

**GLOBAL GOVERNANCE OF CIVIL AVIATION SAFETY: AN
ANALYSIS FROM THE PERSPECTIVE OF GLOBAL
ADMINISTRATIVE LAW**

by

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ABSTRACT

This thesis suggests that conceptualising the global governance of aviation safety through the lens of administrative law provides a proper checks-and-balances system for individuals by allowing national courts to apply global aviation safety standards.

The research examines the state's compliance with aviation safety regulations within the traditional paradigm of the binding rules of international law-making and state sovereignty. Through the impact of globalisation, air transport market liberalisation and deregulation, the line between domestic aviation safety and international aviation safety has diminished. At the same time, civil aviation safety has become a global concern. In that sense, the current international legal system for civil aviation safety does not respond to contemporary realities.

After defining the issue, the thesis addresses the emerging legal theory global administrative law (GAL), which embraces the changes in global social life and the impact of globalisation on existing international legal theories about international aviation safety. The thesis illustrates the notion that the global governance of aviation safety is an example of joint administrative action of international and national public powers by multiple actors and thus falls within the executive structure of the global administrative legal theory.

Finally, the thesis explores the possible contributions of a global administrative law (GAL) theory, to the global governance of aviation safety, which would allow national courts to apply global aviation safety standards. Examining the increasing trend of national courts that apply international law or citing foreign courts' decisions on common values in different jurisdictions confirms the assertion that judicial dialogue, particularly among the higher national courts, is developing. Consequently, based on these developments, the global judicial approach to aviation safety may develop for the benefit of people around the world.

Keywords: Civil aviation safety, global governance, global administrative law, air transport liberalisation, state sovereignty, judicial globalisation.

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During my work in the civil aviation field, I had the inspiration to this vast subject. When the research journey started, I could not know how this would develop. The challenges and obstacles were responded with a 'no way to quit' attitude. In the end, the joy of achievement was indescribable. Now I can present the result of years of dedicated work.

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A special thanks to my family. Believing in education and free-thinking, encouraging me beyond your imagination and supporting me in every possible way with unconditional love have been a real treasure of my life. Every step of my professional career, I become more aware of how lucky I am as a woman to have such a family as you.

Most of all, I would like to thank my partner Jorg. Your unremitting support, encouragement patience and faith in me during these hard-working years have made this thesis possible. Thank you, Jorg, for making me more than I could have imagined.

DEDICATION

I dedicate this study to the victims of air crashes around the world that could have been prevented by complying with aviation safety regulations more effectively. Also, to the families of air crash victims, who have to go through tiresome, painful, lengthy legal proceedings to find out what happened and how it happened, and if anyone is accountable for what happened to their loved ones.

“During bad circumstances, which is the human inheritance, you must decide not to be reduced. You have your humanity, and you must not allow anything to reduce that. We are obliged to know we are global citizens. Disasters remind us we are world citizens, whether we like it or not.” – Maya Angelou

Table of Contents

ABSTRACT.....	1
ACKNOWLEDGEMENTS.....	3
DEDICATION.....	5
TABLE OF CONTENTS.....	7
LIST OF FIGURES.....	13
LIST OF ABBREVIATIONS.....	14
INTRODUCTION.....	17
1. Background and motivation of the research.....	21
2. Objectives of the research.....	23
3. The scope of the research.....	24
4. Research questions and hypothesis.....	27
5. Structure of the thesis.....	30
CHAPTER I -LITERATURE REVIEW AND METHODOLOGY.....	38
Introduction.....	38
1.1 Historical Background.....	39
1.1.1 Overviewing of the evolution of public international aviation law.....	39
1.1.2 Limits of Customary International Law to Secure State Compliance.....	44
1.1.3 The changing concept of state sovereignty.....	45
1.2 The Impact of Global Developments on Air Transport.....	46
1.2.1 Air transport liberalisation and impacts on global aviation safety.....	49
1.3 Innovative Approach.....	51
1.3.1 Administrative law type mechanisms for global governance of civil aviation safety.....	51
1.3.2 Global aviation safety standards in national courts.....	54
1.4 The Research Methodology.....	60
CHAPTER II – CURRENT INTERNATIONAL LEGAL SYSTEM FOR ENSURING STATE COMPLIANCE WITH INTERNATIONAL AVIATION SAFETY STANDARDS SET BY ICAO.....	67
Introduction.....	67
2.1 Law of air space.....	69

2.1.1 The interpenetrative character of aviation law	71
2.1.2 Evolution of public international aviation law	73
2.1.2.1 The International Air Navigation Conference, Paris 1910.....	75
2.1.2.2 The Convention Relating to the Regulation of Aerial Navigation, 1919.....	78
2.1.2.3 The Chicago Convention of 1944	81
2.1.2.3.1 Conventional consensus on states' air space sovereignty	82
2.1.2.3.2 Limits on complete and exclusive state sovereignty over airspace.....	86
2.2. The International Civil Aviation Organization (ICAO)	88
2.2.1 The Statute of ICAO as a UN Specialised Agency	93
2.2.2 ICAO as an intergovernmental organisation	94
2.3. The Norm-Setting capacity of the ICAO Council as an executive committee	96
2.3.1 Safety and security standards for safe flight	100
2.3.2 Standards and Recommended Practices (SARPs).....	103
2.4. Integration of SARPs into national Law	106
2.4.1 The concept of state obligation derived from the Chicago Convention (1944).....	107
2.4.2 Binding effect of SARPs	112
2.4.2.1 State obligations based on customary international law	113
2.4.2.2 Aviation safety and fundamental human rights ; the right to life	118
2.4.2.3 Oversight responsibility of contracting states	124
2.5 The problem of ensuring state compliance with SARPs	129
2.5.1. The effectiveness of traditional international legal norms in ensuring state compliance with SARPs	136
2.5.1.1 Limits of customary international law in ensuring state compliance with SARPs	137
2.5.1.2 Changing the concept of state sovereignty in international law	142
2.5.1.3 The role of soft law	146
CHAPTER III – THE IMPACTS OF GLOBALIZATION ON CIVIL AVIATION	
SAFETY	151
Introduction	151
3.1 Air transport liberalisation	154
3.1.1 Chicago bilateral system	155
3.1.2 Air transport liberalisation and the General Agreement on Trade in Services (GATS)	159
3.1.3 Liberalised Air Transport	162

3.1.3.1 IATA’s position on air transport liberalisation	167
3.1.3.2 ICAO’s position on air transport liberalisation	169
3.1.4 Air transport liberalisation and safety	171
3.1.5 Determining air transport as a normal industry subject to free market or public utility with the public interest	175
3.2. Deregulation of air transport	177
3.2.1 Deregulation in the United States: Open Skies Agreements.....	179
3.2.2 Deregulation in the European air transport market	181
3.2.2.1 Single aviation market.....	181
3.2.2.2 Single European Sky	182
3.2.2.3 Open skies agreement between the European Union and the United States.....	183
3.2.3 Deregulation around the world.....	185
3.2.3.1 Asia–Pacific	185
3.2.3.2 Latin America.....	189
3.2.3.3 Africa.....	191
3.2.3.4 Middle East	192
3.3 Liberalised air transport market practices and their impacts on aviation safety	194
3.3.1 Code-share agreements	197
3.3.2 Operating with foreign-registered aircraft	199
3.3.3 Operating with a foreign flight crew	201
3.3.4 The problem of a ‘flag of convenience’ for aircraft.....	202
3.3.5 Off-shore operations.....	206
3.3.6 Mergers and acquisitions.....	207
3.3.7 Outsourcing of activities affecting aircraft operations	208
3.4. Air transport liberalisation and emerging markets	209
3.4.1 Air passenger market growth and emerging markets.....	210
3.4.2 Safety risks in emerging air transport markets.....	216
3.4.3 Aircraft accident analysis by region.....	222
3.5. Towards a global governance of aviation safety?.....	229
CHAPTER IV – ADMINISTRATIVE LAW TYPE OF MECHANISMS FOR THE GLOBAL GOVERNANCE OF CIVIL AVIATION SAFETY	233
Introduction	233

4.1 The complexity of increasing global governance in the international legal order	236
4.1.1 States' role in global governance	238
4.1.2 The emerging complexity of the international aviation law	242
4.2 Administrative law for global governance in the aviation safety realm	248
4.2.1 Developments towards global governance of the international civil aviation regime	251
4.2.1.1 The concept of state sovereignty in the global governance of aviation safety	252
4.2.1.2 The question of legitimacy	254
4.4 Global governance of aviation safety	256
4.4.1 Administrative character of global aviation safety governance	262
4.5. Global governance of aviation safety within the administrative structure of GAL theory	266
4.5.1 International organisations as global regulatory bodies in the field of civil aviation	266
4.5.2 ICAO: Shifting from an international organisation to a global regulatory body	270
4.5.2.1 The global supervisory role of ICAO in the global governance of aviation safety	273
4.5.2.1.1 Safety Oversight Programme (SOP)	274
4.5.2.1.2 Universal Safety Oversight Audit Programme (USOAP)	277
4.5.2.1.3 Continuous Monitoring Approach (CMA)	278
4.5.2.1.4 Global Aviation Safety Plan (GASP)	279
4.5.2.1.5 Safety Management Manual (SMM)	280
4.5.2.1.6 Global Aviation Safety Roadmap	281
4.5.2.1.7 Funding programmes to enhance aviation safety	282
4.5.2.1.8 Global Aviation Training (GAT)	285
4.5.2.1.9 No Country Left Behind (NCLB)	287
4.6 Establishing legitimacy in the global governance of aviation safety	290
4.6.1 Applying administrative law principles in the global governance of aviation safety	292
4.6.1.1 Participation of stakeholders in the global governance of aviation safety	294
4.6.1.1.1 State participation and continuity in the decision-making process of international aviation safety standards	295

4.6.1.1.2 Participation of all other stakeholders in the decision-making process of aviation safety standards	299
4.6.1.2 Transparency	302
4.6.1.2.1 Sharing information among the parties	307
4.6.1.2.2 Limited transparency of security audits	307
4.6.1.3 The right to review	308
4.6.2 The notion of publicness for aviation safety	315
CHAPTER V- THE APPLICATION OF GLOBAL AVIATION SAFETY	
STANDARDS IN NATIONAL COURTS	325
Introduction	325
5.1. The role of national courts in global space	327
5.1.1 The changing role of national courts in global governance	329
5.1.1.1 The impact of globalisation on the application of international law by national courts	337
5.1.1.2 The impact of human rights standards on the role of national courts	339
5.2 International Aviation Safety Regulations (SARPs) in domestic courts.....	344
5.2.1 The shortcomings of the traditional approach of domestic courts in applying SARPs	345
5.2.1.1 Lack of precedent in application of SARPs in domestic courts.....	346
5.2.1.2 The impact of the state’s political interest on domestic courts	347
5.3 Global aviation safety standards in national courts.....	355
5.3.1 Securing the rule of law in the global governance of aviation safety	357
5.3.2 Universal values v. territoriality	361
5.3.3 Global regulatory body v. external authority	367
5.3.4 The publicness character of civil aviation safety	370
5.4 Looking ahead; Global judicial cooperation in global aviation safety.....	375
CONCLUSION	380
SELECTED BIBLIOGRAPHY.....	389
APPENDICES	423

LIST OF FIGURES

- Figure 2.1** World Aviation 1950 to 2012
- Figure 2.2** UNWTO Tourism Towards 2030: Actual trend and forecast 1950-2030
- Figure 2.3** Passenger-Kilometres Performed Total Scheduled Traffic, 2009-2018
- Figure 3.1** Number of frequencies
- Figure 3.2** Number of the country–pair routes
- Figure 3.3** The causal relationship between air service liberalisation and economic growth
- Figure 3.4** 1970-2018 Air Transport Passengers Carried
- Figure 3.5** International scheduled revenue passenger-kilometres (RPK) growth in 2018
- Figure 3.6** Top Largest Air Transport Markets Amongst Emerging Countries in 2038
- Figure 3.7** Accidents Rates by region 2012-2017/2017/2018
- Figure 3.8** Deficiencies in Regulatory Oversight as a Contributing Factor to Accidents 2012-2017/2017/2018
- Figure 3.9** Fatality numbers by regions

