The right to travel by air of persons with disabilities

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6 Conclusions

6.1 INTRODUCTION

In the introductory chapter, the problems pertaining to access to air travel of PWDs are portrayed, and two research questions are raised: how to balance the rights of PWDs according to States' obligations towards international human rights law and international air law without causing undue burden, either operational or monetary, to airports and airline operators or inconveniencing other passengers; and how to legally ensure the balance in the first question in a harmonized manner among jurisdictions in view of the transnational character of air travel and when inconsistent legal provisions benefit no one.

On the basis of these two questions, in the previous Chapters I have analyzed the existing legal regimes and came to the following conclusions:

- There is no international right to travel by air (Chapter 2).
- Accessibility standards in air travel are not harmonized among States. This holds true with respect to their scope of application, contents and enforcement (Chapter 4 and Chapter 5).
- Annex 9 and the Manual on Access to Air Transport by Persons with Disabilities (PWD Manual) are not comprehensive and do not foresee in enforcement measures (Chapter 4).
- The Convention for the Unification of Certain Rules Relating to International Carriage by Air of 1929 (Warsaw Convention of 1929),[1] and the Convention for the Unification of Certain Rules for International Carriage by Air of 1999 (Montreal Convention of 1999)[2] cannot render an effective remedy for PWDs in relation to moral damage caused by a breach of an air carrier's duty under accessibility standards or to inadequate compensation for damage to mobility aids (Chapter 5).

According to these problems, this concluding Chapter presents the *lex ferenda* concerning accessible air travel based on the capabilities framework and the rules of treaty interpretation to harmonize air law and human rights law. Section 6.2 and Section 6.3 suggest solutions concerning an interpretation on

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

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

the right to travel and obligations towards PWDs. Section 6.4 addresses substantive solutions and enforcement and procedural aspects to the International Civil Aviation Organization (ICAO) and the Committee on the Rights of Persons with Disabilities (CRPD Committee). The recommendations at national and regional levels are contained in Section 6.5. Section 6.6 contains the concluding remarks.

6.2 RECOGNITION OF THE RIGHT TO TRAVEL BY AIR

One of the consequences of having no international right to travel is that PWDs as well as others asserting that they have been unjustifiably denied or obstructed from travel cannot legally claim to have been discriminated against on the basis of disability (Section 2.6.1). This situation brings me to two possible solutions: to establish a new separate right to travel or to interpret existing rights to cover travel by air.

For the first option, I am aware that to translate all human needs to human rights may lead to devaluing rights themselves;[3] therefore, there should be criteria to establish a new human right. In a widely-cited article on conjuring up new human rights, Alston proposes that new rights can become international human rights by passing through substantive and procedural processes.[4] In relation to the procedural process, he suggests a seven-step procedure, from a proposal to recognize a new human right to the adoption of a resolution by the UN General Assembly.[5] This roadmap, on the one hand, guarantees due process; on the other hand, it requires a certain period of time.

Turning to the other possibility, in Chapter 2, I noted that the root of accessibility and personal mobility in the CRPD lies in civil and political rights, but the HRC has not interpreted these rights to cover modes of transport. On the contrary, the CESCR more actively guarantees the opportunity to travel by relying on economic, social and cultural rights. In my view, the problem of no explicit right to travel and, in turn, no explicit corresponding obligation for States, is the result of the division between a negative right and a positive right. Ensuring access to public transport may entail costs and investment, so such efforts do not fit the notion that negative rights involve few costs for States. In my opinion, this may be a reason why the HRC does not cover obligations on modes of transport in the right to freedom of movement in the International Covenant on Civil and Political Rights (ICCPR).

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3 Upendra Baxi, *The Future of Human Rights*, 72-75 (Oxford University Press 2002).

4 Philip Alston, *Conjuring up New Human Rights: A Proposal for Quality Control*, 78:3 Am. J. Int'l L. 607, 615 (1984).

5 Alston, *ibid.*, 620. *See* Sinai Deutch, *Are Consumer Rights Human Rights?*, 32:3 Osgoode Hall L.J. 537 (1994). Deutch also proposes similar substantive and procedural processes to recognize consumer rights as human rights.

In *Human Rights Transformed,* Fredman relies on, among others, the capabilities approach and contends that positive obligations arise from all human rights and proposes not to differentiate between negative and positive rights.[6] By shifting the view to one where the rights in the ICCPR can impose positive obligations, I propose encapsulating obligations concerning access to travel within the right to freedom of movement, given their connection. Freedom of movement covers the mobility of persons to move within a country, leave any country and enter one's own country.[7] The capability to access any modes of transport, including air transport, supports an exercise of this right. Moreover, this interpretation covers every purpose of travel unlike the method of attaching this obligation to the right to work, to health or to education.

