handed to the carrier.²⁰³ This proposed provision could be contended as reverse discrimination since it does not waive the fee to other passengers. However, the justification lies on the importance of mobility aids to uphold the personal mobility of PWDs; thus, in my view, it is a lawful measure.

The Montreal Convention of 1999, contains an innovative provision obliging States to require carriers to maintain adequate insurance to cover their liability.²⁰⁴ The free-of-charge special declaration²⁰⁵ may affect the liability amount borne by an air carrier and consequently the amount of insurance which an air carrier has to maintain. However, there is no information on the amount by which the financial burden will be increased if this proposal is passed.

5.5.3.2 *Waiving limit for mobility aids*

Neither the Warsaw Convention of 1929, nor the Montreal Convention of 1999, prevents air carriers from waiving the limit of liability.²⁰⁶ The EU and Canada rely on these legal provisions to solve the low limited liability amount on mobility aids.²⁰⁷

Similar to the Montreal Convention of 1999, The Convention concerning International Carriage by Rail (COTIF) and the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 1974 (Athens Convention), do not provide any particular clause on mobility aids and a limit on damages for baggage.²⁰⁸ Conspicuously, the EU, ratifying all of these conventions, only provides full compensation for mobility aids for PWDs when travelling by rail and sea but not by air.²⁰⁹ In the case of road transport in the EU Regulation, compensation also corresponds to the replacement value with no financial limit.²¹⁰

203 European Parliament, *Report on the proposal for a regulation of the European Parliament and of the Council amending Regulation (EC) No 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights and Regulation (EC) No 2027/97 on air carrier liability in respect of the carriage of passengers and their baggage by air*, (COM(2013)0130 – C7-0066/2013 – 2013/0072(COD), 22.1.2014, amendment 146.

204 Montreal Convention of 1999, art. 50.

205 See Section 5.3.6.3.

206 Warsaw Convention of 1929, art. 33; Montreal Convention of 1999, arts 25, 27.

207 See Section 5.4.2.3.

208 COTIF, *supra* n. 117, Appendix A, art. 34; Athens Convention, *supra* n. 117, art. 8; Regulation (EU) No 1177/2010 of the European Parliament and of the Council of 24 November 2010 concerning the rights of passengers when travelling by sea and inland waterway and amending Regulation (EC) No 2006/2004 OJ L 334, 17.12.2010, p. 1–16, art. 15.

209 Regulation (EC) No 1371/2007 of the European Parliament and of the Council of 23 October 2007 on rail passengers' rights and obligations, OJ L 315, 3.12.2007, p. 14, art. 25.

210 Regulation (EU) No 181/2011, *supra* n. 117, art. 17.

In air travel, the EU solely encourages air carriers to waive limits, but it is unsettled between air carriers and PWDs whether all air carriers waive the compensation limit in this issue or not.²¹¹ This uncertainty results in a problem on obtaining insurance for mobility aids.²¹² Accordingly, the CRPD Committee in its concluding observation to the EU recommends that the EU harmonizes existing legislation on passenger rights, and the rights of maritime passengers can be taken as a model.²¹³ Probably, the waiver of limit will work when it is combined with the enforcement measure as seen in the case of Canada.²¹⁴

Air carriers may argue that this enforcement interferes with their freedom of contract since the Montreal Convention of 1999, leaves the waiver to the discretion of air carriers with the phrase 'a carrier may stipulate'.²¹⁵ In *Sidhu*, Lord Hope, with whom other members of the House agreed, affirms that limitation clauses are a generic feature in contracts of carriage and thus come under the fundamental principle of freedom of contract.²¹⁶ This defense is rebuttable because the principle of non-discrimination under human rights law can curb the freedom of contract.²¹⁷ *Sidhu* is adjudicated under the Warsaw Convention of 1929, which aims to protect air carriers while the Montreal Convention of 1999, is consumer-oriented; hence, the momentum has switched. Moreover, States have an obligation to protect PWDs so they can, and they should exercise their authority to eliminate all discrimination on the basis of disability by any person, in this case, limited liability by an air carrier.

5.5.3.3 Excluding mobility aids from baggage

Another option proposed by the European Commission is to discuss with ICAO the exclusion of mobility aids from the definition of baggage so that the Montreal Convention of 1999, will not apply to mobility aids.²¹⁸ However, ICAO only urges air carriers to reimburse the full replacement cost of the mobility aids but does not touch upon any issue of definition.²¹⁹

211 Steer Davies Gleave, *supra* n. 11, para 4.55.

212 Steer Davies Gleave, *ibid.*, para 6.16.

213 Committee on the Rights of Persons with Disabilities, *supra* n. 46, para. 53.

214 For a decision by the CA Agency about KLM and the exceeding limit, see *supra* n. 168.

215 Montreal Convention of 1999, arts 25, 27. See Dempsey & Milde, *supra* n. 144, 201.

216 *Sidhu*, *supra* n. 65.

217 See Section 2.4.2.1.

218 *Supra* n. 142, minutes, 4.

219 PWD Manual, *supra* n. 16, para. 10.5

5.5.4 Solutions for moral damage caused to persons with disabilities and for damage to mobility aids and service animals

5.5.4.1 Distinguishing among types of damage

The then ECJ in *IATA and ELFAA v. Department of Transport* concluded that remedial measures for flight delays in Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91 (Regulation 261), were not precluded by the Montreal Convention of 1999.²²⁰ Its line of cases is that there are two types of damage: standardized damage and individual damage in the case of flight delay.²²¹ The former was identical for every passenger and mentioned in Regulation 261, while the latter was governed by the Montreal Convention of 1999.²²²

Can one argue that moral damage, as in *Stott*, mentioned by the UK Disability Regulations, which implemented Regulation 1107, is also standardized? In the case of *Stott*, the court correctly negated this argument because emotional injury was not standardized and, accordingly, it should be assessed based on the temporal and substantive scope of the Montreal Convention of 1999.²²³

The duty to repair and replace delayed, damaged or lost mobility aids of PWDs may be comparable to the duty of care to passengers in a delayed flight under EU Regulation 261; thus, it is not subject to limited liability. This claim can be supported by the ECJ's observation on standardized damage that the redress will be in 'the form of standardized and immediate assistance or care for everybody concerned'.²²⁴ The 'temporary' replacement of delayed, damaged or lost mobility aids stipulated by the EU and Canada,²²⁵ seems to fit with this line of jurisprudence because PWDs also require immediate

220 Case C-344/04 *The Queen, on the application of International Air Transport Association and European Low Fares Airline Association v Department for Transport* [2006].

221 Case C-344/04, *ibid.*, para. 43.

222 Case C-344/04 *ibid.*, paras 43-48. The Advocate General additionally argued that obligations under Regulation 261 constituted public nature and differed from the civil liability under the Montreal Convention of 1999. This argument on types of action for damage is rebutted since the distinguish is rather artificial. See Opinion of Advocate General Geelhoed delivered on 8 Sept. 2005, Case C-344/04, paras 49-51; Leloudas, *supra* n. 110, 99. In the international carriage by sea, there are cases concerning the exclusivity principle in the Athens Convention and the Package Travel Regulations and the UK courts decide differently. See Don Green, *Re-examining the Exclusivity Principle Following Stott v Thomas Cook Tour Operator Ltd*, 6 Travel L. Q., 114, 116 (2014).

223 *Stott*, *supra* n. 17, para. 58.

224 Case C-344/04, *supra* n. 220, para. 43.

225 See Section 5.4.2.3.

replacement of their mobility aids to ensure their independence. It is debatable whether reparation is a standardized measure. In general, reparation is a standard gesture offered to every PWD concerned. Arguably, the reparation type and cost is subject to the damage in each case, so it is individual-based damage.²²⁶ The same holds true in the case of permanent replacement stipulated by Canada.

If the ECJ's view in *IATA* were to be adopted in the case of reparation and temporary and permanent replacement of mobility aids, it would be problematic. The ECJ also concluded that these standardized measures do not prevent passengers from compensation laid down in the Montreal Convention of 1999.²²⁷ By allowing two-way redress, the total amount of compensation in the end may exceed the limit of the Convention.²²⁸ Actually, the distress suffered by PWDs when there is no temporary replacement of mobility aids can also be recouped under the Montreal Convention of 1999. As criticized by noted aviation lawyers and scholars, this reasoning ignores the exclusivity principle.²²⁹ By way of comparison, the reparation and replacement of mobility aids fall clearly under redress measures, which PWDs can claim from air carriers under the Montreal Convention of 1999. In sum, following the *IATA* case to escape from the Montreal Convention of 1999, is not a suitable solution.

5.5.4.2 Modernizing the Montreal Convention of 1999

Scholars and judges suggest amending the Montreal Convention of 1999.²³⁰ Apart from adding the abovementioned solutions in the modernization, the amendment could incorporate a saving clause. Lady Hale in *Stott* noted that some treaties provide for an exception in their application of a provision if it contradicts the fundamental rights protected in a State.²³¹ This saving clause

226 See Thibodeau, *supra* n. 65, para. 81. This is comparable to refund of ticket in case of Regulation 261.

227 Case C-344/04 *supra* n. 220, para. 47.

228 Paul Stephen Dempsey & Svante O. Johansson, *Montreal v. Brussels: The Conflict of Laws on the Issue of Delay in International Air Carriage*, 35 *Air & Space L.* 207, 219-220 (2010).

229 See Pablo Mendes de Leon, *Jurisdiction under and Exclusivity of Private International Air Law Agreements on Air Carrier Liability: The Case of Airbus versus Armavia Airlines* (2013), 270 in *From Lowlands to High Skies: A Multilevel Jurisdictional Approach Towards Air Law: essays in honour of John Balfour* (Pablo Mendes de Leon, Brill 2013); Jorn J. Wegter, *The ECJ Decision of 10 January 2006 on the Validity of Regulation 261/2004: Ignoring the Exclusivity of the Montreal Convention*, 31 *Air & Space L.* 133, 146 (2006); Dempsey & Johansson, *ibid.*, 224; Leloudas, *supra* n. 110, 100.

230 Andrew Field, *International Air Carriage, the Montreal Convention and the Injuries for Which There is no Compensation*, 12 *Canterbury L. Rev.* 237, 252 (2006); Neta Palkovitz, *EL-AL's Liability for Claims Related to Security Services in the Israeli Context: Between Exclusivity and Domestic Policy*, 37 *Air & Space L.*, 213, 230 (2012); *Stott*, *supra* n. 17, paras 63, 70.

231 *Stott*, *ibid.*, para. 67. See Section 1.3.2.4.

creates a hierarchy of law and allows States to strengthen human rights protection.

As evidenced by the ICAO Assembly Resolution encouraging States to become parties to the Montreal Convention of 1999, as soon as possible,²³² this implies neither an intention to denounce the Montreal Convention of 1999, nor any hint at its fragmentation. Modernization of the Montreal Convention of 1999, will inevitably reincarnate the Warsaw system, where there are a number of amendments and not every State becomes a party to all amendments. Nevertheless, if there is an amendment, stakeholders representing passengers not limited to PWDs should be able to participate in the meeting to voice passengers' concerns since there were none at the Montreal Conference to draft the Montreal Convention of 1999.²³³

5.5.4.3 Concluding an *inter se* agreement between States Parties to the CRPD

Another possible option provided in the VCLT is an agreement between certain of the parties to modify the Montreal Convention of 1999.²³⁴ This can be done between States Parties to the Montreal Convention of 1999, and those to the CRPD; nevertheless, one foreseeable limitation is that the US, a large participant in carriage by air,²³⁵ is not a party to the CRPD. Furthermore, this option will repeat the Warsaw system; hence, it is not a viable solution.

5.6 CONCLUDING REMARKS

Remedial measures for PWDs in air travel under public and private laws are equipped with administrative and judicial mechanisms. As Higgins puts it, 'without a remedy, a right may be but an empty shell'.²³⁶ Apart from inconsistencies in a few US lower courts and the Brazilian court, the Warsaw Convention of 1929, and the Montreal Convention of 1999, generate three restraints on PWDs from achieving full recovery of their discrimination claim: (1) exclusivity, (2) purely moral damage to themselves without any physical injury, not to baggage and (3) limited compensable amounts to mobility aids and service animals.

The proposed solutions in Section 5.5 are imperfect, and they have not been implemented globally. There is no international institute to provide a uniform interpretation of the Montreal Convention of 1999.²³⁷ Neither the

232 ICAO, Resolution A39-9, para. 2.

233 ICAO Doc 9775 Vol. I, *supra* n. 102, 5-35.

234 VCLT, art. 41(1)(b).

235 *King v. Bristow Helicopters Ltd.*, *supra* n. 117, para. 7.

236 Rosalyn Higgins, *Problems and Process: International Law and How We Use It*, 99 (Clarendon Press, 1994).

237 Koning, *supra* n. 179, 774.

CRPD Committee nor ICAO has pioneered a practical solution to this conundrum. Abeyratne suggested referring any discussion to the Legal Committee of the Council of ICAO and other groups involved in the preparatory draft.²³⁸ This implies that another diplomatic conference should be convened.

The ICJ can only render an advisory opinion on the interpretation of a treaty regarding whether an international law should be interpreted as diminishing human rights value when the UN General Assembly or a specialized agency, namely, ICAO via its Assembly or its Council requests this.²³⁹ Up to May 2017, ICAO has never been referred any question to the ICJ.²⁴⁰

Also, the CRPD Committee missed an opportunity to interpret the exclusivity principle because no communication by Mr. Stott was submitted after the judgment of the UK Supreme Court which, in my opinion, can be considered as an exhaustion of local remedies. National and regional initiatives inevitably lead to a question on extraterritorial application and non-uniformity. It seems that until there is an international solution, increasing the level of compliance with accessibility standards and non-discrimination practice is the answer to preventing any unavailable remedy.

238 Abeyratne, *supra* n. 138, 188.

239 Statute of the International Court of Justice (San Francisco, 26 June 1945), T.S. No. 993, art. 65; Agreement between the United Nations and the International Civil Aviation Organization, (31 May 1948), ICAO Doc 7970, art. X. Osieke viewed that any contracting State may request the matter be submitted to the ICJ for an advisory opinion. See Ebere Osieke, *Unconstitutional Acts In International Organisations: The Law and Practice of ICAO*, 28:1 Int'l & Comp. L.Q., 1, 22 (1979).

240 International Court of Justice, *List of Advisory Proceedings referred to the Court since 1946*, <http://www.icj-cij.org/docket/index.php?p1=3&p2=4&p3=1> (accessed 1 Mar. 2017).

6 | Conclusions

6.1 INTRODUCTION

In the introductory chapter, the problems pertaining to access to air travel of PWDs are portrayed, and two research questions are raised: how to balance the rights of PWDs according to States' obligations towards international human rights law and international air law without causing undue burden, either operational or monetary, to airports and airline operators or inconveniencing other passengers; and how to legally ensure the balance in the first question in a harmonized manner among jurisdictions in view of the transnational character of air travel and when inconsistent legal provisions benefit no one.

On the basis of these two questions, in the previous Chapters I have analyzed the existing legal regimes and came to the following conclusions:

- There is no international right to travel by air (Chapter 2).
- Accessibility standards in air travel are not harmonized among States. This holds true with respect to their scope of application, contents and enforcement (Chapter 4 and Chapter 5).
- Annex 9 and the Manual on Access to Air Transport by Persons with Disabilities (PWD Manual) are not comprehensive and do not foresee in enforcement measures (Chapter 4).
- The Convention for the Unification of Certain Rules Relating to International Carriage by Air of 1929 (Warsaw Convention of 1929),¹ and the Convention for the Unification of Certain Rules for International Carriage by Air of 1999 (Montreal Convention of 1999)² cannot render an effective remedy for PWDs in relation to moral damage caused by a breach of an air carrier's duty under accessibility standards or to inadequate compensation for damage to mobility aids (Chapter 5).

According to these problems, this concluding Chapter presents the *lex ferenda* concerning accessible air travel based on the capabilities framework and the rules of treaty interpretation to harmonize air law and human rights law. Section 6.2 and Section 6.3 suggest solutions concerning an interpretation on

1 Convention for the Unification of Certain Rules Relating to International Transportation by Air (Warsaw, 12 Oct. 1929), T.S. 876, (Warsaw Convention of 1929).

2 Convention for the Unification of Certain Rules for International Carriage by Air, (Montreal, 28 May 1999), ICAO Doc 9740, (Montreal Convention of 1999).

the right to travel and obligations towards PWDs. Section 6.4 addresses substantive solutions and enforcement and procedural aspects to the International Civil Aviation Organization (ICAO) and the Committee on the Rights of Persons with Disabilities (CRPD Committee). The recommendations at national and regional levels are contained in Section 6.5. Section 6.6 contains the concluding remarks.

6.2 RECOGNITION OF THE RIGHT TO TRAVEL BY AIR

One of the consequences of having no international right to travel is that PWDs as well as others asserting that they have been unjustifiably denied or obstructed from travel cannot legally claim to have been discriminated against on the basis of disability (Section 2.6.1). This situation brings me to two possible solutions: to establish a new separate right to travel or to interpret existing rights to cover travel by air.

For the first option, I am aware that to translate all human needs to human rights may lead to devaluing rights themselves;³ therefore, there should be criteria to establish a new human right. In a widely-cited article on conjuring up new human rights, Alston proposes that new rights can become international human rights by passing through substantive and procedural processes.⁴ In relation to the procedural process, he suggests a seven-step procedure, from a proposal to recognize a new human right to the adoption of a resolution by the UN General Assembly.⁵ This roadmap, on the one hand, guarantees due process; on the other hand, it requires a certain period of time.

Turning to the other possibility, in Chapter 2, I noted that the root of accessibility and personal mobility in the CRPD lies in civil and political rights, but the HRC has not interpreted these rights to cover modes of transport. On the contrary, the CESCR more actively guarantees the opportunity to travel by relying on economic, social and cultural rights. In my view, the problem of no explicit right to travel and, in turn, no explicit corresponding obligation for States, is the result of the division between a negative right and a positive right. Ensuring access to public transport may entail costs and investment, so such efforts do not fit the notion that negative rights involve few costs for States. In my opinion, this may be a reason why the HRC does not cover obligations on modes of transport in the right to freedom of movement in the International Covenant on Civil and Political Rights (ICCPR).

3 Upendra Baxi, *The Future of Human Rights*, 72-75 (Oxford University Press 2002).

4 Philip Alston, *Conjuring up New Human Rights: A Proposal for Quality Control*, 78:3 Am. J. Int'l L. 607, 615 (1984).

5 Alston, *ibid.*, 620. See Sinai Deutch, *Are Consumer Rights Human Rights?*, 32:3 Osgoode Hall L.J. 537 (1994). Deutch also proposes similar substantive and procedural processes to recognize consumer rights as human rights.

In *Human Rights Transformed*, Fredman relies on, among others, the capabilities approach and contends that positive obligations arise from all human rights and proposes not to differentiate between negative and positive rights.⁶ By shifting the view to one where the rights in the ICCPR can impose positive obligations, I propose encapsulating obligations concerning access to travel within the right to freedom of movement, given their connection. Freedom of movement covers the mobility of persons to move within a country, leave any country and enter one's own country.⁷ The capability to access any modes of transport, including air transport, supports an exercise of this right. Moreover, this interpretation covers every purpose of travel unlike the method of attaching this obligation to the right to work, to health or to education.

One plausible objection is that States will be judged to breach an obligation if they have to realize the obligation immediately. This claim also presents a problem with the typology of positive and negative rights. Instead, the realization of an obligation should depend on the type of obligation. States can differentiate between obligations into short-, medium- and long-term goals.⁸ The Sustainable Development Goals (SDGs) target of accessible and sustainable transport systems in 2030⁹ should be incorporated as a State's progressive goal. If resources are necessary to implement obligations, the progressive realization should be applied. The public budget analysis mentioned in Section 3.5.4 can be applied to monitor the implementation. While the SDGs do not directly assign private entities as duty bearers, an obligation of the State to protect implies an obligation to monitor the implementation of accessibility standards by private entities (Section 3.3.1).

6 Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties*, 11-12, 204 (Oxford University Press 2008). See Section 6.3.2.

7 International Covenant on Civil and Political Rights (New York, 16 Dec. 1966) 999 U.N.T.S. 171 and 1057 U.N.T.S. 407, art. 12 (ICCPR).

8 Fredman gives an example of the South African Court's judgment on the criteria for specifying the duty. See Fredman, *supra* n. 6, 213.

9 G.A. Res. 1, U.N. GAOR 70th Sess., U.N. Doc A/RES/70/1 (2015). Goal 11.2 By 2030, provide access to safe, affordable, accessible and sustainable transport systems for all, improving road safety, notably by expanding public transport, with special attention to the needs of those in vulnerable situations, women, children, persons with disabilities and older persons.

6.3 OBLIGATIONS *ERGA OMNES* FROM THE RIGHTS OF PERSONS WITH DISABILITIES

6.3.1 Accessibility, personal mobility, and non-discrimination on the basis of disability and obligation *erga omnes*

On account of the nature of human rights obligations being non-reciprocal and containing universal values, the HRC¹⁰ and the International Law Institute,¹¹ as well as a number of legal scholars,¹² accept that the basic rights of the human person reflect *erga omnes* obligations. This acceptance is mentioned in a broad sense without specific details on which rights are ‘basic’. This may be due to the indivisibility of human rights and the notion that all human rights can be regarded as fundamental or basic.¹³

Accessibility, personal mobility and non-discrimination on the basis of disability are all non-reciprocal, so they partially pass the criteria to be *erga omnes*. However, since under the CRPD they address PWDs, can they be embraced as universal values?

It can be pointed out that accessibility benefits not only PWDs and attains a status of global public good as discussed in Section 1.5.1.2. An obligation *erga omnes* can be conceptualized through accessibility being a global public good.¹⁴

Personal mobility in the CRPD addresses specifically PWDs to improve their oppressed situation; however, it is derived from the freedom of movement which is generally important to everybody.

The principle of non-discrimination on the basis of disability protects the inherent dignity of persons and guarantees equal enjoyment of human rights and fundamental freedoms. Therefore, its foundation is doubtlessly universal.

10 Human Rights Committee, General Comment 31, The Nature of the General Obligation Imposed on States Parties to the Covenant (Eightieth session, 2004), U.N. Doc. CCPR/C/21/Rev.1/Add. 13, para. 2.

11 International Law Institute, *The Protection of Human Rights and the Principle of Non-Intervention in Internal Affairs of States*, 63 Institut de Droit International Annuaire, 338 (1989); International Law Institute, *Obligations and Rights Erga omnes in International Law by Giorgio Gaja (Rapporteur)*, 71:1 Institut de Droit International Annuaire, 116, 116 (2005).

12 Christian J. Tams, *Enforcing Obligations Erga Omnes in International Law*, (Cambridge University Press, 2005); Jiefang Huang, *Aviation Safety and ICAO*, 168 (Kluwer Law International 2009); Theodor Meron, *On a Hierarchy of International Human Rights*, 80 Am. J. Int'l L., 1 (1986). In his work on the Concept of International Obligation *Erga Omnes*, Ragazzi concluded in 1997 that the protection of human rights other than those listed by the ICJ has not reached the obligation *erga omnes* status generally; on the other hand, he left the door open for assessment of each human right separately. See Maurizio Ragazzi, *The Concept of International Obligations Erga Omnes*, 144-145 (Clarendon Press 1997).

13 Meron, *ibid.*, 7.

14 Bodansky views that being global public goods is a way to conceptualize an obligation *erga omnes*. See Daniel Bodansky, *What's in a Concept? Global Public Goods, International Law, and Legitimacy*, 23:3 Eur. J. Int'l L., 651, 653(2012).

According to these criteria and as part of human rights, accessibility, personal mobility and non-discrimination on the basis of disability have an *erga omnes* character.

6.3.2 Can positive obligations become obligations *erga omnes*?

Ragazzi notes that all the *erga omnes* obligations listed in the *Barcelona Traction*¹⁵ share the character of negative obligations.¹⁶ If this claim were true, general human rights obligations could not be *erga omnes* because, as asserted by Fredman, both civil and political rights and socio-economic rights contain both negative and positive obligations.¹⁷ This also holds true in the case of the CRPD where accessibility and non-discrimination on the basis of disability include positive obligations such as an obligation to eliminate existing barriers and an obligation to reasonably accommodate PWDs.