LIST OF ABBREVIATIONS

AACO	The Arab Air Carriers Organisation
ACAC	The Arab Civil Aviation Commission
ACI	The Airports Council International
AOC	Air Operator's Certificate
ASA	Air Service Agreements
ASEAN	Association of South-East Asian Nations
ATM	Air Traffic Management
CAA	Civil Aviation Authority
CANSO	The Civil Air Navigation Services
CAS	The Court of Arbitration for Sport
CC	The Chicago Convention
CIL	Customary International Law
CIS	Commonwealth of Independent States
COMESA	Common Market for Eastern and Southern Africa
CMA	Continuous Monitoring Approach
CRM	Crew Resource Management
DGCA	Directors General of Civil Aviation
EASA	European Aviation Safety Agency
ECAA	European Common Aviation Area
ECAC	European Civil Aviation Conference
ECJ	European Court of Justice
ECtHR	European Court of Human rights
ETSC	The European Transport Safety Council
EU	European Union
FAA	Federal Aviation Administration
GAL	Global Administrative Law
GASP	Global Aviation Safety Plan
GAT	Global Aviation Training
GATS	The General Agreement on Trade in Services
GATT	The General Agreement on Tariffs and Trade
IASA	The International Aviation Safety Assessment
IATA	The International Air Transport Association
ICAO	International Civil Aviation Organisation
ICJ	The International Court of Justice
IFFAS	International Financial Facility for Aviation Safety
IMF	International Monetary Fund
IOSA	The Operational Safety Audit
ISSG	The Industry Safety Strategy
ITF	International Transport Workers' Federation
JRG	Judicial Reference Group
LACAC	The Latin American Civil Aviation Commission

MALIAT	Multilateral Agreement on the Liberalisation of International Air Transport
MFN	Most Favoured Nation
NCLB	No Country Left Behind
NGO	Non-Governmental Organisation
NOTAM	Notices to Airmen
PANS	Procedures for Air Navigation Services
PICAO	The Provisional International Civil Aviation Organisation
RPK	Revenue Passenger Kilometer
SAATM	Single African Air Transport Market
SAFA	Safety Assessment of Foreign Aircraft
SAFE	Safety Fund
SARPs	Standards and Recommended Practices
SMM	Safety Management Manual
SMS	Safety Management Systems
SOAP	Safety Oversight Audit Programme
SSC	Significant Safety Concerns
SSP	State Safety Programme
UK	United Kingdom
UNWTO	UN World Tourism Organization
US	United States of America
USOAP	The Universal Safety Oversight Audit Programme
WADA	The World Anti-Doping Agency
WTO	World Trade Organisation

INTRODUCTION

The international civil aviation regime has been developing since its establishment by the Chicago Convention on International Civil Aviation¹ which was signed on 7 December 1944 by 52 States.²

Chapter VI of the Chicago Convention (1944) addresses International Standards and Recommended Practices (SARPs).³ Article 37 of the Chicago Convention (1944) formulates the adoption of the international standards and recommended practices (SARPs) and authorises International Civil Aviation Organisation (ICAO)⁴ to adopt and designate them as Annexes⁵ to the Convention.

¹ Hereinafter Chicago Convention

² Currently the number of signatory states of the Chicago Convention is 193 ICAO official website <<https://www.icao.int/MemberStates/Member%20States.English.pdf>> accessed 10 October 2019

³ The current definition of SARPs was adopted by the 29th Session of the Assembly on October 8, 1992 by Resolution A 29-7 Appendix A. The terms “*Standard*” and “*Recommended Practice*” were defined as follows:

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

Recommended Practice- any specification for physical characteristics, configuration, material performance, personnel or procedure, the uniform application of which is recognized as desirable in the interest of safety, regularity or efficiency of international air navigation and to which Contracting States will endeavour to conform in accordance with the Convention.” (emphasis added)

⁴ The International Civil Aviation Organization (ICAO) is a United Nations (UN) specialised agency in the field of civil aviation. The International Civil Aviation Organization (ICAO) was established by the Chicago Convention Article 43-47. By signing the Convention, the contracting States also agreed on the creation of the International Civil Aviation Organization (ICAO). ICAO came into being on 4 April 1947 to manage the administration and governance of the Convention on International Civil Aviation (Chicago Convention). ICAO official website, <<https://www.icao.int/about-icao/Pages/default.aspx>> accessed 04 April 2109

⁵ The ICAO Council had adopted over 12000 SARPs across 19 Annexes as of the time of writing. These are; Annex 1 Personnel Licensing Annex 2 Rules of the Air Annex 3 Meteorological Service for International Air Navigation Annex 4 Aeronautical Charts Annex 5 Units of Measurement to be Used in Air and Ground Operations Annex 6 Operation of Aircraft Annex 7 Aircraft Nationality and Registration Marks Annex 8 Airworthiness of Aircraft Annex 9 Facilitation Annex 10 Aeronautical Telecommunications Annex 11 Air Traffic Services Annex 12 Search and Rescue Annex 13 Aircraft Accident and Incident Investigation Annex 14 Aerodromes Annex 15 Aeronautical Information Services Annex 16 Environmental Protection Annex 17 Security: Safeguarding International Civil Aviation Against Acts of Unlawful Interference Annex 18 The Safe Transport of Dangerous Goods by Air Annex 19 Safety Management . ICAO Official Website <http://www.icao.int/Documents/annexes_booklet.pdf> accessed 05 April 2019 , <<https://www.icao.int/about-icao/AirNavigationCommission/Pages/how-icao-develops-standards.aspx>> accessed 05 April 2019

SARPs are described as a fundamental basis for harmonised global aviation safety in the air and on the ground.⁶

The international civil aviation regime belongs to the growing group of transnational regulatory regimes with rulemaking powers that do not only affecting states but other actors, as private organisations; and individuals.

Globalisation and globalisation driven air transport market developments such as liberalisation and deregulation have blurred the distinction between domestic and international with regard to civil aviation safety. Therefore, the classical distinction between domestic and international regulatory norms that regulates aviation safety becomes challengeable.

While national market restrictions are more and more lifted and global air transport market develops, compliance with internationally set aviation safety standards remains in the sole responsibility of the single states.

This thesis suggests that the current system of civil aviation safety needs to be adjusted in order to accommodate contemporary global developments.

The state's obligation to comply with global civil aviation safety standards has a direct link to the fundamental human right, right to life. However, individuals who are affected by safety standards, compliance with these standards and the effective implementation of those standards by states – not only by their states of nationality but by all states – have no adequate power to participate in the checks-and-balances system that comprises the governance of global civil aviation safety. This thesis suggests that this deficit can be overcome by applying global aviation safety standards in national courts.

According to the current international law system and customary international legal norms,⁷ global aviation safety standards and related regulations need to be adopted into state domestic legislative system to be applied in national courts. In the case of state non-compliance with global aviation safety standards, individuals, who are affected directly by the state non-compliance have no means to address this issue in national courts. However,

⁶ ICAO official website <<https://www.icao.int/about-icao/airnavigationcommission/pages/how-icao-develops-standards.aspx>> accessed 05 April 2019

⁷ Considering treaty obligations as *jus cogens* and compliance with safety obligations, obligations *erga omnes* of a state towards all states.

national courts are the obvious choice to which individuals would turn when issues at stake relate to non-compliance with international aviation safety regulations.

New forms of global regulatory regimes that include not only states but individuals, firms private organisations differ from international law. Legal scholars across the world have been focusing on this new supranational phenomenon to identify the contemporary approach for explaining the legal impacts of globalisation.⁸

Therefore, global governance that includes field policies of international institutions such as ICAO's safety standards for international civil aviation has a direct impact on individuals. Within the new phenomena, global governance of civil aviation, states and individuals are the subjects of the same legal system.⁹ The structure of global governance does not comply with the structure of international law which is based on state consent and individuals are absent. At this point, the theory of global administrative law emerged and need for this legal theory is explained by Kingsbury et al., as 'based on the conception of individual rights and the associated idea of the rule of law.'¹⁰

The research explores and attempts to demonstrate the legal theory, Global Administrative Law, which offers a global administrative-legal order that encompasses states and individuals for the global governance of civil aviation safety.

⁸ Compiled by Maurizia De Bellis, 'Global Administrative Law: Bibliographical Resources' NYU, Institute for International and Justice, < <http://iilj.org/wp-content/uploads/2016/08/GAL-Bibliography-June-2006.pdf> > accessed 5 April 2019

⁹ Stefano Battini, 'International Organizations and Private Subjects: A Move Toward a Global Administrative Law?' (2005) International Law and Justice Working papers 2005/3 (Global Administrative Law Series) 4.

¹⁰ Benedict Kingsbury, Nico Krisch & Richard B. Stewart, 'The Emergence of Global Administrative Law' (2005) Vol.68 Law and Contemporary Problems 15, 46. Retrieved from <<https://scholarship.law.duke.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1361&context=lcp>> accessed 13 April 2019

The Global Administrative Law Research project¹¹ at NYU School of Law Institute for International Law and Justice is one of the projects focused on administrative law type of mechanism for global governance.¹²

Therefore, the thesis focuses on new forms of administrative structures that are being set for a global rather than an international sphere. Accordingly, Global Administrative Law (GAL) theory¹³ and suggested administrative law type of mechanism for global governance are explored.

The thesis asserts that the global governance of aviation safety is an example of the joint administrative action of international and national public powers through multiple actors, i.e. an executive structure described by the GAL theory. The administrative law principles suggested for global governance by GAL theory would give individuals the ability, as part of global governance, to challenge a state's implementation of global aviation safety regulations and compliance in national courts. The benefit of the GAL theory is to conceptualise the

¹¹ 'The project, which engages academics and practitioners in North America, Europe, Latin America, Africa, Asia, and the Pacific region, seeks to study this burgeoning field of practice and theory systematically, with a view to analysing its elements and shaping its inevitable future development so as to help realize such potential as it offers for justice and effectiveness in global regulatory governance.' Benedict Kingsbury & Richard B. Stewart, 'Legitimacy and Accountability in Global Regulatory Governance: The Emerging Global Administrative Law and the Design and Operation of Administrative Tribunals of International Organisations' (2008) 1. Retrieved from Institute International Law and Justice, New York Law School, <<http://www.iilj.org/publications/legitimacy-and-accountability-in-global-regulatory-governance-the-emerging-global-administrative-law-and-the-design-and-operation-of-administrative-tribunals-of-international-organizations/>> accessed 13 April 2019

¹² Benedict Kingsbury, Nico Krisch & Richard B. Stewart 'The Emergence of Global Administrative Law' IILJ Working Paper 2004/1, Global Administrative Law Series 2-4. <<https://www.iilj.org/publications/the-emergence-of-global-administrative-law-2/>> accessed 13 April 2019

¹³ The project on global administrative law has a website that includes working papers bibliographies and links to papers from scholars around the world. NYU, Institute for International and Justice < www.iilj.org > accessed 13 April 2019 'Sets of papers from this project have appeared in several journal symposia, including: Benedict Kingsbury, Nico Krisch, Richard B. Stewart, Jonathan Wiener (Eds), The Emergence of Global Administrative Law, *Law and Contemporary Problems*, Vol. 68, 3-4. (Summer-Autumn 2005), 1-385; Nico Krisch, Benedict Kingsbury (eds), Global Governance and Global Administrative Law in the International Legal Order, *European Journal of International Law* vol. 17 (2006), pp. 1-278; and the Global Administrative Law symposium in *NYU Journal of International Law and Politics*, Vol. 37:4 (2005). See also *Global Administrative Law: Cases, Materials, Issues*, edited by S. Cassese et al. (second edition 2008), published by the Institute for Research on Public Administration and the Institute for International Law and Justice (<http://www.iilj.org/GAL/GALCasebook.asp>).' quoted from Benedict Kingsbury & Richard B. Stewart, 'Legitimacy and Accountability in Global Regulatory Governance: The Emerging Global Administrative Law and the Design and Operation of Administrative Tribunals of International Organisations' (2008) 1. fn.1 Retrieved from Institute International Law and Justice, New York Law School, <<http://www.iilj.org/publications/legitimacy-and-accountability-in-global-regulatory-governance-the-emerging-global-administrative-law-and-the-design-and-operation-of-administrative-tribunals-of-international-organizations/>> accessed 13 April 2019

global governance of aviation safety through the lens of administrative law that provides a proper checks-and-balances system for individuals.