One plausible objection is that States will be judged to breach an obligation if they have to realize the obligation immediately. This claim also presents a problem with the typology of positive and negative rights. Instead, the realization of an obligation should depend on the type of obligation. States can differentiate between obligations into short-, medium- and long-term goals.[8] The Sustainable Development Goals (SDGs) target of accessible and sustainable transport systems in 2030[9] should be incorporated as a State's progressive goal. If resources are necessary to implement obligations, the progressive realization should be applied. The public budget analysis mentioned in Section 3.5.4 can be applied to monitor the implementation. While the SDGs do not directly assign private entities as duty bearers, an obligation of the State to protect implies an obligation to monitor the implementation of accessibility standards by private entities (Section 3.3.1).

6 Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties,* 11-12, 204 (Oxford University Press 2008). *See* Section *?*6.3.2.

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

8 Fredman gives an example of the South African Court's judgment on the criteria for specifying the duty. *See* Fredman, *supra* n. 6, 213.

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

6.3 OBLIGATIONS *ERGA OMNES* FROM THE RIGHTS OF PERSONS WITH DISABILITIES

6.3.1 Accessibility, personal mobility, and non-discriminationa on the basis of disability and obligation *erga omnes*

On account of the nature of human rights obligations being non-reciprocal and containing universal values, the HRC[10] and the International Law Institute,[11] as well as a number of legal scholars,[12] accept that the basic rights of the human person reflect *erga omnes* obligations. This acceptance is mentioned in a broad sense without specific details on which rights are 'basic'. This may be due to the indivisibility of human rights and the notion that all human rights can be regarded as fundamental or basic.[13]

Accessibility, personal mobility and non-discrimination on the basis of disability are all non-reciprocal, so they partially pass the criteria to be *erga omnes.* However, since under the CRPD they address PWDs, can they be embraced as universal values?

It can be pointed out that accessibility benefits not only PWDs and attains a status of global public good as discussed in Section 1.5.1.2. An obligation *erga omnes* can be conceptualized through accessibility being a global public good.[14]

Personal mobility in the CRPD addresses specifically PWDs to improve their oppressed situation; however, it is derived from the freedom of movement which is generally important to everybody.

The principle of non-discrimination on the basis of disability protects the inherent dignity of persons and guarantees equal enjoyment of human rights and fundamental freedoms. Therefore, its foundation is doubtlessly universal.

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10 Human Rights Committee, General Comment 31, The Nature of the General Obligation Imposed on States Parties to the Covenant (Eightieth session, 2004), U.N. Doc. CCPR/C/21/Rev.1/Add. 13, para. 2.

11 International Law Institute, *The Protection of Human Rights and the Principle of Non-Intervention in Internal Affairs of States*, 63 Institut de Droit International Annuaire, 338 (1989); International Law Institute, *Obligations and Rights Erga omnes in International Law by Giorgio Gaja (Rapporteur),* 71:1 Institut de Droit International Annuaire, 116, 116 (2005).

12 Christian J. Tams, *Enforcing Obligations Erga Omnes in International Law*, (Cambridge University Press, 2005); Jiefang Huang, *Aviation Safety and ICAO*, 168 (Kluwer Law International 2009); Theodor Meron, *On a Hierarchy of International Human Rights*, 80 Am. J. Int'l L., 1 (1986). In his work on the Concept of International Obligation *Erga Omnes,* Ragazzi concluded in 1997 that the protection of human rights other than those listed by the ICJ has not reached the obligation *erga omnes* status generally; on the other hand, he left the door open for assessment of each human right separately. *See* Maurizio Ragazzi, *The Concept of International Obligations Erga Omnes*, 144-145 (Clarendon Press 1997).

13 Meron, *ibid.*, 7.

14 Bodansky views that being global public goods is a way to conceptualize an obligation *erga omnes. See* Daniel Bodansky, *What's in a Concept? Global Public Goods, International Law, and Legitimacy*, 23:3 Eur. J. Int'l L., 651, 653(2012).

According to these criteria and as part of human rights, accessibility, personal mobility and non-discrimination on the basis of disability have an *erga omnes* character.

6.3.2 Can positive obligations become obligations *erga omnes*?

Ragazzi notes that all the *erga omnes* obligations listed in the *Barcelona Traction*[15] share the character of negative obligations.[16] If this claim were true, general human rights obligations could not be *erga omnes* because, as asserted by Fredman, both civil and political rights and socio-economic rights contain both negative and positive obligations.[17] This also holds true in the case of the CRPD where accessibility and non-discrimination on the basis of disability include positive obligations such as an obligation to eliminate existing barriers and an obligation to reasonably accommodate PWDs.

