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## **The right to travel by air of persons with disabilities**

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## 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)<sup>1</sup> 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)<sup>2</sup> 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

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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,<sup>3</sup> and the ICAO Assembly resolution,<sup>4</sup> 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'.<sup>5</sup>

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.<sup>6</sup> Buergenthal suggested that the UN has the authority to define and codify these human rights.<sup>7</sup> Schermers and Blokker further elaborate that the General Assembly is competent to interpret the UN Charter and enumerate human rights obligations.<sup>8</sup> 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.<sup>9</sup>

On the basis of this provision, observance of human rights becomes one of the obligations of ICAO.<sup>10</sup> 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.<sup>11</sup> These resolutions led to the revision of Annex 9 and publication of the Manual on Access to Air Transport by

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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 (5<sup>th</sup> 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, 60<sup>th</sup> 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, 25<sup>th</sup> 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.<sup>12</sup> Moreover, the Core Principles on Consumer Protection (Core Principles) incorporate non-discrimination and accessibility as a bedrock to protect PWDs.<sup>13</sup>

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.<sup>14</sup>

##### 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.<sup>15</sup> A definition of Standard in Annex

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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,<sup>16</sup> 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.’<sup>17</sup>

In spite of a slightly different definition, Standards in Annex 9 have a similar level of legal force as other Standards generally.<sup>18</sup>

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.’<sup>19</sup>

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,<sup>20</sup> are drafted so broadly that States could believe that they have already fulfilled the highest practicable degree of uniformity.<sup>21</sup> Plus, obligations concerning accessibility under the CRPD can be implemented gradually;<sup>22</sup> therefore, States could continuously implement them to reach the level of full accessibility and accordingly, under their sole authority, decide not to report ICAO.

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16 See Section 1.6.2.

17 Annex 9, *Facilitation*, (14<sup>th</sup> 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.<sup>23</sup> 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.'<sup>24</sup>

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.<sup>25</sup> 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.<sup>26</sup>

#### 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.<sup>27</sup> 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'.<sup>28</sup>

However, in reality, no State has filed any difference from Recommended Practices in Annex 9 concerning PWDs.<sup>29</sup> Similar to my conclusion in Section

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23 ICAO, Supplement to Annex 9 (12<sup>th</sup> 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.<sup>30</sup> 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.<sup>31</sup> 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.<sup>32</sup>

Owing to the essence of the PWD Manual, the ICAO Assembly requested its Member State to give due regard to the PWD Manual.<sup>33</sup> 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

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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, (2<sup>nd</sup> 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.<sup>34</sup>

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'.<sup>35</sup> Thus, Standards in Annex 9 that have no link to safety-related Standards in other Annexes are not audited.<sup>36</sup> 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).<sup>37</sup>

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.<sup>38</sup> 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.<sup>39</sup>

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.<sup>40</sup>

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34 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), 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 (3<sup>rd</sup> 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*, (9<sup>th</sup> ed. Mar. 2011), Att-6 – Att-9; ICAO, *Summary Minutes with Subject Index*, (206<sup>th</sup> 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, 8<sup>th</sup> 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.’<sup>41</sup>

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.<sup>42</sup> 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.<sup>43</sup> 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.<sup>44</sup> 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

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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.<sup>45</sup>

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.<sup>46</sup> A novelty clause on consumer protection in the ASA is initiated by the EU in its ASAs with the US and Canada.<sup>47</sup> 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.<sup>48</sup> 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.<sup>49</sup>

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

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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, (9<sup>th</sup> 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.’<sup>50</sup>

The principal objectives of Annex 9 at that time were mainly the regularity and efficiency of air navigation.<sup>51</sup> 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.<sup>52</sup> In the fourteenth edition, accessibility is consolidated in SARPs either explicitly or implicitly.<sup>53</sup> Standard 8.34 ensures ‘equivalent’ access to air services.<sup>54</sup> In general, in regard to human dignity, another general principle in the CRPD,<sup>55</sup> it is stated in Recommended Practice 8.22 that ‘assistance should be provided in a manner that respects the dignity of the individual’.<sup>56</sup> Respecting inherent dignity means accepting human diversity and differences.<sup>57</sup> Thus, it guarantees equality and non-discrimination and likewise PWDs have become more protected in terms of SARPs and contents.

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50 Annex 9, *Facilitation*, (6<sup>th</sup> ed. Apr. 1969), Recommended Practices 6.24, emphasis added.

51 *Ibid.*, foreword.