Furthermore, this thesis examines the increasing trend of national courts that apply international law or citing foreign courts' decisions on common values in different jurisdictions to indicate judicial dialogue, particularly among the higher national courts.¹⁴

This is paving the way to a global judicial approach in the field of civil aviation safety would be possible.

1. Background and motivation of the research

The main motivation for undertaking this research comes from past professional experience as a legal advisor at the civil aviation authority in Turkey. During the time in post (from 2006 to 2009) I witnessed two occasions where I realised there were problems in this area.

Particularly, this research is motivated by obstacles observed in national courts encountered by families of the victims of two air crashes in the year 2007.¹⁵

The assessment conducted the lack of power of individuals in domestic post air crash legal process regarding questioning state compliance with global aviation safety standards. In other words, individuals are powerless in the checks and balance system of state implementation of

¹⁴ Anne-Marie Slaughter, 'Judicial Globalisation' (Summer 2000) Vol.40 Issue .4, Virginia Journal of International Law 1103, see also Anne-Marie Slaughter, 'A Typology of Transjudicial Communication' (1994, December) Vol.29, Issue 1, University of Richmond Law Review 99 ; Karen Knop, 'Here and There: International Law in Domestic Courts' (Winter 2000) Vol.32 No.2 , New York University Journal of International Law and Politics, 501; Elaine Mak, '*Judicial Decision-Making in a Globalised World: A Comparative Analysis of the Changing Practices of Western Highest Courts*' (Kindle ed. Hart Publishing 2013); Elaine Mak, 'Globalisation of the National Judiciary and the Dutch Constitution' (2013, March) Vol.9, Issue 2, Utrecht Law Review 36 , Retrieved from < <https://www.utrechtlawreview.org> > accessed 19 September 2019

¹⁵ On 9 January 2007, an Antonov 26B on an international flight belonging to Aeriantur-M Airlines crashed while attempting to land at a U.S. military base in Balad, Iraq. The Moldovan-registered civil cargo plane was carrying Turkish construction workers. The crash killed 34 people on board, including the Moldovan crew members, and left one passenger critically injured. Officials claimed that poor weather conditions caused the crash, but other sources contended that the plane had been shot down by a missile. Later that year, on 30 November 2007, in an air crash known as Isparta Atlasjet, an MD-83 aircraft belonging to Atlasjet (Flight # KK4203) was on a domestic flight en route from Istanbul to Isparta when the plane hit a rocky, mountainous area shortly before it was due to land. All the people on board (fifty passengers and seven crew members) were killed. Aviation Safety Network, <<https://aviation-safety.net/database/dblist.php?Year=2007&lang=&page=1>> accessed April 16

international aviation safety standards into domestic law. In the following years, several fatal domestic and international air accidents occurred around the world raising the question about access to justice for the victims of aviation accidents.¹⁶

A central element for the analysis put forward in this dissertation concerns the differentiation between domestic and international flights. According to the ICAO glossary, a domestic flight is defined as “a flight that starts and ends in the same state”¹⁷ By this definition, regulatory issues regarding safety compliance for domestic flight would be considered solely within the states’ authority. However, the most prominent issue in civil aviation nowadays is that state compliance with global aviation safety standards. Aviation safety is a global

¹⁶ Some of the major fatal air accidents are; August 20, 2008; Spanair flight JK5022 (the MD-82 aircraft) operated from Madrid-Barajas (MAD) to Gran Canaria (LPA) crashed on take-off at Madrid-Barajas Airport (MAD), Spain. Of the aircraft’s occupants, 154 were killed, including all six crew members. Eighteen passengers were seriously injured; June 1, 2009; An Air France Airbus A330-200 was destroyed when it crashed into the sea while on a transatlantic flight from Rio de Janeiro-Galeao International Airport, RJ (GIG) to Paris-Charles de Gaulle Airport (CDG). Two hundred twenty-eight were killed including 12 crew members; July 28, 2010, An Airbus passenger plane was destroyed when it crashed in the Margalla Hills near Islamabad-Benazir Bhutto International Airport (ISB), Pakistan. All six crew members and 146 passengers on board were killed; July 8, 2011, A Boeing 727 operated by Hewa Bora Airways crashed on landing at Kisangani Airport (FKI), D.R. Congo. Of the 115 persons on board, there were 77 fatalities, including the three flight crewmembers and two of the four cabin crew; April 20, 2012, A Boeing 737-236 passenger plane, operated by Bhoja Airlines, was destroyed in an accident near Islamabad, Pakistan. All 121 passengers and six crew members were killed; November 17, 2013, A Boeing 737-53A passenger plane, operated by Tatarstan Airlines, was destroyed in an accident at Kazan Airport (KZN), Russia. All 44 passengers and six crew members were killed; March 8, 2014, Malaysia Airlines Flight MH370 from Kuala Lumpur, Malaysia to Beijing, China was reported missing. There were 227 passengers and 12 crew members on board and presumed dead; July 17, 2014, A Boeing 777-200 passenger plane, operating Malaysia Airlines Flight MH17, was destroyed in an accident in eastern Ukraine, near Hrabove. All 298 on board were killed ; December 28, 2014, An Indonesia AirAsia Airbus A320-216 was destroyed when it impacted the water of the Java Sea between Surabaya and Singapore, all 156 passengers and six crew members on board were killed; March 24 2015, An Airbus A320 operated by Germanwings was destroyed in an accident in a mountainous area in southern France , all 144 passengers and six crew members were killed; May 19 2016, EgyptAir flight MS804, an Airbus A320 impacted the Mediterranean Sea some 200 km north of the Egyptian coastline, killing all 66 on board; October 29 2018, A Boeing 737 MAX 8, crashed into the sea shortly after take-off from Jakarta-Soekarno-Hatta International Airport, Indonesia, killing all 189 on board; May 18 2018, The Boeing 737-200, operating on Cubana de Aviación flight 972 from Havana to Holguín, Cuba, crashed shortly after take-off. There were 107 passengers on board along with six crew members. One hundred twelve were killed, one passenger survived; March 10, 2019, Ethiopian Airlines flight ET302, a Boeing 737 MAX 8, crashed shortly after take-off from Addis Ababa-Bole Airport, Ethiopia. There were no survivors among the 157 occupants. Aviation Safety Network <<https://aviation-safety.net/database/>> accessed 16 April 2019

¹⁷ “Domestic flight stages include all flight stages flown between points within the domestic boundaries of a State by an air carrier whose principal place of business is in that State. Flight stages between a State and territories belonging to it, as well as any flight stages between two such territories, should be classified as domestic.” ICAO Official Website < https://www.icao.int/dataplus_archive/documents/glossary.docx> accessed 16 April 2019

concern. International or domestic flight, people from a variety of nationalities have lost their lives by just being in the same aircraft.¹⁸

Accordingly, the historical background of the international system of civil aviation and reasons for the international convention on civil aviation (Chicago Convention 1944) are at the start of this research.¹⁹ Then it explores the contemporary air transport market developments to indicate that civil aviation has been developing globally within the global aviation community. This community does not include only states, but also non-state actors and private organisations.

In parallel, the research reveals the global approach of the International Civil Aviation Organisation (ICAO) system of governing civil aviation has already taken place by shifting ICAO's governance system of aviation safety from international to global.

Finally, an emerging legal theory, the GAL theory, which suggests administrative law type mechanisms for global governance that enable individuals to find grounds to apply global aviation safety standards in national court systems, is applied.

2. Objectives of the research

¹⁸ For instance, in 2008 Spanair flight JK5022 was a domestic scheduled passenger flight. Among the 154 passenger who lost their lives 135 were Spanish nationals, 19 of the deceased were from other nationalities. Aviation Safety Network, <<https://aviation-safety.net/database/>> accessed 16 April 2019

An Air France Airbus A330-200 (June 1, 2009) was international scheduled passenger flight. Passengers from 32 nationalities died in the crash of the Airbus 330. Among them were 61 French people and 58 Brazilians. <<https://www.welt.de/english-news/article3954246/Air-France-to-compensate-families-of-crash-victims.html>> accessed 16 April 2019

Malaysia Airlines Flight MH370 (March 8, 2014) was an international scheduled passenger flight. The airline reported people of 14 nationalities were among the 227 passengers, including at least 152 Chinese, 38 Malaysians, seven Indonesians, six Australians, five Indians, four French and three Americans. <<https://www.reuters.com/article/us-malaysiaairlines-flight/malaysian-plane-presumed-crashed-questions-over-false-ids-idUSBREA2701720140308>> accessed 16 April 2019

An Airbus A320 operated by Germanwings (March 24, 2015) was an international scheduled passenger flight. Passengers on board were reported from at least 15 countries including 72 Germans and 35 Spaniards. <<https://www.nytimes.com/interactive/2015/03/25/world/europe/germanwings-victims.html>> accessed 16 April 2019

Ethiopian Airlines flight ET302, a Boeing 737 MAX 8 was an international scheduled passenger flight. 157 (149 passengers and 8 crew members) were killed. The victims were of 35 Nationalities. <<https://www.ethiopianairlines.com/corporate/media/media-relations/press-release/detail/1080>> accessed 16 April 2019

¹⁹ Convention on International Civil Aviation, (Chicago Convention) was opened for signature on 7 December 1944 by 52 States (the number of current signatory states is 193) and entered into force on 4 April 1947. (Doc.7300)<<https://www.icao.int/publications/pages/doc7300.aspx>> accessed 13 May 2019

In accordance with background and motivation, the research has the following interrelated research objectives. The objectives are;

- 1- To *critically investigate* the applicability of the safety standards that are set within Standards and Recommended Practices (SARPs) by the ICAO in national courts
- 2- To *determine* the current international legal system that falls short in securing state compliance with aviation safety standards and is too remote for individuals to reach.
- 3- To *identify* global developments caused by air transport liberalisation, globalisation and advanced technology demonstrate that changed the governance of international aviation since the 1944 governing treaty of International Civil Aviation–Chicago Convention entered into force.
- 4- To *explore* the global governance of aviation safety as an example of the joint administrative action of international and national public powers through multiple actors which is an executive structure outlined in the GAL theory.
- 5- To *demonstrate* the contribution of GAL principles, particularly the notion of the public character of aviation safety in establishing the legitimacy of ICAO as an external authority in domestic courts to apply global aviation safety standards.

Objective 1 and 2 explore the current international legal system regarding ensuring state compliance with Standards and Recommended Practices (SARPs) and absence of individuals within the system although state compliance with safety standards have a direct effect on individuals worldwide. The key objective is objective 3 linking objectives 4 and 5. Objective 3 attempts to indicate how the impact of air transport market developments changed the aviation safety concept from international to global. This analysis provides the base for claiming to apply principles of administrative law type of mechanism for global governance of aviation safety. Objective 4 and 5 will rely on the analysis and findings by objective 3.