The ICJ, human rights tribunals and UN human rights treaty bodies all appear to reject the restriction of *erga omnes* status to only negative obligations. First, in the ICJ's advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the right to self-determination contains obligations *erga omnes* and two of them are positive obligations.[18] In the HRC General Comment No. 31, when the HRC concluded that obligations concerning human rights attain the *erga omnes* status, it further directed positive obligations towards States.[19] This point illustrates that, at least in human rights, an obligation *erga omnes* is not limited to only a negative obligation. Third, the European Court of Human Rights (ECtHR) decided that positive obligations also flow from the right to life, which is a norm of *jus cogens* and requires obligations *erga omnes*.[20] Moreover, the Committee on the Elimination of Racial Discrimination (CERD Committee)[21] and the ECtHR[22] held that the

15 *Barcelona Traction, Light and Power Company, Limited (New Application: 1962) (Belgium v. Spain)*, Judgment, I.C.J. Rep. 1970 (5 Feb. 1970), para. 34.

16 Ragazzi, *supra* n. 12, 133.

17 Fredman, *supra* n. 6, 3.

18 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Rep. 2004 (9 July 2004), 155-159.

19 HRC General Comment 31, *supra* n. 10, paras 2, 8.

20 European Court of Human Rights, *Factsheet – Right to Life*, 3, http://www.echr.coe.int/Documents/FS_Life_ENG.pdf (accessed 13 Jan. 2017). Other rights in the ECHR entails positive obligations, including article 3 and article 8 thereof. *See* Jean-François Akandji-Kombe, *Positive Obligations under the European Convention on Human Rights: A Guide to the Implementation of the European Convention on Human Rights*, https://infoeuropa.eurocid.pt/files/database/000047001-000048000/000047394.pdf (accessed 18 May 2017).

21 Committee on the Elimination of Racial Discrimination, General Recommendation XXVII, Discrimination against Roma (Fifty-seventh session, 2000), U.N. Doc. A/55/18, Annex V, paras 12-16.

protection from racial discrimination, referred to in *Barcelona Traction* as *erga omnes*,[23] also contains positive obligations. These foregoing illustrations apparently signify a trend, at least in human rights law, towards no division between positive and negative obligations in relation to the *erga omnes* status. Hence, accessibility, personal mobility and non-discrimination on the basis of disability, regardless of their positive obligations, are not barred from being *erga omnes* in character.

6.3.3 Obligation *erga omnes* and private entities

In Section 5.3.2.3, I argued that an obligation *erga omnes* binds States to curb private entities from infringing the right holders to whom States are obliged. Accordingly, in the case of accessible air travel, States owe obligations towards PWDs to protect them from private airport operators, air carriers or other sub-contractors.

Nonetheless, an obligation *erga omnes* does not confer universal jurisdiction on a bystander State.[24] States which grant an operating license to air carriers and airport operators have jurisdictions to prescribe and to enforce these private entities. When these private entities breach their regional, national or contractual obligations towards PWDs, States have an obligation to protect by putting measures in place against such private entities including remedial measures. Failure to do so triggers other States, which are not directly injured, to invoke responsibility from the responsible State.[25]

6.4 ICAO AND THE CRPD COMMITTEE

6.4.1 Contents of ICAO accessibility standards

I concluded in Chapter 4 that, while ICAO is an appropriate organization to provide harmonized accessibility standards, there is room for improvement in relation to ICAO's content and enforcement measures.

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22 *DH and Others v The Czech Republic* [GC], no. 57325/00, 13 Nov. 2007. ECHR 2007-IV. The case involves with the disproportionately high placement of Roma students in schools for the learning disabled. The Grand Chamber of the ECtHR applied the indirect discrimination and ordered the Czech Republic to pass legislation making indirect discrimination illegal.

23 *Barcelona Traction, supra* n. 15, para. 34.

24 Cedric Ryngaert, *Unilateral Jurisdiction and Global Values,* 45 (Eleven International Publishing 2015). *See* Section 3.6.4.

25 The International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts, art. 48; James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries,* 279 (Cambridge University Press 2002).

The CRPD Committee and ICAO concur that the formulation and language of accessibility standards should be broad.[26] At the same time, the contents in Annex 9 and the PWD Manual should be comprehensive enough to cover physical environment and transportation, information and communication technologies, and facilities and services as mentioned in Article 9 of the CRPD, as well as to address every type of impairment (Section 1.5.1.1). It is not easy to include all obstacles to access to air travel faced by PWDs, so rather than pinpointing each and every topic, ICAO should set central criteria that are applicable to a number of issues. Moreover, consultation with PWDs (Section 6.4.3) is necessary. At the very least, Annex 9 and the PWD Manual should contain contents that are less than the contents incorporated in the accessibility standards in the US and Canada (Section 4.7.1), and they should follow the CRPD obligations (Section 3.4.2 – Section 3.4.6). In other words, there should be the following contents:

Standards

- Criteria based on the indirect discrimination test to assess the lawfulness of accessibility standards, because Standards and Recommended Practices (SARPs) may leave implementation methods to States' discretion (Section 3.4.1). The criteria can be applied to evaluate issues about requirements on accompanying persons, extra seats, service animals, advance notice and restriction pertaining to mobility aids, all of which are examined in Section 4.6.3.1 to Section 4.6.3.5.
- Criteria to ascertain the reasonable accommodation based on a definition under the CRPD as discussed in Section 3.4.5.
- Incorporation of accessibility as a condition in license issuance and renewal (Section 3.4.3).
- Criteria concerning justified exceptions to accessibility standards which should clearly connect with aviation safety or security (Section 3.4.2.2).
- Criteria on dissuasive penalties for non-compliance to accessibility standards (Section 3.3.1).
- Interpretation guidelines on remedial measures in the Warsaw Convention of 1929, and the Montreal Convention of 1999 (See Section 6.4.2.2 and Section 6.4.4.4 below).
- Incorporation of the waiver of limited liability for mobility aids and service animals as a condition in license issuance and renewal (Section 3.3.2.2.B).

Proposed Standards for Annex 9

- Contracting States shall ensure that accessibility standards do not have any direct or indirect detrimental effect on any persons with disabilities without any justified objective.

26 Committee on the Rights of Persons with Disabilities, General Comment 2, Art. 9 (Eleventh session, 2014), U.N. Doc. CRPD/C/GC/2, para. 25; ICAO, Resolution A39-22, para. 4.

- Contracting States shall incorporate a duty of reasonable accommodation according to the Convention on the Rights of Persons with Disabilities into their accessibility standards.
- Contracting States shall ensure that exceptions to accessibility standards must relate to the safety of the flight, passengers, or persons with disabilities unless there are express exceptions to accessibility standards provided by ICAO. In any case, Contracting States shall make an explanation of exceptions accessible to the public.
- Contracting States shall ensure that an air carrier's liability for mobility aids and service animals under any applicable national, regional or international law is unlimited.

Recommended Practices
- A specification of the language to be provided in an accessible format (Section 4.6.2.1.B).
- Content concerning in-flight entertainment information (Section 4.6.2.1.B).
- Types, services and documents of service animals permitted on board (Section 4.6.3.2).

The distinction separating the Standards from the Recommended Practices is their contents. Those suggested as Standards involve basic legal criteria, while those suggested as Recommended Practices are more operational and detailed.

6.4.2 Remedial measures

6.4.2.1 Proposals made pursuant to the Montreal Convention of 1999

At the outset, I propose solutions on the basis of the Montreal Convention of 1999, since it modernizes the Warsaw Convention of 1929, whereas ICAO urges States to ratify it.[27]

The differentiation between types of damage, as seen in the *IATA* case under the European Court of Justice (ECJ) (Section 5.5.3.1), is questionable on the grounds of ignorance about the exclusivity principle. Either amending the Montreal Convention of 1999 (Section 5.5.3.2), or concluding an agreement between certain of the parties to modify the Montreal Convention of 1999 (Section 5.5.3.3), will lead to inconsistency since the States Parties to the new convention may not be the same as those having ratified the Montreal Convention of 1999, or the number of States Parties to the new convention may not

27 ICAO, Resolution A39-9.

be equal to that of the Montreal Convention of 1999. Therefore, I turn to other available solutions in Section 5.5.1 and Section 5.5.2.

6.4.2.2 An interpretation to recognize human rights values

My method to select the most suitable solutions for all the major stakeholders in air travel facilitations (Section 1.1) is based on the rules of treaty interpretation (Section 1.3.2), because all of these solutions should aid the interpretation of the Warsaw Convention of 1929, and the Montreal Convention of 1999.

Both the consistency between national and regional consumer protection and the Warsaw Convention of 1929, and the Montreal Convention of 1999, encouraged under the ICAO Core Principles, and the recommendation in the International Law Commission (ILC) on the Fragmentation of International Law (ILC Fragmentation Report) on the principle of harmonization present similar interpretation rules. Since obligations that arise from accessibility, personal mobility and non-discrimination on the basis of disability are *erga omnes*,[28] the Warsaw Convention of 1929, and the Montreal Convention of 1999, should be interpreted in a harmonized manner to these. Accordingly, States and courts cannot deny application simply because some States are not bound by these obligations. Moreover, I follow Judge Trindade in *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)* in assessing remedies for human rights violations through a human rights lens,[29] and not interpreting a provision in a way that weakens the safeguards of recognized human rights.[30]

The harmonized interpretation should be done through cooperation between ICAO and the CRPD Committee as further explained in Section 6.4.4.4.

6.4.2.3 A solution for moral damage under discrimination claims

In Chapter 5, I presented three alternatives. The first two involve confining the exclusivity principle (Section 5.5.1.1 and Section 5.5.1.2), while the last one deals with the expression 'bodily injury' (Section 5.5.1.3). The options to confine the exclusivity principle and allow recourse to local law, as Judge Ginsburg reasons in *Tseng*, would undermine the uniform regulation of the Warsaw Convention of 1929.[31] This objective is anchored in the Montreal Convention of 1999, along with the consumer protection objective.[32] With the general rules

28 *See* Section 6.3.1.