The ICJ, human rights tribunals and UN human rights treaty bodies all appear to reject the restriction of *erga omnes* status to only negative obligations. First, in the ICJ's advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the right to self-determination contains obligations *erga omnes* and two of them are positive obligations.¹⁸ In the HRC General Comment No. 31, when the HRC concluded that obligations concerning human rights attain the *erga omnes* status, it further directed positive obligations towards States.¹⁹ This point illustrates that, at least in human rights, an obligation *erga omnes* is not limited to only a negative obligation. Third, the European Court of Human Rights (ECtHR) decided that positive obligations also flow from the right to life, which is a norm of *jus cogens* and requires obligations *erga omnes*.²⁰ Moreover, the Committee on the Elimination of Racial Discrimination (CERD Committee)²¹ and the ECtHR²² held that the

15 *Barcelona Traction, Light and Power Company, Limited (New Application: 1962) (Belgium v. Spain)*, Judgment, I.C.J. Rep. 1970 (5 Feb. 1970), para. 34.

16 Ragazzi, *supra* n. 12, 133.

17 Fredman, *supra* n. 6, 3.

18 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Rep. 2004 (9 July 2004), 155-159.

19 HRC General Comment 31, *supra* n. 10, paras 2, 8.

20 European Court of Human Rights, *Factsheet – Right to Life*, 3, http://www.echr.coe.int/Documents/FS_Life_ENG.pdf (accessed 13 Jan. 2017). Other rights in the ECHR entails positive obligations, including article 3 and article 8 thereof. See Jean-François Akandji-Kombe, *Positive Obligations under the European Convention on Human Rights: A Guide to the Implementation of the European Convention on Human Rights*, <https://infoeuropa.eu/rocid.pt/files/database/000047001-000048000/000047394.pdf> (accessed 18 May 2017).

21 Committee on the Elimination of Racial Discrimination, General Recommendation XXVII, Discrimination against Roma (Fifty-seventh session, 2000), U.N. Doc. A/55/18, Annex V, paras 12-16.

protection from racial discrimination, referred to in *Barcelona Traction* as *erga omnes*,²³ also contains positive obligations. These foregoing illustrations apparently signify a trend, at least in human rights law, towards no division between positive and negative obligations in relation to the *erga omnes* status. Hence, accessibility, personal mobility and non-discrimination on the basis of disability, regardless of their positive obligations, are not barred from being *erga omnes* in character.

6.3.3 Obligation *erga omnes* and private entities

In Section 5.3.2.3, I argued that an obligation *erga omnes* binds States to curb private entities from infringing the right holders to whom States are obliged. Accordingly, in the case of accessible air travel, States owe obligations towards PWDs to protect them from private airport operators, air carriers or other sub-contractors.

Nonetheless, an obligation *erga omnes* does not confer universal jurisdiction on a bystander State.²⁴ States which grant an operating license to air carriers and airport operators have jurisdictions to prescribe and to enforce these private entities. When these private entities breach their regional, national or contractual obligations towards PWDs, States have an obligation to protect by putting measures in place against such private entities including remedial measures. Failure to do so triggers other States, which are not directly injured, to invoke responsibility from the responsible State.²⁵

6.4 ICAO AND THE CRPD COMMITTEE

6.4.1 Contents of ICAO accessibility standards

I concluded in Chapter 4 that, while ICAO is an appropriate organization to provide harmonized accessibility standards, there is room for improvement in relation to ICAO's content and enforcement measures.

22 *DH and Others v The Czech Republic* [GC], no. 57325/00, 13 Nov. 2007. ECHR 2007-IV. The case involves with the disproportionately high placement of Roma students in schools for the learning disabled. The Grand Chamber of the ECtHR applied the indirect discrimination and ordered the Czech Republic to pass legislation making indirect discrimination illegal.

23 *Barcelona Traction*, *supra* n. 15, para. 34.

24 Cedric Ryngaert, *Unilateral Jurisdiction and Global Values*, 45 (Eleven International Publishing 2015). See Section 3.6.4.

25 The International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts, art. 48; James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries*, 279 (Cambridge University Press 2002).

The CRPD Committee and ICAO concur that the formulation and language of accessibility standards should be broad.²⁶ At the same time, the contents in Annex 9 and the PWD Manual should be comprehensive enough to cover physical environment and transportation, information and communication technologies, and facilities and services as mentioned in Article 9 of the CRPD, as well as to address every type of impairment (Section 1.5.1.1). It is not easy to include all obstacles to access to air travel faced by PWDs, so rather than pinpointing each and every topic, ICAO should set central criteria that are applicable to a number of issues. Moreover, consultation with PWDs (Section 6.4.3) is necessary. At the very least, Annex 9 and the PWD Manual should contain contents that are less than the contents incorporated in the accessibility standards in the US and Canada (Section 4.7.1), and they should follow the CRPD obligations (Section 3.4.2 – Section 3.4.6). In other words, there should be the following contents:

Standards

- Criteria based on the indirect discrimination test to assess the lawfulness of accessibility standards, because Standards and Recommended Practices (SARPs) may leave implementation methods to States' discretion (Section 3.4.1). The criteria can be applied to evaluate issues about requirements on accompanying persons, extra seats, service animals, advance notice and restriction pertaining to mobility aids, all of which are examined in Section 4.6.3.1 to Section 4.6.3.5.
- Criteria to ascertain the reasonable accommodation based on a definition under the CRPD as discussed in Section 3.4.5.
- Incorporation of accessibility as a condition in license issuance and renewal (Section 3.4.3).
- Criteria concerning justified exceptions to accessibility standards which should clearly connect with aviation safety or security (Section 3.4.2.2).
- Criteria on dissuasive penalties for non-compliance to accessibility standards (Section 3.3.1).
- Interpretation guidelines on remedial measures in the Warsaw Convention of 1929, and the Montreal Convention of 1999 (See Section 6.4.2.2 and Section 6.4.4.4 below).
- Incorporation of the waiver of limited liability for mobility aids and service animals as a condition in license issuance and renewal (Section 3.3.2.2.B).

Proposed Standards for Annex 9

- Contracting States shall ensure that accessibility standards do not have any direct or indirect detrimental effect on any persons with disabilities without any justified objective.

26 Committee on the Rights of Persons with Disabilities, General Comment 2, Art. 9 (Eleventh session, 2014), U.N. Doc. CRPD/C/GC/2, para. 25; ICAO, Resolution A39-22, para. 4.

- Contracting States shall incorporate a duty of reasonable accommodation according to the Convention on the Rights of Persons with Disabilities into their accessibility standards.
- Contracting States shall ensure that exceptions to accessibility standards must relate to the safety of the flight, passengers, or persons with disabilities unless there are express exceptions to accessibility standards provided by ICAO. In any case, Contracting States shall make an explanation of exceptions accessible to the public.
- Contracting States shall ensure that an air carrier's liability for mobility aids and service animals under any applicable national, regional or international law is unlimited.

Recommended Practices

- A specification of the language to be provided in an accessible format (Section 4.6.2.1.B).
- Content concerning in-flight entertainment information (Section 4.6.2.1.B).
- Types, services and documents of service animals permitted on board (Section 4.6.3.2).

The distinction separating the Standards from the Recommended Practices is their contents. Those suggested as Standards involve basic legal criteria, while those suggested as Recommended Practices are more operational and detailed.

6.4.2 Remedial measures

6.4.2.1 Proposals made pursuant to the Montreal Convention of 1999

At the outset, I propose solutions on the basis of the Montreal Convention of 1999, since it modernizes the Warsaw Convention of 1929, whereas ICAO urges States to ratify it.²⁷

The differentiation between types of damage, as seen in the *IATA* case under the European Court of Justice (ECJ) (Section 5.5.3.1), is questionable on the grounds of ignorance about the exclusivity principle. Either amending the Montreal Convention of 1999 (Section 5.5.3.2), or concluding an agreement between certain of the parties to modify the Montreal Convention of 1999 (Section 5.5.3.3), will lead to inconsistency since the States Parties to the new convention may not be the same as those having ratified the Montreal Convention of 1999, or the number of States Parties to the new convention may not

²⁷ ICAO, Resolution A39-9.

be equal to that of the Montreal Convention of 1999. Therefore, I turn to other available solutions in Section 5.5.1 and Section 5.5.2.

6.4.2.2 *An interpretation to recognize human rights values*

My method to select the most suitable solutions for all the major stakeholders in air travel facilitations (Section 1.1) is based on the rules of treaty interpretation (Section 1.3.2), because all of these solutions should aid the interpretation of the Warsaw Convention of 1929, and the Montreal Convention of 1999.

Both the consistency between national and regional consumer protection and the Warsaw Convention of 1929, and the Montreal Convention of 1999, encouraged under the ICAO Core Principles, and the recommendation in the International Law Commission (ILC) on the Fragmentation of International Law (ILC Fragmentation Report) on the principle of harmonization present similar interpretation rules. Since obligations that arise from accessibility, personal mobility and non-discrimination on the basis of disability are *erga omnes*,²⁸ the Warsaw Convention of 1929, and the Montreal Convention of 1999, should be interpreted in a harmonized manner to these. Accordingly, States and courts cannot deny application simply because some States are not bound by these obligations. Moreover, I follow Judge Trindade in *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)* in assessing remedies for human rights violations through a human rights lens,²⁹ and not interpreting a provision in a way that weakens the safeguards of recognized human rights.³⁰

The harmonized interpretation should be done through cooperation between ICAO and the CRPD Committee as further explained in Section 6.4.4.4.

6.4.2.3 *A solution for moral damage under discrimination claims*

In Chapter 5, I presented three alternatives. The first two involve confining the exclusivity principle (Section 5.5.1.1 and Section 5.5.1.2), while the last one deals with the expression 'bodily injury' (Section 5.5.1.3). The options to confine the exclusivity principle and allow recourse to local law, as Judge Ginsburg reasons in *Tseng*, would undermine the uniform regulation of the Warsaw Convention of 1929.³¹ This objective is anchored in the Montreal Convention of 1999, along with the consumer protection objective.³² With the general rules

28 See Section 6.3.1.

29 Separate opinion of Judge Cançado Trindade, *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Merits, Judgment, I.C.J. Rep. 2010 (30 Nov. 2010), para. 220. See Section 3.3.2.2.

30 *Ibid.*, para. 89. See Section 1.3.2.

31 *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 US 155, 161 (1999).

32 Montreal Convention of 1999, preamble.

of interpretation as a backdrop, both objectives should be taken into account and construed in a conformable manner.³³ Thus, the first two options are not viable.

The Montreal Conference concluded that the term ‘bodily injury’ is evolving.³⁴ The rules of treaty interpretation endorse States to construe this term in a non-static manner (Section 1.3.2.1.C). At least, this way of interpretation has been endorsed in *Walz v. Clickair* by the ECJ in the case of compensation for non-material damage caused to baggage because the Montreal Convention of 1999, aims to protect the interests of consumers.³⁵ In my view, this option does not go against the spirit of the Convention and is in line with the principle of harmonization. The exclusivity principle is still adhered to and the national courts do not, and are not, entitled to create new laws.

Moreover, this proposal to include purely moral injury under the expression ‘bodily injury’ is comparable to the liability regime for carriage by sea which allows compensation for personal injury and, at the same time, recognizes the exclusivity principle.³⁶ The Athens Convention approach is similar to the CRPD Committee’s concluding observation to the EU that the rights of maritime passengers can serve as a model.³⁷

Air carriers may be afraid of being bombarded with legal actions. However, passengers have to prove their damage, and courts can exercise their discretion on a case-by-case basis. What is more essential, is that the option does not automatically suppress recourse for moral damage. Compared to the stretched interpretation of the term ‘accident’ in *Husain*, no floodgate is broken (Section 5.3.4). The argument that insurance premiums will be increased if moral damage is compensable is unconvincing. If this surcharge reflects the actual market, it should be accepted by all involved.

33 See WTO, *US – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R 12 Oct. 1998, paras 17, 153; Section 1.3.2.3 A.

34 ICAO, *International Conference on Air Law*, ICAO Doc 9775 Vol. I, 243. See Section 5.3.5.2, Chapter 5.

35 Case C-63/09 *Walz v. Clickair SA* [2010], para. 31. The Brazilian court also gives the plaintiff compensation for moral damage to delayed baggage but the reasoning is established on its Constitution, not the Montreal Convention of 1999. See Section 5.3.6.2, Chapter 5.

36 Athens Convention relating to the Carriage of Passengers and Their Luggage by Sea, (Athens, 13 Dec. 1974) (Athens Convention); Protocol of 2002 to the Athens Convention Relating to the Carriage of Passengers and Their Luggage by Sea, 1974 (1 Nov. 2002), arts 3, 14. The exclusivity principle in the Athens Convention is narrower than that of the Montreal Convention of 1999 because the former governs only ‘the death of or personal injury to a passenger or for the loss of or damage to luggage’. See Don Green, *Re-examining the Exclusivity Principle Following Stott v Thomas Cook Tour Operator Ltd*, 6 Travel L. Q., 114, 116 (2014).

37 Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Report Submitted by the European Union*, (Fourteenth session, 2015), U.N. Doc. CRPD/C/EU/CO/1, para. 53.

6.4.2.4 *A solution for the compensation limit over damage to mobility aids and service animals*

From the three options in Section 5.5.2, the exclusion of mobility aids from the meaning of baggage is the least practicable solution, because it requires amending the Montreal Convention of 1999. In my view, any option requiring a revision of the Montreal Convention of 1999, is not an ideal solution because it can create a non-uniform regime as seen in the case of the Warsaw Convention of 1929.

The other two proposals in Section 5.5.2.1 and Section 5.5.2.2 do not require any amendment to the Montreal Convention of 1999. By weighing up the pros and cons from the consumer protection viewpoint, I am inclined toward the option to waive the limit of baggage for mobility aids and service animals. This will be less burdensome for PWDs, because they do not have to declare the value of their mobility aids or service animals, while the free-of-charge declaration requires PWDs to inform the air carrier of the value. There may be a chance that PWDs do not know about the liability condition, so they fail to inform the air carrier and subject themselves to existing limited liability regime.

One note of caution concerns the impact to an air carrier's insurance premium and whether the unlimited liability for baggage claims will include compensation for moral damage that results from damage to mobility aids and service animals. ICAO and the CRPD Committee can thwart this possibility by initiating a cost-benefit study on this issue and by publishing an interpretative guideline. Furthermore, ICAO and the CRPD Committee should encourage States to incorporate this waiver as a condition of license issuance or renewal, or to ensure that their national air carriers insert this waiver into the conditions of carriage.

6.4.3 Inclusion of persons with disabilities in the drafting process

The motto 'nothing about us without us' which is echoed in Article 4(3) of the CRPD requires States Parties to closely consult with PWDs and their NGOs when they develop and implement legislation and policies on PWDs. This should translate to an obligation of ICAO. On the basis of the ICAO Assembly Resolution A1-11, the cooperation with private international organizations is permitted; however, the resolution limits the participation only to wide and well-established international bodies and, in practice, these are organizations focusing on civil aviation or trade.³⁸ The ICAO Assembly Resolution A1-11

38 ICAO, Resolution A1-11, para. A(1); Ludwig Weber, *International Civil Aviation Organization (ICAO)*, 132 (Kluwer Law International, 2012).

limits cooperation solely to organizations sharing a common interest with ICAO.³⁹ In Section 4.2.1, Chapter 4, I reached a conclusion that ICAO has to observe the non-discrimination on the basis of disability principle and the accessibility principle in the CRPD. Accordingly, any private international organizations working for PWDs which aim to promote equivalent access to air travel should not be barred from collaboration with ICAO in this aspect.

Cooperation can range from the exchange of information and documentation to participation in the work of technical meetings, committees or working groups.⁴⁰ Accordingly, when the ICAO Facilitation Panel develops SARPs for PWDs, it should invite PWDs or their representative organizations to render their opinion to ensure the effectiveness and practicality of SARPs. Nevertheless, under the ICAO Assembly Resolution A1-11, participation does not entitle the NGOs on PWDs to the right to vote.⁴¹

6.4.4 Strengthening ICAO enforcement measures

I concluded in Section 4.7.2 that the legal force of SARPs in Annex 9 pertaining to PWDs is rather weaker compared to safety-related SARPs. However, their essence is not less, since they connect with human rights and *erga omnes* obligations concerning accessibility and non-discrimination on the basis of disability as mentioned in Section 6.3. ICAO can support the compliance of States with these human rights obligations in relation to air transport by taking the following practicable actions.

6.4.4.1 Audit

There is no doubt about the contribution of audits in relation to guaranteeing implementation of Annexes. The question is rather how ICAO is able to audit Standards on PWDs. Standards on PWDs are not linked to the issue of security, so they cannot be subjected to the security audit. In addition to an option to establish a new audit program for Annex 9,⁴² ICAO could tie Standards on PWDs to the safety audit.

Abeyratne who supports a safety audit on Standards on PWDs reasons that the safety of PWDs is linked to the safety audit.⁴³ The scope of the ICAO safety audit includes the licensing of operational personnel, certification of aircraft,

³⁹ ICAO, *ibid.*, para. A(3).

⁴⁰ ICAO, *ibid.*, para. A(2).

⁴¹ ICAO, *ibid.*, para. A(4).

⁴² For Standards in Annex 9 which are audited under the USAP-CMA and the USOAP-CMA, see Section 4.2.2.4 and *supra* n. 38. Yet, there are some Standards which cannot connect with safety such as Standard 3.19 on exit visas.

⁴³ Ruwantissa Abeyratne, *The Rights of a Disabled Airline Passenger: A New Approach?*, 60 German J. Air & Space L., 177,193 (2011).

air operators and aerodromes, and the control and supervision of licensed personnel,⁴⁴ all of which correlate to the proposed contents of SARPs in Section 6.4.1.

In Section 5.2.3.2, I noted that under the ICAO Safety Oversight Manual, the penalty for non-compliance with national civil aviation regulations is a matter for States.⁴⁵ With regard to an audit on Standards on PWDs, since a penalty can inhibit disobedience, in my view, ICAO should be able to audit the dissuasiveness of such penalty.

6.4.4.2 Air services agreements

An air services agreement (ASA) represents the primary legal basis for international commercial air services.⁴⁶ ICAO has realized its significance in reinforcing the application of matters related to aviation and has urged for the insertion of ICAO's policies or model clauses into an ASA. Thereafter, matters such as safety, security, computer reservation systems and the smoking ban became typical clauses therein (Section 1.6.4 and Section 1.6.5.4).⁴⁷

The model clause on accessible air travel can be developed and adopted by the ICAO Council by virtue of Article 54 of the Convention on International Civil Aviation (Chicago Convention).⁴⁸ Then, the ICAO Assembly can adopt a resolution to exhort Contracting States to incorporate this clause into their ASAs.⁴⁹

44 ICAO, *Safety Oversight Manual*, ICAO Doc 9734 AN/959, Part A, The Establishment and Management of a State's Safety Oversight System, (2nd ed. 2006), para. 2.3.1.1.

45 *Ibid.*, para. 3.3.

46 ICAO, Resolution A39-17, Appendix G.

47 The clause on smoking ban has not found in the ASAs between the EU-US, the EU-Canada and the US-Canada because they have banned smoking already. See ICAO, *ICAO Template Air Services Agreement*, <http://www.icao.int/Meetings/AMC/MA/ICAN2009/templateair-servicesagreements.pdf> (accessed 13 Jan. 2017).

48 Convention on International Civil Aviation (Chicago, 7 Dec. 1944), 15 U.N.T.S. 295, 61 Stat. 1180, T.I.A.S. No. 1591, art. 54(i) (Chicago Convention). Article 54(i) mandates the Council to request, collect, examine and publish information relating to the advancement of air navigation and the operation of international air services. But Milde notices that there is no record of decisions by the Council under this paragraph. By way of comparison to the Core Principle, the Council developed and adopted it according to the mandate of the General Assembly. Therefore, the Council can develop a model clause on PWDs by virtue of Article 54(b) which requires the Council to carry out the directs of the Assembly. See Chicago Convention, art. 54; Michael Milde, *International Air Law and ICAO*, 166 (3d ed., Eleven International Publishing 2016); Resolution A38-14, Appendix A, para. 19.

49 For an example on aviation security clause and the relevant ICAO Assembly resolution, see ICAO *Template Air Services Agreement*, *supra* n. 47; ICAO, Resolution A38-15, Appendix C, para. 4.

6.4.4.3 ICAO General Assembly Resolutions

In addition to urging for the incorporation of a model clause into an ASA, the General Assembly as a supreme organ can pass other resolutions to generate accessible air travel.

This action can be compared to the ban on smoking on board. The momentum shifted towards a smoke-free flight because of the safety concerns over in-flight smoking and public health issues brought up at the World Conference held by the WHO and other UN agencies. The Conference adopted a resolution to urge ICAO to prohibit smoking on all commercial passenger flights.⁵⁰ As a result, the Assembly set an objective with a specific deadline to complete smoking bans.⁵¹ The Assembly also assigned the Council to report on implementation.⁵² Although the prohibition was not achieved within the time limit, promising advancement was noted.⁵³ The General Assembly can also urge States to make air travel accessible. There is no need to set a concrete deadline because an obligation can be gradually implemented. However, the resolution should adhere to the CRPD General Comment No. 2 on the distinction between existing and new airports and aircraft. Moreover, I do not see this content as conflicting with the sovereignty of the States that do not ratify the CRPD, since obligations concerning accessibility are *erga omnes*. The CRPD General Comment can be considered as a guideline to implement such obligations.

6.4.4.4 Cooperation between ICAO and the CRPD Committee

Article 38 of the CRPD intends to foster cooperation between the CRPD Committee and other UN specialized agencies (Section 3.7.3). Article 65 of the Chicago Convention and ICAO Assembly Resolution A1-10 grant the ICAO Council authority to enter into agreements with other international bodies to work with ICAO on matters regarding international civil aviation.⁵⁴ According to these legal provisions, ICAO and the CRPD Committee should cooperate and contribute from their area of expertise (Section 4.7.3). Concerning consumer protection, the Sixth Meeting of the Worldwide Air Transport Conference recommended that ICAO work on a cost-benefit analysis of air transport connectivity.⁵⁵ In my view, human rights elements and the capabilities approach should be added as factors to the cost-benefit analysis. Here, the CRPD Committee can provide ICAO with the human rights perspective to

50 ICAO, Annual Report of the Council, 1992, 86. See Ruwantissa Abeyratne, *Tobacco Smoking in Aircraft – A Fog of Legal Rhetoric?*, XVIII: 2 Air & Space L., 50, 55 (1993).

51 ICAO, Resolution A29-15, para. 3.

52 *Ibid.*, para. 4.

53 ICAO, *The World of Civil Aviation 1999-2002*, Circular 279-AT/116, 67.

54 Chicago Convention, art. 65; ICAO, Resolution A1-10, para. 1; Weber, *supra* n. 38, 127-128.

55 ICAO, *Consumer Protection*, Worldwide Air Transport Conference (ATCONF) Sixth Meeting, ATConf/6-WP/104, para. 2.3-3.

support benefitting accessibility in air travel to eradicate any prejudice in implementing SARPs. This practice is comparable to the WHO study on banning smoking which led to all smoke-free flights as mentioned in Section 7.6.4.4.3.

When developing regulations, policies and guidelines in relation to PWDs in air travel, ICAO should invite the CRPD Committee to provide its views and *vice versa*. An example can be drawn from the guidelines concerning advance passenger information, and passenger name record because ICAO, the World Customs Organization, and IATA collectively developed these guidelines.⁵⁶ These joint publications demonstrate the work between public international bodies as well as between public and private organizations. Through such cooperation between ICAO and the CRPD Committee, the views from the aviation world and human rights can be bridged and balanced.

At the 39th Session of the ICAO Assembly, ICAO stressed the SDGs and the new initiative 'No Country Left Behind' (NCLB).⁵⁷ NCLB aims to assist States when implementing SARPs by establishing partnerships with other Member States, industry, financial institutions and other stakeholders.⁵⁸ This initiative is without doubt in line with international cooperation as referred to in Article 32 of the CRPD. This can be another channel for collaboration between ICAO and the CRPD Committee (Section 3.7.2).

Also, Chapter 5 concluded that national courts are responsible for interpreting the Warsaw Convention of 1929, and the Montreal Convention of 1999. When there are conflicts between treaty provisions in different regimes, the ILC Fragmentation Report warns that the settlement should not be the responsibility of organs exclusively linked to one of the conflicting regimes.⁵⁹ It is inconclusive to say that national courts are specialized in civil and commercial law more than in human rights law. However, to foreclose a similar argument, ICAO and the CRPD Committee should cooperate to publish interpretation guidelines on remedial measures concerning the Warsaw Convention of 1929, and the Montreal Convention of 1999. An initiation to study and make recommendations on problems concerning private air law can be done under the direction of the ICAO Assembly, the Council or the ICAO Legal Committee, subject to the prior approval of the ICAO Council.⁶⁰

56 ICAO, *API Guidelines and PNR Reporting Standards*, <https://www.icao.int/Security/FAL/SitePages/API%20Guidelines%20and%20PNR%20Reporting%20Standards.aspx> (accessed 24 May 2017).