3. The scope of the research

Generally, international aviation law, which has an impact on domestic aviation law, has been classified as either public or private. The scope of this research falls within the field of public international aviation law, which encompasses state-to-state coordination, dispute resolution and bilateral or multilateral treaties, such as the conditions of admissibility of foreign aircraft to state territories.²⁰ This distinction is based on the identity of the parties and the forum of rule enforcement.²¹

Also, the scope of the research is limited to civil aviation and focuses on the commercial air transport passenger market. The study covers the global regulation of civil aviation safety which includes regulatory functions, safety oversight operations, market developments, implementation and compliance with civil aviation safety regulations. However, it is beyond the scope of this research to assess private air carriers' liabilities and international air carrier liability regimes. These subjects fall within the scope of private international aviation law, which concerns relations between international airlines, their passengers and the legal conflicts applicable to the rights and liabilities of air carriers²² in case of death, personal damages and loss or damage to property on international flights.²³

This research's focus is on aviation safety, which concerns the prevention of accidental harm. Although safety and security complement each other, they are considered 'two sides of the same coin'.²⁴ However, aviation safety and security threats are different, and those differences need to be parsed. The Annexes to the Chicago Convention (1944) contain the standards and recommended practices (SARPs) regarding the safety and security of civil aviation with the aim of establishing uniformity to enhance safe and orderly international civil aviation. The concepts of aviation safety and aviation security differ based on the types of dangers that are addressed. The focus of aviation safety is on 'preventing accidental harm'.²⁵ Dempsey demonstrated aviation safety regulations on preventing accidental harm as common-law fault-based negligence.²⁶ The concept of aviation security, on the other hand, as

²⁰ Carl H. Fulda 'International Aspects of Aviation' (1967) Vol. 33 J. Air L. & Com. 63, 64.

²¹ Havel, Brian F.; Sanchez, Gabriel S. 'The Principles and Practice of International Aviation Law' (Kindle Ed. Cambridge University Press. June 2014) 13.

²² John Cobb Cooper, 'The Institute of International Air Law' (1953) Vol. 2, Issue 2. Journal of the Society of Public Teachers of Law (New Series) 122, 124.

²³ Carl H. Fulda 'International Aspects of Aviation' (1967) Vol. 33 J. Air L. & Com. 63, 64.

²⁴ Paul Stephen Dempsey, 'Compliance and Enforcement in International Law: Achieving Global Uniformity in Aviation Safety' (2004) Vol. 30, Issue 1, North Carolina Journal of International Law and Commercial Regulation 1, 4.

²⁵ *ibid* 4.

²⁶ *ibid* 4.

defined in Annex 17, refers to acts of unlawful interference.²⁷ Therefore, the security measures regulated in Annex 17 focus on ‘preventing intentional harm’²⁸ carried out by an individual or individuals.

Given the challenges of civil aviation safety developments, the safety of air transport has become a global concern. Accordingly, state compliance with aviation safety standards has become an issue that can no longer be assessed exclusively within state sovereignty. It is suggested that global developments in the air transport market are not adequately reflected in the international legal system. Traditional international norms such as *jus cogens*²⁹ or *erga omnes*³⁰ that explain why and how a state should comply with international law inadequately address issues deriving from contemporary global air transport market developments.

Moreover, the research explores the emerging legal theory Global Administrative Law (GAL) theory for the reason that the GAL theory addresses the global regulatory regimes and proposes administrative law–type mechanisms for these regimes that allow individuals and the courts of nation-states to be part of the global administrative system. Firstly, the global governance of civil aviation needs a new conceptual framework. The GAL theory provides a new conceptual framework, whereby global governance is viewed as an administration and is

²⁷ Annex 17 to the Convention on International Civil Aviation, Security, Safeguarding International Aviation Against Act of Unlawful Interference, 8th Edition April 2006. ‘Acts of unlawful interference are defined as: ‘These are acts or attempted acts such as to jeopardise the safety of civil aviation and air transport, ie: unlawful seizure of aircraft in flight, unlawful seizure of aircraft on the ground, hostage-taking on board aircraft or on aerodromes, forcible intrusion on board an aircraft, at an airport or on the premises of an aeronautical facility, introduction on board an aircraft or at an airport of a weapon or hazardous device or material intended for criminal purposes, communication of false information such as to jeopardise the safety of an aircraft in flight or on the ground, of passengers, crew, ground personnel or the general public at an airport or on the premises of a civil aviation facility’. ICAO Official Website <<http://www.icao.int/Security/SFP/Pages/Annex17.aspx>> accessed 17 April 2019

²⁸ Paul Stephen Dempsey, ‘Compliance and Enforcement in International Law: Achieving Global Uniformity in Aviation Safety’ (2004) Vol. 30, Issue 1, North Carolina Journal of International Law and Commercial Regulation 1, 4.

²⁹ A *Jus Cogens* rule is described in the Vienna Convention on the law of Treaties as follows: ‘...a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.’ Ian Brownlie, ‘*Principles of International Law*’ (5th ed. Oxford University Press. 1998) 516.

³⁰ ‘An *erga omnes* is an obligation introduced by the ICJ in the *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*; *Second Phase*, International Court of Justice (ICJ), 5 February 1970) when determining that *erga omnes* obligations are the concern of all states. In view of the importance of the obligations involved, all states can be held to have a legal interest in their protection. This concept of obligations that are directed towards the international community as a whole further finds recognition in the law of state responsibility’ Erika de Wet, ‘Jus Cogens and Obligations Erga Omnes (January 20013) in Dinah Shelton (ed) ‘*Oxford Handbook on Human Rights*’ (OUP, 2013 forthcoming)] 13 -14. Available at SSRN: <<https://ssrn.com/abstract=2279563>> accessed 13 October 2019

organised by principles of an administrative legal nature. Conceptualising global governance from an administrative legal perspective provides a proper checks-and-balances system for individuals.

Consequently, the global judicial cooperation of domestic courts in global aviation safety and transjudicial communication ³¹ could develop in the future. Enabling national courts to apply global regulations would avoid the remote influence of individual applications in international institutions to challenge state compliance with universal or international obligations.

Therefore, in this research, it is asserted that the Global Administrative Law (GAL) theory approach may help in addressing the contemporary legal issues in state compliance with global aviation safety standards that traditional international law norms do not sufficiently cover.³² In particular, the approaches and principles of the GAL theory regarding the global governance and publicness criteria of global regulations, the role of individuals and states in global governance, and the different approach to the principles of citizenship, state sovereignty and the rule of law are considered as a valuable contribution to contemporary practical global aviation safety issues.

However, since the emerging theory of GAL is open to academic discussion, criticism and scholarly contributions, the purpose of this research is to lead the reader to consider alternative structural approaches that can be applied in contemporary and future global societies when the shortcomings of the current international legal system emerge.

A delimitation of this research is the inability to analyse every aspect of current international law development and all the academic arguments concerning GAL theory. This study focuses on the shortcomings of existing international legal systems when applying international aviation safety regulations in national courts within the framework of state compliance with SARPs.

4. Research questions and hypothesis

³¹ 'communication among courts-whether national or supranational-across borders' Anne -Marie Slaughter, 'A Typology of Transjudicial Communication' (1994, December) Vol.29, Issue 1, University of Richmond Law Review 99,101.

³² Discussed in Chapter III

This research examines the ability for individuals to apply international aviation safety standards issued by International Civil Aviation Organisations (ICAO)³³ within SARPs (Standards and Recommended Practices) in national courts when the state's compliance with safety standards is in question. With this core issue in mind viewing the current public international aviation law and international legal order leads to the conclusion that current international legal system falls short in securing state compliance with aviation safety standards and is too remote for individuals to reach.

The international regulatory framework for civil aviation safety is set out in the Chicago Convention (1944). The Chicago Convention was established according to historical conditions of 1944, and the regulatory system was designed mainly to ensure and developed uniform standards for international civil aviation. The implementation of safety standards has been left to states based on the principle of complete and exclusive state sovereignty over the air space.

This research project applies a view to challenging the traditional application of legal norms by analysing the adaptations in air transport around the globe. Furthermore, the research asserts that global governance of aviation safety fits into the contemporary world. To support this claim, the research reviews and identifies the impact of contemporary air transport market developments within the framework of the ICAO regulatory system. Furthermore, the research invokes the GAL theory for addressing contemporary legal issues in state compliance with international aviation safety standards that would otherwise not be covered by traditional law. In particular, the principles of the GAL theory regarding global governance and the public character of global aviation safety regulations, the role of

³³ 'The International Civil Aviation Organization (ICAO) is a UN specialized agency, established by States in 1944 to manage the administration and governance of the Convention on International Civil Aviation (Chicago Convention). ICAO works with the Convention's 193 Member States and industry groups to reach consensus on international civil aviation Standards and Recommended Practices (SARPs) and policies in support of a safe, efficient, secure, economically sustainable and environmentally responsible civil aviation sector. These SARPs and policies are used by ICAO Member States to ensure that their local civil aviation operations and regulations conform to global norms, which in turn permits more than 100,000 daily flights in aviation's global network to operate safely and reliably in every region of the world.

In addition to its core work resolving consensus-driven international SARPs and policies among its Member States and industry, and among many other priorities and programmes, ICAO also coordinates assistance and capacity building for States in support of numerous aviation development objectives; produces global plans to coordinate multilateral strategic progress for safety and air navigation; monitors and reports on numerous air transport sector performance metrics; and audits States' civil aviation oversight capabilities in the areas of safety and security.' ICAO Official Website < <https://www.icao.int/about-icao/Pages/default.aspx> > accessed 16 April 2019

individuals and states in global governance and state sovereignty are considered a valuable contribution to contemporary practical global aviation safety issues.

ICAO, as global decision-making authority, mostly satisfies GAL's administrative law principles, which include transparency, continuity, participation and the right to review the fulfilment of the worldwide governing authority on the national level.³⁴

The ultimate purpose of this approach is to make individuals part of a global governance system and establish the proper control, monitoring and enforcement of a global aviation safety regime. In this way, state compliance with global aviation safety standards could be controlled by national courts all over the world.

The underlying motivation behind this approach is the necessity of reconceptualising the conventional ways of thinking about this topic.

The primary challenge at the outset of the study is whether answers can be found within traditional international legal norms to emerging questions regarding the relationship between institutions, their regulations and the addressees of these regulations within the global governance of specific areas.

The main research question is as follow:

- Would the administrative legal mechanisms suggested by global administrative law (GAL) theory allow national courts to apply global aviation safety standards set by ICAO in SARPs?

The objective of this study is reflected in the sub-questions, which follow:

- What are the current legal mechanisms to secure state compliance via national courts for individuals;
- What are the limits of customary international law in securing state compliance with aviation safety standards;
- What is the impact of global air transport market developments on aviation safety;

³⁴ Benedict Kingsbury, Nico Krisch & Richard B. Stewart, 'The Emergence of Global Administrative Law' (2005) Vol.68 Law and Contemporary Problems 15 Retrieved from <<https://scholarship.law.duke.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1361&context=lcp> > accessed 13 April 2019

- Is global governance of aviation safety sustainable within the current international legal system;
- Does the ICAO governance system mainly comply with a global governance structure as GAL theory suggests;
- What is the role of GAL theory in fostering the legitimacy of ICAO's regulation within states;
- What is the role of national courts in securing state compliance with aviation safety;

The central hypothesis is that administrative legal mechanisms as laid out by the GAL theory allow national courts to apply global aviation safety standards set by ICAO in SARPs.

5. Structure of the thesis

The thesis is structured in five Chapters.

The first chapter provides information on the literature review and methodology used in the research project.

The literature review is mainly conducted on relevant theories regarding the regulatory and institutional aspect of the Chicago Convention (1944), ICAO and regulatory system of civil aviation safety are reviewed. The literature review also covers the impact of liberalisation and empirical studies that indicate the operational global policy developments on the air transport market and the global governance of aviation safety.

The literature review extends to introducing the Global Administrative Theory (GAL) that suggest administrative law type mechanisms for global governance. It also covers an empirical study covering institutional and operational policy developments within the ICAO governing system of aviation safety that complies with the conceptual framework as suggested by the GAL theory.

The second part of Chapter I explains the methodology used in the research. It underlines the difference between doctrinal legal research and scientific research.

The second chapter analyses the current, international legal system for securing state compliance with aviation safety standards. This chapter discusses the problem of state compliance with aviation safety regulations and the insufficiency of traditional international

legal norms to produce a system that applies to new challenges arising from developments in the globalised civil aviation field. The chapter includes an analysis of the historical background of public international aviation law and the legal structure of the International Civil Aviation Organization (ICAO).