52 Annex 9, *Facilitation*, (9<sup>th</sup> 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 Bassler, *Human Dignity*, 20 in *Critical Perspectives on Human Rights and Disability Law* (Marcia H. Rioux, Lee Ann Bassler & 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.<sup>58</sup> 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.<sup>59</sup> The Core Principles discuss ‘access to clear and transparent information’ in the principles concerning the period before travel.<sup>60</sup> 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,<sup>61</sup> 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.<sup>62</sup> 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.<sup>63</sup> 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.<sup>64</sup>

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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.<sup>65</sup> The EU, which actively negotiated the CRPD, has ratified the CRPD,<sup>66</sup> under its authority from Article 13 (disability discrimination) and Article 95 (internal market) of the Treaty Establishing the European Community (TEC).<sup>67</sup>

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.<sup>68</sup> 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.<sup>69</sup> The CJEU has authority to refer to international agreements for the purpose of determining the validity and interpretation of acts of the EU.<sup>70</sup> 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’.<sup>71</sup> 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.<sup>72</sup> After the EU became a party to the CRPD, the CJEU, in *Fag og Arbejde (FOA) v. Kommunernes Landsforening*, recognized the

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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&mtmsg\\_no=IV-15&chapter=4&clang=\\_en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtmsg_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 (5<sup>th</sup> ed., Oxford University Press 2011); Ferri, *supra* n. 66, 64-67.

72 Case C-13/05 *Chacón Navas v. Eurest Colectividades SA* [2006], para. 43. See Lisa Waddington, *Case C-13/05, Chacón Navas v. Euresst 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.<sup>73</sup>

Under EU law, the CRPD is considered a mixed agreement because the EU shares competencies with its Member States in parts of CRPD.<sup>74</sup> Air transport also falls in the area of shared competences.<sup>75</sup> 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.<sup>76</sup> 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.<sup>77</sup> 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)<sup>78</sup> gave the EU exclusive competence in air transport.<sup>79</sup>

#### 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.<sup>80</sup> Article 1 of Regulation 1107 lays down the scope to PWDs:

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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.’<sup>81</sup>

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.<sup>82</sup>

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*,<sup>83</sup> 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.<sup>84</sup> 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.<sup>85</sup> 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.<sup>86</sup> 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.<sup>87</sup> The judgment does not explicitly refer to the CRPD but the UK Equality Act as an implementation of the CRPD,<sup>88</sup> was interpreted as laying down a duty on the defendant to facilitate access at a foreign airport.<sup>89</sup> In short, Regulation 1107 constitutes a common rule or exclusive competence in the prescribed scope but Member States are not barred from expanding their

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81 Regulation 1107, art. 1(2).

82 Anna Konert & Hans Ephraïmson, *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'.<sup>90</sup> PWDs have the right not to be refused carriage on grounds of disability;<sup>91</sup> 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.<sup>92</sup> 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.<sup>93</sup> Obligations addressed to air carriers are exclusively those involved with services on board and air carriage.<sup>94</sup>

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)<sup>95</sup> 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.<sup>96</sup>

#### 4.4 THE US

##### 4.4.1 Observance of the CRPD

The US has only signed the CRPD but not ratified it.<sup>97</sup> The obligation of a signatory State not to defeat the object and purpose of a treaty is recognized

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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](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.<sup>98</sup> 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'.<sup>99</sup> 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)<sup>100</sup> 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.<sup>101</sup>

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.<sup>102</sup> 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.<sup>103</sup>

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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. Strawinsi, *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.<sup>104</sup> With the intention of the ACAA to cover all commercial airlines, since 13<sup>th</sup> May 2009, foreign air carriers have to comply with the ACAA for flights that begin or end at a US airport.<sup>105</sup> 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.<sup>106</sup> The US DOT argues that application will ensure the achievement of the ACAA objectives.<sup>107</sup> 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.<sup>108</sup>

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.<sup>109</sup> 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.<sup>110</sup> Discrimination includes providing any special service without a request from a PWD.<sup>111</sup> 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.<sup>112</sup> Part 382 bans the notion of separate but equal.<sup>113</sup> An air carrier cannot take any adverse action because a PWD claims a right under Part 382.<sup>114</sup>

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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](http://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.<sup>115</sup>

### 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.<sup>116</sup> The National Transportation Act of 1987 guaranteed accessibility for PWDs.<sup>117</sup> This was later incorporated in the Canada Transportation Act (CTA) as one of the Canadian transportation policies.<sup>118</sup> 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.<sup>119</sup>