57 ICAO, Resolution A39-23; Resolution A39-25; Resolution A39-26. See Ruwantissa Abeyratne, *Outcome of the 39th Session of the International Civil Aviation Organization Assembly*, 42:1 Air & Space L., 13 (2017).

58 ICAO, Resolution A39-23.

59 International Law Commission, *Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission, Finalized by Martti Koskenniemi, A/CN.4/L.682 (13 Apr. 2006) para. 493(2).

60 ICAO, Resolution A7-5, para. 2(c).

6.5 THE NATIONAL AND REGIONAL LEVELS

Other than obligations on accessible air travel for PWDs elaborated on in Section 3.2 to Section 3.5, the EU as well as its Member States and other States should take the following recommendations into account.

6.5.1 Refraining from exercising extraterritorial jurisdiction

It is concluded in Section 4.6.1.1 to Section 4.6.1.3 that States have no legitimate grounds to apply their national accessibility standards to foreign air carriers outside their territory. Unilateral regulatory efforts can be done on the basis of human rights protection, and the impact of this could result in a global rule. However, this lacks an important factor of rulemaking which is that 'the rule must be promulgated by the person on whom discretion vests to make the rule'.⁶¹ Therefore, States should refrain from regulating accessibility standards extraterritorially, but they are entitled to apply accessibility standards through an ASA or other measures rendered in the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights (Maastricht Principles) (Section 3.6.3).

6.5.2 Incorporation of an accessibility clause in air services agreements

Only the ASAs concluded by the EU with the US and with Canada contain a clause on accessibility (Section 4.6.1.4). On the other hand, a provision on human rights protection is incorporated into a number of trade agreements concluded by the EU and the US.⁶² A study on why trade agreements boost human rights finds that, although this clause may be based on political reasons and most countries signed these agreements purely for the economic benefits, the legal force of these trade agreements prevents human rights abuse and creates a better human rights situation.⁶³ Therefore, States that have more negotiating power should add an accessibility clause or a passenger protection clause into an ASA.

In my view, States with less negotiating power also benefit from this incorporation because the ASAs often contain a consultation clause and a

61 Ruwantissa Abeyratne, *Rulemaking in Air Transport: A Deconstructive Analysis*, 201, (Springer International Publishing 2016).

62 Emilie Hafner-Burton, *Forced to be Good: Why Trade Agreements Boost Human Rights*, 1-2 (Cornell University Press 2009).

63 *Ibid.*, 166.

dispute resolution clause.⁶⁴ With these existing provisions, together with an accessibility provision, when there is a dispute concerning extraterritorial application, the consultation process under the ASAs can generate a platform to review the question and wield more bargaining power than in a unilateral waiver system.

6.6 CONCLUDING REMARKS

The recommendations above may at first glance be challenged on their feasibility. Nevertheless, one should not forget that the CRPD and Annex 9, as well as the selected accessibility standards in this study, have already distinguished the realization of obligations between existing and new airports and aircraft (Section 3.4.2.2.A. and Section 4.6.2.2.A). The CRPD balances the burden with gradual implementation (Section 3.5.1). In other words, these recommendations do not require a sudden change if obligations involve an investment, though this is more than welcome.

A step-by-step approach with a concrete plan of action is possible, and the year 2030 set by the SDGs can be taken as a target. During this time, reasonable accommodations can alleviate the inconvenience caused by inaccessible environment or service. The capabilities approach helps ensure that accessibility is not too burdensome and that it is beneficial to airport operators, air carriers and passengers. The recommendations based on the rules of treaty interpretation relieve States from monitoring regulations with discrepant contents. In short, all major stakeholders in the field of air travel facilitation stand to reap benefits from recommendations for harmonized accessible air travel.

64 ICAO *Template Air Services Agreement*, *supra* n. 47, arts 33, 34.

Summary

Travel is an essential part of people's livelihoods. Goal 11.2 of the Sustainable Development Goals (SDGs) sets that by 2030 there should be safe, affordable, accessible and sustainable transport systems for all people, including persons with disabilities (PWDs). To ensure PWD's equal access to air travel, three aspects should be considered: (1) physical environment and transportation, (2) information and communication and (3) services. Since accessibility requires effort, I am aiming with this research to assess to what extent physical and informational environment and services should be adjusted to meet the needs of PWDs. I explore responsibilities of States, airport operators, and air carriers. The main research questions are:

1. *How does one balance the rights of PWDs according to States' obligations towards international human rights law and international air law, without causing undue burden, either operational or financial, to airports and airline operators or inconveniencing other passengers?*
2. *How does one legally ensure the balance in question (1) in a uniform manner among jurisdictions since air travel has a transnational character and when inconsistent legal provisions benefit no one?*

In Chapter 1, I provide an introduction to the research and elaborate on the theoretical framework underlying the research. To establish the desired uniformity among jurisdictions aimed at in the second research question, I have selected regional laws and national laws based on the functional method of comparative law and taking into account the ratification status with regards to the Convention on the Rights of Persons with Disabilities (CRPD), the Convention on International Civil Aviation (Chicago Convention) and the Convention for the Unification of Certain Rules for International Carriage by Air of 1999 (Montreal Convention of 1999). Hence, I did research into laws concerning accessibility standards on air travel of the European Union (EU), the United States (US) and Canada. Furthermore, I discuss in Chapter 1 the key terms of this study, namely, 'persons with disabilities', 'travel by air', 'mobility aid, devices and assistive technologies' and 'live assistance'.

Chapter 2 begins by elaborating on the right to travel in order to see how it is defined and to what extent it entails obligations for States. The right to travel under this research focuses on the acknowledgement of having the opportunity to go from one place to another by commercial aircraft. The

question is relevant because if there is a right, a PWD is entitled to claim accessible air travel. Thorough review of international human rights law and international air law proves that the right to travel is not recognized. However, the examination reveals that travel, including travel by air, involves both civil and political rights, as well as economic, social and cultural rights. In national law as discussed in this Chapter, travel can be restricted for reasons of safety and security which is, by the same token, also the case for the freedom of movement under the International Covenant on Civil and Political Rights (ICCPR). The principle of non-discrimination plays a prominent role in both international and national laws. An argument on the lack of opportunity to travel or to access public transport on an equal basis with others is closely linked with the non-discrimination principle.

Since there is no explicit international human right to travel by air, I examine in Chapter 3 the CRPD on the fundamental rights of PWDs to receive accessible air travel according to their needs and I discuss into what extent such rights can be enforced. The framework in Chapter 3 will be applied to assess the legislation of the International Civil Aviation Organization (ICAO), the EU, the US and Canada in Chapter 4 and law on international carriage by air in Chapter 5.

The obligations under the CRPD are classified according to the tripartite typology of State obligations. The obligation to respect ensures that States refrain from creating new barriers for travel. The obligation to protect guarantees that States monitor airport operators and air carriers, which are sometimes not public entities, on violation of the rights of PWDs. Moreover, States must ensure effective remedy in case of human rights breach. Under international human rights law, States can exercise their discretion on the type of remedies rendered to the victim. In relation to racial discrimination, the Committee on the Elimination of Racial Discrimination (CERD Committee) expresses that national courts and other competent authorities should award monetary compensation for material or moral damage. Still, the Committee on the Rights of Persons with Disabilities (CRPD Committee) did not specify the types of compensable damages.

The main obligations, on the bases of the CRPD, to fulfil are to provide accessible travel by air for PWDs. First, States have to abolish existing laws, regulations, customs and practices that constitute discrimination against PWDs and to develop and publish accessibility standards on air travel. They are obliged to eliminate obstacles and barriers to accessibility, provide reasonable accommodation and raise awareness. How the CRPD Committee ascertains whether the existing law amounts to discrimination or not can be extracted from the meaning of non-discrimination on the basis of disability.

The obligation to develop and publish accessibility standards on air travel is derived from Article 9(2)(a) of the CRPD. The contents of accessibility standards have to cover three areas mentioned earlier, namely, (1) physical environment and transportation, (2) information and communication and (3)

services, and must accommodate all types of impairment. The CRPD does not make it clear whether the contents of accessibility standards can contain exceptions or not. However, I conclude that there are exceptions to accessibility standards. Objects, infrastructure, goods, products, and services that were designed, built or produced prior to the publication of the accessibility standards can be exempted from the application thereof. Safety can be another justified reason, particularly when the concern for safety is supported with accredited evidence from an international organization. Unjustified exceptions are types of ownership, size of the operation, geography, and cost. A lack of resources or high cost is not always a justified excuse for States not to implement their obligations.

Obligations on accessibility are subject to gradual implementation, while obligations on non-discrimination on the basis of disability have to be implemented immediately. Although accessibility is a precondition for PWDs to enjoy other rights on an equal basis with others and links with the SDGs, the CRPD contains no hierarchy among rights.

In Chapter 3 I also address jurisdiction issues. The CRPD does not explicitly mention the scope of application, while the territorial jurisdiction is adhered to in public international air law. Because air travel may involve more than one country and States tend to require application of domestic law as a condition for foreign entities to gain market access, there may be concurrent jurisdictions.

In Chapter 4 I further investigate international, regional and national accessibility standards with respect to air travel based on the framework in Chapter 3. The Chapter contains detailed discussion on the observance of the CRPD by ICAO, the EU, the US and Canada and an analysis of their accessibility standards. The study focuses on the scope of application of accessibility standards, conformity with obligations concerning accessibility standards, conformity with non-discrimination on the basis of disability, and enforcement. Then, it questions the effectiveness of ICAO to provide a model of accessibility standards.

An analysis of the accessibility standards illustrates that their contents are varied and it brings about a question concerning compliance with the prohibition of discrimination on the basis of disability principle. In this Chapter, I focus on five issues, namely, accompanying persons, service animals, extra seats, advance notice and restrictions on mobility aids. I apply the concepts of detrimental effect and objective justification to evaluate the standards.

According to my analysis, the ICAO Standards and Recommended Practices (SARPs) in relation to accessibility for PWDs are formulated in a descriptive manner to address operational aspects. Moreover, it permits States to exercise their discretion so broadly that differences are found in selected accessibility standards. By this formulation, central legal criteria to evaluate the lawfulness of deviations from accessibility standards are not explicitly established. Moreover, the contents therein are imprecise and not extensive. ICAO has not at its

disposal monitoring and enforcement functions because there is no audit power concerning SARPs in relation to accessibility for PWDs. ICAO has not made any recommendation to States on the implementation of accessibility standards through the air service agreements (ASA) and the license requirement. Plus, ICAO has not reached out to cooperate with the CRPD Committee on this topic.

In Chapter 5, I analyse remedies for PWDs with respect to air travel. They involve two types of law. One is regulations on accessibility standards which have the nature of public law, the other consists of private law. The two sets of laws generate three restraints for PWDs in relation to their discrimination claim. First, PWDs can only file an action for damage under the Montreal Convention of 1999. However, in case of refusal of access to air travel, a PWD may not have suffered any bodily harm, only humiliation, and degradation of human dignity. Yet, under the Montreal Convention of 1999, purely moral damage without any physical injury cannot be compensated. Lastly, the Montreal Convention of 1999 limits the compensable amount to mobility aids and service animals and this amount does not always reflect actual damage. In other words, the combination of these two sets of laws results in ineffective remedies for PWDs.

For the purpose of balancing the rights of PWDs and obligations of States as well as other stakeholders, in Chapter 6, I bring together the most significant findings of this research and provide the following recommendations. First, obligations concerning access to travel should be encapsulated within the right to freedom of movement, since the ability to access any modes of transport, including air transport, supports the exercise of this right. Next, accessibility, personal mobility, and non-discrimination on the basis of disability have an *erga omnes* character. Hence, States have the obligation to provide accessible air travel to PWDs even if they are not party to the CRPD.

In order to make these recommendations practicable, I address in Chapter 6 substantive solutions and enforcement and procedural aspects for ICAO, the CRPD Committee, and States. ICAO and the CRPD Committee should focus on the contents of ICAO accessibility standards and remedial measures by jointly publishing an interpretation guideline. This method will guarantee that air law and human rights law are taken into account. . Further, ICAO should strengthen its enforcement measures through audits, ASAs, and its general assembly resolutions. The EU and States should refrain from exercising extra-territorial jurisdiction in their accessibility standards, and they should incorporate a clause concerning accessibility in ASAs.

Overall, the recommendations above may, at first glance, be challenged on their feasibility. However, a step-by-step approach with a concrete plan of action based on the capabilities approach and the rules of treaty interpretation is possible, to which the year 2030, can be set as a feasible target.

Samenvatting

(summary in Dutch)

HET RECHT VAN PERSONEN MET EEN HANDICAP OM PER VLIEGTUIG TE REIZEN

Reizen is essentieel in het leven van mensen. Het is daarom dat doelstelling 11.2 van de Duurzame ontwikkelingsdoelen (*Sustainable Development Goals*, *SDGs*) stelt dat er in 2030 veilige, betaalbare, toegankelijke en duurzame transportsystemen voor alle mensen moeten zijn, waaronder voor personen met een handicap. Om te waarborgen dat personen met een handicap gelijkwaardige toegang hebben tot luchtvaart moeten drie aspecten in ogenschouw worden genomen: (1) fysieke omgeving en vervoer, (2) informatie en communicatie en (3) dienstverlening. Omdat toegankelijkheid inspanning vereist, beoogt dit onderzoek te bestuderen in welke mate de fysieke en informatieve omgeving en diensten aangepast dienen te worden aan de behoeften van personen met een handicap. Daarbij kijk ik naar de verantwoordelijkheden van staten, exploitanten van luchthavens en luchtvaartmaatschappijen. De hoofdvragen van het onderzoek zijn:

1. *Hoe kunnen de rechten van personen met een handicap in evenwicht worden gebracht met de verplichtingen van staten ten aanzien van internationale wetgeving over mensenrechten en internationaal luchtrecht, zonder dat dit onevenredige lasten, zowel operationeel als financieel, oplevert voor exploitanten van luchthavens of luchtvaartmaatschappijen danwel andere passagiers belemmeren.*
2. *Hoe kan het evenwicht genoemd in vraag 1 op uniforme wijze in de verschillende jurisdicties gewaarborgd worden, wetende dat de luchtvaart een transnationaal karakter kent en inconsistente wettelijke bepalingen niemand ten goede komen.*

In hoofdstuk 1 introduceer ik het onderwerp en verduidelijk ik het theoretisch kader dat aan het onderzoek ten grondslag ligt. Om de gewenste uniformiteit tussen jurisdicties te bewerkstelligen, zoals bedoeld in de tweede onderzoeksvraag, heb ik een selectie gemaakt van regionale en nationale wetten gebaseerd op de functionele methode van vergelijkend recht, hierbij rekening houdend met de ratificatiestatus ten aanzien van de VN-Conventie inzake de rechten van personen met een handicap (*Convention on the Rights of Persons with Disabilities*, *CRPD*), het Verdrag inzake de internationale burgerluchtvaart (Verdrag van Chicago) en het Verdrag tot het brengen van een eenheid in enige bepalingen inzake het internationale luchtvervoer van 1999 (Verdrag van Montreal van 1999). Op grond van deze selectie heb ik onderzoek gedaan naar wet-

en regelgeving met betrekking tot toegankelijkheidsnormen in de luchtvaart van de Europese Unie (EU), de Verenigde Staten (VS) en Canada. Verder bespreek ik in hoofdstuk 1 de kernbegrippen van dit onderzoek, namelijk 'personen met een handicap', 'luchtvaart', 'mobiliteitshulp, hulpmiddelen en ondersteunende technologieën' en 'live assistentie'.

Hoofdstuk 2 begint met een nadere uitwerking van het recht om te reizen om te bezien hoe dit is gedefinieerd en in hoeverre het verplichtingen inhoudt voor staten. Hierbij richt het onderzoek zich op de erkenning van het hebben van de mogelijkheid om met een commercieel luchtvaartuig van de ene plaats naar de andere te gaan. Deze vraag is relevant, omdat indien dit recht er is, een persoon met een handicap gerechtigd is toegankelijke luchtvaart te eisen. Grondig onderzoek naar internationale mensenrechten en internationale luchtwetgeving laat zien dat het recht om te reizen niet is erkend. Het onderzoek laat ook zien dat reizen, met inbegrip van reizen per vliegtuig, raakt aan burgerrechten en politieke rechten, alsmede aan economisch, sociale en culturele rechten. In nationale wetgeving, zoals besproken in dit hoofdstuk, kan reizen worden beperkt omwille van veiligheidsredenen, wat eveneens het geval kan zijn ten aanzien van het vrije verkeer op basis van het Internationaal Verdrag inzake burgerrechten en politieke rechten (*International Covenant on Civil and Political Rights, ICCPR*). Het non-discriminatiebeginsel speelt een prominente rol in zowel internationale als nationale wetten. Een klacht over het gebrek aan mogelijkheden om op gelijkwaardige wijze als anderen te kunnen reizen of toegang te krijgen tot openbaar vervoer is nauw verbonden met het non-discriminatiebeginsel.

Aangezien er geen expliciet internationaal mensenrecht is om per vliegtuig te reizen, onderzoek ik in hoofdstuk 3 de CRPD voor wat betreft de fundamentele rechten van personen met een handicap op toegankelijk luchtvervoer conform hun behoeften en bespreek ik in hoeverre dergelijke rechten kunnen worden afgedwongen. Het kader in hoofdstuk 3 pas ik toe op de wetgeving van de Internationale Burgerluchtvaartorganisatie (*International Civil Aviation Organisation, ICAO*), de EU, de VS en Canada in hoofdstuk 4 en, in hoofdstuk 5, het private internationale luchtrecht.

De verplichtingen volgens de CRPD zijn geclassificeerd volgens de driedelige typologie van de verplichtingen van staten. De verplichting tot 'respecteren' verplicht staten zich ervan te weerhouden om nieuwe belemmeringen voor reizen op te werpen. De verplichting om 'te beschermen' garandeert dat staten luchthavenexploitanten en luchtvaartmaatschappijen, die soms geen overheidsinstanties zijn, monitoren op schending van de rechten van personen met een handicap. Bovendien moeten verdragsstaten een doeltreffende oplossing garanderen in het geval van schendingen van mensenrechten. Volgens de internationale mensenrechten hebben staten een discretionaire bevoegdheid om te bepalen welke type van oplossingen aan het slachtoffer worden aangeboden. Met betrekking tot rassendiscriminatie heeft het VN-Comité voor de uitbanning van rassendiscriminatie (CERD) geoordeeld dat nationale rechtban-

ken en andere bevoegde autoriteiten een financiële vergoedingen dienen toe te kennen voor materiële en immateriële schade. Nochtans heeft het Comité inzake rechten van personen met een handicap (CRDP-comité) niet gespecificeerd wat valt onder compensabele schaden.

De belangrijkste verplichtingen, op basis van de CRPD, om het reizen per vliegtuig toegankelijk te maken voor personen met een handicap zijn de afschaffing van bestaande wet- en regelgeving, gewoonten en praktijken die discriminerend zijn voor personen met een handicap, het ontwikkelen en publiceren van toegankelijkheidsnormen voor de luchtvaart, het elimineren van obstakels en belemmeringen voor toegankelijkheid, redelijke aanpassingen verschaffen en het verhogen van de bewustwording. Hoe het CRPD-comité vaststelt of een bestaande wet als discriminerend moet worden opgevat kan worden afgeleid uit de betekenis van non-discriminatie op basis van handicap en de daarop gebaseerde commentaren.

De verplichting tot het ontwikkelen en publiceren van toegankelijkheidsnormen voor de luchtvaart is afgeleid van artikel 9(2)(a) van de CRPD. De inhoud van toegankelijkheidsnormen moet betrekking hebben op de drie eerder genoemde gebieden, namelijk (1) fysieke omgeving en vervoer, (2) informatie en communicatie en (3) diensten, en moet tegemoet komen aan alle typen beperkingen. De CRPD maakt niet duidelijk of de inhoud van de toegankelijkheidsnormen uitzonderingen kan bevatten of niet. Ik concludeer echter dat er uitzonderingen kunnen bestaan op de toegankelijkheidsnormen. Voorwerpen, infrastructuur, goederen, producten en diensten die gebouwd, ontworpen of geproduceerd zijn voorafgaand aan de publicatie van de toegankelijkheidsnormen kunnen vrijgesteld worden van de toepassing hiervan. Veiligheid kan een andere gerechtvaardigde reden zijn om af te wijken, vooral wanneer de bezorgdheid voor de veiligheid ondersteund wordt door geaccrediteerde bewijzen van een internationale organisatie. Ongerechtvaardigde uitzonderingen zijn vormen van eigendom, grootte van de operatie, geografie en kosten. Ook het gebrek aan middelen of hoge kosten vormt niet altijd een gerechtvaardigd excuus voor staten om hun verplichtingen niet na te komen.

Verplichtingen inzake toegankelijkheid zijn onderhevig aan het beginsel van geleidelijke verwezenlijking, terwijl verplichtingen tot non-discriminatie op basis van handicap onmiddellijk moeten worden nageleefd. Hoewel toegankelijkheid een voorwaarde is voor personen met een handicap om gelijke rechten te genieten en het verband houdt met de SDGs, kent de CRPD geen hiërarchie in rechten.

In hoofdstuk 3 besteed ik ook aandacht aan jurisdictie vraagstukken. De CRPD noemt niet expliciet de reikwijdte, maar in de internationale publiekrechtelijke luchtwetgeving wordt territoriale jurisdictie nageleefd. Omdat luchtvaart betrekking kan hebben op meer dan één land en staten de neiging hebben om te vereisen dat nationale wetgeving wordt toegepast als voorwaarde voor buitenlandse entiteiten om toegang tot de markt te krijgen, kunnen er gelijktijdig verschillende jurisdicties voorkomen.

In hoofdstuk 4 onderzoek ik verder internationale, regionale en nationale toegankelijkheidsnormen met betrekking tot luchtvaart op basis van het kader in hoofdstuk 3. Het hoofdstuk bevat een gedetailleerde discussie over de naleving van de CRPD door ICAO, de EU, de VS en Canada en een analyse van hun toegankelijkheidsnormen. De studie richt zich op de reikwijdte van de toegankelijkheidsnormen, overeenstemming met non-discriminatie op basis van handicap en handhaving. Vervolgens wordt de effectiviteit van ICAO in het voorzien in een model voor toegankelijkheidsnormen onderzocht.

Een analyse van de toegankelijkheidsnormen illustreert dat de inhoud gevarieerd is. De naleving van het verbod op discriminatie op grond van een handicap roept vragen op. In dit hoofdstuk richt ik mij op vijf problemen, namelijk begeleiders, hulpdieren, extra zitplaatsen, voorafgaande kennisgeving en beperkingen met betrekking tot mobiliteitshulpmiddelen. Ik pas het concept van het nadelige effect en de objectieve rechtvaardiging toe om de normen te evalueren.

Volgens mijn analyse zijn de ICAO Standaarden en aanbevolen werkwijzen (SARPs), in relatie tot toegankelijkheid voor personen met een handicap op een beschrijvende manier geformuleerd om operationele aspecten aan te pakken. Bovendien laat het toe dat staten hun discretionaire bevoegdheid ruim kunnen toepassen waardoor diverse verschillen zijn gevonden in de geselecteerde toegankelijkheidsnormen. Door deze manier van formuleren zijn er niet expliciet eenduidige juridische criteria vastgesteld om de wetmatigheid te beoordelen van afwijkingen van de toegankelijkheidsnormen. Bovendien is de inhoud ervan niet nauwkeurig en weinig uitgebreid. ICAO heeft geen toezichts- en handhavingsfuncties ter beschikking omdat er geen controle bevoegdheid is ten aanzien van SARPs in relatie tot toegankelijkheid voor personen met een handicap. ICAO heeft geen aanbeveling gedaan aan Staten met betrekking tot de implementatie van toegankelijkheidsnormen door middel van overeenkomsten voor luchtdiensten en vergunningsvereisten. Ook heeft ICAO geen samenwerking gezocht met het CRPD-comité op dit onderwerp.