Accordingly, the chapter highlights the two main findings in the current system. The first finding is that the concept of sovereignty in public international law is changing. The historical background of public international aviation law demonstrates that the Convention on International Civil Aviation grants exclusive state sovereignty. The second finding is that the binding effect of standards and recommended practices (SARPs) on the contracting states of the Convention on International Civil Aviation–Chicago Convention (1944), which refers to customary international legal norms, has not been adequately implemented. The latest *ICAO Universal Safety Oversight Audit Programme*³⁵ report (2013–2016)³⁶ highlights significant state-level non-compliance and a lack of effective enforceability applicable to state legislation and regulations of safety standards. This chapter concludes that by referencing contemporary global developments in general, particularly in air transport, the underlying ineffectiveness of traditional international legal theories plays a predominant role in explaining the shortcomings of compliance with nation-states' aviation safety standards.

The third chapter presents the adaptation of public international aviation law in line with the dynamics of international relations and the impact of economic liberalisation, globalisation, commercialisation of service providers and new civil aviation technology worldwide. The chapter demonstrates that the effect of global air transport market developments is significant in two ways: first, sovereignty-based international air transport markets that embrace state protectionism have been primarily conformed to the liberalised global air transport market structure. Second, the air transport industry is demanding a liberalised market structure, which has created air transport practices such as Open Skies agreements³⁷, code-sharing and

³⁵ 'ICAO's Universal Safety Oversight Audit Programme (USOAP) was initially launched in January 1999, in response to widespread concerns about the adequacy of aviation safety oversight around the world. Initially, USOAP activities consisted in regular and mandatory audits of ICAO Member States' safety oversight systems. USOAP audits focus on a State's capability in providing safety oversight by assessing whether the State has effectively and consistently implemented the critical elements (CEs) of a safety oversight system, which enable the State to ensure the implementation of ICAO's safety-related Standards and Recommended Practices (SARPs) and associated procedures and guidance material.' ICAO Official Website <<https://www.icao.int/safety/cmaforum/Pages/default.aspx>> accessed 15 April 2019

³⁶ ICAO Official Website <https://www.icao.int/safety/CMAForum/Documents/USOAP_REPORT_2013-2016.pdf> accessed 15 April 2019

³⁷ 'Open Skies Agreement, a type of agreement which, while not uniformly defined by its various advocates, would create a regulatory regime that relies chiefly on sustained market competition for the achievement of its air services goals and is largely or entirely devoid of a priori governmental management of access rights,

worldwide alliances ³⁸to bypass sovereignty-based protectionism and the nationality restrictions that national governments had imposed. In order to support this assertion, the chapter includes an analysis of air transport market developments such as liberalisation, deregulation and privatisation as well as their effect on the growth of the global and individual state economies by exploring the databases of ICAO, International Air Transport Association (IATA)³⁹, WTO⁴⁰ and others.

On the one hand, states want to receive the economic benefit of air transport market liberalisation; on the other hand, states resist relinquishing control over their air transport activities and the bilateral agreements that they still hold in common. These cause the civil aviation industry to find ways to build freer markets by creating new operational practices in aviation systems to avoid the nationality restrictions placed on air carriers. For instance, airline alliances are called an accidental product of the nationality rule not a product of strategic planning.⁴¹

These air transportation practices employed in a liberalised air transport market – such as code-share agreements, operating with a foreign-registered aircraft⁴², operating with a foreign

capacity and pricing, while having safeguards appropriate to maintaining the minimum regulation necessary to achieve the goals of the agreement.’ ICAO Official Website
<https://www.icao.int/Meetings/a39/Documents/Provisional_Doc_9626.pdf> Chapter 2.2 accessed 18 April 2019

³⁸ “The tendency of international air carriers to seek to maximize their access to and penetration of global and regional markets by using cooperative commercial arrangements (such as pooling and interlining) with other international air carriers has always been present but is now taking new forms (joint ventures, code sharing, alliances, mergers, franchising) with several implications for the process and structure of bilateral regulation.” ICAO Official Website <https://www.icao.int/Meetings/a39/Documents/Provisional_Doc_9626.pdf> Chapter 2.3 accessed 18 April 2019

³⁹ ‘The International Air Transport Association (IATA) is the trade association for the world’s airlines, representing some 290 airlines or 82% of total air traffic. We support many areas of aviation activity and help formulate industry policy on critical aviation issues.’ IATA Official website
<<https://www.iata.org/about/pages/index.aspx>> accessed 19 April 2019

⁴⁰ ‘The World Trade Organization (WTO) is the only global international organization dealing with the rules of trade between nations.’ WTO Official Website <https://www.wto.org/english/thewto_e/thewto_e.htm> accessed 18 April 2019

⁴¹ Brian F. Havel ‘*Beyond Open Skies; A New Regime for International Aviation*’ (Kluwer Law International 2009) 164.

⁴² ‘The past two decades have seen air operators increasingly employ foreign registered aircraft for various reasons. More and more, aircraft might be leased or otherwise interchanged and operated outside the State of Registry, sometimes for long periods of time. In some cases, a foreign registered aircraft might be leased or sub-leased or chartered from one country to another.’ ICAO Secretariat Study on the Safety and Security Aspects of Economic Liberalization (Presented to the Council on 1 June 2005) 3. ICAO Official Website
<https://www.icao.int/sustainability/SafetySecurity/SafetySecurityStudy_en.pdf> accessed April 20 2019

flight crew⁴³, off-shore operations⁴⁴, mergers and acquisitions⁴⁵, outsourcing of activities⁴⁶ that affect aircraft operations and possible developments towards a ‘flags of convenience’⁴⁷ for aircraft – all indicate state regulatory involvement in single-flight operations. At this point, the chapter offers an analysis of growth in the emerging air transport markets and relevant ICAO data from sources such as the *State of Global Aviation Safety 2013*⁴⁸. One of the findings is that while emerging markets have more growth than others, their effective

⁴³ Article 32 (a) of the Convention requires that “The pilot of every aircraft and the other members of the operating crew of every aircraft engaged in international navigation shall be provided with certificates of competency and licenses issued or rendered valid by the State in which the aircraft is registered”. As a result, where an aircraft is operated by a State different than the State of Registry, such as in the case of dry leases (i.e. the lease of an aircraft without crew), the problem of validation of foreign crew licenses by the State of Registry could arise. The issue becomes complicated when the rules and requirements for crew licenses in the State of Registry are at variance with the corresponding rules in the State that initially issued the licenses. Differences between the laws and regulations of the State of Registry and those of the State of the Operator may also exist in the case of wet leases (i.e. a lease of aircraft with crew). While the lessor usually remains the official operator in such cases, the lessee may already operate aircraft of a similar type under its Air Operator Certificate (AOC). It may happen then that the wet-leased aircraft are operated under the lessee’s AOC and, consequently, the State of the lessee becomes the State of the Operator. In such circumstances, proper surveillance of the operating crew may become difficult. The situation could become more complicated if the operation involves a mixed crew (e.g. the cabin crew from the lessee carrier and the cockpit crew from a foreign lessor carrier). See *ibid* 3-4.

⁴⁴“Off-shore” operations (i.e. flight operations away from the designating State, State of Registry or State of the Operator). In a situation where the designated airlines of a bilateral agreement are granted the so-called 7th freedom rights (i.e. to carry traffic from the second State to/from third State(s) without the need for the service to connect the home State), such airlines may set up an operational base in a second country for services to/from third countries. Where cabotage or right of establishment is permitted, air carriers may operate in the territory of the granting State. Such a situation could raise the question as to how the required safety oversight should be handled between the State of the Operator and the State in which the operation is based.” See *ibid* 4.

⁴⁵ “Cross-border airline merger/acquisition. Where this is allowed, it could lead to such companies having operations or places of business in different States, or operating mainly outside the State in which their registered offices and/or owners are located. This situation could raise questions regarding the attribution of regulatory oversight responsibility amongst the States concerned (e.g. in the case of the merged airline having two principal places of business), or on the application of whose standards, where they differ between the countries concerned.” See *ibid* 4.

⁴⁶ “Examples include: airlines outsourcing their ground handling; sending their aircraft to be repaired and/maintained in foreign countries; and contracting out certain flight operations and/or crew administration to another airline or company. In each of these cases, multinational industries have emerged to provide such services. Some States also encountered such a situation where an AOC applicant had only a corporate skeleton with most of the proposed operational activities to be performed/provided by foreign companies (including the aircraft and flight crews). This situation could present challenges for the licensing and safety oversight authorities from both the State issuing the AOC and the State of the outsourced activity on how to ensure that such practice or entity properly meet the safety and security requirements.” See *ibid* 4-5.

⁴⁷ “a term derived from the maritime industry which denotes a situation in which commercial vessels owned by nationals of a State, but registered in another State, are allowed to operate freely between and among other States.” See *ibid* 3. fn.1

⁴⁸ ICAO State of Global Aviation Safety (2013 Edition) ICAO Official Website <https://www.icao.int/safety/state%20of%20global%20aviation%20safety/icao_sgasa_book_en_sept2013_final_web.pdf> accessed 20 April 2019

implementation of safety standard is lower than the global average. An analysis of the *IATA Safety Report 2016*⁴⁹ facilitates a discussion of the link between accident rates and region. The analysis leads to another finding, which is that the level of air accidents is higher in regions with developing countries and emerging markets.

Aviation safety is a shared concern not only of states but air industry, private organisations, the academic community and the travelling public around the world. Accordingly, state compliance with aviation safety standards is becoming more vital in delivering aviation safety not only to citizens of individual states but to the global community. This suggests that the structural and operational changes in the air transport market are not adequately reflected in the international legal system, which is too limited to address issues deriving from contemporary governance problems in the air transport market.

This chapter concludes that aviation safety is a global concern and should be governed with equivalent standards worldwide. In line with global air transport market developments, aviation safety governance cannot only be applied domestically and internationally but globally. That is because the involvement of multiple states is possible according to various aviation safety compliance levels for a single flight and controlling state law is essential in case of an accident because of state-level compliance with safety-related legislation. Thus, global aviation safety can be structured and governed within the administrative legal mechanisms that global administrative legal theory posits.

The fourth chapter contains an analysis of the global governance of aviation safety and the applicability of the administrative structure of global administrative law to the governance of global aviation safety. The global governance of aviation safety serves as an example of the joint administrative action of international and national public powers through multiple actors, which is an executive structure outlined in global administrative legal theory. There are a growing number of transnational regulatory regimes with rule-making powers, which affect not only states but other actors, private organisations and individuals. The question is whether traditional norms and theories of international law can respond to the legal issues arising from transnational regulatory regimes.

⁴⁹ IATA Safety Report 2016 'SKYbrary is an electronic repository of safety knowledge related to flight operations, air traffic management (ATM) and aviation safety in general. It is also a portal, a common entry point, that enables users to access the safety data made available on the websites of various aviation organisations - regulators, service providers, industry' <<https://skybrary.aero/bookshelf/books/3875.pdf>> accessed 21 April 2019

In order to address the notion that the governance of aviation safety is not international but global, the chapter includes an analysis of the increasingly complex global governance of the general international legal order. Global fields in which the domestic and international orders are blurred in civil aviation adhere to the definition of global administrative space that GAL theory suggests⁵⁰. This observation raises two critical issues: one is the legitimacy of the sources of global regulation and the other is state sovereignty. The chapter further posits that GAL theory and its responsiveness to the democracy deficit occurs through administrative legal mechanisms in global regulatory regimes. Moreover, this chapter illustrates the notion that ICAO's governance systems comply with GAL theory's definitions of global governance. ICAO has been developing global projects, which apply global collaboration to sovereign states. To support this assertion, worldwide ICAO programmes that urge states to collaborate with all stakeholders within the global civil aviation are explored.

The fourth chapter concludes that the governance of global aviation safety and the regulative and supervisory activities of the ICAO focus on the collaboration and cooperation of states rather than on traditional enforcement activities, which comply more with the global governance of GAL than with international administrative law. ICAO meets in practice with the administrative structure of the GAL theory in establishing legitimacy in national legal systems. Additionally, ICAO's safety oversight and global aviation safety programmes, which aim to establish uniformity in global aviation safety regulations, support the global governance of civil aviation safety.