29 Separate opinion of Judge Cançado Trindade, *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Merits, Judgment, I.C.J. Rep. 2010 (30 Nov. 2010), para. 220. *See* Section 3.3.2.2.

30 *Ibid.*, para. 89. *See* Section 1.3.2.

31 *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 US 155, 161 (1999).

32 Montreal Convention of 1999, preamble.

of interpretation as a backdrop, both objectives should be taken into account and construed in a conformable manner.[33] Thus, the first two options are not viable.

The Montreal Conference concluded that the term 'bodily injury' is evolving.[34] The rules of treaty interpretation endorse States to construe this term in a non-static manner (Section 1.3.2.1.C). At least, this way of interpretation has been endorsed in *Walz v. Clickair* by the ECJ in the case of compensation for non-material damage caused to baggage because the Montreal Convention of 1999, aims to protect the interests of consumers.[35] In my view, this option does not go against the spirit of the Convention and is in line with the principle of harmonization. The exclusivity principle is still adhered to and the national courts do not, and are,not, entitled to create new laws.

Moreover, this proposal to include purely moral injury under the expression 'bodily injury' is comparable to the liability regime for carriage by sea which allows compensation for personal injury and, at the same time, recognizes the exclusivity principle.[36] The Athens Convention approach is similar to the CRPD Committee's concluding observation to the EU that the rights of maritime passengers can serve as a model.[37]

Air carriers may be afraid of being bombarded with legal actions. However, passengers have to prove their damage, and courts can exercise their discretion on a case-by-case basis. What is more essential, is that the option does not automatically suppress recourse for moral damage. Compared to the stretched interpretation of the term 'accident' in *Husain,* no floodgate is broken (Section 5.3.4). The argument that insurance premiums will be increased if moral damage is compensable is unconvincing. If this surcharge reflects the actual market, it should be accepted by all involved.

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33 *See* WTO, *US – Import Prohibition of Certain Shrimp and Shrimp Products,* WT/DS58/AB/R 12 Oct. 1998, paras 17, 153; Section 1.3.2.3 A.

34 ICAO, *International Conference on Air Law*, ICAO Doc 9775 Vol. I, 243. *See* Section 5.3.5.2, Chapter 5.

35 Case C-63/09 *Walz v. Clickair SA* [2010], para. 31. The Brazillian court also gives the plaintiff compensation for moral damage to delayed baggage but the reasoning is established on its Constitution, not the Montreal Convention of 1999. *See* Section 5.3.6.2, Chapter 5.

36 Athens Convention relating to the Carriage of Passengers and Their Luggage by Sea, (Athens, 13 Dec. 1974) (Athens Convention); Protocol of 2002 to the Athens Convention Relating to the Carriage of Passengers and Their Luggage by Sea, 1974 (1 Nov. 2002), arts 3, 14. The exclusivity principle in the Athens Convention is narrower than that of the Montreal Convention of 1999 because the former governs only 'the death of or personal injury to a passenger or for the loss of or damage to luggage'. *See* Don Green, *Re-examining the Exclusivity Principle Following Stott v Thomas Cook Tour Operator Ltd,* 6 Travel L. Q., 114, 116 (2014).

37 Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Report Submitted by the European Union,* (Fourteenth session, 2015), U.N. Doc. CRPD/C/EU/CO/1, para. 53.

6.4.2.4 A solution for the compensation limit over damage to mobility aids and service animals

From the three options in Section 5.5.2, the exclusion of mobility aids from the meaning of baggage is the least practicable solution, because it requires amending the Montreal Convention of 1999. In my view, any option requiring a revision of the Montreal Convention of 1999, is not an ideal solution because it can create a non-uniform regime as seen in the case of the Warsaw Convention of 1929.

The other two proposals in Section 5.5.2.1 and Section 5.5.2.2 do not require any amendment to the Montreal Convention of 1999. By weighing up the pros and cons from the consumer protection viewpoint, I am inclined toward the option to waive the limit of baggage for mobility aids and service animals. This will be less burdensome for PWDs, because they do not have to declare the value of their mobility aids or service animals, while the free-of-charge declaration requires PWDs to inform the air carrier of the value. There may be a chance that PWDs do not know about the liability condition, so they fail to inform the air carrier and subject themselves to existing limited liability regime.

One note of caution concerns the impact to an air carrier's insurance premium and whether the unlimited liability for baggage claims will include compensation for moral damage that results from damage to mobility aids and service animals. ICAO and the CRPD Committee can thwart this possibility by initiating a cost-benefit study on this issue and by publishing an interpretative guideline. Furthermore, ICAO and the CRPD Committee should encourage States to incorporate this waiver as a condition of license issuance or renewal, or to ensure that their national air carriers insert this waiver into the conditions of carriage.