In hoofdstuk 5 verken ik de oplossingen voor personen met een handicap met betrekking tot luchtvaart. Deze hebben betrekking op twee typen wetgeving. Een daarvan is regelgeving inzake toegankelijkheidsnormen die publiekrechtelijke van aard is, de andere betreft privaatrecht. Remediërende maatregelen onder deze twee soorten van wetten brengen drie beperkingen met zich voor personen met een handicap ten aanzien van een rechtsvordering op grond van discriminatie. In de eerste plaats kunnen personen met een handicap alleen een rechtszaak aanspannen op grond van discriminatie onder het Verdrag van Montreal van 1999. Echter, in geval van een weigering van toegang tot luchtvaart heeft de persoon met een handicap mogelijk geen lichamelijk letsel geleden maar bovenal vernedering en afbreuk van menselijke waardigheid. Onder het Verdrag van Montreal van 1999 kan morele schade zonder enige fysieke schade echter niet worden gecompenseerd. Tot slot beperkt het Verdrag van Montreal van 1999 de hoogte van financiële compen-

satie als het mobiliteitshulpmiddelen en hulpdieren betreft en dit bedrag is niet altijd gelijk aan de daadwerkelijk geleden schade. Met andere woorden, de combinatie van deze twee sets van wetgeving resulteert in non-effectieve oplossingen voor personen met een handicap.

Met het oog op het evenwicht tussen de rechten van personen met een handicap en de verplichtingen van staten en andere belanghebbenden breng ik in het laatste hoofdstuk 6 de belangrijkste bevindingen van dit onderzoek samen en doe ik de volgende aanbevelingen. Ten eerste moeten de verplichtingen inzake de toegang tot reizen worden geïncorporeerd in de regels aangaande het vrije verkeer, aangezien de mogelijkheid tot toegang tot alle vervoersmiddelen, met inbegrip van luchtvaart, de uitoefening van dit recht ondersteunt. Vervolgens hebben toegankelijkheid, persoonlijke mobiliteit en non-discriminatie op basis van een handicap een *erga omnes* karakter. Staten hebben derhalve de plicht om toegankelijke luchtvaart aan te bieden aan personen met een handicap, zelfs als zij geen partij zijn bij de CRPD.

Om deze aanbevelingen praktisch uitvoerbaar te maken, behandel ik in hoofdstuk 6 inhoudelijke oplossingen en handhavings- en procedurele aspecten voor ICAO, het CRPD-comité en staten. ICAO en het CRPD-comité zouden zich moeten concentreren op de inhoud van de ICAO-toegankelijkheidsnormen en de remediërende maatregelen door gezamenlijk een interpretatie richtlijn te publiceren. Deze methode zorgt ervoor dat er zowel met het luchtrecht als de mensenrechten rekening wordt gehouden. ICAO zou verder haar handhavingsmaatregelen moeten versterken door middel van audits, overeenkomsten voor luchtdiensten en resoluties van ICAO's General Assembly. De EU en staten zouden zich moeten onthouden van extraterritoriale jurisdictie in hun toegankelijkheidsnormen en zij zouden een clause over toegankelijkheid moeten opnemen in de overeenkomsten voor luchtdiensten.

Over het geheel genomen kan op het eerste gezicht de haalbaarheid van bovenstaande aanbevelingen worden betwist. Echter, een stap-voor-stap benadering met een concreet actieplan op basis van de capaciteitsbenadering en de regels voor verdragsinterpretaties is mogelijk, waarvoor het jaar 2030 een haalbare doelstelling is.

Selected bibliography

1 TREATIES

- African Charter on Human and Peoples' Rights [Banjul Charter] (Nairobi, Kenya, 27 June 1981), 21 I.L.M. 59 (1981).
- Agreement between the United Nations and the International Civil Aviation Organization, (31 May 1948), ICAO Doc 7970.
- Agreement on Air Transport between Canada and the European Community and its Member States, (2009).
- Air Transport Agreement between the Government of the United States of America and the Government of Canada, (1995).
- Athens Convention relating to the Carriage of Passengers and Their Luggage by Sea, (Athens, 13 Dec. 1974).
- Charter of the United Nations (San Francisco, 26 June 1945), T.S. No. 993.
- Convention concerning International Carriage by Rail, (3 June 1999), Uniform Rules concerning the Contract of International Carriage of Passengers by Rail.
- Convention for the Unification of Certain Rules for International Carriage by Air, (Montreal, 28 May 1999), ICAO Doc 9740.
- Convention for the Unification of Certain Rules Relating to International Transportation by Air (Warsaw, 12 Oct. 1929), T.S. 876.
- Convention on International Civil Aviation (Chicago, 7 Dec. 1944), 15 U.N.T.S. 295, 61 Stat. 1180, T.I.A.S. No. 1591.
- Convention on the Elimination of All Forms of Discrimination against Women (New York, 18 Dec. 1979) 1249 U.N.T.S.
- Convention on the Rights of Persons with Disabilities, (24 Jan. 2007), U.N. Doc. A/RES/61/106.
- European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 Nov. 1950), 312 E.T.S. 5.
- International Convention on the Elimination of All Forms of Racial Discrimination (New York, 7 Mar. 1966) 660 U.N.T.S.
- International Covenant on Civil and Political Rights (New York, 16 Dec. 1966) 999 U.N.T.S. 171 and 1057 U.N.T.S. 407.
- International Covenant on Economic, Social and Cultural Rights (New York, 16 Dec. 1966) 993 U.N.T.S. 3.
- Protocol of 2002 to the Athens Convention Relating to the Carriage of Passengers and Their Luggage by Sea, 1974 (1 Nov. 2002).
- Protocol to Amend the Convention on Offences and Certain Other Acts Committed on Board Aircraft, done at Montréal on 4 April 2014 (ICAO Doc 10034).
- Statute of the International Court of Justice.

- The EU-US Air Transport Agreement, (2007).
- Vienna Convention on the Law of Treaties (Vienna, 23 May 1969) 1155 U.N.T.S. 331.

2 CASES AND DECISIONS

1 International Court of Justice / Permanent Court of International Justice

- *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Merits, Judgment, I.C.J. Rep. 2010 (30 Nov. 2010).
- *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Compensation, Judgment, I.C.J. Reports 2012.
- *Barcelona Traction, Light and Power Company, Limited (New Application: 1962) (Belgium v. Spain)*, Judgment, I.C.J. Rep. 1970 (5 Feb. 1970).
- *Factory at Chorzow (Germ. v. Pol.)*, 1928 P.C.I.J. (ser. A) No. 17 (Sept. 13).
- *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, I.C.J. Rep. 1997 (25 Sept. 1997).
- *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Rep. 2004 (9 July 2004).
- *Lotus Case*, (1927), P.C.I.J. Series A, No. 10, 18-19.
- *Oil Platforms case (Iran v. United States of America) (Merits)* I.C.J. Reports 2003 (6 Nov. 2003).
- *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, I.C.J. Rep. 2010 (20 Apr. 2010).

2 World Trade Organization

- *US – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R 12 Oct. 1998.

3 Court of Justice of the European Union

- Case C-13/05 *Chacón Navas v. Eurest Colectividades SA* [2006].
- Case C-162/96, *Racke v. Hauptzollamt Mainz* [1998] ECR I-3655.
- Case C-168/00 *Simone Leitner v TUI Deutschland GmbH & Co KG* [2001] ECR, I-2631.
- Case C-286/90 *Poulsen and Diva Navigation Corp.* [1992] ECR, I-6019.
- Case C-344/04 *The Queen, on the application of International Air Transport Association and European Low Fares Airline Association v Department for Transport* [2006].
- Case C-354/13 *Fag og Arbejde (FOA) v Kommunernes Landsforening (KL)* [2014].
- Case C-63/09 *Walz v. Clickair SA* [2010].
- Case C-83/10 *Aurora Sousa Rodríguez and Others v Air France SA* [2011].

4 European Court of Human Rights

- *Botta v. Italy*, no. 21439/93 24 February 1998.
- *DH and Others v The Czech Republic* [GC], no. 57325/00, 13 Nov. 2007. ECHR 2007-IV.

- *Madsen v. Denmark* (dec.) no. 58341/00, 7 November 2002.
- *Nada v. Switzerland*, no. 10593/08 12 September 2012.
- *S.A.S. v. France* [GC], no. 43835/11, 1 July 2014, ECHR 2014, 2.
- *Zehnalová and Zehnal v. the Czech Republic*, no. 38621/97, ECHR 2002-V, 1.

5 Others

Australia

- *Leonie Cameron v Qantas Airways Limited* [1995] FCA 1304; (1995) Atpr 41-417 (1995) 55 FCR 147 (16 June 1995).
- *Qantas Ltd. v. Povey*, [2003] VSCA 227.

Brazil

- Ap. 2007.001.42990, 11a. Câmara Cível do TJ/RJ, em 2007.
- REExt 127.720-9, STF, em 06.02.96.
- REExt. 636.331, STF, em 24.06.2016.

Canada

- *Balani v. Lufthansa German Airlines Corp.*, 2010 ONSC 3003, 2010 CarswellOnt 8357.
- *Canadian Human Rights Commission v. Canadian Transportation Agency*, [2011] F.C.A. 332.
- *Canadian Transportation Agency v. Morten*, [2010] F.C. 1008.
- *Council of Canadians with Disabilities v. VIA Rail Canada Inc.* [2007] 1 S.C.R. 650.
- *Nijjar v. Canada 3000 Airlines Ltd.*, 1999 CanLII 19861 (CHRT).
- *Thibodeau v. Air Canada*, [2014] SCC 67.
- Canadian Transportation Agency, Decision No. 106-AT-A-1999, (16 Mar. 1999).
- Canadian Transportation Agency, Decision No. 108-AT-A-1998, (19 Mar. 1998).
- Canadian Transportation Agency, Decision No. 110-AT-A-1999, (18 Mar. 1999).
- Canadian Transportation Agency, Decision No. 123-AT-A-2003 (6 Mar. 2003).
- Canadian Transportation Agency, Decision No. 126-AT-A-2001, (21 Mar. 2001).
- Canadian Transportation Agency, Decision No. 134-AT-A-2013, (28 Mar. 2013).
- Canadian Transportation Agency, Decision No. 170-AT-A-1998, (16 Apr. 1998).
- Canadian Transportation Agency, Decision No. 173-AT-A-1999, (16 Apr. 1999).
- Canadian Transportation Agency, Decision No. 175-AT-A-2008, (11 Apr. 2008).
- Canadian Transportation Agency, Decision No. 194-AT-A-2007, (20 Apr. 2007).
- Canadian Transportation Agency, Decision No. 211-AT-A-2012, (7 June 2012).
- Canadian Transportation Agency, Decision No. 228-AT-A-2011, (16 June 2011).
- Canadian Transportation Agency, Decision No. 246-AT-A-1999, (17 May 1999).
- Canadian Transportation Agency, Decision No. 249-C-A-2013, (26 June 2013).
- Canadian Transportation Agency, Decision No. 256-AT-A-2002, (15 May 2002).
- Canadian Transportation Agency, Decision No. 263-AT-A-2000, (13 Apr. 2000).
- Canadian Transportation Agency, Decision No. 295-AT-A-2006, (19 May 2006).
- Canadian Transportation Agency, Decision No. 3-AT-A-2004 (5 Jan. 2004).
- Canadian Transportation Agency, Decision No. 309-C-A-2010, (21 July 2010).

- Canadian Transportation Agency, Decision No. 312-AT-A-1999, (4 June 1999).
- Canadian Transportation Agency, Decision No. 313-C-A-2010, (27 June 2010).
- Canadian Transportation Agency, Decision No. 335-AT-A-2007 (29 June 2007).
- Canadian Transportation Agency, Decision No. 336-AT-A-2008, (26 June 2008).
- Canadian Transportation Agency, Decision No. 354-AT-A-2015, (16 Nov. 2015)
- Canadian Transportation Agency, Decision No. 386-AT-A-2009, (10 Sept. 2009).
- Canadian Transportation Agency, Decision No. 387-AT-A-2003, (30 June 2003).
- Canadian Transportation Agency, Decision No. 4-AT-A-2010, (6 Jan. 2010).
- Canadian Transportation Agency, Decision No. 426-AT-A-2003, (23 July 2003).
- Canadian Transportation Agency, Decision No. 435-AT-A-2005 (8 July 2005).
- Canadian Transportation Agency, Decision No. 450-AT-A-2005, (13 July 2005).
- Canadian Transportation Agency, Decision No. 452-AT-A-1999, (29 July 1999).
- Canadian Transportation Agency, Decision No. 483-C-A-2010, (24 Nov. 2010).
- Canadian Transportation Agency, Decision No. 487-AT-A-1999, (17 Aug. 1999).
- Canadian Transportation Agency, Decision No. 515-A-1997, (19 Aug. 1997).
- Canadian Transportation Agency, Decision No. 521-AT-A-1999, (7 Sept. 1999).
- Canadian Transportation Agency, Decision No. 525-AT-A-2004, (4 Oct. 2004).
- Canadian Transportation Agency, Decision No. 528-AT-A-2004, (5 Oct. 2004).
- Canadian Transportation Agency, Decision No. 547-AT-A-2004, (18 Oct. 2004).
- Canadian Transportation Agency, Decision No. 560-AT-A-2004, (22 Oct. 2004).
- Canadian Transportation Agency, Decision No. 582-AT-A-1999, (15 Oct. 1999)
- Canadian Transportation Agency, Decision No. 593-AT-A-2004, 1 Nov. 2004).
- Canadian Transportation Agency, Decision No. 597-AT-A-2004, (3 Nov. 2004).
- Canadian Transportation Agency, Decision No. 6-AT-A-2008, (10 Jan. 2008).
- Canadian Transportation Agency, Decision No. 60-AT-A-2010, (19 Feb. 2010).
- Canadian Transportation Agency, Decision No. 604-AT-A-2006, (31 Oct. 2006).
- Canadian Transportation Agency, Decision No. 63-AT-A-2003 (12 Feb. 2003).
- Canadian Transportation Agency, Decision No. 635-AT-A-1998, (22 Dec. 1998).
- Canadian Transportation Agency, Decision No. 648-AT-A-2006, (27 Nov. 2006).
- Canadian Transportation Agency, Decision No. 653-AT-A-2003 (21 Nov. 2003).
- Canadian Transportation Agency, Decision No. 66-AT-A-2010, (25 Feb. 2010).
- Canadian Transportation Agency, Decision No. 674-AT-A-2001, (28 Dec. 2001).
- Canadian Transportation Agency, Decision No. 675-AT-A-1999, (2 Dec. 1999).
- Canadian Transportation Agency, Decision No. 682-AT-A-2002, (20 Dec. 2002).
- Canadian Transportation Agency, Decision No. 685-AT-A-2002, (20 Dec. 2002).
- Canadian Transportation Agency, Decision No. 70-AT-A-2013, (28 Feb. 2013).
- Canadian Transportation Agency, Letter Decision No. LET-AT-A-82-2013, (5 June 2013).
- Canadian Transportation Agency, Letter Decision No. LET-C-A-129-2011, (2 Dec. 2011).

France

- Cass.crim., 15 décembre 2015, Bull crim. 2015, n° 286., <https://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000031658282> (accessed 14 Mar. 2017).

Thailand

- Central Administrative Court Red case No. 1059/2552, 24 June 2009.

United Kingdom

- Deep Vein Thrombosis and Air Travel Group Litigation, [2003] EWCA Civ. 1005.
- FirstGroup Plc v Paulley, [2017] UKSC 4.
- Janice Campbell v. Thomas Cook Tour Operations Limited, [2014] EWCA Civ 1668.
- King v. Bristow Helicopters Ltd., [2002] UKHL 7.
- Morris v. KLM Royal Dutch Airlines, [2002] UKHL 7.
- Phillips v. Air New Zealand Ltd, [2002] C.L.C. 1199 (2002).
- Ross v Ryanair Ltd and Stansted Airport Ltd [2004] EWCA Civ 1751.
- Sidhu v. British Airways Plc. [1997] AC 430.
- Stott v. Thomas Cook Tour Operators Ltd., [2014] UKSC 15.

United States of America

- *Adler et al v. WestJet Airlines, Ltd.*, 31 F.Supp.3d 1381 (S.D.Fla. 2014).
- *Air France v. Saks*, 470 U.S. 392, 405 (1985).
- *Aquino v. Asiana Airlines Inc.*, 105 Cal.App.4th 1272 (CAApp. 2003).
- *Beckman v. Saratoga & Schenectady R.R., Co.*, 3 Paige Ch. 45, 45 (N.Y. 1831).
- *Boswell v. Skywest Airlines, Inc.*, 361 F.3d 1263, 1265 (10th Cir. 2004).
- *Brandt v. American Airlines*, 2000 U.S. Dist. LEXIS 3164.
- *British Caledonian Airways Ltd v. Langhorne Bond*, Federal Aviation Administration and others, 665 F.2d 1153, 1162, C.A.D.C. (1981).
- *Bunis v. Israil GSA, Inc.*, 511 F.Supp.2d 319 (2007).
- *Day v. Trans World Airlines, Inc.*, 528 F.2d 31 (1975).
- *Department of Transportation v. Paralyzed Veterans of America et. al.*, 477 US 597, 106 S. Ct. 2705, 91 L.Ed. 2d 494 (1986).
- *Deterra v. America West Airlines*, 226 F.Supp. 2d 298, 299 n.6 (D. Mass. 2002).
- *Dick v. American Airlines, Inc.*, 476 F.Supp.2d 61 (2007).
- *Dogbe v. Delta Air Lines, Inc.*, 969 F.Supp.2d 261 (E.D.N.Y. 2013).
- *Eastern Airlines, Inc. v. Floyd* 499 U.S. 530 (1991).
- *Ehrlich v. American Airlines Inc.*, 360 F.3rd 366 (2nd Cir. 2004).
- *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng* 525 US 155 (1999).
- *Fazio v. Northwest Airlines, Inc.*, Not Reported in F.Supp.2d (2004).
- *Gibbs v. American Airlines*, 191 F.Supp.2d 144 (2002).
- *Gilmore v. Gonzales*, 435 F.3d 1125, (9th Cir. 2006).
- *Gilstrap v. United Air Lines, Inc.*, 709 F.3d 995 (9th Cir. 2013).
- *Griggs et al. v. Duke Power Co.* 401 U.S. 424 (1971).
- *Hipolito v. Northwest Airlines, Inc.*, 15 Fed.Appx. 109 (2001).
- *Ibrahim v. Department of Homeland Security, et al.*, Order denying motion to dismiss and motion to stay discovery No. C 06-00545 WHA, 2012 WL 6652362, at *7 (N.D. Cal., Dec. 20, 2012).
- *King v. American Airline Inc et al*, 284 F.3d 352 (2002).
- *Latif v. Holder*, NS-OR-0001. Docket / Court, 3:10-CV-00750-BR; 24 June 2014.

- *Lopez v. Jet Blue Airways*, 662 F.3d 593, 596 (2d Cir. 2011).
- *Love v. Delta Airlines*, 310 F.3d 1347, 1359 (11th Cir. 2002).
- *McCaskey v. Continental Airlines, Inc.*, 159 F. Supp. 2d 562 (S.D. Tex. 2001).
- *Miller v. Reed* 176 F. 3d 1202 (9th Cir. 1999).
- *National Federation of the Blind v. United Airlines Inc.*, No. 11-16240, (9th Cir. 2016).
- *Olympic Airways v. Husain*, 540 U.S. 644 (2004).
- *Prescod v. AMR*, 383 F.3d 861, 868 (9th Cir. 2004).
- *Ramos v. American Airlines, Inc.*, Not Reported in F.Supp.2d (2011).
- *Ravreby v. United Airlines, Inc.*, 293 N.W.2d 260 (1980).
- *Segalman v. Southwest Airlines Co.*, 603 Fed.Appx. 595, (9th Cir. 2015).
- *Shinault v. American Airlines, Inc.*, 936 F.2d 796 (1991).
- *Squire v. United Airlines, Inc.*, 973 F. Supp. 1004, 1006 (D. Colo. 1997).
- *Tallarico v. Trans World Airlines, Inc.*, 881 F.2d 566 (8th Cir. 1989).
- *The Estate of Vilma Soltesz et al., v. Delta Air Lines, Inc. et al.*, 2014 WL 2452488 (S.D.N.Y.).
- *The Estate of Vilma Soltesz et al., v. Delta Air Lines, Inc. et al.*, 1:14-cv-03893-RJS, (S.D. N.Y. dismissed 4 Apr. 2016).
- *Theresa Purcell v. American Airline, Inc.*, District of Hawaii, Case 1:15-cv-00211-LEK-RLP Document 82, 31 Aug. 2016.
- *Tinh Thi Nguyen v. Korean Air Lines Co., Ltd.*, 807 F.3d 133 (2015).
- *Turturro v. Continental Airlines*, 128 F. Supp. 2d 170 (S.D.N.Y. 2001).
- *United States v. Kroll*, 481 F.2d (8th Cir. 1973).
- *Waters v. Port Authority of New York & New Jersey*, 158 F. Supp. 2d 415 (D.N.J. 2001).
- *Wilson v. United Airlines*, No. 94 C 54:1, 1995 WL 530653 (N.D. Ill. 7 Sept. 1995).
- Department of Transportation, Order 2006-8-7 Docket OST 2006-23528, (7 Aug 2006).
- Department of Transportation, Order 2006-8-7, Docket OST 2006-23528 (7 Aug. 2006).
- Department of Transportation, Order 2013-12-4, Docket OST 2013-0004, (6 Dec. 2013).
- Department of Transportation, Order 2016-1-3, Docket OST-2016-0002, (7 Jan. 2016).
- Department of Transportation, Order 2016-4-7, Docket OST-2016-0002 (14 Apr. 2016).
- Department of Transportation, Order 2016-4-8, Docket OST-2016-0002 (14 Apr. 2016).
- Department of Transportation, Order 2016-4-9, Docket OST-2016-0002 (14 Apr. 2016).

3 UN DOCUMENTS

1. General Assembly

- Declaration on the Elimination of all Forms of Racial Discrimination Resolution adopted by the General Assembly, 1904 (XVIII) G.A. Res. 1904, U.N. GAOR 18th Sess., U.N. Doc A/RES/18/1904 (1963).
- Draft Articles on State Responsibility, Official records of the General Assembly, Fifty-sixth Session, Supplement 10 A/56/10.
- G.A. Res. 1, U.N. GAOR 70th Sess., U.N. Doc A/RES/70/1 (2015).
- G.A. Res. 106, U.N. GAOR, 60th Sess., U.N.Doc. A/RES/61/106 (2007).
- G.A. Res. 1914, U.N. GAOR, 25th Sess., U.N. Doc. A/RES/1914 (XXV 1970).

- Standard Rules on the Equalization of Opportunities for Persons with Disabilities, GAOR, 48th Sess., Rule 5, U.N. Doc. A/48/96 (1993).
- UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law G.A. Res. 147, U.N. GAOR, 60th Sess., U.N. Doc. A/RES/60/147 (2006).
- Universal Declaration of Human Rights (10 Dec. 1948), U.N.G.A. Res. 217 A (III) (1948).
- World Programme of Action Concerning Disabled Persons, GAOR, 37th Sess., U.N. Doc. A/37/51 (1982).

2 *International Law Commission*

- International Law Commission, *Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission, Finalized by Martti Koskenniemi*, A/CN.4/L.682 (13 Apr. 2006).
- International Law Commission, *Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission*. A/CN.4/L.702 (18 July 2006).
- International Law Commission, *Report of the International Law Commission of its Fifty-Eighth Session*, G.A. Res. 10, U.N. GAOR, 61st Sess., U.N. Doc. A/61/10, (2006).

3 *Human Rights Committee*

Communications

- Human Rights Committee, *Lauri Peltonen v. Finland* (Communication no. 492/1992), CCPR/C/51/D/492/1992.
- Human Rights Committee, *Love et al. v. Australia* (Communication no. 983/2001), CCPR/C/77/D/983/2001.
- Human Rights Committee, *M. Schmitz de Jong v. The Netherlands*, (Communication No. 855/1999), U.N. Doc. CCPR/C/72/D/855/1999.
- Human Rights Committee, *Ory v. France* (Communication no. 1960/2010), CCPR/C/110/D/1960/2010.

General Comments

- Human Rights Committee, General Comment 16, Art. 17 (Thirty-second session, 1988).
- Human Rights Committee, General Comment 18, Art. 2 (Thirty-seventh session, 1989).
- Human Rights Committee, General Comment 25, Art. 25 (Fifty-seventh session, 1996), U.N. Doc. CCPR/C/21/Rev.1/Add.7.
- Human Rights Committee, General Comment 27, Freedom of movement (Sixty-seventh session, 1999), U.N. Doc. CCPR/C/21/Rev.1/Add. 9.