The fifth chapter explores the ability of national courts to invoke global aviation safety standards by applying GAL principles on the grounds that GAL theory recognises individuals as the addressees of global regulatory regimes⁵¹. The chapter starts by analysing the role of

⁵⁰ "The blurred distinction between domestic and international law. In the global administrative space, the line that separates the domestic and the international orders is often indistinct. Regulators come together in global institutions and set standards that they then implement in their domestic capacity; and individuals or private entities are often the real addressees of such global standards and follow them even where no formal legal implementing act has been undertaken by the regulator. Individuals or private entities are in some cases directly subject to binding international decisions; and domestic courts are perhaps beginning to assert stronger powers of review over global regulatory action. Thus, the ordering functions performed by the domestic/ international dichotomy in international law may become attenuated." Nico Krisch and Benedict Kingsbury 'Introduction: Global Governance and Global Administrative Law in the International Legal Order' (2006) Vol.17 No.1 The European Journal of International Law 11. <<http://ijl.org/wp-content/uploads/2016/08/Kingsbury-Krisch-Global-Governance-and-GAL-in-the-International-Legal-Order.pdf>> accessed 20 April 2019

⁵¹ Benedict Kingsbury, Nico Krisch & Richard B. Stewart 'The Emergence of Global Administrative Law' IILJ Working Paper 2004/1, Global Administrative Law Series 10. <<https://www.ijl.org/publications/the-emergence-of-global-administrative-law-2/>> accessed 13 April 2019

national courts in the current international legal system. In particular, the chapter offers an analysis of the application of SARPs that contain global aviation standards in national courts with the aim of demonstrating that global aviation safety standards are intended to be applied globally. Limiting national courts in applying global safety standards within domestic legislation means that global standards do not serve their intended purpose. To support this claim, the chapter presents the changing role of national courts in contemporary global governance. Afterwards, the chapter explains GAL theory's approach to the relationship between the rule of law and global regulations in global governance. The chapter describes decisions of higher state courts from various jurisdictions and legal systems: common law and civil law.

To support the idea of changing role of national courts and their involvement in global values such as fundamental human rights, high courts' decisions from different jurisdictions are analysed. Furthermore, the research done by Elaine Mak which aims to indicate the judges' engagement with international law in the highest courts of the United Kingdom, Canada, the United States, France and the Netherlands is studied. One of the distinctive findings of this research revealed that 'comparative analysis of the views and experiences of the judges clarifies how the decision-making of these Western courts has developed in light of the internationalisation of law and the increased opportunities for transnational judicial communication.'⁵²

In addition, the notion of publicness that GAL theory proposes goes further than the common interest when it concerns global aviation safety. That is because establishing the legitimacy of global aviation safety standards involves allowing them to be invoked before national courts. The chapter concludes with the GAL theory that national courts, as part of global governance, can develop an increasingly common approach to global issues such as global aviation safety. Furthermore, theories and national court practices confirm some level of judicial dialogue that could establish a global judicial vision of aviation safety so that differences in the implementation of aviation safety standards could be reduced and a global approach could be established.

In this research, my purpose is to show that the current international legal system and customary international norms that govern international law do not comply with

⁵² Elaine Mak, *Judicial Decision-Making in a Globalised World: A Comparative Analysis of the Changing Practices of Western Highest Courts* (Kindle ed. Hart Publishing 2013) location 3of 8779

contemporary air transport market realities. As the air transport market develops globally, the safety of aviation should also be governed and applied globally. In this study, I depart from current international legal norms to examine the emerging legal field of global administrative law. Through that lens, I explore the possibility of reconstructing the set of legal mechanisms that govern domestic and international administrative interaction in the global field of aviation safety. The research demonstrates that a legal system is never complete but always develops in tandem with changing needs, i.e. the participation of the affected parties.

CHAPTER I -LITERATURE REVIEW AND METHODOLOGY

Introduction

Concerning the role of an existing literature review in a research project, Boote and Beile write that ‘a substantive, thorough, sophisticated literature review is a precondition for doing substantive, thorough, sophisticated research’¹. As Boote and Beile argue, understanding the literature and understanding the strengths and weaknesses of existing studies is crucial for good research.

The difference between an annotated bibliography and a literature review explained with a metaphor as ‘similar to the difference between still pictures and a movie. A movie contains still pictures, but it connects them into a meaningful storyline.’² Accordingly, the purpose of this literature review is examining existing literature in this context and explore academic reviews to provide a ‘meaningful storyline’ for the reader. The contribution is to present the current knowledge through the creative perspective that applies original ideas and academic perspectives to the topic that the thesis investigates.³

In this thesis, mainly the literature review covers the issue of state compliance on the subjects of aviation safety, the current international legal system to secure state compliance with aviation safety standards and the global governance of civil aviation safety and the administrative legal mechanisms that GAL theory suggests for the global governance of aviation safety. The existing literature demonstrates a comprehensive understanding of the relevant issues and helps to clarify similarities and differences that may exist in this research. Accordingly, an extensive and systematic consultation of published books, law journal articles, official discussion papers, annual safety reports and safety audit reports, have been viewed.

¹ David N. Boote; Penny Beile Boote ‘Scholars Before Researchers: On the Centrality of the Dissertation Literature Review in Research Preparation’ (2005, August/September) Vol.34 No.6 Educational Researchers ; ProQuest Psychology Journals 3,3. <<https://istc695sp12.files.wordpress.com/2012/01/lit-review.pdf>> accessed April 20 2019

² Rise B. Axelrod , Charles R. Cooper ‘*Axelrod & Cooper's Concise Guide to Writing*’ (6th ed. Belford/St. Martin 2012), Quoted by Sara Efrat Efron, Ruth Ravid ‘*Writing the Literature Review, A Practical Guide*’ (Kindle Edition ,Guilford Publications November 2018) 3.

³ Sara Efrat Efron; Ravid, Ruth ‘*Writing the Literature Review, A Practical Guide*’ (Kindle Edition, Guilford Publications 2018) 4.

The meaningful storyline in this literature review is structured with the main outline as below;

Historical Background

- Overviewing of the Evolution of Public International Aviation Law
- Limits of Customary International Law to Secure State Compliance
- Changing the concept of state sovereignty

The Impact of Global Developments of Air Transport on Aviation Safety

- Air transport liberalisation and impacts on global aviation safety

Innovative Approach

- Administrative law type of mechanism for global governance of aviation safety
- Global aviation safety standards in national courts

1.1 Historical Background

1.1.1 Overviewing of the evolution of public international aviation law

This research underlines the transformation of international civil aviation governance by the transnational regulatory system. The first part of the literature review presents a comprehensive picture of the history of international civil aviation, the evolution of public international civil aviation law. It also inspects shortcoming of the current international civil aviation system which is based on the Chicago Convention (1944) on International Civil Aviation.

Initially, the literature review mainly focuses on the principle of states' complete and exclusive sovereignty over the air space which has been characterised in different circumstances and in different periods that have been influenced by historical developments. In this context, besides the historical landmark events of international aviation such as the

International Air Navigation Conference Paris (1910)⁴, and International Agreements, The Convention Relating to the Regulation of Aerial Navigation (1919)⁵ and the Chicago Convention on International Civil Aviation (1944), the review goes back to the main discussions before the First World War. It starts from International Air Navigation Conference Paris 1910 which was about how to regulate the international regime of the air.

Doctrinal discussions were mainly focusing on whether the air was free ⁶ until the agreement reached on state sovereignty over the airspace in 1944 by Chicago Convention. Scholarly discussions on state sovereignty of the air revealed the perspectives and analysis under the impact of history. ⁷

In line with the development of technology in aviation, starting from 1920s, that made it possible to fly between continents, state's absolute sovereignty over its airspace became a more complicated issue. It became an international issue rather than regional. Eventually, the international community had reached an agreement on main principles by the Chicago Convention 1944 to regulate how to use airspace.

⁴ "on the invitation of France, the first important conference on an international air law code was convened in Paris in 1910. This conference was attended by 18 European States and a number of basic principles governing aviation were laid down" ICAO Official Website

<https://www.icao.int/EURNAT/Pages/HISTORY/history_1910.aspx> accessed 13 April 2019

⁵ "In seven months and using the groundwork laid at the 1910 Paris Diplomatic Conference, this Aeronautical Commission drew up a Convention Relating to the Regulation of Aerial Navigation, which was signed by 27 of the 38 States on 13 October 1919 in the Salon de l'Horloge of the Ministry of Foreign Affairs at Paris." ICAO Official Website

<https://www.icao.int/secretariat/PostalHistory/1919_the_paris_convention.htm> accessed 13 April 2019

⁶ Hugh H. L. Bellot, 'The Sovereignty of the Air' (1918, December) Vol.3 Issue 27, International Law Notes

⁷ Arthur K. Kuhn 'Aerial Navigation in its Relation to International Law' (1909) Proceedings of the American political Science; Arthur K. Kuhn, 'International Aerial Navigation and the Peace Conference' (1920) Vol. 14, Issue 2, American Journal of International Law; Hugh H. L. Bellot, 'The Sovereignty of the Air' Vol.3 Issue 27, International Law Notes, (1918, December); Roger F Williams, 'Developments in Aerial Law' (1926-1927) Vol.75 No.2 University of Pennsylvania Law Review and American Law Register 139; John A. Eubank, 'Who Owns the Airspace' (1929) Vol. 63, Issue 1, United States Law Review 1; Manley O. Hudson, 'Aviation and International Law' (1930, April) Vol. 24, Issue 2 American Journal of International Law 228; Howard S. LeRoy 'International Air Law Trends' Symposium: Aviation Law Looks at the Future (1944-1945) Vol. 31, Issue 2, Virginia Law Review 448; D. Goedhuis, 'Civil Aviation After the War' (1942, October) Vol. 36 Issue 4 American Journal of International Law 594; John A. Eubank, 'The Adjudication of Rights in Air Space by Judicial Process' Vol. 31 No.2 (1947) Marquette Law Review 113; D. Goedhuis, 'Sovereignty and Freedom in the Air Space Part II: Papers Read before the Society in the Year 1955' Vol. 41 (1955) Transactions for the Year 137; D. Goedhuis, 'The Air Sovereignty Concept and United States Influence on its Future Development' Vol.22 Issue 2 (1955) Journal of Air Law and Commerce 209 ; Albert I. Jr Moon, 'A Look at Airspace Sovereignty' (Autumn 1963) Vol. 29, Issue 4 Journal of Air Law and Commerce 328

The Chicago Convention (1944) underlines the state's absolute and complete sovereignty over the airspace above its territory but also determines principles to limit the power of absolute sovereignty principle in international air services based on the character of scheduled or non-scheduled international air services.

The regulatory institution to regulate international air transport, International Civil Aviation Organisation (ICAO) was established by signing Chicago Convention (1944) and entered into force in 1947 to provide for safe and orderly international air transport by establishing certain principles and arrangements.

The institutional structure and norm-setting capacity of ICAO are explored. Article 54 of the Convention authorises the Council of the ICAO to adopt international standards and recommended practices (SARPs) and to designate them as Annexes of the Convention for the convenience of the contracting States. A review of the literature is conducted focusing on previous writings concerning institutional aspects of civil aviation safety regulation, Chicago Convention (1944) and ICAO. The main aviation law Journals, including Air and Space Law (ASL)⁸, Annals of Air and Space Law (AASL)⁹, Journal of Air Law and Commerce (JALC)¹⁰ and ICAO Journals¹¹ are reviewed.