The CA Agency's power to pass laws concerning transportation of PWDs covers four aspects.<sup>120</sup> 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,<sup>121</sup> (2) the Code of Practice: Accessibility of Non-National Airports System Air Terminals,<sup>122</sup> (3) the Code of Practice: Aircraft Accessibility of Persons with Disabilities<sup>123</sup> and (4) the Accessibility Guidelines for Small Aircraft.<sup>124</sup> 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-

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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).<sup>125</sup> Third, the tariffs, rates, fares, charges and terms and conditions of carriage applicable to the transportation of PWDs come under the Air Transportation Regulations.<sup>126</sup> These Regulations specifically prescribe the content of the terms and conditions of carriage for PWDs.<sup>127</sup> 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.<sup>128</sup> 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.<sup>129</sup>

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.<sup>130</sup> The concepts of accessibility and of universal design are recalled in two Codes of Practice on airport terminals and on aircraft.<sup>131</sup> 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.<sup>132</sup> Relying on this judgment, the CA Agency interprets the CTA to protect human rights and prevent discrimination.<sup>133</sup>

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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.<sup>134</sup> 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.<sup>135</sup> 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.<sup>136</sup> 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.<sup>137</sup> 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

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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*.<sup>138</sup>

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.<sup>139</sup>

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.<sup>140</sup> 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*<sup>141</sup> 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.<sup>142</sup> 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.<sup>143</sup>

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.<sup>144</sup> The US DOT affirmed its conformity with Article 37 and Standards concerning PWDS in Annex 9.<sup>145</sup> 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

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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.<sup>146</sup> 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.<sup>147</sup> 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.<sup>148</sup>

#### 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.<sup>149</sup> 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.<sup>150</sup> 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-

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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](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.<sup>151</sup> 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.<sup>152</sup>

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.<sup>153</sup> 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.<sup>154</sup> Second, the US Part 382 incorporates a waiver system for non-national air carriers that find conflict between two national or regional regulations,<sup>155</sup> 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.<sup>156</sup> The US DOT has seldom

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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](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](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.<sup>157</sup> 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.<sup>158</sup> 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.<sup>159</sup> 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.

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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.<sup>160</sup> The lack of an enforceable provision on physical accessibility is acknowledged in the initial report of the EU submitted to the CRPD Committee,<sup>161</sup> and provides the reason why Slovenia refers to Annex 9 in the field of airport construction in its report to the CRPD Committee.<sup>162</sup> 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.<sup>163</sup> 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-

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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.<sup>164</sup>

The reason for adding this Recital as shown in the report is that ‘appropriate consultation is needed to ensure successful design’.<sup>165</sup> 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.<sup>166</sup> 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.<sup>167</sup> 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),<sup>168</sup> to which the EU has a permanent observer status.<sup>169</sup> Although the relationship between the EU and ICAO is only as an ad-hoc observer in the Assembly and technical bodies,<sup>170</sup> 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.<sup>171</sup>

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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/](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](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.<sup>172</sup> To fill in this loophole on airport and aircraft design, on 2<sup>nd</sup> 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).<sup>173</sup> 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,<sup>174</sup>

Under the CRPD, the Internet is one of the means by which States are obliged to promote access to information for PWDs.<sup>175</sup> 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,<sup>176</sup> 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.<sup>177</sup> Thus, it

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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.<sup>178</sup> 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.<sup>179</sup>

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.<sup>180</sup> 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.<sup>181</sup> 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.<sup>182</sup> The contents should cover all

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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, 4<sup>th</sup> 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.<sup>183</sup> 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.<sup>184</sup> 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.<sup>185</sup> 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.<sup>186</sup> 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.<sup>187</sup> In December 2016, the UK Civil Aviation Authority published the Guidance for Airports on Providing Assistance to People with Hidden Disabilities.<sup>188</sup> 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.<sup>189</sup>

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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.<sup>190</sup> Other unregulated issues mostly concern extra payment for services for PWDs such as an extra seat,<sup>191</sup> 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.<sup>192</sup>

#### 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.<sup>193</sup>

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

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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.<sup>194</sup>

#### 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.<sup>195</sup> 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.<sup>196</sup>

#### C. Airline business model

No exception is granted on the basis of airline business models, such as being a low-cost carrier.<sup>197</sup> This is why Regulation 1107 assigns the duty to assist PWDs to the airport and levy charges from air carriers.<sup>198</sup> In practice, this charge is specifically and separately collected to fund the cost of services rendered to PWDs.<sup>199</sup> 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'.<sup>200</sup>

#### 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

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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 (8<sup>th</sup> ed. 2009) para. 30.