6.4.3 Inclusion of persons with disabilities in the drafting process

The motto 'nothing about us without us' which is echoed in Article 4(3) of the CRPD requires States Parties to closely consult with PWDs and their NGOs when they develop and implement legislation and policies on PWDs. This should translate to an obligation of ICAO. On the basis of the ICAO Assembly Resolution A1-11, the cooperation with private international organizations is permitted; however, the resolution limits the participation only to wide and well-established international bodies and, in practice, these are organizations focusing on civil aviation or trade.[38] The ICAO Assembly Resolution A1-11

38 ICAO, Resolution A1-11, para. A(1); Ludwig Weber, *International Civil Aviation Organization (ICAO),* 132 (Kluwer Law International, 2012).

limits cooperation solely to organizations sharing a common interest with ICAO.[39] In Section 4.2.1, Chapter 4, I reached a conclusion that ICAO has to observe the non-discrimination on the basis of disability principle and the accessibility principle in the CRPD. Accordingly, any private international organizations working for PWDs which aim to promote equivalent access to air travel should not be barred from collaboration with ICAO in this aspect.

Cooperation can range from the exchange of information and documentation to participation in the work of technical meetings, committees or working groups.[40] Accordingly, when the ICAO Facilitation Panel develops SARPs for PWDs, it should invite PWDs or their representative organizations to render their opinion to ensure the effectiveness and practicality of SARPs. Nevertheless, under the ICAO Assembly Resolution A1-11, participation does not entitle the NGOs on PWDs to the right to vote.[41]

6.4.4 Strengthening ICAO enforcement measures

I concluded in Section 4.7.2 that the legal force of SARPs in Annex 9 pertaining to PWDs is rather weaker compared to safety-related SARPs. However, their essence is not less, since they connect with human rights and *erga omnes* obligations concerning accessibility and non-discrimination on the basis of disability as mentioned in Section 6.3. ICAO can support the compliance of States with these human rights obligations in relation to air transport by taking the following practicable actions.

6.4.4.1 Audit

There is no doubt about the contribution of audits in relation to guaranteeing implementation of Annexes. The question is rather how ICAO is able to audit Standards on PWDs. Standards on PWDs are not linked to the issue of security, so they cannot be subjected to the security audit. In addition to an option to establish a new audit program for Annex 9,[42] ICAO could tie Standards on PWDs to the safety audit.

Abeyratne who supports a safety audit on Standards on PWDs reasons that the safety of PWDs is linked to the safety audit.[43] The scope of the ICAO safety audit includes the licensing of operational personnel, certification of aircraft,

39 ICAO, *ibid.*, para. A(3).
40 ICAO, *ibid.*, para. A(2).
41 ICAO, *ibid.*, para. A(4).
42 For Standards in Annex 9 which are audited under the USAP-CMA and the USOAP-CMA, *see* Section 4.2.2.4 and *supra* n. 38. Yet, there are some Standards which cannot connect with safety such as Standard 3.19 on exit visas.
43 Ruwantissa Abeyratne, *The Rights of a Disabled Airline Passenger: A New Approach?*, 60 German J. Air & Space L., 177,193 (2011).

air operators and aerodromes, and the control and supervision of licensed personnel,[44] all of which correlate to the proposed contents of SARPs in Section 6.4.1.

In Section 5.2.3.2, I noted that under the ICAO Safety Oversight Manual, the penalty for non-compliance with national civil aviation regulations is a matter for States.[45] With regard to an audit on Standards on PWDs, since a penalty can inhibit disobedience, in my view, ICAO should be able to audit the dissuasiveness of such penalty.

6.4.4.2 Air services agreements

An air services agreement (ASA) represents the primary legal basis for international commercial air services.[46] ICAO has realized its significance in reinforcing the application of matters related to aviation and has urged for the insertion of ICAO's policies or model clauses into an ASA. Thereafter, matters such as safety, security, computer reservation systems and the smoking ban became typical clauses therein (Section 1.6.4 and Section 1.6.5.4).[47]

The model clause on accessible air travel can be developed and adopted by the ICAO Council by virtue of Article 54 of the Convention on International Civil Aviation (Chicago Convention).[48] Then, the ICAO Assembly can adopt a resolution to exhort Contracting States to incorporate this clause into their ASAs.[49]

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44 ICAO, *Safety Oversight Manual,* ICAO Doc 9734 AN/959, Part A, The Establishment and Management of a State's Safety Oversight System, (2nd ed. 2006), para. 2.3.1.1.

45 *Ibid.,* para. 3.3.

46 ICAO, Resolution A39-17, Appendix G.

47 The clause on smoking ban has not found in the ASAs between the EU-US, the EU-Canada and the US-Canada because they have banned smoking already. *See* ICAO, *ICAO Template Air Services Agreement*, http://www.icao.int/Meetings/AMC/MA/ICAN2009/templateairservicesagreements.pdf (accessed 13 Jan. 2017).