- Human Rights Committee, General Comment 31, The Nature of the General Obligation Imposed on State Parties to the Covenant (Eightieth session, 2004), U.N. Doc. CCPR/C/21/Rev.1/Add.13.
- Human Rights Committee, General Comment 34, Art. 19: Freedom of Opinion and Expression, (One hundred and second session, 2011), U.N. Doc. CCPR/C/GC/34.
- Human Rights Committee, General Comment 8, Art. 9 (Sixteenth session, 1982).

4 *Committee on Economic, Social and Cultural Rights*

Concluding Observations

- Committee on Economic, Social and Cultural Rights, *Concluding Observations on the initial report of Montenegro*, (Fifty-third session, 2014), U.N. Doc. E/C.12/MNE/CO/1.
- Committee on Economic, Social and Cultural Rights, *Concluding Observations on the fourth periodic report of France*, (Fifty-eighth session, 2016), U.N. Doc. E/C.12/FRA/CO/4.

General Comments

- Committee on Economic, Social and Cultural Rights, General Comment 3, Art. 2, para. 1, (Fifth session, 1990), U.N. Doc. E/1991/23.
- Committee on Economic, Social and Cultural Rights, General Comment 5, Persons with Disabilities (Eleventh session, 1994), U.N. Doc. E/1995/22.
- Committee on Economic, Social and Cultural Rights, General Comment 6, The Economic, Social and Cultural Rights of Older Persons (Thirteenth session, 1995), U.N. Doc. E/1996/22.
- Committee on Economic, Social and Cultural Rights, General Comment 9, The Domestic Application of the Covenant (Nineteenth session, 1998), U.N. Doc. E/C.12/1998/24.
- Committee on Economic, Social and Cultural Rights, General Comment 14, Art. 12 (Twenty-second session, 2000) U.N. Doc. E/C.12/2000/4/
- Committee on Economic, Social and Cultural Rights, General Comment 20: Art. 2 para. 2 (Forty-second session, 2009), U.N. Doc. E/C.12/GC/20.
- Committee on Economic, Social and Cultural Rights, General Comment 18, The Right to Work (Thirty-fifth session, 2005), U.N. Doc. E/C.12/GC/18.
- Committee on Economic, Social and Cultural Rights, General Comment 21, Right of Everyone to Take Part in Cultural Life (art. 15, para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights) (Forty-third session, 2009), U.N. Doc. E/C.12/GC/21.

5 *Committee on the Elimination of Racial Discrimination*

Communications

- Committee on the Elimination of Racial Discrimination, *B.J. v. Denmark* (Communication no. 17/1999), U.N. Doc. CERD/C/56/D/17/1999.

- Committee on the Elimination of Racial Discrimination, *L.A. et al. v. Slovakia* (Communication no. 49/2011), U.N. Doc. CERD/C/85/D/49/2011.
- Committee on the Elimination of Racial Discrimination, *Miroslav Lacko v. Slovak Republic*, (Communication no. 11/1998), U.N. Doc. CERD/C/59/D/11/1998.

General Comments

- Committee on the Elimination of Racial Discrimination, General Recommendation XXVI, Art. 6 (Fifty-sixth session, 2000).
- Committee on the Elimination of Racial Discrimination, General Recommendation XXVII, Discrimination against Roma (Fifty-seventh session, 2000).
- Committee on the Elimination of Racial Discrimination, General Recommendation XXX, Discrimination against Non-citizens (Sixty-fifth session, 2005).

6 Committee on the Elimination of Discrimination against Women

- Committee on the Elimination of Discrimination against Women, General Recommendation 34, the Rights of Rural Women (2016), U.N. Doc CEDAW/C/GC/34.

7 Committee on the Rights of the Child

Concluding Observations

- Committee on the Rights of the Child, *Consideration of Reports Submitted by The Bahamas*, (Thirty-eighth session, 2005), U.N. Doc. CRC/C/15/Add.253, paras 45-46.

General Comments

- Committee on the Rights of the Child, General Comment 16, State Obligations Regarding the Impact of the Business Sector on Children's Rights (Sixty-second session, 2013), U.N. Doc. CRC/C/GC/16.

8 Committee on the Rights of Persons with Disabilities

Concluding Observations

- Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Report Submitted by Argentina*, (Eighth session, 2012), U.N. Doc. CRPD/C/ARG/CO/1.
- Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Report Submitted by Azerbaijan*, (Eleventh session, 2014), U.N. Doc. CRPD/C/AZE/CO/1.
- Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Initial Report Submitted by Austria*, (Tenth session, 2013), U.N. Doc. CRPD/C/AUT/CO/1.

- Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Report Submitted by Belgium*, (Twelfth session, 2014), U.N. Doc. CRPD/C/BEL/CO/1.
- Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Report Submitted by Bolivia*, (Sixteenth session, 2016), U.N. Doc. CRPD/C/BOL/CO/1.
- Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Report Submitted by Brazil*, (Fourteenth session, 2015), U.N. Doc. CRPD/C/BRA/CO/1.
- Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Report Submitted by China*, (Eighth session, 2012), U.N. Doc. CRPD/C/CHN/CO/1.
- Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Report Submitted by Columbia*, (Sixteenth session, 2016), U.N. Doc. CRPD/C/COL/CO/1.
- Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Report Submitted by Cook Islands*, (Thirteenth session, 2015), U.N. Doc. CRPD/C/COK/CO/1.
- Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Report Submitted by Costa Rica*, (Eleventh session, 2014), U.N. Doc. CRPD/C/CRI/CO/1.
- Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Report Submitted by Croatia*, (Thirteenth session, 2015), U.N. Doc. CRPD/C/HRV/CO/1.
- Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Report Submitted by the Czech Republic*, (Thirteenth session, 2015), U.N. Doc. CRPD/C/CZE/CO/1.
- Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Report Submitted by Denmark*, (Twelfth session, 2014), U.N. Doc. CRPD/C/DNK/CO/1.
- Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Report Submitted by El Salvador*, (Tenth session, 2013), U.N. Doc. CRPD/C/SLV/CO/1.
- Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Initial Report Submitted by Ethiopia*, (Sixteenth session, 2016), U.N. Doc. CRPD/C/ETH/CO/1.
- Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Report Submitted by the European Union*, (Fourteenth session, 2015), U.N. Doc. CRPD/C/EU/CO/1.
- Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Report Submitted by Gabon*, (Fourteenth session, 2015), U.N. Doc. CRPD/C/GAB/CO/1.
- Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Report Submitted by Germany*, (Thirteenth session, 2015), U.N. Doc. CRPD/C/DEU/CO/1.

- Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Report Submitted by Guatemala*, (Sixteenth session, 2016), U.N. Doc. CRPD/C/GTM/CO/1.
- Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Initial Periodic Report of Hungary*, (Eighth session, 2012), U.N. Doc. CRPD/C/HUN/CO/1.
- Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Report Submitted by Italy*, (Sixteenth session, 2016), U.N. Doc. CRPD/C/ITA/CO/1.
- Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Report Submitted by Kenya*, (Fourteenth session, 2015), U.N. Doc. CRPD/C/KEN/CO/1.
- Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Report Submitted by Lithuania*, (Fifteenth session, 2016), U.N. Doc. CRPD/C/LTU/CO/1.
- Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Report Submitted by Mauritius*, (Fourteenth session, 2015), U.N. Doc. CRPD/C/MUS/CO/1.
- Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Report Submitted by Mexico*, (Twelfth session, 2014), U.N. Doc. CRPD/C/MEX/CO/1.
- Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Report Submitted by Mongolia*, (Thirteenth session, 2015), U.N. Doc. CRPD/C/MNG/CO/1.
- Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Initial Report Submitted by New Zealand*, (Twelfth session, 2014), U.N. Doc. CRPD/C/NZL/CO/1.
- Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Report Submitted by Portugal*, (Fifteenth session, 2016), U.N. Doc. CRPD/C/PRT/CO/1.
- Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Report Submitted by Paraguay*, (Ninth session, 2013), U.N. Doc. CRPD/C/PRY/CO/1.
- Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Report Submitted by Peru*, (Seventh session, 2012), U.N. Doc. CRPD/C/PER/CO/1.
- Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Initial Report Submitted by Qatar*, (Fourteenth session, 2015), U.N. Doc. CRPD/C/QAT/CO/1.
- Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Report Submitted by the Republic of Korea*, (Twelfth session, 2014), U.N. Doc. CRPD/C/KOR/CO/1.
- Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Report Submitted by Spain*, (Sixth session, 2011), U.N. Doc. CRPD/C/ESP/CO/1.
- Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Report Submitted by Serbia*, (Fifteenth session, 2016), U.N. Doc. CRPD/C/SRB/CO/1.

- Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Initial Report Submitted by Slovakia*, (Fifteenth session, 2016), U.N. Doc. CRPD/C/SVK/CO/1.
- Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Report Submitted by Sweden*, (Eleventh session, 2014), U.N. Doc. CRPD/C/SWE/CO/1.
- Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Report Submitted by Turkmenistan*, (Thirteenth session, 2015), U.N. Doc. CRPD/C/TKM/CO/1.
- Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Report Submitted by Tunisia*, (Fifth session, 2011), U.N. Doc. CRPD/C/TUN/CO/1.
- Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Report Submitted by Uganda*, (Fifteenth session, 2016), U.N. Doc. CRPD/C/UGA/CO/1.
- Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Report Submitted by Ukraine*, (Fourteenth session, 2015), U.N. Doc. CRPD/C/UKR/CO/1.
- Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Report Submitted by United Arab Emirates*, (Sixteenth session, 2016), U.N. Doc. CRPD/C/ARE/CO/1.

Communications

- Committee on the Rights of Persons with Disabilities, *F v. Austria* (Communication no. 21/2014), U.N. Doc. CRPD/C/14/D/21/2014.
- Committee on the Rights of Persons with Disabilities, *Gröninger v. Germany* (Communication no. 2/2010), U.N. Doc. CRPD/C/D/2/2010.
- Committee on the Rights of Persons with Disabilities, *H.M. v. Sweden* (Communication no. 3/2011), U.N. Doc. CRPD/C/7/D/3/2011.
- Committee on the Rights of Persons with Disabilities, *Marie-Louise Jungelin v. Sweden*, (Communication No. 5/2011), U.N. Doc. CRPD/C/12/D/5/2011.
- Committee on the Rights of Persons with Disabilities, *Nyusti and Takács v. Hungary* (Communication no.1/2010), CRPD/C/9/D/1/2010.
- Committee on the Rights of Persons with Disabilities, *X. v. Argentina* (Communication no. 8/2012), U.N. Doc. CRPD/C/11/D/8/2012.

General Comments

- Committee on the Rights of Persons with Disabilities, General Comment 2, Art. 9 (Eleventh session, 2014), U.N. Doc. CRPD/C/GC/2.

Initial Reports

- *Initial Report on the Implementation of the Provisions of the Convention on the Rights of Persons with Disabilities submitted by Austria*, (10 October 2011), U.N. Doc CRPD/C/AUT/1.

- *Initial Report on the Implementation of the Provisions of the Convention on the Rights of Persons with Disabilities submitted by Belgium*, (13 March 2013), U.N. Doc CRPD/C/BEL/1.
- *Initial Report on the Implementation of the Provisions of the Convention on the Rights of Persons with Disabilities submitted by the Canada*, (7 July 2015), U.N. Doc. CRPD/C/CAN/1.
- *Initial Report on the Implementation of the Provisions of the Convention on the Rights of Persons with Disabilities submitted by Cyprus*, (27 February 2015), U.N. Doc CRPD/C/CYP/1.
- *Initial Report on the Implementation of the Provisions of the Convention on the Rights of Persons with Disabilities submitted by the Czech Republic*, (27 June 2013), U.N. Doc. CRPD/C/CZE/1.
- *Initial Report on the Implementation of the Provisions of the Convention on the Rights of Persons with Disabilities submitted by the European Union*, (3 Dec. 2014), U.N. Doc. CRPD/C/EU/1.
- *Initial Report on the Implementation of the Provisions of the Convention on the Rights of Persons with Disabilities submitted by Germany*, (7 May 2013), U.N. Doc. CRPD/C/DEU/1.
- *Initial Report on the Implementation of the Provisions of the Convention on the Rights of Persons with Disabilities submitted by Latvia*, (29 October 2015), U.N. Doc CRPD/C/LVA/1.
- *Initial Report on the Implementation of the Provisions of the Convention on the Rights of Persons with Disabilities submitted by Lithuania*, (2 December 2014), U.N. Doc CRPD/C/LTU/1.
- *Initial Report on the Implementation of the Provisions of the Convention on the Rights of Persons with Disabilities submitted by Poland*, (3 November 2015), U.N. Doc CRPD/C/POL/1.
- *Initial Report on the Implementation of the Provisions of the Convention on the Rights of Persons with Disabilities submitted by Serbia*, (29 September 2014), U.N. Doc CRPD/C/SRB/1.
- *Initial Report on the Implementation of the Provisions of the Convention on the Rights of Persons with Disabilities submitted by Slovakia*, (24 September 2014), U.N. Doc CRPD/C/SVK/1.
- *Initial Report on the Implementation of the Provisions of the Convention on the Rights of Persons with Disabilities submitted by Republic of Slovenia*, (30 Oct. 2015), U.N. Doc. CRPD/C/SVN/1.
- *Initial Report on the Implementation of the Provisions of the Convention on the Rights of Persons with Disabilities submitted by Sweden*, (18 Sept. 2012), U.N. Doc. CRPD/C/SWE/1.
- *Initial Report on the Implementation of the Provisions of the Convention on the Rights of Persons with Disabilities submitted by Thailand*, (30 Jan. 2015), U.N. Doc. CRPD/C/THA/1.
- *Initial Report on the Implementation of the Provisions of the Convention on the Rights of Persons with Disabilities submitted by the United Kingdom*, (3 July 2013), U.N. Doc CRPD/C/GBR/1.

Others Materials

- Committee on the Rights of Persons with Disabilities, General comment on Article 9: Accessibility Draft prepared by the Committee (Eleventh session, 2014), CRPD/C/11/3, para. 24.
- Committee on the Rights of Persons with Disabilities, *Guidelines on treaty-specific document to be submitted by states parties under article 35, paragraph 1, of the Convention on the Rights of Persons with Disabilities*, (Second session, 2009) U.N. Doc. CRPD/C/2/3.
- Committee on the Rights of Persons with Disabilities, *Replies of the European Union to the List of Issues*, 8 July 2015), U.N. Doc. CRPD/C/EU/Q/1/Add.1.
- UN Division for Social Policy and Development Disability, Report of the ninth session of the Conference of States Parties to the Convention on the Rights of Persons with Disabilities, CRPD/CSP/2016/5, Annex II
- UN Office of the High Commissioner for Human Rights (OHCHR), *Draft General Comment on Article 12 of the Convention – Equal Recognition before the Law & Draft General Comment on Article 9 of the Convention – Accessibility*, <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/DGCArticles12And9.aspx> (accessed 13 Jan. 2017).
- UN Office of the High Commissioner for Human Rights (OHCHR), *ITU's Comments on the CRPD Draft General Comment on Article 9*, <http://www.ohchr.org/Documents/HRBodies/CRPD/GC/ITUArt9.doc> (accessed 13 Jan. 2017).
- UN Office of the High Commissioner for Human Rights (OHCHR), *Response from the Government of Denmark with regards to Draft General Comment on Article 9 of the Convention – Accessibility*, <http://www.ohchr.org/Documents/HRBodies/CRPD/GC/DenmarkArt12.doc> (accessed 13 Jan. 2017).
- UN Office of the High Commissioner for Human Rights (OHCHR), *Views of the Australian Government on the draft General Comment by the Committee on the Rights of Persons with Disabilities regarding Article 9 of the Convention – Accessibility*, para. 5, <http://www.ohchr.org/Documents/HRBodies/CRPD/GC/AustralianHRCart12.doc> (accessed 13 Jan. 2017).

9 *Preparatory Works of the Conventions on the Rights of Persons with Disabilities*

- Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities Working Group, *Report of the Working Group to the Ad Hoc Committee*, 24, U.N. Doc. A/AC.265/2004/WG.1 (2004).
- Ad Hoc Committee on an International Convention, *Response by the International Civil Aviation Organization (ICAO)*, <http://www.un.org/esa/socdev/enable/rights/uncontrib-icao.htm> (accessed 13 Jan. 2017).
- Report of the Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, 9, U.N. Doc. A/59/360 (2004).
- Report of the fourth session of the Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, 13, U.N. Doc. A/59/360 (2004).

- Report of the sixth session of the Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, 14, U.N. Doc. A/60/266 (2005).
- UN Department of Economic and Social Affairs Division for Social Policy and Development, *Daily Summary of Discussions Related to Article 4*, <http://www.un.org/esa/socdev/enable/rights/ahc4sumart04.htm> (accessed 13 Jan. 2017).
- UN Department of Economic and Social Affairs Division for Social Policy and Development, *Article 4 – General Obligations Third Session*, <http://www.un.org/esa/socdev/enable/rights/ahcstata4tscompilation.htm> (accessed 13 Jan. 2017).
- UN Department of Economic and Social Affairs Division for Social Policy and Development, *Daily Summary of Discussion at the Seventh Session 20 January 2006*, <http://www.un.org/esa/socdev/enable/rights/ahc7sum20jan.htm> (accessed 13 Jan. 2017).
- UN Department of Economic and Social Affairs Division for Social Policy and Development, *UN Convention on the Human Rights of People with Disabilities Sixth Ad Hoc Committee Daily Summaries 5 August 2005*, <http://www.un.org/esa/socdev/enable/rights/ahc6sum5aug.htm> (accessed 13 Jan. 2017).
- UN Department of Economic and Social Affairs Division for Social Policy and Development, *Daily Summary of Discussion at the Seventh Session 17 January 2006*, <http://www.un.org/esa/socdev/enable/rights/ahc7sum17jan.htm> (accessed 13 Jan. 2017).
- UN Department of Economic and Social Affairs Division for Social Policy and Development, *The Concept of Reasonable Accommodation in Selected National Disability Legislation*, <http://www.un.org/esa/socdev/enable/rights/ahc7bkgrndra.htm> (accessed 13 Jan. 2017).
- UN Department of Economic and Social Affairs Division for Social Policy and Development, *Chair's Draft Elements of a Comprehensive and Integral International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities*, art. 2, <http://www.un.org/esa/socdev/enable/rights/wgcontrib-chair1.htm> (accessed 13 Jan. 2017).
- UN Department of Economic and Social Affairs Division for Social Policy and Development, *UN Convention on the Human Rights of People with Disabilities Ad Hoc Committee Daily Summaries 16 January 2006*, <http://www.un.org/esa/socdev/enable/rights/ahc7sum16jan.htm> (accessed 13 Jan. 2017).
- UN Department of Economic and Social Affairs Division for Social Policy and Development, *Daily Summary of Discussions Related to Article 7*, <http://www.un.org/esa/socdev/enable/rights/ahc4sumart07.htm> (accessed 13 Jan. 2017).
- UN Department of Economic and Social Affairs Division for Social Policy and Development, *Comments, Proposals and Amendments Submitted Electronically for the Seventh Session*, <http://www.un.org/esa/socdev/enable/rights/ahcstata2sevscomments.htm> (accessed 13 Jan. 2017).
- UN Department of Economic and Social Affairs Division for Social Policy and Development, *Position Paper of People with Disability Australia Incorporated (Australian) National Association of Community Legal Centres*, <http://www.un.org/esa/socdev/enable/rights/ahc8docs/ahc8naclc2.doc> (accessed 13 Jan. 2017).
- UN Department of Economic and Social Affairs Division for Social Policy and Development, *The Concept of Reasonable Accommodation in Selected National Disability*

- Legislation*, <http://www.un.org/esa/socdev/enable/rights/ahc7bkgrndra.htm> (accessed 13 Jan. 2017).
- UN Department of Economic and Social Affairs Division for Social Policy and Development, *Daily Summary of Discussion at the Seventh Session 30 January 2006*, <http://www.un.org/esa/socdev/enable/rights/ahc7sum30jan.htm> (accessed 13 Jan. 2017).
 - UN Department of Economic and Social Affairs Division for Social Policy and Development, *Accessibility to Information and Communication: perspectives of the visually impaired*, <http://www.un.org/esa/socdev/enable/rights/ahc7bkgrndaccess.htm> (accessed 13 Jan. 2017).
 - UN Department of Economic and Social Affairs Division for Social Policy and Development, *Daily Summary of Discussions Related to Article 19 Accessibility*, <http://www.un.org/esa/socdev/enable/rights/ahc3sum19.htm> (accessed 13 Jan. 2017).
 - UN Office of the High Commissioner for Human Rights, *Background Conference: The Concept of 'Special' Measures in International Human Rights Law*, 1 <http://www.un.org/esa/socdev/enable/rights/documents/ahc6ohchrspmeasures.doc> (accessed 13 Jan. 2017).
 - United Nations, Ad Hoc Committee, *Article 18 – Liberty of movement References*, <http://www.un.org/esa/socdev/enable/rights/ahcstata18refinthr.htm> (accessed 21 Mar. 2017).
 - United Nations, Ad Hoc Committee, *Article 20 – Personal Mobility References*, <http://www.un.org/esa/socdev/enable/rights/ahcstata20refinthr.htm> (accessed 21 Mar. 2017).

10 Other UN Materials

- Department of Economic and Social Affairs (DESA) of the United Nations Secretariat, *Accessibility and Development Mainstreaming Disability in the Post-2015 Development Agenda*, ST/ESA/350, http://www.un.org/disabilities/documents/accessibility_and_development.pdf (accessed 25 May 2017)
- Human Rights Council, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, 11th session, U.N. Doc. A/HRC/11/13, (22 Apr. 2009).
- Human Rights Council, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, 17th session, Principle 25, U.N. Doc. A/HRC/17/31, (2001).
- UN Office of the High Commissioner for Human Rights, *Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies*, 2006, HR/PUB/06/12, Guideline 4.
- United Nations Economic and Social Council, Commission on Human Rights, Sub-commission on Prevention of Discrimination and Protection of Minorities 49th session, Summary record of the 36th meeting, E/CN.4/Sub.2/1997/SR.36, 2 September 1997.
- United Nations Treaty Collection, *Status of Optional Protocol to the Convention on the Rights of Persons with Disabilities*, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-15-a&chapter=4&clang=_en (accessed 25 May 2017).

- United Nations Treaty Collection, Status of the Convention on the Rights of Persons with Disabilities, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&clang=_en (accessed 25 May 2017).
- United Nations, *List of Non-Governmental Organization Accredited to the Conference of States Parties*, <https://www.un.org/development/desa/disabilities/conference-of-states-parties-to-the-convention-on-the-rights-of-persons-with-disabilities-2/list-of-non-governmental-organization-accredited-to-the-conference-of-states-parties.html> (accessed 13 Jan. 2017).
- United Nations, *Recommendations on International Travel and Tourism*, the United Nations Conference on International Travel and Tourism Rome 21 Aug – 5 Sep 1963, E/ConF.47/18.

4 ICAO DOCUMENTS

1 Annexes

- Annex 6, *Operation of Aircraft, Part I International Commercial Air Transport – Aeroplanes*, (9th ed. July 2010).
- Annex 9, *Facilitation*, (6th ed. Apr. 1969).
- Annex 9, *Facilitation*, (9th ed. July 1990).
- Annex 9, *Facilitation*, (14th ed. Oct. 2015).
- Annex 17, *Security*, (9th ed. Mar. 2011).
- Annex 18, *The Safe Transport of Dangerous Goods by Air*, (4th ed. Jul. 2011).
- Supplement to Annex 9 (12th ed. Apr. 2011), (iv)-(v).

2 Assembly Resolutions

- ICAO, Resolution A1-11.
- ICAO, Resolution A2-24.
- ICAO, Resolution A29-15.
- ICAO, Resolution A35-14.
- ICAO, Resolution A36-6.
- ICAO, Resolution A36-13.
- ICAO, Resolution A37-15.
- ICAO, Resolution A37-20.
- ICAO, Resolution A38-11.
- ICAO, Resolution A38-15.
- ICAO, Resolution A39-9.
- ICAO, Resolution A39-15.
- ICAO, Resolution A39-17.
- ICAO, Resolution A39-20.
- ICAO, Resolution A39-22.
- ICAO, Resolution A39-23.
- ICAO, Resolution A39-25.
- ICAO, Resolution A39-26.

