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The right to travel by air of persons with disabilities

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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 Arnardoittir & 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 Ougurgouz, *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.