48 Convention on International Civil Aviation (Chicago, 7 Dec. 1944), 15 U.N.T.S. 295, 61 Stat. 1180, T.I.A.S. No. 1591, art. 54(i) (Chicago Convention). Article 54(i) mandates the Council to request, collect, examine and publish information relating to the advancement of air navigation and the operation of international air services. But Milde notices that there is no record of decisions by the Council under this paragraph. By way of comparison to the Core Principle, the Council developed and adopted it according to the mandate of the General Assembly. Therefore, the Council can develop a model clause on PWDs by virtue of Article 54(b) which requires the Council to carry out the directs of the Assembly. *See* Chicago Convention, art. 54; Michael Milde, *International Air Law and ICAO,* 166 (3d ed., Eleven International Publishing 2016); Resolution A38-14, Appendix A, para. 19.

49 For an example on aviation security clause and the relevant ICAO Assembly resolution, s*ee ICAO Template Air Services Agreement, supra* n. 47; ICAO, Resolution A38-15, Appendix C, para. 4.

6.4.4.3 ICAO General Assembly Resolutions

In addition to urging for the incorporation of a model clause into an ASA, the General Assembly as a supreme organ can pass other resolutions to generate accessible air travel.

This action can be compared to the ban on smoking on board. The momentum shifted towards a smoke-free flight because of the safety concerns over in-flight smoking and public health issues brought up at the World Conference held by the WHO and other UN agencies. The Conference adopted a resolution to urge ICAO to prohibit smoking on all commercial passenger flights.[50] As a result, the Assembly set an objective with a specific deadline to complete smoking bans.[51] The Assembly also assigned the Council to report on implementation.[52] Although the prohibition was not achieved within the time limit, promising advancement was noted.[53] The General Assembly can also urge States to make air travel accessible. There is no need to set a concrete deadline because an obligation can be gradually implemented. However, the resolution should adhere to the CRPD General Comment No. 2 on the distinction between existing and new airports and aircraft. Moreover, I do not see this content as conflicting with the sovereignty of the States that do not ratify the CRPD, since obligations concerning accessibility are *erga omnes.* The CRPD General Comment can be considered as a guideline to implement such obligations.

6.4.4.4 Cooperation between ICAO and the CRPD Committee

Article 38 of the CRPD intends to foster cooperation between the CRPD Committee and other UN specialized agencies (Section 3.7.3). Article 65 of the Chicago Convention and ICAO Assembly Resolution A1-10 grant the ICAO Council authority to enter into agreements with other international bodies to work with ICAO on matters regarding international civil aviation.[54] According to these legal provisions, ICAO and the CRPD Committee should cooperate and contribute from their area of expertise (Section 4.7.3). Concerning consumer protection, the Sixth Meeting of the Worldwide Air Transport Conference recommended that ICAO work on a cost-benefit analysis of air transport connectivity.[55] In my view, human rights elements and the capabilities approach should be added as factors to the cost-benefit analysis. Here, the CRPD Committee can provide ICAO with the human rights perspective to

50 ICAO, Annual Report of the Council, 1992, 86. *See* Ruwantissa Abeyratne, *Tobacco Smoking in Aircraft – A Fog of Legal Rhetoric?,* XVIII: 2 Air & Space L., 50, 55 (1993).
51 ICAO, Resolution A29-15, para. 3.
52 *Ibid.,* para. 4.
53 ICAO, *The World of Civil Aviation 1999-2002,* Circular 279-AT/116, 67.
54 Chicago Convention, art. 65; ICAO, Resolution A1-10, para. 1; Weber, *supra* n. 38, 127-128.
55 ICAO, *Consumer Protection,* Worldwide Air Transport Conference (ATCONF) Sixth Meeting, ATConf/6-WP/104, para. 2.3-3.

support benefitting accessibility in air travel to eradicate any prejudice in implementing SARPs. This practice is comparable to the WHO study on banning smoking which led to all smoke-free flights as mentioned in Section ?6.4.4.3.

When developing regulations, policies and guidelines in relation to PWDs in air travel, ICAO should invite the CRPD Committee to provide its views and *vice versa.* An example can be drawn from the guidelines concerning advance passenger information, and passenger name record because ICAO, the World Customs Organization, and IATA collectively developed these guidelines.[56] These joint publications demonstrate the work between public international bodies as well as between public and private organizations. Through such cooperation between ICAO and the CRPD Committee, the views from the aviation world and human rights can be bridged and balanced.

At the 39th Session of the ICAO Assembly, ICAO stressed the SDGs and the new initiative 'No Country Left Behind' (NCLB).[57] NCLB aims to assist States when implementing SARPs by establishing partnerships with other Member States, industry, financial institutions and other stakeholders.[58] This initiative is without doubt in line with international cooperation as referred to in Article 32 of the CRPD. This can be another channel for collaboration between ICAO and the CRPD Committee (Section 3.7.2).