⁸ Air & Space Law aims to provide a forum for practitioners and scholars who are dealing with the international legal aspects of air and space law and focus on the study and practice of air and space law, aviation policy, and the civil, commercial, administrative and criminal aspects of air and space law developments. Kluwer Law Online <<http://www.kluwerlawonline.com/toc.php?pubcode=AILA>> accessed 26 April 2019

⁹The *Annals of Air and Space Law* is a journal produced and published by the Institute and Centre of Air and Space Law, Faculty of Law, McGill University, Montreal, Canada. Established in 1976, the *Annals* is devoted to fostering the free exchange of ideas and information pertaining to the law applicable to aerospace activities. The *Annals* has been publishing original articles, drafted in English or French, covering the entire spectrum of domestic and international air law and the law of space applications. The contributors are academics and leading practitioners from all parts of the world. <<https://www.mcgill.ca/iasl/annals>> accessed 26 April 2019

¹⁰ The *Journal of Air Law and Commerce*, a quarterly publication of the School of Law, was founded at Northwestern University in 1930 and moved to SMU in 1961. The oldest scholarly periodical in the English language devoted primarily to the legal and economic problems affecting aviation and space, it has a worldwide circulation with more than 2,300 subscribers in 54 countries. Articles by distinguished lawyers, economists, government officials, and scholars deal with domestic and international problems of the airline industry, private aviation, and space, as well as general legal topics that have a significant impact on the area of aviation. <<https://scholar.smu.edu/jalc/>> accessed 26 April 2019

¹¹ The objective of the Journal is to provide a concise account of the activities of the International Civil Aviation Organization and to feature additional information of interest to Contracting States and the international aeronautical world. ICAO Official Website<<https://www.icao.int/publications/Pages/ICAO-Journal.aspx?year=2019&lang=en>> accessed 26 April 2019

After an overview of the early evolution of international civil aviation, the governance capacity of the current international legal system to secure state compliance with the international aviation safety standards set by the International Civil Aviation Organization (ICAO) is demonstrated. International aviation safety obligations, which are derived from Standards and Recommended Practices (SARPs) and the system of the ICAO, with particular reference to international law and customary international legal norms are reviewed. The review of existing literature explores the regulatory function of ICAO and the development of the SARPs.

The implementation of SARPs in states starts with exploring the concept of state obligation within the framework of the Chicago Convention (1944). As part of the discussion the legal terms of the ‘state obligation’ addressed by SARPs and binding effect of SARPs are analysed in line with customary international legal norms, i.e., *jus cogens* and *erga omnes*. Furthermore, state obligations to implement aviation safety standards is explored as *erga omnes* obligation in applying the view of Dr Jiefeng Huang¹² intrinsic link to one of the fundamental human rights, right to life and aviation safety. Accordingly, preventable accidents by complying with safety standards have a direct link to fundamental human rights, right to life. Huang states that ‘to protect aviation safety is to protect the right to life’.¹³ In his analysis aviation safety is a concern of all states, universal, and non-reciprocity. And with this character, aviation safety obligations of states are ‘emerging as obligations *erga omnes*’.¹⁴

Although the global aim of the ICAO is to enhance the uniformity of compliance with SARPs, the review of the ICAO’s state oversight audit reports indicates the problem of the lack of state compliance. ICAO’s Universal Safety Oversight Audit Programme (USOAP) and other related ICAO documentations regarding safety and safety oversight are used and analysed to support the thesis with up to date and reliable aviation safety data and statistics.¹⁵

¹² Jiefang Huang ‘*Aviation Safety Through the Rule of Law: ICAO’s Mechanisms and Practices*’ Kluwer Law International BV, The Netherlands (2009)

¹³ Jiefang Huang ‘Aviation Safety and ICAO’ (2009, March 18) 241.
<<https://openaccess.leidenuniv.nl/bitstream/handle/1887/13688/000-huang-diss-28-01-09.pdf?sequence=1> >
accessed 10 May 2019

¹⁴ *ibid*

¹⁵ Some of these documents are, Doc. 9750 Global Air Navigation Plan 2013-2018. (2013); Doc.10022. Assembly Resolutions in force (as of 4 October 2013); Doc.9436 Administrative Package for Ratification for of the Protocol on Article 3bis (1984, May 10); Doc.9600, 29th Session of the Assembly Montreal, 22 September – 8 October 1992 A9-RES. (1992); Doc.9734 AN/959 ICAO Safety Oversight Manual. (2006); Doc.9848. Assembly Resolutions in force (as of 4 October 2004); ICAO Council Working Paper A38-WP712 Ex/7, 2275/2013; ICAO Safety Management Manual (SMM), Doc.9859 AN/474, 3rd Edition. (2013); ICAO Manual on the Regulation of International Air Transport.Doc.9626 (2004); Resolution A29-13 (Improvement of Safety

The latest *ICAO Universal Safety Oversight Audit Programme* report (2013–2016) highlights significant state-level non-compliance and a lack of effective enforceability applicable to state legislation and regulations of safety standards.

Furthermore, books and law journal articles of leading scholars from international civil aviation that underlining state compliance problem linking to aviation safety are reviewed.¹⁶

The level of state compliance with SARPs revealed by the USOAP reports supports the argument that customary international norm such as *jus cogens* has a limited impact on the practice of compliance with SARPs.

One of the eminent scholars from aviation law Abeyratne emphasises inefficiency of the current system which is based on encouraging states to comply with SARPs.¹⁷ Dempsey also argues that years of experience have indicated that this system is not working as planned.¹⁸ There have been many different factors identified as the causes of non-compliance with SARPs by the contracting States, including differences in economic and technical standards, lack of expert personnel,¹⁹ and the abilities of the states.²⁰ The problem of compliance with

Oversight); Resolutions Adopted 37th Session; Resolutions Adopted 38th Session. (2013, October); Resolutions Adopted by ICAO General Assembly. (2007, September). *ICAO Universal Safety Oversight Audit Programme report (2013–2016)*

¹⁶ Among them Ruwantissa Abeyratne, 'The Role of the International Civil Aviation Organization (ICAO) in the Twenty First Century' Vol.34 (2009) *Annals of Air and Space Law* 529; Brian Havel, '*Beyond Open Skies; A New Regime for International Aviation*' (Kluwer Law International 2009); Paul Stephen Dempsey, 'Compliance and Enforcement in International Law: Achieving Global Uniformity in Aviation Safety' (2004) Vol. 30, Issue 1, *North Carolina Journal of International Law and Commercial Regulation* 1; Oliver Onidi, 'A Critical Perspective on ICAO' (2008, February) Vol. 33, Issue 1. *Air & Space Law*, 38

¹⁷ Ruwantissa Abeyratne 'ICAO's Strategic Action Plan: A Legal Analysis / Der Strategische Handlungsplan der ICAO: Eine Juristische Analyse / Le Plan d'Action Strategique d'OACI: Une Analyse Juridique [article] *Zeitschrift für Luft- und Weltraumrecht*' (1996) Vol. 45, Issue 3 *German Journal of Air and Space Law* 231, 237.

¹⁸ Paul S. Dempsey 'Compliance and Enforcement in International Law: Achieving Global Uniformity in Aviation Safety' (2004) Vol. 30, Issue 1, *North Carolina Journal of International Law and Commercial Regulation*, 1-74

¹⁹ Jiefeng Huang 'Aviation Safety and ICAO' (2009, March 18) <<https://openaccess.leidenuniv.nl/bitstream/handle/1887/13688/000-huang-diss-28-01-09.pdf?sequence=1%20>> 'In some cases, certain developing countries did not have an adequate expertise fully to appreciate the contents of Annexes, let alone the capability to determine whether there were differences to be fulfilled with ICAO' p 70

²⁰ Paul S. Dempsey 'Compliance and Enforcement in International Law: Achieving Global Uniformity in Aviation Safety' (2004) Vol. 30, Issue 1, *North Carolina Journal of International Law and Commercial Regulation* 1,38.

SARPs was summarised by Milde, the former Director of ICAO: “while everybody was praising the clothes, the Emperor was actually naked.”²¹

1.1.2 Limits of Customary International Law to Secure State Compliance

Scholarly discussions that challenge the effectiveness of legal norms of customary international law to secure state compliance in the contemporary world are addressing the changing concepts of international law. For instance, Estreicher emphasised the difference of customary international law in a Westphalian world and in an increasingly interdependent contemporary world where states agree in advance to delegate some part of their sovereign authority to the institutions established by these agreements.²² Petsche challenges ‘workability’ of the *jus cogens* rule in international law by asserting *jus cogens* has a limited impact on the actual practice of international law.²³

Discussions support the view that mainly international regimes that govern international fields are no longer functioning based on state-to-state agreements. The actors in the international sphere are no longer limited to states. In addition to states, international organisations, private international organisations and citizens have started to play an active role by organising and cooperating in the international field such as the environment, health, finance, human rights among others, in order to regulate and resolve issues that are the concern of all the parties.

²⁴Global aviation safety is of the international fields that are difficult to sustain state compliance with aviation safety standards based on legal norms of customary international law.

²¹ Michael Milde ‘Enforcement of Aviation Safety Standards: Problems of Safety Oversight / Die Durchsetzung von Sicherheitsstandards in der Luftfahrt - Die Probleme von Sicherheitsversaumnissen / Execution des Standards de Securite Aeriens - Problemes de Defaults de Securite [article] Zeitschrift fur Luft- und Weltraumrecht’ (1996) - Vol. 45 German Journal of Air and Space Law 3,9.

²² Samuel Estreicher ‘Rethinking the Binding Effect of Customary International Law’(Fall 2003) Vol. 44 Issue 1, Virginia Journal of International Law 5,12-13.

²³ Markus Petsche ‘Jus Cogens as a Vision of the International Legal Order’ (2010) Vol. 29 Issue 2, Penn State International Law Review, 233, 236.

²⁴ Rosalyn Higgins ‘International Law in a Changing International System’(March 1999), Vol. 58 Issue 1 Cambridge Law Journal 78,85.

1.1.3 The changing concept of state sovereignty

Changing concepts in international law by the impact of economic globalisation, liberalisation and advanced technology is covered by an extensive range of scholarly works. However, the criterion used to include or exclude from the review is to select materials that cover the relevant topic. One of the related topics to the subject of the thesis is the changing concept of state sovereignty.

Mainly, the changing concept of sovereignty has been the subject of many different approaches by scholars of law, political, social scientists and jurists. The concept of sovereignty has been characterised in different circumstances and in different periods which have been influenced by historical developments. Many scholars address the need for amendment in defining state sovereignty by taking globalisation and international cooperation into consideration.²⁵ Alvarez challenges the traditional international law norms asserting that such norms no longer respond to the needs of the contemporary world. The review also explores the constructing legal theory developed by Chayes and Chayes Handler, *The New Sovereignty*.²⁶

By the impact of air transport liberalisation and privatisation, the sovereignty concept of Chicago Convention (1944) addressing the exclusive and complete authority of the state has changed. In practice, developments in the air transport market led states to give away some part of their sovereignty and lift the restrictions and trade barriers in order to have their share of market capital. However, as Havel and Sanchez stated, the changing concept of state sovereignty has gone “unnoticed” in the governance of international civil aviation.²⁷

²⁵ Danielle S. Petit ‘Sovereignty and Globalization: Fallacies, Truth, and Perception’ (Summer 2001) Vol. 17 Issue 3, *New York Law School Journal of Human Rights* 1139,1142. “Globalization.... represents the perception of the world as an interconnected whole and the consciousness that a number of issues can no longer be addressed purely at a local level.”

²⁶ Chayes, A., & Chayes Handler, A. *The New Sovereignty, Compliance with International Regulatory Agreements* (Harvard University Press 1995)

²⁷ Brian F. Havel & Gabriel S. Sanchez, ‘Restoring Global Aviation’s “Cosmopolitan Mentalit’e’ (2011) Vol.11, Issue 1 *Boston University International Law Journal* 1 29.

1.2 The Impact of Global Developments on Air Transport

The 2018 edition of ICAO Safety report revealed that 4.1 billion passengers were travelling by air worldwide in 2017²⁸. Although the safety report shows that with the global fatality rate of 12.2 fatalities, 2017 is the safest year on the record, the safety level across the world cannot be considered being uniform.²⁹ Civil aviation is a global industry, and the safety of civil aviation is a global concern.

After underlining the shortcomings of the current international legal system to secure state compliance with global aviation safety standards the literature review aims to explore global air transport market developments such as liberalisation and deregulation and its consequences for global aviation safety. This part of the literature review seeks to establish a direct link between the global development of the air transport market and safety of civil aviation.