3 Documents

- ICAO, *Airport Planning Manual*, ICAO Doc 9184-AN/902 Part 1, (2nd ed. 1987).
- ICAO, *ICAO's Policies on Charges for Airports and Air Navigation Services*, ICAO Doc 9082 (8th ed. 2009).
- ICAO, *International Conference on Air Law*, ICAO Doc 9775 Vol. I.
- ICAO, *International Conference on Air Law*, ICAO Doc 9775 Vol. II.
- ICAO, *International Conference on Air Law*, ICAO Doc 9775 Vol. III.
- ICAO, *Manual on Access to Air Transport by Persons with Disabilities*, ICAO Doc 9984 (2013).
- ICAO, *Safety Oversight Manual*, ICAO Doc 9734 AN/959, Part A, The Establishment and Management of a State's Safety Oversight System, (2nd ed. 2006).
- ICAO, *Summary Minutes with Subject Index*, (206th session, 2015), ICAO Doc 10065-C/1182 C-Min. 206/1-10.

4 Other ICAO Materials

- ICAO, *Achieving Compatibility in Consumer Protection Regulations*, Worldwide Air Transport Conference (ATCONF) Sixth Meeting, ATConf/6-WP45.
- ICAO, *Annex 9*, <http://www.icao.int/Security/FAL/Pages/Annex9.aspx> (accessed 13 Jan. 2017).
- ICAO, *Annual Report of the Council*, 1992.
- ICAO, *API Guidelines and PNR Reporting Standards*, <https://www.icao.int/Security/FAL/SitePages/API%20Guidelines%20and%20PNR%20Reporting%20Standards.aspx> (accessed 24 May 2017).
- ICAO, *Audit Summary Report of the Civil Aviation Authority and Civil Aviation Department of the Czech Republic*, http://cfapp.icao.int/fsix/AuditReps/initial/czech_2000_en.pdf (accessed 13 Apr. 2017).
- ICAO, *Audit Summary Report of the Department of Civil Aviation of the Lao People's Democratic Republic*, http://cfapp.icao.int/fsix/AuditReps/initial/lao_1999_en.pdf (accessed 13 Apr. 2017).
- ICAO, *Audit Summary Report of the Federal Office for Civil Aviation of Switzerland*, 1-8 Nov. 2000.
- ICAO, *Audit Summary Report of Transport Canada*, http://cfapp.icao.int/fsix/AuditReps/initial/canada_2000_en.pdf (accessed 13 Apr. 2017).
- ICAO, *Available Capacity and Average Passenger Mass*, http://www.icao.int/Meetings/STA10/Documents/Sta10_Wp005_en.pdf (accessed 6 Mar. 2017).
- ICAO, *Consumer Protection*, Worldwide Air Transport Conference (ATCONF) Sixth Meeting, ATConf/6-WP/104.
- ICAO, *Consumer Protection and Definition of Passenger Rights in Different Contexts*, Worldwide Air Transport Conference (ATCONF) Sixth Meeting, ATConf/6-WP/5.
- ICAO, *Core Principles on Consumer Protection*, <http://www.icao.int/sustainability/Documents/ConsumerProtection/CorePrinciples.pdf> (accessed 13 Jan. 2017).
- ICAO, *Facilitation Panel (FALP) Sixth Meeting, Report of the Persons with Disabilities Working Group*, http://www.icao.int/Meetings/FALP/Documents/falp6_2010/FALP6_WP06_en.pdf (accessed 13 Jan. 2017).

- ICAO, *Facilitation Panel Seventh Meeting, Proposal to Amend Annex 9 SARPs Relating to Persons with Disabilities*, <http://www.icao.int/Meetings/FALP/Documents/Falp7-2012/WP3/WP3.EN.pdf> (accessed 13 Jan. 2017).
- ICAO, *Facilitation Panel, 8th Meeting Annex 9 Audits, 3.1* <http://www.icao.int/Meetings/FALP/Documents/Falp8-2014/FALP8.WP12.Annex9Audits.Final.13Nov2014.pdf> (accessed 13 Jan. 2017).
- ICAO, *Global Aviation Facilitation Plan (GAFP)*, Facilitation Panel (FALP) Ninth Meeting, FALP/9-WP/8.
- ICAO, *ICAO Business Plan 2017 – 2019*, <http://www.icao.int/Meetings/a39/Documents/Business%20Plan%202017-2019.pdf> (accessed 13 Jan. 2017).
- ICAO, *ICAO Regional FAL Seminar, Annex 9 Compliance Issue*, <http://www.icao.int/ESAF/Documents/meetings/2014/FAL-FEB/Annex%209%20%20-Compliance%20Issues.pdf> (accessed 13 Jan. 2017).
- ICAO, *ICAO Template Air Services Agreement*, <http://www.icao.int/Meetings/AMC/MA/ICAN2009/templateairservicesagreements.pdf> (accessed 13 Jan. 2017).
- ICAO, *The World of Civil Aviation 1999-2002*, Circular 279-AT/116, 67.

5 EU DOCUMENTS

- Commission of the European Communities, *Communication on the scope of the liability of air carriers and airports in the event of destroyed, damaged or lost mobility equipment of passengers with reduced mobility when travelling by air*, 7.8.2008, COM (2008) 510 final.
- Council Decision of 26 November 2009 concerning the Conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities, OJ L 23, 27.1.2010.
- EUR-Lex, *Procedure 2013/0072/COD*, <http://eur-lex.europa.eu/legal-content/EN/HIS/?uri=celex:52013PC0130> (accessed 1 Mar. 2017).
- European Commission, *Airline's Contracts with Passengers: Consultation paper of Directorate-General for Energy and Transport, with Directorate-General for Health and Consumer Protection*, 07.06.2002.
- European Commission, *Interpretative Guidelines on Regulation (EC) No 261/2004 of the European Parliament and of the Council establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights and on Council Regulation (EC) No 2027/97 on air carrier liability in the event of accidents as amended by Regulation (EC) No 889/2002 of the European Parliament and of the Council*, OJ C 214, 15.6.2016, p. 5–21.
- European Commission, *Interpretative Guidelines on the Application of Regulation (EC) N° 1107/2006 of the European Parliament and of the Council of 5 July 2006 Concerning the Rights of Disabled Persons and Persons with Reduced Mobility when Travelling by Air*, SWD (2012) 171 Final, 11.6.2012, 3.
- European Commission, *Minutes of the Making Regulation 1107/2006 a success: 1st NEB meeting*, 3 Dec. 2008.
- European Commission, *Minutes of the Making Regulation 1107/2006 a success: 1st NEB meeting*, 3 Dec. 2008.

- European Commission, *Proposal for a Directive of the European Parliament and of the Council on the approximation of the laws, regulations and administrative provisions of the Member States as regards the accessibility requirements for products and services*, COM(2015) 615 final, 2015/0278 (COD), 2.12.2015.
- European Commission, *Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights and Regulation (EC) No 2027/97 on air carrier liability in respect of the carriage of passengers and their baggage by air*, COM/2013/0130 final – 2013/0072 (COD), 13.3.2013.
- European Commission, *Proposal for a Regulation of the European Parliament and of the Council concerning the Rights of Persons with Reduced Mobility When Travelling by Air*, COM(2005) 47 final 07/2005 (COD), 16.2.2005.
- European Commission, *Report from the Commission to the European Parliament and the Council on the Functioning and Effects of Regulation (EC) No 1107/2006 of the European Parliament and of the Council of 5 July 2006 concerning the Rights of Disabled Persons and Persons with Reduced Mobility When Travelling by Air*, Com(2011) 166 final, 11.4.2011.
- European Commission, *Topical Reports: Airline Business Models by DLR*, 8, https://ec.europa.eu/transport/sites/transport/files/modes/air/doc/abm_report_2008.pdf (accessed 13 Jan. 2017).
- European Parliament, *European Parliament Resolution of 23 October 2012 on Passenger Rights in All Transport Modes*, (2012/2067(INI)).
- European Parliament, List of Titles of Written Questions by Members of the European Parliament Indicating the Number, Original Language, Author, Political Group, Institution Addressed, Date Submitted and Subject of the Question, E-3184/10 (DA) by Britta Thomsen (S&D) to the Commission (7 May 2010).
- European Parliament, List of Titles of Written Questions by Members of the European Parliament Indicating the Number, Original Language, Author, Political Group, Institution Addressed, Date Submitted and Subject of the Question, E-2654/2010, OJ C 138 E, 7.5.2011.
- European Parliament, Report on the Proposal for a Regulation of the European Parliament and of the Council Concerning the Rights of Persons with Reduced Mobility when Travelling by Air, Robert Evans (Rapporteur), A6-0317/2005, 27.10.2005.
- European Parliament, *Report on the proposal for a regulation of the European Parliament and of the Council amending Regulation (EC) No 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights and Regulation (EC) No 2027/97 on air carrier liability in respect of the carriage of passengers and their baggage by air*, (COM(2013)0130 – C7-0066/2013 – 2013/0072(COD), 22.1.2014.
- Opinion of the European Economic and Social Committee on the Proposal for a Regulation of the European Parliament and of the Council concerning the Rights of Persons with Reduced Mobility When Travelling by Air (COM(2005) 47 final – 07/2005 (COD)), OJ C 24, 31.1.2006, p.12-14.
- Parliamentary questions, P-1331/2008, 31 March 2008, OJ C 291, 13/11/2008.

6 BOOKS

- Abeyratne, R. I. R., *Competition and Investment in Air Transport* (Springer International Publishing 2016).
- Abeyratne, R. I. R., *Rulemaking in Air Transport: A Deconstructive Analysis* (Springer International Publishing 2016).
- Airports Council International, *Airports & Persons with Disabilities: A Handbook for Airport Operators* (4th ed., Airports Council International 2003).
- American Law Institute, *Restatement (Third) of Foreign Relations Law of the United States*, Vol. 1 (1987).
- Andersen, E. A., & Lindsnaes, B., *Towards New Global Strategies: Public Goods and Human Rights* (Brill 2007).
- Ankumah, E. A., *The African Commission on Human and Peoples' Rights : Practice and Procedures* (Martinus Nijhoff Publishers 1996).
- Baxi U., *The Future of Human Rights* (Oxford University Press 2002).
- Benvenisti, E., *The Law of Global Governance*, 368 *Recueil des Cours*, (2014).
- Broderick, A., *The Long and Winding Road to Equality and Inclusion for Persons with Disabilities* (Intersentia 2015).
- Clarke, M. A., *Contracts of Carriage by Air* (3rd ed., Lloyd's List 2010).
- Craig, P., & de Búrca, G., *EU Law: Text, Cases and Materials*, (5th ed., Oxford University Press 2011).
- Crawford, J., *Brownlie's Principles of Public International Law*, (8th ed., Oxford University Press 2012).
- Crawford, J., *International Law as an Open System: Selected Essays*, 37 (Cameron May 2002).
- Crawford, J., *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge University Press 2002).
- De Aguirre, C. F., *Public Policy: Common Principles in the American States*, 379 *Recueil des Cours* (2016).
- De Schutter, O., *International Human Rights Law: Cases Materials, Commentary* (2nd ed. Cambridge University Press 2014).
- Dempsey, P. S., & Milde, M., *International Air Carrier Liability: The Montreal Convention of 1999* (McGill University, 2005).
- Dempsey, P. S., *Public International Air Law* (McGill University, 2008).
- Diederiks-Verschoor, I.H.Ph. & Mendes de Leon, P.M.J., *An Introduction to Air Law*, 137 (9th ed., Kluwer Law International 2012).
- Djeflal, C., *Static and Evolutive Treaty Interpretation: A Functional Reconstruction* (Cambridge University Press 2016).
- Edmundson, W. A., *An Introduction to Rights* (2nd ed., Cambridge University Press 2012).
- Ensminger, J. J., *Service and Therapy Dogs in American Society* (Charles C Thomas Publisher 2010).
- Fawcett, J. J., Shuïlleabháin, M. N., & Shah, S., *Human Rights and Private International Law*, (Oxford University Press, 2016).
- Fedtko, J., & Oliver, D., *Human Rights and the Private Sphere: A Comparative Study*, (Routledge-Cavendish 2007).

- Fredman, S., *Human Rights Transformed: Positive Rights and Positive Duties* (Oxford University Press 2008).
- Gaja, G., *The Protection of General Interest in the International Community: General Course on Public International Law*, 364 *Recueil des Cours* (2011).
- Gardiner, R. K., *Treaty Interpretation* (2nd ed., Oxford University Press, 2015).
- Hafner-Burton, E., *Forced to be Good: Why Trade Agreements Boost Human Rights* (Cornell University Press 2009).
- Higgins, R., *Problems and Process: International Law and How We Use It*, 99 (Clarendon Press, 1994).
- Huang, J., *Aviation Safety and ICAO*, (Kluwer Law International 2009).
- Ingleis, J. D., *Study of Discrimination in respect of the Right of Everyone to Leave any Country, Including His Own, and to Return to His Country*, 5 (United Nations 1963).
- International Air Transport Association, *IOSA Standards Manual* (8th ed., International Air Transport Association 2014).
- Jennings, R., & Watts, A., (eds.), *Oppenheim's International Law*, (9th ed, Longman, 1992).
- Joseph, S., & Castan, M., *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (3rd ed., Oxford University Press 2013).
- Kanter, A. S., *The Development of Disability Rights Under International Law: From Charity to Human Rights* (Routledge 2015).
- Kaul, I., Grunberg, I., & Stern, M.A., *Global Public Goods: International Cooperation in the 21st Century* (Oxford University Press 1999).
- Lawson, A., *Disability and Equality Law in Britain* (Hart Publishing 2008).
- Leloudas, G., *Risk and Liability in Air Law*, (Informa, 2009).
- Lerner, N., *The U.N. Convention on the Elimination of All Forms of Racial Discrimination: A Commentary* (Sijthoff 1970).
- Mak, C., *Fundamental Rights in European Contract Law: A Comparison of the Impact of Fundamental Rights on Contractual Relationships in Germany, the Netherlands, Italy and England*, (Ph.D. thesis), (2007).
- Milde, M., *International Air Law and ICAO* (3rd ed., Eleven International Publishing 2016).
- Nmehielle, V. O. O., *The African Human Rights System: Its Laws, Practice and Institutions*, 118-119 (Martinus Nijhoff Publishers 2001).
- Nowak, M., *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (Kehl am Rhein 1993).
- Nussbaum, M., *Frontier of Justice: Disability, Nationality, Species Membership* (Belknap Press of Harvard University Press 2006).
- Ouguergouz, F., *The African Charter on Human and Peoples' Rights. A Comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa*, 182 (Martinus Nijhoff Publishers 2003).
- Posner, E. A., *The Twilight of Human Rights Law*, (Oxford University Press 2014).
- Ragazzi, M., *The Concept of International Obligations Erga Omnes*, 144-145 (Clarendon Press 1997).
- Reukema, B., *Discriminatory Refusal of Carriage in North America* (Kluwer 1982).
- Ryngaert, C., *Jurisdiction in International Law*, (2nd ed., Oxford University Press 2015).
- Ryngaert, C., *Unilateral Jurisdiction and Global Values*, (Eleven International Publishing 2015).

- Saul, B., Kinkley, D., & Mowbray, J., *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases, and Materials* (Oxford University Press 2014).
- Schabas, W. A., *The Universal Declaration of Human Rights: The Travaux Préparatoires* (Cambridge University Press 2013).
- Schermer, H. G., & Blokker, N., *International Institutional Law : Unity within Diversity* (5th rev. ed., Martinus Nijhoff 2011).
- Schiek, D., Waddington L., & Bell, M., *Non-Discrimination Law* (Hart Publishing 2007).
- Shelton, D., *Remedies in International Human Rights Law*, (3rd ed., Oxford University Press 2015).
- Siems, M., *Comparative Law*, (Cambridge University Press, 2014).
- Tams, C.J., *Enforcing Obligations Erga Omnes in International Law*, (Cambridge University Press, 2005).
- Thornberry, P., *The International Convention on the Elimination of All Forms of Racial Discrimination: A Commentary* (Oxford University Press 2016).
- Tompkins, Jr., G. N., *Liability Rules Applicable to International Air Transportation as Developed by the Courts in the United States* (Kluwer Law International 2010).
- UN Office of the High Commissioner for Human Rights (OHCHR), *From Exclusion to Equality Realizing the rights of persons with disabilities* (2007).
- UN Office of the High Commissioner for Human Rights (OHCHR), *Monitoring the Convention on the Rights of Persons with Disabilities: Guidance for Human Rights Monitors* (2010).
- Vandenhoe, W., *Non-discrimination and Equality in the View of the UN Human Rights Treaty Bodies* (Intersentia 2005).
- Von Bar, C., & Clive, E., (eds), Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group), *Principles, Definitions and Model Rules of European Private Law, Vol I* (European Law Publishers 2009).
- Weber, L., *International Civil Aviation Organization (ICAO)* (Kluwer Law International, 2012).
- World Health Organization, *International Classification Of Functioning, Disability and Health* (World Health Organization, 2001).

7 CONTRIBUTION TO BOOKS

- Alvarez, J. E., *Beware Boundary Crossings*, in *Boundaries of State, Boundaries of Rights: Human Rights, Private Actors, and Positive Obligations* (Kahana, T., & Scolnicov, A., Cambridge University Press 2016).
- Basser, L.A., *Human Dignity in Critical Perspectives on Human Rights and Disability Law* (Rious, M. H., Basser, L. A., & Jones, M., Martinus Nijhoff 2011).
- Bhuta, N., *The Frontiers of Extraterritoriality – Human Rights Law as Global Law in Frontier of Human Rights: Extraterritoriality and Its Challenge* (Bhuta, N., Oxford University Press 2016).
- Bjorge, E., *The Convergence of the Methods of Treaty Interpretation: Different Regimes, Different Method of Interpretation?*, in *A Farewell to Fragmentation Reassertion and Convergence in International Law* (Andenas, M., Cambridge University Press 2015).

- Chetail, V., *The Transnational Movement of Persons Under General International Law – Mapping the Customary Foundations of International Migration Law*, in *Research Handbook On International Law And Migration* (Chetail, V., Edward Elgar 2014).
- Chinkin, C., *International Human Rights Law* in *International Human Rights Law* ((Moeckli, D., Shah, S., Sivakumaran, S., & Harris, D. J., Oxford University Press 2010).
- De Wet, E., & Vidmar, J., *Conclusions*, in *Hierarchy in International Law: The Place of Human Rights* (De Wet, E., & Vidmar, J., Oxford University Press, 2012).
- Hendriks, A., *The Significance of Equality and Non-Discrimination for the Protection of the Rights and Dignity of Disabled Persons*, in *Human Rights and Disabled Persons* (Degener, T., & Koster-Dreese, Y., Martinus Nijhoff 1995).
- Heyns, C., *Civil and Political Rights in the African Charter* in *The African Charter on Human and People's Rights: The System in Practice* (Evans M. D., & Murrey, R., Cambridge University Press 2002).
- Kallehauge, H., *General Themes Relevant to the Implementation of the UN Disability Convention into Domestic Law: Who is responsible for the implementation and how should it be performed?*, in *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian perspectives* (Arnardóttir, O. M., & Quinn, G., Martinus Nijhoff 2009).
- Koch, I. E., *From Invisibility to Indivisibility: The International Convention on the Rights of Persons with Disabilities* in *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian perspectives* (Arnardóttir, O. M., & Quinn, G., Martinus Nijhoff 2009).
- Lawson, A., & Matthews, B., *Dismantling Barriers to Transport by Law: The European Journey* in *Disability Policy and Practice: Applying the Social Model* (Barnes, C., & Mercer, G., Disability Press 2004).
- Lawson, A., *The UN Convention on the Rights of Persons with Disabilities and European Disability Law: A Catalyst for Cohesion?* in *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian perspectives* (Arnardóttir, O. M., & Quinn, G., Martinus Nijhoff 2009).
- Lord, J. E., & Brown, R., *The Role of Reasonable Accommodation in Securing Substantive Equality for Persons with Disabilities: The UN Convention on the Rights of Persons with Disabilities* in *Critical Perspectives on Human Rights and Disability Law* (Rious, M. H., Basser, L. A., & Jones, M., Martinus Nijhoff 2011).
- Mégret, F., *Nature of Obligations* in *International Human Rights Law* (Moeckli, D., Shah, S., Sivakumaran, S., & Harris, D. J., Oxford University Press 2010).
- Mendes de Leon, P. M. J., *Jurisdiction under and Exclusivity of Private International Air Law Agreements on Air Carrier Liability: The Case of Airbus versus Armavia Airlines* (2013) in *From Lowlands to High Skies: A Multilevel Jurisdictional Approach Towards Air Law: essays in honour of John Balfour* (Mendes de Leon, P. M. J., Brill 2013).
- Mendes de Leon, P. M. J., *The Dynamics of Sovereignty and Jurisdiction in International Aviation Law* in *State, Sovereignty and International Governance* (Kreijen, G., Oxford University Press, 2002).
- Nussbaum, M., *Capabilities, Human Rights, and the Universal Declaration* in *Human Rights in the World Community: Issues and Action* (Weston, B. H., & Grear, A., 4th ed., University of Pennsylvania Press 2016).

- O'Kinneide, C., *Extracting Protection for the Rights of Persons with Disabilities from Human Rights Frameworks: Established Limits and New Possibilities in The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian perspectives* (Arnardoittir, O. M., & Quinn, G., Martinus Nijhoff 2009).
- Palmer, S., *Privatization and Human Rights in the United Kingdom in Boundaries of State, Boundaries of Rights: Human Rights, Private Actors, and Positive Obligations* (Kahana, T., & Scolnicov, A., Cambridge University Press 2016).
- Shelton, D., *International Law and 'Relative Normativity'*, in *International Law* (Evans, M. D., 3rd ed., Oxford University Press 2014).
- Stein, M. A., & Lord, J. E., *Future Prospects for the United Nations Convention on the Rights of Persons with Disabilities in The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian perspectives* (Arnardoittir, O. M., & Quinn, G., Martinus Nijhoff 2009).
- Waddington, L., *Breaking New Ground: The Implications of Ratification of the UN Convention on the Rights of Persons with Disabilities for the European Community in The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian perspectives* (Arnardoittir, O. M., & Quinn, G., Martinus Nijhoff 2009).

8 ARTICLES

- Abeyratne, R. I. R., *Outcome of the 39th Session of the International Civil Aviation Organization Assembly*, 42:1 *Air & Space L.*, 13 (2017).
- Abeyratne, R. I. R., *The Rights of a Disabled Airline Passenger: A New Approach?*, 60 *German J. Air & Space L.*, 177 (2011).
- Abeyratne, R. I. R., *Tobacco Smoking in Aircraft – A Fog of Legal Rhetoric?*, XVIII: 2 *Air & Space L.*, 50 (1993).
- Ahmad, T., *One Passenger, One Fare: A Policy Which Neither Benefits The Air Carriers Nor The Disabled Population*, 36 *Annals Air & Space L.*, 377 (2011).
- Alston, P., *Conjuring up New Human Rights: A Proposal for Quality Control*, 78:3 *Am. J. Int'l L.* 607 (1984).
- Altmeyer, L. R., *Freedom to Fly: An Analysis of the Constitutional Right to Air Travel*, 80 *J. Air L. & Com.*, 719 (2015).
- Ancell, D., & Graham, A., *A Framework for Evaluating the European Airline Costs of Disabled Persons and Persons with Reduced Mobility*, 50(C), *JATM*, 41 (2016).
- Baker, D., & Godwin, S., *ALL ABROAD!: The Supreme Court of Canada Confirms that Canadians with Disabilities Have Substantive Equality Rights*, 71 *Sask. L. Rev.*, 39 (2008).
- Bodansky, D., *What's in a Concept? Global Public Goods, International Law, and Legitimacy*, 23:3 *Eur. J. Int'l L.*, 651, 653(2012).
- Bokareva, O., *Air Passengers' Rights in the EU: International Uniformity versus Regional Harmonization*, 41 *Air & Space L.*, 3 (2016).
- Bradley, C. A., *Unratified Treaties, Domestic Politics, and the U.S. Constitution*, 48:2 *Harv. Int'l L.J.*, 307 (2007).
- Buergenthal, T., *The Normative and Institutional Evolution of International Human Rights*, 19 *Hum. Rts. Q.* 703 (1997).