US and Canada base their exceptions on annual traffic with different measurements.<sup>201</sup> 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.<sup>202</sup>

*E. Aircraft type, size, and configuration*

Aircraft type, size and configuration can limit the level of accessible aircraft.<sup>203</sup> 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.<sup>204</sup> 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.<sup>205</sup> 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.<sup>206</sup> 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.<sup>207</sup>

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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](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.<sup>208</sup> 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.<sup>209</sup>

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.<sup>210</sup>

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*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*, (9<sup>th</sup> 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.<sup>211</sup> 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.<sup>212</sup> In practice, air carriers still set weight limits on the carriage of electric wheelchairs.<sup>213</sup>

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.<sup>214</sup> However, such air carrier has to clearly state safety constraints in its policy and provide reasonable alternative accommodation.<sup>215</sup>

### 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.<sup>216</sup>

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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.<sup>217</sup> The sanitation and airport terminal problems are reasonable according to the US DOT.<sup>218</sup> However, some international flights are not longer than US domestic flights.<sup>219</sup> 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.

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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.<sup>220</sup> 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.<sup>221</sup> 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.<sup>222</sup> 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.<sup>223</sup> 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

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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.<sup>224</sup> Under the CRPD, reasonable accommodation applies when accessibility standards are not sufficient.<sup>225</sup> 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.<sup>226</sup> 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.<sup>227</sup> 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.<sup>228</sup> Moreover, such obstacles cannot be eliminated without incurring undue hardship.<sup>229</sup> 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.<sup>230</sup> This step is, in other words, a pro-

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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.<sup>231</sup> Justified arguments under the CA Agency's series of decisions on undue hardship in air transport are constraints relating to safety,<sup>232</sup> operational realities,<sup>233</sup> financial and economic implications<sup>234</sup> and physical or structural limitations.<sup>235</sup> This undue hardship test is examined when there is no regulation applicable to the case, so it mirrors the CRPD reasonable accommodation.<sup>236</sup>

#### 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

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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.<sup>237</sup> 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.<sup>238</sup> This suggestion mirrors the individual autonomy of PWDs to make their own choices.<sup>239</sup> 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.<sup>240</sup>

In support of equal opportunity, ICAO further requests air carriers to offer discounts to an accompanying person.<sup>241</sup> The EU correspondingly encourages an air carrier either to offer a discounted rate or a free ticket.<sup>242</sup> 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.<sup>243</sup> 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.<sup>244</sup>

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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.<sup>245</sup> While the EU and Canada restrictively permit merely ‘recognized’ assistance dogs to travel without charge,<sup>246</sup> 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.<sup>247</sup> 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.<sup>248</sup>

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.<sup>249</sup>

Refusing access to PWDs accompanied by service animals other than recognized dogs amounts to detrimental effect to these PWDs.<sup>250</sup> The issue lies on the justification of this policy. The EU’s justification on the matter is

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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](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.<sup>251</sup> 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.<sup>252</sup> 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.<sup>253</sup> 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.<sup>254</sup> Apart from Canada, the rest seem to take a different approach.<sup>255</sup> Neither Annex 9 nor the PWD Manual touches on persons with obesity. Perhaps, it must be settled whether a person with

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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.<sup>256</sup>

#### 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’.<sup>257</sup> 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.<sup>258</sup>

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.<sup>259</sup> 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.<sup>260</sup> 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.<sup>261</sup> 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.<sup>262</sup> Justifica-

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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.<sup>263</sup>

#### 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.<sup>264</sup> 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.<sup>265</sup>

All EU Member States, the US and Canada have their own specific agency to enforce accessibility standards.<sup>266</sup> The measures to enforce accessibility standards vary from an annual disability-related report to on-site inspection.<sup>267</sup> 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.<sup>268</sup>

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*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.<sup>269</sup> 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.

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<sup>269</sup> 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.<sup>270</sup> 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.<sup>271</sup> 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

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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.<sup>272</sup>

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.<sup>273</sup>

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.<sup>274</sup> 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

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<sup>272</sup> See Section 4.6.2 and Section 4.6.3.

<sup>273</sup> The US DOT argues its conformity with SARPs when it published Part 382. See Section 4.6.1.1.

<sup>274</sup> 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.<sup>275</sup> 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-

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<sup>275</sup> 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.