Also, Chapter 5 concluded that national courts are responsible for interpreting the Warsaw Convention of 1929, and the Montreal Convention of 1999. When there are conflicts between treaty provisions in different regimes, the ILC Fragmentation Report warns that the settlement should not be the responsibility of organs exclusively linked to one of the conflicting regimes.[59] It is inconclusive to say that national courts are specialized in civil and commercial law more than in human rights law. However, to foreclose a similar argument, ICAO and the CRPD Committee should cooperate to publish interpretation guidelines on remedial measures concerning the Warsaw Convention of 1929, and the Montreal Convention of 1999. An initiation to study and make recommendations on problems concerning private air law can be done under the direction of the ICAO Assembly, the Council or the ICAO Legal Committee, subject to the prior approval of the ICAO Council.[60]

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56 ICAO, *API Guidelines and PNR Reporting Standards,* https://www.icao.int/Security/FAL/SitePages/API%20Guidelines%20and%20PNR%20Reporting%20Standards.aspx (accessed 24 May 2017).

57 ICAO, Resolution A39-23; Resolution A39-25; Resolution A39-26. *See* Ruwantissa Abeyratne, *Outcome of the 39th Session of the International Civil Aviation Organization Assembly,* 42:1 Air & Space L., 13 (2017).

58 ICAO, Resolution A39-23.

59 International Law Commission, *Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission, Finalized by Martti Koskenniemi,* A/CN.4/L.682 (13 Apr. 2006) para. 493(2).

60 ICAO, Resolution A7-5, para. 2(c).

6.5 THE NATIONAL AND REGIONAL LEVELS

Other than obligations on accessible air travel for PWDs elaborated on in Section 3.2 to Section 3.5, the EU as well as its Member States and other States should take the following recommendations into account.

6.5.1 Refraining from exercising extraterritorial jurisdiction

It is concluded in Section 4.6.1.1 to Section 4.6.1.3 that States have no legitimate grounds to apply their national accessibility standards to foreign air carriers outside their territory. Unilateral regulatory efforts can be done on the basis of human rights protection, and the impact of this could result in a global rule. However, this lacks an important factor of rulemaking which is that 'the rule must be promulgated by the person on whom discretion vests to make the rule'.[61] Therefore, States should refrain from regulating accessibility standards extraterritorially, but they are entitled to apply accessibility standards through an ASA or other measures rendered in the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights (Maastricht Principles) (Section 3.6.3).

6.5.2 Incorporation of an accessibility clause in air services agreements

Only the ASAs concluded by the EU with the US and with Canada contain a clause on accessibility (Section 4.6.1.4). On the other hand, a provision on human rights protection is incorporated into a number of trade agreements concluded by the EU and the US.[62] A study on why trade agreements boost human rights finds that, although this clause may be based on political reasons and most countries signed these agreements purely for the economic benefits, the legal force of these trade agreements prevents human rights abuse and creates a better human rights situation.[63] Therefore, States that have more negotiating power should add an accessibility clause or a passenger protection clause into an ASA.

In my view, States with less negotiating power also benefit from this incorporation because the ASAs often contain a consultation clause and a

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

62 Emilie Hafner-Burton, *Forced to be Good: Why Trade Agreements Boost Human Rights*, 1-2 (Cornell University Press 2009).

63 *Ibid.*, 166.

dispute resolution clause.[64] With these existing provisions, together with an accessibility provision, when there is a dispute concerning extraterritorial application, the consultation process under the ASAs can generate a platform to review the question and wield more bargaining power than in a unilateral waiver system.

6.6 CONCLUDING REMARKS

The recommendations above may at first glance be challenged on their feasibility. Nevertheless, one should not forget that the CRPD and Annex 9, as well as the selected accessibility standards in this study, have already distinguished the realization of obligations between existing and new airports and aircraft (Section 3.4.2.2.A. and Section 4.6.2.2.A). The CRPD balances the burden with gradual implementation (Section 3.5.1). In other words, these recommendations do not require a sudden change if obligations involve an investment, though this is more than welcome.

A step-by-step approach with a concrete plan of action is possible, and the year 2030 set by the SDGs can be taken as a target. During this time, reasonable accommodations can alleviate the inconvenience caused by inaccessible environment or service. The capabilities approach helps ensure that accessibility is not too burdensome and that it is beneficial to airport operators, air carriers and passengers. The recommendations based on the rules of treaty interpretation relieve States from monitoring regulations with discrepant contents. In short, all major stakeholders in the field of air travel facilitation stand to reap benefits from recommendations for harmonized accessible air travel.

64 *ICAO Template Air Services Agreement, supra* n. 47, arts 33, 34.