- Chang, Y. C., & Chen, C. F., *Identifying Mobility Service Needs for Disabled Air Passengers*, 32(5), *Tourism Management*, 1214 (2011).
- Cheng, B., *A New Era in the Law of International Carriage by Air: From Warsaw (1929) to Montreal (1999)*, 53 *Int'l & Comp. L.Q.*, 833, (2004).
- Ciobanu, A., *Saving the Airlines: A Narrower Interpretation of the Term "Accident" in Article 17 of the Montreal Convention*, 31 *Annals of Air and Space L.* 1 (2006).
- Cornett, A., *Air Carrier Liability under Warsaw: The Ninth Circuit Holds that Aircraft Personnel's Failure to Act in the Face of Known Risk is an "Accident" When Determining Warsaw Liability – Husain v. Olympic Airways*, 68 *J. Air L. & Com.* 163 (2003).
- Corrigan, J. M., *The Right of the Air Carrier to Refuse Carriage*, 3 *Annals Air & Space L.* 25 (1978).
- Cresswell, T., *The Right to Mobility; The Production of Mobility in the Courtroom*, 38:4, *Antipode*, 742 (2006).
- Creutzfeldt, N., & Berlin, C., *ADR in Aviation: European and National Perspectives*, 35:2 *C.J.Q.*, 148 (2016).
- Cunningham, M., *The Montreal Convention: Can Passengers Finally Recover for Mental Injuries?*, 41 *Vand. J. Transnat'l L.*, 1043 (2008).
- Dempsey, P. S., & Johansson, S. O., *Montreal v. Brussels: The Conflict of Laws on the Issue of Delay in International Air Carriage*, 35 *Air & Space L.* 207 (2010).
- Dempsey, P. S., *Olympic Airways v. Husain: The US Supreme Court Gives the Term 'Accident' a Whole New Meaning*, 28 *Annals of Air and Space L.* 333 (2003).
- Deutch, S., *Are Consumer Rights Human Rights?*, 32:3 *Osgoode Hall L.J.* 537 (1994).
- Edmons, C. D., *When Pigs Fly: Litigation under the Air Carrier Access Act*, 78 *N.D. L. Rev.*, 687 (2002).
- Ferri, D., *The Conclusion of the UN Convention on the Rights of Persons with Disability by the EC/EU*, 2, *Eur. Y.B. Disability L.*, 47 (2010).
- Field, A., *Air Travel, Accidents and Injuries: Why the New Montreal Convention is Already Outdated*, 28 *Dalhousie L.J.* 69 (2005).
- Field, A., *International Air Carriage, the Montreal Convention and the Injuries for Which There is no Compensation*, 12 *Canterbury L. Rev.* 237 (2006).
- Glynn, M. A., *Case Comment Stott v. Thomas Cook Tour Operators Ltd [2014] UKSC 15 & Thibodeau v. Air Canada [2014] SCC 67*, 39 *Annals Air & Space L.*, 683 (2014).
- Green, D., *Re-examining the Exclusivity Principle Following Stott v Thomas Cook Tour Operator Ltd*, 6 *Travel L. Q.*, 114 (2014).
- Guerreri, G., *Airport Operator as Independent Contractor – Clear Guidelines from the Court of Cassation*, 28 *Air & Space L.*, 97 (2003).
- Harnacke, C., *Disability and Capability: Exploring the Usefulness of Martha Nussbaum's Capabilities Approach for the UN Disability Rights Convention*, 41(4) *J. Law Med Ethics.*, 768 (2013).
- Heffernan, D., *The US Government Prepares to Make Non-US Airlines Subject to New Rules Regarding the Transportation of Disabled Passengers*, 29:4-5 *Air & Space L.*, 245, 248-249 (2004).
- Hendriks, A., *Disabled Persons and Their Right to Equal Treatment: Allowing Differentiation while Ending Discrimination*, 1:2 *Health & Hum. Rts.*, 152 (1995).
- Hendriks, A., *The UN Disability Convention and (Multiple) Discrimination: Should EU Non-Discrimination Law be Modeled Accordingly?*, 2 *Eur. Y.B. Disability L.*, 7 (2010).

- Hendriks, A., *UN Convention on the Rights of Persons with Disabilities*, 14:3 Eur. J. Health L. 273 (2007).
- Hindman, S. A., *The Air Carrier Access Act: It is Time for an Overhaul*, 9:2 Issues Aviation L. & Pol'y, 365 (2010).
- Huss, R. J., *Why Context Matters: Defining Service Animals Under Federal Law*, 37 Pepp. L.R. 1163 (2010).
- International Law Institute, *Obligations and Rights Erga omnes in International Law by Giorgio Gaja (Rapporteur)*, 71:1 Institut de Droit International Annuaire, 116 (2005).
- International Law Institute, *The Protection of Human Rights and the Principle of Non-Intervention in Internal Affairs of States*, 63 Institut de Droit International Annuaire, 338 (1989).
- Justesen, T. R., & Justesen, T. R., *An Analysis of the Development and Adoption of the United Nations Convention Recognizing the Rights of Individuals with Disabilities: Why the United States Refuses to Sign this UN Convention*, 14:2 Hum. Rts. Brief, 36 (2007).
- Karsten, J., *Passenger, Consumers, and Travellers: The Rise of Passenger Rights in the EC Transport Law and its Repurcussions for Community Consumer Law and Policy*, 30 J. Consumer Pol'y, 117 (2007).
- Kayess, R., & French, P., *Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities*, 8:1 Hum. Rts. L. Rev. 1, (2008).
- Kinahan, E. M., *Despite the ACAA, Turbulence is not just in the Sky for Disabled Travelers*, 4:2&3 DePaul J. Health Care L. 397 (2001).
- Konert, A., & Ephraimson, H., *Passengers with Reduced Mobility in the EU, Canada and the US*, 33:3 Air & Space L., 233 (2008).
- Koning, I., *Liability in Air Carriage. Carriage of Cargo Under the Warsaw and Montreal Conventions*, 33 Air & Space L., 318 (2008).
- Koning, I., *The Disabling of the EC Disability Regulation: Stott v. Thomas Cook Tour Operators Ltd in the Light of the Exclusivity Doctrine*, 22 Eur. Rev. of Private L., 769 (2014).
- Koskenniemi, M., *The Case for Comparative International Law*, 20 Finn Y.B. Int'l L., 1 (2009).
- Lawson, A., *Accessibility Obligations in the UN Convention on the Rights of Persons with Disabilities: Nyusti and Takács v Hungary*, 30:2 S. Afr. J. on Hum. Rts., 380 (2014).
- Lawson, A., *People with Psychosocial Impairments or Conditions, Reasonable Accommodation and the Convention on the Rights of Persons with Disabilities*, 26:2 L. in Context, 62 (2008).
- Lawson, A., *Reasonable Accommodation and Accessibility Obligations: Toward a More Unified European Approach?*, 11 Eur. Anti-Discrimination L. Rev. 11 (2011).
- Lawson, A., *The United Nations Convention on the Right of Persons with Disabilities: New Era or False Dawn?*, 34:2 Syracuse J. Int'l L. & Com. 563 (2007).
- McCarthy, M. J., *Improving the United States Airline Industry's Capacity to Provide Safe and Dignified Services to Travelers with Disabilities: Focus Group Findings*, 33:25-26, Disabi Rehabil, 2612 (2011).
- McDonald, M., *The Montreal Convention and the Preemption of Air Passenger harm Claims*, 44 The Irish Jurist, 203, 237 (2010).
- Mégret, F., & Msipa, D., *Global Reasonable Accommodation: How the Convention on the Rights of Persons with Disabilities Changes the Way We Think about Equality*, 30:2 S. Afr. J. on Hum. Rts., 252 (2014).

- Mendes De Leon, P. M. J., & Eyskens, W., *The Montreal Convention: Analysis of Some Aspects of the Attempted Modernization and Consolidation of the Warsaw System*, 66 J. Air L. & Com., 1155 (2000-2001).
- Mendes de Leon, P. M. J., *The Legal Force of ICAO SARPs in a Multilevel Jurisdiction Context*, 12: 2-3 J. LuchtRecht, 11 (2013).
- Meron, T., *On a Hierarchy of International Human Rights*, 80 Am. J. Int'l L., 1 (1986).
- Milde, M., *The Warsaw System of Liability in International Carriage by Air: History, Merits and Flaws... and the New "non-Warsaw" Convention of 28 May 1999*, 24 Annals Air & Space L., 155 (1999).
- O'Keefe, C., *Air Travel for the Disabled: Isn't it Time for a Harmonized Approach?*, 31:6 Air & Space L., 408 (2006).
- Palkovitz, N., *EL-AL's Liability for Claims Related to Security Services in the Israeli Context: Between Exclusivity and Domestic Policy*, 37 Air & Space L., 213 (2012).
- Pegram, T., *Regulatory Stewardship and Intermediation: Lessons from Human Rights Governance*, 670 Ann. Am. Acad. Polit. SS. 225 (2017).
- Poria, Y., Reichel, A., & Brandt, Y., *The Flight Experiences of People with Disabilities: An Exploratory Study*, 49(2), J. Travel Res., 216 (2010).
- Rachovitsa, A., *Treaty Clauses and Fragmentation of International Law: Applying the More Favourable Protection Clause in Human Rights Treaties*, 16 Hum. Rts. L. Rev., 77 (2016).
- Riðanoviæ, B., *Legal effects and Review of Regulation 1107/2006 (disabled persons and persons with reduced mobility when travelling by air)*, XVI:1 Aviation & Space J., 53 (2017).
- Schiek, D., *Intersectionality and the Notion of Disability in EU Discrimination Law*, 53 C.M.L. Rev. 35 (2016).
- Schwartz, M. A., *Propelling Aviation to New Heights: Accessibility to In-flight Entertainment for Deaf and Hard Hearing Passengers*, 77 J. Air L. & Com., 151 (2012).
- Scott, J., *Extraterritoriality and Territorial Extension in EU Law*, 62 Am. J. Comp. L. 87 (2014).
- Semmel, S. D., *When Pigs Fly, They Go First Class: Service Animals in the Twenty-First Century*, 3 Barry L. Rev., 39 (2002).
- Shaffer, G., *International Law and Global Public Goods in a Legal Pluralist World*, 23:3 Eur. J. Int'l L. 669 (2012).
- Silversmith, J. A., *The Long Arm of the DOT: The Regulation of Foreign Air Carriers Beyond US Borders*, 38 Air & Space L., 173 (2013).
- Simma, B., & Pulkowski, D., *Of Planets and the Universe: Self-contained Regimes in International Law*, 17:3 Eur. J. Int'l L., 483 (2006).
- Simma, B., *Universality of International Law from the Perspective of a Practitioner*, 20:2 Eur. J. Int'l L., 265 (2009).
- Sobel, R., & Torres, R. L., *The Right to Travel: A Fundamental Right of Citizenship*, 80 J. Transp. L. Logistics & Pol'y, 1 (2013).
- Sobel, R., *The Right to Travel and Privacy: Intersecting Fundamental Freedoms*, 30 J. Marshall J. Info. Tech. & Privacy L., 639 (2014).
- Strawinski, J. S., *Where is the ACAA today? Tracing the law developing from the Air Carrier Access Act of 1986*, 68 J. Air L. & Com. 385 (2003).
- Tompkins, Jr., G. N., *2014 Summary of MC99 Court Decisions*, 40 Air & Space L., 147 (2015).

- Tompkins, Jr., G. N., *2015 Summary of MC99 Court Decisions*, 41 Air & Space L., 129 (2016).
- Tompkins, Jr., G. N., *Are the Objectives of the 1999 Montreal Convention in Danger of Failure?*, 39 Air & Space L. 203 (2014).
- Tompkins, Jr., G. N., *Summary of MC99 Judicial Decisions 2012*, 38 Air & Space L., 123 (2013).
- Tompkins, Jr., G. N., *Summary of MC99 Judicial Updates 2013*, 39 Air & Space L., 91 (2014).
- Trömel, S., *A Personal Perspective on the Drafting History of the United Nations Convention on the Rights of Persons with Disabilities*, 1 Eur. Y.B. Disability L., 115 (2009).
- Urton, R., *Trouble in the Skies: The ACAA's Failure to Protect Passengers with Disabilities*, 21:2 Law & Ineq. J., 437 (2013).
- Waddington, L., *Case C-13/05, Chacón Navas v. Eurest Colectividades SA, judgment of the Grand Chamber of 11 July 2006*, nyr, 44, Common Mkt. L. Rev., 487 (2007).
- Waddington, L., *Fine-tuning Non-discrimination Law: Exceptions and Justifications Allowing for Differential Treatment on the Ground of Disability*, 15:1-2 Int'l J. Discrimination & L., 11 (2015).
- Waddington, L., *Saying All the Right Things and Still Getting It Wrong: The Court of Justice's Definition of Disability and Non-Discrimination Law*, 22, M.J. 576 (2015).
- Waddington, L., *The European Union and the United Nations Convention on the Rights of Persons with Disabilities: A Story of Exclusive and Shared Competences*, 18 Maastricht J. Eur. & Comp. L. 431 (2011).
- Wegter, J. J., *The ECJ Decision of 10 January 2006 on the Validity of Regulation 261/2004: Ignoring the Exclusivity of the Montreal Convention*, 31 Air & Space L. 133 (2006).
- Whalen, T. J., *The New Warsaw Convention: The Montreal Convention*, 25 Air & Space L., 12 (2000).
- Yau, M. K. S., McKercher, B., & Packer, T., *Traveling with a Disability: More than an Access Issue*, 31(4), Ann. Tour. Res., 946 (2004).
- Young, J. W., *Globalism versus Extraterritoriality Consensus versus Unilateralism: Is there a Common Ground? A US Perspective*, 24:4-5 Air & Space L., 211 (1999).

9 STUDIES AND REPORTS

- Akandji-Kombe, J. F., *Positive Obligations under the European Convention on Human Rights: A Guide to the Implementation of the European Convention on Human Rights*, <https://infoeuropa.eurocid.pt/files/database/000047001-000048000/000047394.pdf> (accessed 18 May 2017).
- Allain, J., *Legal Reports No. 2 Treaty Interpretation and the United Nations Convention on the Rights of Persons with Disabilities*, <http://www.disabilityaction.org/fs/doc/publications/legal-report-2-treaty-interpretation-and-the-un-convention-on-the-rights-of-persons-with-disabilities.pdf> (accessed 13 Jan. 2017).
- Casullo, L., *The Economic Benefits of Improved Accessibility to Transport Systems: Roundtable Summary and Conclusions*, <http://www.itf-oecd.org/economic-benefits-improved-accessibility-transport-systems-roundtable-summary-and-conclusions> (accessed 6 Mar. 2017).

- Center for American Progress, *Gay and Transgender Discrimination Outside the Workplace*, <https://www.americanprogress.org/issues/lgbt/reports/2011/07/19/9927/gay-and-transgender-discrimination-outside-the-workplace/> (accessed 13 Apr. 2017).
- European Commission, *Evaluation of the application of Regulation 1107/2006 by Steer Davies Gleave on the application and enforcement of the regulation concerning the rights of disabled people and persons with reduced mobility when travelling by air*, http://ec.europa.eu/transport/sites/transport/files/themes/passengers/studies/doc/2010_06_evaluation_regulation_1107-2006.pdf (accessed 13 Jan. 2017).
- European Commission, *Report on the assessment on rules on penalties applicable to infringements to Regulation (EC) 1107/2006, concerning the rights of disabled persons and persons with reduced mobility when travelling by air, prepared by the law firm Philippe & Partners*, https://ec.europa.eu/transport/themes/passengers/air/european_case_law_en (accessed 13 Jan. 2017).
- FIAN International, *Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights*, (2013) http://www.etoconsortium.org/nc/en/main-navigation/library/maastricht-principles/?tx_drblob_pi1%5BdownloadUid%5D=23 (accessed 13 Jan. 2017).
- Skinner, G., McCorquodale R., & De Schutter, O., *The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business*, <http://accountabilityroundtable.org/wp-content/uploads/2013/12/The-Third-Pillar-FINAL1.pdf> (accessed 13 Jan. 2017).
- Swiss Re and University of Oxford, *Consumer Dispute Resolution – Implementing the Directive*, https://www.law.ox.ac.uk/sites/files/oxlaw/conference_report.pdf (accessed 18 May 2017).
- Toland, C.J., *Overview of the Air Carrier Access Act*, Congressional Research Service, <http://research.policyarchive.org/19925.pdf> (accessed 13 Jan. 2017).
- Van Boven, T., *The United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, http://legal.un.org/avl/pdf/ha/ga_60-147/ga_60-147_e.pdf (accessed 13 Jan. 2017).
- Von den Steinen, E., Probst C., & the Association of European Airlines, *An Overview of the Air Services Agreements Concluded by the EU*, [http://www.europarl.europa.eu/RegData/etudes/note/join/2013/495849/IPOL-TRAN_NT\(2013\)495849_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/note/join/2013/495849/IPOL-TRAN_NT(2013)495849_EN.pdf) (accessed 24 Feb. 2017).
- Weller, P., Feldman A., & Purdam, K., *Religious Discrimination in England and Wales*, 79, https://www.researchgate.net/profile/Marie_Parker-Jenkins/publication/265577360_Religious_discrimination_in_England_and_Wales/links/571a382608ae408367bc858e.pdf (accessed 13 Apr. 2017).

10 REFERENCES

- Cambridge Dictionary, <http://dictionary.cambridge.org/dictionary/english/travel> (accessed 13 Jan. 2017).

- Law, J., *A Dictionary of Law*, (8th ed., Oxford University Press, 2015) <http://www.oxfordreference.com/view/10.1093/acref/9780199664924.001.0001/acref-9780199664924-e-4078?rskey=oW0xsh&result=4422> (accessed 23 May 2017).
- Oxford English Dictionary, <http://www.oed.com/view/Entry/205268?rskey=GhLZ9e&result=2&isAdvanced=false#eid> (accessed 13 Jan. 2017)

11 CONFERENCE PROCEEDINGS AND PRESENTATIONS

- Darcy, S., *Flying with impairments: Improving Airline Practices by Understanding the Experiences of People with Disabilities*, 2007 Travel and Tourism Research Association Proceedings, 61, 67, <http://ttra.omnibooksonline.com/2007/57229-ttra-1.1171436/t-001-1.1171645/f-010-1.1171758/a-010-1.1171759> (accessed 25 May 2017).
- FitzGerald, G. F., *The International Civil Aviation Organization – A Case Study in the Implementation of Decisions of a Functional International Organization in The Effectiveness of International Decisions*, Papers of a Conference of the American Society of International Law (Schwebel, S., A. W. Sijthoff 1971).
- Lord, J. E., 'Accessibility and Human Rights Fusion in the CRPD: Assessing the Scope and Content of the Accessibility Principle and Duty Under the CRPD' Presentation for the General Day of Discussion on Accessibility, <http://www2.ohchr.org/SPdocs/CRPD/DGD7102010/submissions/JanetELord.doc> (accessed 13 Jan. 2017).
- Sen, A., *Equality of What? Stanford University: Tanner Lectures on Human Value, Delivered at Stanford University, May 22, 1979*, 218, http://www.ophi.org.uk/wp-content/uploads/Sen-1979_Equality-of-What.pdf (accessed 13 Jan. 2017).

12 NEWS AND NEWS RELEASES

- Castiglioni, R., *Airlines Drop The Ball On Wheelchair Insurance*, <http://www.reducedmobility.eu/20140704481/The-News/airlines-drop-the-ball-on-wheelchair-insurance.html> (accessed 1 Mar. 2017).
- Castiglioni, R., *Cost of assistance for the disabled at European airports revealed*, <http://www.reducedmobility.eu/20141122536/The-News/cost-of-assistance-for-the-disabled-at-european-airports-revealed.html> (accessed 13 Jan. 2017).
- Castiglioni, R., *Jet2 Ban to Include Disabled Electric Wheelchair Users*, <http://www.reducedmobility.eu/20150723638/TheNews/jet2-ban-to-include-disabled-electric-wheelchair-users> (accessed 13 Jan. 2017)
- Castiglioni, R., *US Authorities Investigating Jet2 Disability Rules*, <http://www.reducedmobility.eu/20151006654/TheNews/us-authorities-investigating-jet2-disability-rules> (accessed 13 Jan. 2017).
- Disability News Service, *Airlines have 'moral duty' on wheelchair damage*, <http://www.disabilitynewsservice.com/airlines-have-moral-duty-on-wheelchair-damage/> (accessed 1 Mar. 2017).
- Equality and Human Rights Commission, *Pay for damaged wheelchairs, leading Paralympian tells airlines*, <https://www.equalityhumanrights.com/en/our-work/news/pay-damaged-wheelchairs-leading-paralympian-tells-airlines> (accessed 13 Jan. 2017).

- French court fines easyJet over refusal to let disabled passenger board, <https://www.theguardian.com/business/2017/jan/20/french-court-fines-easyjet-over-refusal-to-let-disabled-passenger-board> (accessed 14 Mar. 2017).
- International Law Office, *Court rules on moral and material damages for missed flights and lost baggage*, <http://www.internationallawoffice.com/Newsletters/Aviation/Spain/Ura-Menndez/Court-rules-on-moral-and-material-damages-for-missed-flights-and-lost-baggage> (accessed 1 Mar. 2017).
- Jones, R., *U.S. Failure to Ratify the Convention on the Rights of Persons with Disabilities*, <http://www.awid.org/news-and-analysis/us-failure-ratify-convention-rights-persons-disabilities> (accessed 13 Jan. 2017).
- Library of Congress, *Sweden: Court Rules Legislation Must Be Made Available Free of Charge*, <http://www.loc.gov/law/foreign-news/article/sweden-court-rules-legislation-must-be-made-available-free-of-charge/> (accessed 21 June 2017).
- New York Times, *United Airlines Passenger Is Dragged From an Overbooked Flight*, https://www.nytimes.com/2017/04/10/business/united-flight-passenger-dragged.html?_r=0 (accessed 13 Apr. 2017).
- The Guardian, *How Disabled Travellers Still Face Discrimination by Airlines*, <https://www.theguardian.com/money/2017/apr/24/disabled-traveller-airlines-flying-discrimination-damaged-property> (accessed 27 Apr. 2017).
- UN Office of the High Commissioner for Human Rights (OHCHR), *UN Disability Rights Expert Announces First Visit to North Korea*, <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21538&LangID=E> (accessed 25 May 2017).

13 LEGISLATION

1 Canada

- *Air Transportation Regulations*, SOR/88-58.
- *Canada Transportation Act*, S.C. 1996, c. 10.
- *Canadian Human Rights Act*, R.S.C., 1985, c. H-6.
- *Canadian Transportation Agency Designated Provisions Regulations*, SOR/99-244.
- *Carriage by Air Act*, R.S.C., 1985, c. C-26.
- *Personnel Training for the Assistance of Persons with Disabilities Regulations*, SOR/94-42.
- *Transportation of Dangerous Goods Regulations*, SOR/2008-34.
- Canadian Transportation Agency, *Accessibility Guidelines for Small Aircraft*, (2005); Canadian Transportation Agency, *Code of Practice: Removing Communication Barriers for Travellers with Disabilities*, (2014).
- Canadian Transportation Agency, *Code of Practice: Accessibility of Non-National Airports System Air Terminals*, (2013).
- Canadian Transportation Agency, *Code of Practice: Aircraft Accessibility for Persons with Disabilities*, (2010).
- Canadian Transportation Agency, *Code of Practice: Passenger Terminal Accessibility*, (2007).

2 *European Union*

- Directive 2009/45/EC of the European Parliament and of the Council of 6 May 2009 on safety rules and standards for passenger ships, OJ L 163, 25.6.2009, p. 1-140.
- Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC, OJ L 94, 28.3.2014, p. 243-374.
- Regulation (EC) 261/2004 of the European Parliament and Council of 11 February 2004, establishing common rules on compensation and assistance to passengers in the event of boarding refusal and the cancellation or long delay of flights; and the repeal of Regulation (EEC) No 295/91, OJ L 46 17.02.2004, p. 1-8.
- Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community (Recast), OJ L 293, 31.10.2008, p. 3-20.
- Regulation (EC) No 1107/2006 of the European Parliament and of the Council of 5 July 2006 concerning the Rights of Disabled Persons and Persons with Reduced Mobility when Travelling by Air, OJ L 204, 26.7.2006, p. 1-9.
- Regulation (EC) No 1371/2007 of the European Parliament and of the Council of 23 October 2007 on rail passengers' rights and obligations OJ L 315, 03.12.2007, p. 14-41.
- Regulation (EC) No 889/2002 of the European Parliament and of the Council of 13 May 2002 amending Council Regulation (EC) No 2027/97 on air carrier liability in the event of accidents, OJ L 140, 30.5.2002, p. 2-5, (Regulation 889).
- Regulation (EU) No 1177/2010 of the European Parliament and of the Council of 24 November 2010 concerning the rights of passengers when travelling by sea and inland waterway and amending Regulation (EC) No 2006/2004 OJ L 334, 17.12.2010, p. 1-16.
- Regulation (EU) No 1315/2013 of the European Parliament and of the Council of 11 December 2013 on Union guidelines for the development of the trans-European transport network and repealing Decision No 661/2010/EU, OJ L 348, 20.12.2013, p. 1-128.
- Regulation (EU) No 181/2011 of the European Parliament and of the Council of 16 February 2011 concerning the rights of passengers in bus and coach transport and amending Regulation (EC) No 2006/2004 OJ L 55, 28.02.2011, p. 1-12.
- Treaty on the Functioning of the European Union.
- Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303, 2.12.2000, p. 16-22.
- Regulation (EU) No 965/2012 of 5 October 2012 laying down technical requirements and administrative procedures related to air operations pursuant to Regulation (EC) No 216/2008 of the European Parliament and of the Council, OJ L 296 25.10.2012, p. 1-148.
- Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR), OJ L 165, 18.6.2013, p. 63-79.

3 *United Kingdom*

- UK Civil Aviation Authority, Information for ADR entities approved by the CAA (including guidance on regulatory and additional information requirements), (CAP 1390).
- UK Civil Aviation Authority Guidance for Airports on Providing Assistance to People with Hidden Disabilities, (CAP 1411).

4 *United States of America*

- 14 C.F.R. § 382 (2009).
- 49 C.F.R. § 171 (2009).
- 49 U.S.C. § 40127.
- Nondiscrimination on the Basis of Disability in Air Travel, 73 FR 27614, 13 May 2008.

5 *Others*

- Brazil Constituição Federal de 1988, artigo 5(V), (X), (XXXII).
- Germany Luftverkehrsgesetz (LuftVG) v. 01.08.1922, BGBl. I S. 698.
- Namibia Civil Aviation Safety Act, 6 of 2017.
- Russia St. 27 Konstitutsii Rossiiskoi Federatsii ot 12 dekabrya 1993 goda // Rossiiskaya Gazeta, 25 dekabrya 1993.
- South Africa Civil Aviation Act, 13 of 2009.
- Sudan Civil Aviation Regulations (SUCARs), *Personnel Licensing*, <http://www.scaa.gov.sd/ar/images/Sucar/sucar%20part%202/SUCAR%20part%201.pdf> (accessed 9 May 2017).
- Sudan Civil Aviation Regulations (SUCARs), *Rules of the Air*, <http://www.scaa.gov.sd/ar/images/Sucar/sucar%20part%202/SUCAR%20part%202.pdf> (accessed 9 May 2017).
- Sudan Civil Aviation Safety Act, 2010.
- Switzerland Bundesgesetz über die Luftfahrt (Luftfahrtgesetz, LFG), 748.0 vom 21. Dezember 1948, AS 1977 2110; BBl 1976 III 1232.
- Thailand Persons with Disabilities Empowerment Act, B.E. 2550 (2007).
- The 1987 Constitution of the Republic of the Philippines.
- The Civil Aviation Authority of Thailand, Regulation of Civil Aviation Board No. 4 (1957), Government Gazette, Ror. Jor. 1055, Part 53 11 June 1957.

14 *OTHER SOURCES*

- Access Committee, *Resolution of the US Department of Transportation Access Committee*, <https://www.transportation.gov/access-advisory-committee> (accessed 13 Jan. 2017).
- Access Committee, *Resolution of the US Department of Transportation on 22 November 2016*, <https://www.transportation.gov/sites/dot.gov/files/docs/ACCESS%20Committee%20Final%20Resolution.11.21.16.pdf> (accessed 13 Jan. 2017).

- Air Canada, *Medical / Mobility*, <https://www.aircanada.com/ca/en/aco/home/plan/medical-mobility.html> (accessed 25 May 2017)
- Air New Zealand, *Services for People with Wheelchairs*, <http://www.airnewzealand.co.nz/special-assistance-wheelchair-services> (accessed 25 May 2017).
- All Nippon Airways Company, *International passenger rules and fares tariff* (2 Apr. 2010).
- Alldeaf, *Deaf passengers refused on board a plane to be compensated by Iberia*, <http://www.alldeaf.com/showthread.php?p=1346346> (accessed 13 Jan. 2017).
- Austrian, *Disabled Access to Flights*, https://www.austrian.com/Info/Flying/DisabledAccess.aspx?sc_lang=nl&cc=NL (accessed 25 May 2017)
- Canadian Transportation Agency, *Accessibility complaints*, <https://services.otc-cta.gc.ca/eng/accessibility-complaints> (accessed 13 Jan. 2017).
- Canadian Transportation Agency, *Accessibility complaints*, <https://services.otc-cta.gc.ca/eng/accessibility-complaints> (accessed 13 Jan. 2017).
- Canadian Transportation Agency, *Accessible Transportation Complaints: A Resource Tool for Service Providers*, (Oct. 2012).
- Canadian Transportation Agency, *Sample Tariff* 2014.
- Canadian transportation Agency, *Travelling with Animals that Provide Disability-Related Assistance*, (Sept. 2014).
- Cathay Pacific, *International Passengers Rules and Fares Tariff* (16 Oct. 1999)
- CityJet, *Special Assistance*, <https://www.cityjet.com/flying-with-us/travel-information/special-assistance/> (accessed 1 Mar. 2017).
- Comments of Saudi Arabian Airlines, docket DOT-OST-2004-19482.
- Department of Transportation, *New Horizons: Information for the Air Traveler with a Disability*, <http://airconsumer.ost.dot.gov/publications/horizons.htm> (accessed 13 Jan. 2017).
- Department of Transportation, *U.S. Air Carriers*, <https://www.transportation.gov/policy/aviation-policy/licensing/US-carriers> (accessed 13 Jan. 2017).
- Department of Transportation, *What Airline Employees, Airline Contractors, and Air Travelers with Disabilities Need to Know About Access to Air Travel for Persons with Disabilities A Guide to the Air Carrier Access Act (ACAA) and its Implementing Regulations, 14 CFR Part 382 (Part 382)*, airconsumer.ost.dot.gov/legislation/aca/TAM-07-15-05.doc (accessed 13 Jan. 2017).
- Egyptair, *Special needs*, <https://www.egyptair.com/en/fly/special-services/Pages/special-needs.aspx> (accessed 25 May 2017)
- European Commission, *Co-operation with ICAO*, http://ec.europa.eu/transport/modes/air/single_european_sky/co-operation_ICAO_en.htm (accessed 13 Jan. 2017).
- European Commission, *The European Union at ICAO*, http://ec.europa.eu/transport/modes/air/international_aviation/european_community_ICAO/ (accessed 13 Jan. 2017).
- European Court of Human Rights, *Factsheet – Right to Life*, http://www.echr.coe.int/Documents/FS_Life_ENG.pdf (accessed 13 Jan. 2017).
- Helping Hands, *Who We Are*, <https://monkeyhelpers.org/> (accessed 24 Feb. 2017).
- IATA Recommended Practice 1724 General Conditions of Carriage, 25th edition June 2005.

- ICAO, Current lists of parties to multilateral air law treaties, <http://www.icao.int/secretariat/legal/lists/current%20lists%20of%20parties/allitems.aspx> (accessed 25 May 2017).
- International Court of Justice, *List of Advisory Proceedings referred to the Court since 1946*, <http://www.icj-cij.org/docket/index.php?p1=3&p2=4&p3=1> (accessed 1 Mar. 2017).
- International Maritime Organization, *Intergovernmental Organizations which have concluded agreements of cooperation with IMO*, <http://www.imo.org/en/About/Membership/Pages/IGOsWithObserverStatus.aspx> (accessed 13 Jan. 2017).
- International Telecommunication Union, *Telecommunications accessibility guidelines for older persons and persons with disabilities*, F.790 (01/2007).
- Jet2, *Terms and Conditions*, <http://www.jet2.com/terms> (accessed 1 May 2017).
- KLM, *Published fares, charges and related terms and conditions of carriage applicable to air services of KLM* (5 July 2013).
- Lufthansa German Airlines, *Airline Tariff International Passenger Rules and Fares* (20 Aug. 1999).
- National Council on Disability, *Position Paper on Amending the Air Carrier Access Act to Allow for Private Right of Action*, http://www.ncd.gov/rawmedia_repository/eec5d1a8_daeb_4a65_bd8b_4399a40c5496.pdf (accessed 13 Jan. 2017).
- Petersmann, E. U., *Human rights require 'cosmopolitan constitutionalism' and cosmopolitan law for democratic governance of public goods*, <http://cadmus.eui.eu/handle/1814/27155> (accessed 13 Jan. 2017).
- Qatar Airways, *Airline Tariff International Passenger Rules and Fares* (15 Oct. 2014).
- Roosevelt, E., *My Day, February 6, 1947*, The Eleanor Roosevelt Papers Digital Edition (2008), http://www2.gwu.edu/~erpapers/documents/myday/displaydoc.cfm?_y=1947&_f=md000567 (accessed 13 Apr. 2017).
- Singapore Airlines Limited, *Airline Tariff International Passenger Rules and Fares* (2 May 2000).
- Skytrax, *The World's Top 100 Airlines in 2016* http://www.worldairlineawards.com/awards/world_airline_rating.html (accessed 13 Jan. 2017).
- The Guide Horse Foundation, *Message from the Guide Horse Foundation*, <http://www.guidehorse.com/> (accessed 24 Feb. 2017).
- U.S. Department of Justice, *Service Animals*, https://www.ada.gov/service_animals_2010.htm (accessed 13 Jan. 2017).
- UK Civil Aviation Authority, *Alternative Dispute Resolution*, <https://www.caa.co.uk/Passengers/Resolving-travel-problems/How-the-CAA-can-help/Alternative-dispute-resolution/> (accessed 18 May 2017).
- United Airlines, *Contract of Carriage Document* (17 Feb. 2017).
- US Department of State, *Eighteenth Meeting of the U.S.-EU Joint Committee Record of Meeting April 19, 2016*, <https://www.state.gov/e/eb/rls/othr/ata/e/eu/264796.htm> (accessed 13 Jan. 2017).
- US Department of Transportation, *Order 1240.11 Assessing Compliance with ICAO Standards and Recommended Practices (SARPs) and Implementing their Provisions*, <https://www.faa.gov/documentLibrary/media/Order/1240.11.pdf> (accessed 13 Apr. 2017).
- World Bank, *Public-Private Partnerships in Airports*, <https://ppp.worldbank.org/public-private-partnership/sector/transportation/airports> (accessed 11 Feb. 2017).

Tables

Table 1 Ratification status to the CRPD, the Chicago Convention, the Warsaw Convention of 1929 and the Montreal Convention of 1999¹

	CRPD	Chicago Convention	Warsaw Convention of 1929	Montreal Convention of 1999
The EU	C	-	-	AA
The US	S	R	R	R
Canada	R	R	R	R

AA = approval C = formal confirmation R = ratification S = signature

¹ United Nations Treaty Collection, *Status of the Convention on the Rights of Persons with Disabilities*, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&clang=_en (accessed 25 May 2017); International Civil Aviation Organization, Current lists of parties to multilateral air law treaties, <http://www.icao.int/secretariat/legal/lists/current%20lists%20of%20parties/allitems.aspx> (accessed 25 May 2017).

Table 2 Elements constitute disability

	<i>Medical oppression</i>	<i>Social oppression</i>	<i>Environmental factor</i>	<i>Limitation or restriction</i>
CRPD Persons with disabilities	Long-term physical, mental, intellectual or sensory impairments (non-exhaustive)		Interaction with various barriers	Hinder their full and effective participation in society on an equal basis with others.
ICAO Persons with disabilities	Physical incapacity (sensory or locomotor), an intellectual deficiency, age, illness or any other cause of disability		When using transport	Mobility is reduced, situation needs special attention and the adaptation to the person's needs of the services made available to all passengers
EU Disabled person Person with reduced mobility	Any physical disability (sensory or locomotor, permanent or temporary), intellectual disability or impairment, or any other cause of disability, or age		When using transport	Mobility is reduced, situation needs special attention and the adaptation to the person's needs of the services made available to all passengers

	<i>Medical oppression</i>	<i>Social oppression</i>	<i>Environmental factor</i>	<i>Limitation or restriction</i>
US Qualified Individual with a Disability	A physical or mental impairment on a permanent or temporary basis	Has a record of such an impairment, or is regarded as having such an impairment.	(a) Who, as a passenger (referred to as a "passenger with a disability"), (1) With respect to obtaining a ticket for air transportation on a carrier, offers, or makes a good faith attempt to offer, to purchase or otherwise validly to obtain such a ticket; (2) With respect to obtaining air transportation, or other services or accommodations required by this Part, (i) Buys or otherwise validly obtains, or makes a good faith effort to obtain, a ticket for air transportation on a carrier and presents himself or herself at the airport for the purpose of traveling on the flight to which the ticket pertains; and (ii) Meets reasonable, nondiscriminatory contract of carriage requirements applicable to all passengers; or (b) Who, with respect to accompanying or meeting a traveler, using ground transportation, using terminal facilities, or obtaining information about schedules, fares, reservations, or policies, takes those actions necessary to use facilities or services offered by an air carrier to the general public, with reasonable accommodations, as needed, provided by the carrier carrier.	Substantially limits one or more major life activities

Table 3 Comparison among accessibility standards

	ICAO	EU	US	Canada
Law	Annex 9 to the Chicago Convention Manual on Access to Air Transport by Persons with Disabilities (PWD Manual) Airport Planning Manual (Doc 9184)	REGULATION (EC) No 1107/2006 Of the European Parliament and of the Council of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air (Regulation 1107)	Air Carrier Access Act (ACAA) Federal Register 14 CFR Part 382 Non-discrimination on the Basis of Disability in Air Travel	Transportation Act Air Transportation Regulations SOR/88-58 Accessibility Guidelines for Small Aircraft Personnel Training for the Assistance of Persons with Disabilities Regulation SOR/94-42 Code of Practice: Aircraft Accessibility for Persons with Disabilities Code of Practice: Removing Communication Barriers for Travellers with Disabilities
Scope of application	-	Art. 1	§ 382.3, 382.7, 382.9	CTA, s. 146
Waiver of liability	-	Art. 13	§ 382.35	-
Obligation (retroactive / time)	-	-	-	-
Description of PWD	Annex 9	Art. 2	§ 382.3	-
Temporary impairment	Annex 9	Art. 2	§ 382.3	CTA's decision
obesity	-	-	-	CTA's decision
Tall stature	-	-	-	-
allergy	-	-	Nondiscrimination on the Basis of Disability in Air Travel, 73 FR 27660	CTA's decision
Conflicts between types of disabilities	-	-	Allergy and service animal (Guidance Concerning Service Animal in Air Transportation 68 FR 24877	CTA's decision
Number of PWD on board	-	-	§ 382.17, 382.27(c)(6)	-

	ICAO	EU	US	Canada
Rights to refusal and limitation of carriage	PWD Manual, s. 1.6,	Arts 3-4; Recommendation OPS1 IEM 1260	§ 382.17, 382.19,	-
Medical certificate / documentation	Annex 9, RP 8.39	Does not impose any requirement but an air carrier may assess the passenger and request information to support that assessment (Interpretative guideline)	§ 382.23, 382.91,	-
Accessible physical environment				
<i>Airport</i>	Annex 9, S 8.27, RP 8.28 – RP 8.33; PWD Manual Chapters 4-5; Airport Planning Manual	Recital 11	Subpart D; ADA	Code of Practice: Passenger Terminal Accessibility; Code of Practice: Removing Communication Barriers for Travellers with Disabilities
<i>Aircraft</i>	Annex 9, RP 8.35; PWD Manual, s. 9.1	Recital 11	Subpart E	Code of Practice: Aircraft Accessibility for Persons with Disabilities
Accessible information and communication				
Website accessibility	PWD Manual, s. 3.1.1	-	§ 382.31,	Code of Practice: Removing Communication Barriers for Travellers with Disabilities, s. 1.2
Language	-	Art. 4(3)	-	Both English and French
Safety briefings	PWD Manual, ss 8.11-8.13	-	§ 382.69, 382.115, 382.119,	Code of Practice: Removing Communication Barriers for Travellers with Disabilities, s. 3.2
In-flight information	-	-	§ 382.69, 382.119,	Code of Practice: Aircraft Accessibility for Persons with Disabilities, s. 2.9

	ICAO	EU	US	Canada
Announcements in airport terminals	PWD Manual, s. 5.16	- Art. 1(13) of the European Commission, Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation of long delay of flights and Regulation (EC) No 2027/97 on air carrier liability in respect of the carriage of passengers and their baggage by air	§ 382.51, 382.53	Code of Practice: Removing Communication Barriers for Travellers with Disabilities, s. 2.3
Accessible services (responsible person)	-	Airport and air carrier	§ 382.91,	CTA, s. 147(1); Accessibility Guidelines for Small Aircraft, s.6
Pre-notification requirement	PWD Manual, ss 1.6, 3.12	Art. 6	Not require except to obtain specific services. § 382.25, 382.27	CTA, s. 151(1)
Accompanying person	Annex 9, RP 8.37, RP 8.40; PWD Manual, ss 3.16, 3.18	Art. 4(2), Annex II Interpretative Guideline (discount)	§ 382.29,	CTA, s. 154; Accessibility Guidelines for Small Aircraft, s. 3; CTA decision on one person one fare
Wheelchair / movement at airport (charge)	PWD Manual, ss 4.6, 4.9	Annex I	§ 382.103,	-
Security check	PWD Manual, ss 6.1, 6.3	Annex I	§ 382.55	Code of Practice: Passenger Terminal Accessibility, s.4
Pre-board	PWD Manual, s. 7.3	-	§ 382.93	-

	ICAO	EU	US	Canada
Seat allocation (location, number, exception, charge)	PWD Manual, ss 3.20-3.24, 8.8	Annex II; EU OPS 1.260; JAR-OPS IEM 1.260	Subpart F	-
Service animal (description, exception, charge, where to sit)	Annex 9, RP 8.37 PWD Manual, s. 8.10, Definition in PWD Manual Service animals. Animals, normally being dogs or other animals, specified in national regulations, for the purpose of accompanying persons with disabilities with the objective of providing them with physical or/ and emotional support, being under the control of the person with disabilities and provided that their presence on board an aircraft: a) does not endanger the safety of flight operations; b) is not reasonably considered as a threat to other passengers; and c) does not cause health concerns related to hygiene.	Annex II Only recognized assistance dog can be carried in the cabin subject to national regulations	§ 382.117, 382.27(c)(7), (8), 382.31; Nondiscrimination on the Basis of Disability in Air Travel, 73 FR 27661 PWDs who have two or more service animals may purchase a second seat to accommodate service animals in accordance with FAA safety regulations.	CTA, s. 149; Accessibility Guidelines for Small Aircraft, s. 10; Code of Practice: Aircraft Accessibility for Persons with Disabilities, s. 2.6; Personnel Training for the Assistance of Persons with Dis- abilities Regulations, s. 2. “service animal” means an animal that is required by a person with a disability for assistance and is certified, in writing, as having been trained to assist a person with a disability by a professional service animal institution But the Resource Tool also includes emotional support animals which may not have or require specific training to perform their assistance function (Travelling with Animals that Provide Disability- Related Assistance)

	ICAO	EU	US	Canada
Personal mobility aid (description, exception, charge, where to be loaded)	Annex 9, RP 8.36, S 8.38; PWD Manual, s. 7.9; Doc 9284	Annex II	§ 382.3, 382.121, 382.125,	CTA, s. 148; Accessibility Guidelines for Small Aircraft, s. 9; Code of Practice: Aircraft Accessibility for Persons with Disabilities, s. 2.10
In-flight mobility aid (description, charge)	PWD Manual, ss 8.14, 8.15	-	§ 382.65,	Code of Practice: Aircraft Accessibility for Persons with Disabilities, s. 2.13
Medical equipment (description, exception, charge, where to be loaded)	-	Annex II; Interpretative guideline	§ 382.133,	-
Training	PWD Manual, Chapter 2	Art. 11	§ 382.141-143,	Personnel Training for the Assistance of Persons with Disabilities Regulations; Accessibility Guidelines for Small Aircraft, s. 13
Complaint / Responsible entity	PWD Manual, Chapter 12	Arts 14-15	Subpart K; § 382.151,	-
Remedy	PWD Manual, ss 10.1-10-5	Art. 12, Annex I	§ 382.131 For domestic routes, 14 CFR Part 254 applies (\$3,300 per passenger). International routes are governed by the Montreal Convention.	CTA, ss 155, 156, 172(1)(3); Accessibility Guidelines for Small Aircraft, ss 11, 14

Table 4 States not ratifying the CRPD, the Warsaw Convention of 1929, the Hague Protocol or the Montreal Convention of 1999²

<i>State</i>	<i>CRPD</i>	<i>WS</i>	<i>H</i>	<i>M99</i>
Botswana	x	succession	x	a
Somalia	x	x	x	x
Belarus	s	r	r	x
Bhutan	s	x	x	x
Cameroon	s	succession	succession	r
Chad	s	x	x	x
Democratic People's Republic of Korea	r	r	r	x
Equatorial Guinea	x	r	x	aa
Eritrea	x	x	x	x
Fiji	s	succession	succession	a
Holy See	x	x	x	x
Ireland	s	r	r	r
Kyrgyzstan	s	r	r	x
Lebanon	s	succession	r	a
Libya	s	r	r	x
Liechtenstein	x	r	r	x
Micronesia (Federated States of)	s	x	x	x
Monaco	s	x	r	r
Niue	x	x	x	x
Saint Kitts and Nevis	x	x	x	x
Saint Lucia	s	x	x	x
Samoa	s	succession	r	x
Solomon Island	s	succession	succession	x
South Sudan	x	x	x	x
Surinam	r	r	r	x
Tajikistan	x	x	x	x
Thailand	r	x	x	x
The United States	s	r	r	r

2 United Nations Treaty Collection, *Status of the Convention on the Rights of Persons with Disabilities*, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtldsg_no=IV-15&chapter=4&clang=_en (accessed 25 May 2017); International Civil Aviation Organization, Current lists of parties to multilateral air law treaties, <http://www.icao.int/secretariat/legal/lists/current%20lists%20of%20parties/allitems.aspx> (accessed 25 May 2017).

<i>State</i>	<i>CRPD</i>	<i>WS</i>	<i>H</i>	<i>M99</i>
Timor-Leste	x	x	x	x
Tonga	s	succession	r	a
Uzbekistan	s	r	r	x

X = not ratify

S = sign

R = ratify

CRPD = Convention on the Rights of Persons with Disabilities

M99 = Montreal Convention of 1999

WS = Warsaw Convention of 1929

H = Hague Protocol

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Curriculum vitae

Lalin Kovudhikulrungsri was born in Bangkok, Thailand on 12 December 1982. She completed her Bachelor's degree in law with second class honor from Thammasat University, Thailand, in 2005 and passed the bar exam in the following year. After working as a lawyer for two years, she was awarded a scholarship from the Anandamahidol Foundation, Thailand, to pursue her studies in air and space law for master and doctoral study. In 2008, she obtained the LL.M. degree from the Institute of Air and Space Law, McGill University, Canada.

During her stay in Leiden, Lalin attended the Hague Academy of International Law in 2015 and the Center for the Study of European Contract Law International Summer School on Contract Law in a Liberal Society in 2016. She also presented parts of her topic at international seminars and conferences including the 5th AsianSIL Biennial Conference in 2015, the 14th Aviation Students' Workshop in 2016 and the European Society of International Law, Interest Group on International Human Rights Law Workshop in 2017.

Regarding her professional career, in 2012, Lalin was appointed lecturer at the Faculty of Law, Thammasat University before she took a study leave to continue her doctoral study at the International Institute of Air and Space Law, Leiden University in 2013. Upon completion of her doctoral study, she will return to Thailand and serve as lecturer at Thammasat University specializing in air and space law, and human rights law.

In the range of books published by the Meijers Research Institute and Graduate School of Leiden Law School, Leiden University, the following titles were published in 2016 and 2017

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- MI-274 E.J.M. Vergeer, *Regeldruk vanuit een ander perspectief. Onderzoek naar de beleving van deregulering bij ondernemers*, (diss. Leiden)
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