The analyses of the impact of air transport market developments on aviation safety include;

- the position of the leading international organisations, ICAO as a regulatory organisation and IATA as an International airline association, towards liberalisation
- air transport practices such as Open Skies agreements, code sharing, and alliances that created to remove trade barriers and bypass sovereignty base Chicago bilateral system.
- and the impact of air transport market developments on aviation safety.

Generally, liberalisation of the air industry has had an impact on airlines, leading them to seek opportunities to expand their operations internationally and to access foreign capital.³⁰

²⁸ ICAO Safety Report (2018)

<https://www.icao.int/safety/Documents/ICAO_SR_2018_30082018.pdf>accessed 04/03/2019

²⁹ ibid 15

³⁰ ICAO Secretariat 'Overview of Regulatory and Industry Developments in International Air Transport'

(2016)<https://www.icao.int/Meetings/a39/Documents/Overview_of_Regulatory_and_Industry_Developments_in_International_Air_Transport.pdf> accessed 2 May 2019

ICAO Council, Working Paper (A37-WP/5 EC/1-Developments in International Air Transport Regulation and Liberalisation, (2010)

<https://www.icao.int/Meetings/AMC/Assembly37/Working%20Papers%20by%20Number/wp005_en.pdf> accessed 2 May 2019

Air Transport Research Society, Working Paper, (A39-WP/189 EC/20 -Air Transport Liberalisation and the Economic Development of the Countries (2016)

<https://www.icao.int/Meetings/a39/Documents/WP/wp_189_en.pdf>

Roberta Piermartini & Linda Rousova, (2008, December) Staff Working Paper ERSD-2008-06-Liberalisation of Air Transport Services and Passenger Traffic, World Trade Organisation, Economic Research and Statistic Division.<https://www.wto.org/english/res_e/reser_e/ersd200806_e.pdf> accessed 2 may 2019

As a result, competition in international air transport markets has been increasing.³¹ 5th and 6th ICAO Worldwide Air Transport Conferences are significant to assess the air transport market developments and approach from the international regulatory authority, ICAO.

5th Worldwide Air Transport Conference; Challenges and Opportunities of Liberalisation (ATConf/5) was held in 2003. The 5th Conference was focusing on liberalisation, impact on the air transport market and changes that have taken place in the market.³² 6th Worldwide Air Transport Conference; Sustainability of Air Transport was held in 2013 with the objective to develop a global regulatory framework.³³ ICAO documentations such as working papers presented during conferences and outcome reports are reviewed.

One of the significant impacts of liberalisation on air transport is to introduce new air transport practices. Consequently, uniformity in safety regulations and state compliance with global aviation safety standards became more crucial. While air transport market domains demand more freedom for business, passengers in global air transport are still limited within domestic legislation to apply global standards.

ICAO documents indicate major market developments and responses of all stakeholders to challenges and opportunities of the liberalised air transport market. Mainly, aviation safety concerns derive from liberal air transport practices. Some of these documents are; ICAO Report of the Worldwide Air Transport Opportunities of Liberalisation (Doc.9819 AtConf/5 2003). (2003, March 24-28) The report strongly addresses the responsibilities of the contracting states, which are derived from the Chicago Convention (1944), in respect of compliance with standards and practices related to safety and security and emphasises that “states should ensure that commercial considerations do not compromise safety and security. Working Papers presented by International Transport Workers’ Federation (ITF) under the topic of Aircraft Leasing in International Air Transport and Jurisdictional Issues Associated with the Nationality of Aircraft Registration (ATConf/5-WP/73). (2003, February 28) and Liberalizing Air Carrier Ownership and Control (ATConf/5-WP/75). (2003, February 26). The papers strongly underline the safety (and security) concerns in relation to international

³¹ Pat Hanlon ‘*Global Airlines*’, (3rd ed. Routledge 2007) 8.

³² ICAO Secretariat ‘Worldwide Air Transport Conference: Challenges and Opportunities of Liberalisation’ (2003)
<https://www.icao.int/Meetings/ATConf5/Documents/ATConf5_wp004_en.pdf> accessed 14 March 2019

³³ ICAO Sixth Worldwide Air Transport Conference <
<https://www.icao.int/meetings/atconf6/Pages/default.aspx>> accessed March 14, 2019

aircraft leasing arise from the need to define the respective safety responsibilities of the state of registration (the lessee's state) and the state of operation (the lessor's state).

Ten years later, at the 6th Worldwide 2013 Conference, International Transport Workers' Federation (ITF) repeatedly emphasised pieces of evidence for the safety risks created by the growing practice of offshore registries for civil aviation aircraft by the Working Paper presented.³⁴

Doc 9819 ATConf/5 2003- ICAO Report of the Worldwide Air Transport Conference, Challenges and opportunities of Liberalization. (2003, March 24-28) underlines the safety concerns in cases when foreign-registered aircraft choose to operate under a flag of convenience. In response, ICAO proposed a new optional criterion, based on the principal place of business and effective regulatory control by the designating state.³⁵

On the other hand, in line with global market developments, ICAO's approach to governing aviation safety has been shifted from international to global. To support this argument, global projects of ICAO that address aviation safety are analysed. Especially the worldwide projects that stress global collaboration and cooperation to promote worldwide aviation safety are also met with administrative structures that GAL theory suggest.

The Official ICAO Documents and the global programs of ICAO are explored.³⁶The review supports the development of a conceptual framework to address, collaborative approach of

³⁴ International Transport Workers Federation Working Paper 'ATConf/6-WP/99-The Need for a Strategy to Address the Negative Consequences of Continued Liberalization: Would Maritime Style "Flags of Convenience" Contribute to sustainable Aviation?' (2013, March)

<<https://www.icao.int/Meetings/atconf6/Documents/WorkingPapers/ATConf.6.WP.099.2.en.pdf> >

³⁵ Doc 9819 ATConf/5 2003- ICAO Report of the Worldwide Air Transport Conference, Challenges and opportunities of Liberalization. (2003, March 24-28). Retrieved from ICAO:

<https://www.icao.int/Meetings/atconf6/Documents/Doc9819_en.pdf > accessed 2 May 2019

³⁶ Among them, Doc 10004 2017-2019 Global Aviation Safety Plan Second Edition. (2016); Doc 7300. (n.d.). International Civil Aviation Organisation; Doc 7600/8th Edition. (2014). ICAO Doc 7600/ 8th Edition; Doc 9750-AN/963, 2.-2. G. (2013). Global Air Navigation Plan 2013-2018; Doc 9848 Assembly Resolutions in Force (as of 8 October 2004); Doc 9958 Assembly Resolutions in Force (as of 8 October 2010); Doc. 9814 Annual Report of the ICAO Council. (2002); Doc.9600, A29-13 RES. (1992); Doc.9734/AN/959 Safety Oversight Manual. (2006); Doc.9819 At Conf/5 2003. (2003, March 24-28). ICAO Report of the Worldwide Air Transport Opportunities of Liberalisation; Doc.9859 AN/474 Safety Management Manual; Global Aviation Safety Plan 2014-2016. (2013); ICAO Global Aviation Safety Roadmap; Global Aviation Training (GAT) Overview. (2017); ICAO Assembly 37th Session. (2010, 28 September - 8 October); ICAO Assembly Resolution A32-11. (1994); ICAO Civil Aviation Training Policy; Implementing the Global Aviation Safety Roadmap. (2005). Flight Safety; Leaving No Country Left Behind through the Effective Implementation of ICAO's Standards, Policies and Global Plans. (2017); Safety Audit Results: USOAP interactive viewer. (2017); Safety Audit Strategies. (2010). ICAO Journal Issues 5; Safety Compliance and Verification. (2017); Safety Fund (SAFE). (2017); Safety Management: Global Approach Unlocks Potential of SMS. (2006). ICAO Journal,

ICAO adopted a for all states and other actors. Global administrative law requires collaboration and cooperation in drafting and implementation stages of the global regulations. ICAO has initiated and managed worldwide projects addressing a wide range of safety issues. Some of the global projects of the ICAO are analysed illustrate this global cooperative approach to which the GAL theory refers.

Also, ICAO General Assembly Resolutions and annual Global Aviation Safety Plans and Reports are reviewed to get a clear view of ICAO's position as a regulatory body in liberalised air transport market developments.

1.2.1 Air transport liberalisation and impacts on global aviation safety

ICAO's Universal Safety Oversight Programme and Universal Safety Oversight Audit (USOAP) results which reveals the level of state compliance with SARPs are reviewed. ICAO's official documents³⁷ which contain statistical information regarding air transport developments, accident rates and state compliance levels provide support the importance of uniformity in compliance with aviation safety regulations. USOAP results present and identifies deficiencies and supports that the uniformity in compliance with global aviation safety standards is an issue and needs to be improved.

Moreover, many official documents of regional air transport organisations which reveal specific issues in different regions are reviewed such as Arab Air Carriers Organization (AACO); Airports Council International (ACI); Civil Air Navigation Services Organisation (CANSO); Decision, Declarations and Resolution of the Assembly of the African Union 24th Ordinary Session. (2015, January 30-31); Economic Commission for Africa; Latin American Civil Aviation Commission; Multilateral Agreement on the Liberalisation of International Air transport (MALIAT); the United Arab Emirates, Delegation to the International Civil Aviation Organisation.

61(6); The Future of Safety. (2012). ICAO Journal Vol.67 N.1; Transparency and Sharing of Safety Information DGCA/06-WP/5, p. b. (2006). Directors General of Civil Aviation Conference on a Global Strategy for Aviation Safety.

³⁷ ICAO State of Global Aviation Safety (2011 Edition); ICAO State of Global Aviation Safety (2013 Edition); ICAO Safety Report (2018 Edition)

On the other hand, documents from The International Air Transport Association (IATA) that represents 290 airlines (82% of total air traffic), one of the market domains in formulating air transport industry policies are reviewed. IATA's Annual Air Transport Market Review³⁸, Operational Safety Audit Results (IOSA) ³⁹, Air Passenger Market Analysis⁴⁰ and IATA Annual Safety Reports⁴¹ were applied to indicate regional air transport market developments. Especially, increasing air transport market share in emerging markets where aviation safety is more likely under the risk.⁴² To support this assertion safety risks in emerging markets is analysed. Together with the aircraft accident analysis by region, the review concludes that interaction between domestic and international air transport is increasing and aviation safety is a global concern.

These analyses are instrumental in supporting the changing concept of aviation safety from international to global in the thesis's context. By referring to contemporary global developments in general, particularly in air transport, the underlying lack of effectiveness of traditional international legal theories plays a predominant role in explaining the shortcomings in compliance with the aviation safety standards by nation states. The necessity for a reform of the Chicago Convention (1944) System already started the subject of discussion amongst aviation scholars. ⁴³

Air Transport Liberation and global air transport market developments have been a subject of many scholarly journal articles. Among them, Abeyratne draws attention to the consequences of considering air transport services as a typical economic activity and disregarding the negative impacts outsourcing critical services on maintaining a certain level of flight safety.⁴⁴

³⁸ "IATA's annual review is a complete report on the successes, issues and state of commercial air transport. It is released each year for IATA's Annual General Meeting taking place early June."

<<https://www.iata.org/publications/Pages/annual-review.aspx>> 25 April 2019

³⁹ "The IATA Operational Safety Audit (IOSA) Program is an internationally recognized and accepted evaluation system designed to assess the operational management and control systems of an airline. The IOSA audit creates a standard that is comparable on a world-wide basis, enabling and maximizing the joint use of audit reports." <<https://www.iata.org/whatwedo/safety/audit/iosa/Pages/index.aspx>

⁴⁰IATA Economics

<<https://www.iata.org/publications/economics/Pages/index.aspx?menu=Market%20Developments&cat=Air%20Passenger%20Monthly%20Analysis>> accessed 25 April 1029

⁴¹ IATA Official Website <<https://www.iata.org/publications/Pages/safety-report.aspx>> accessed 25 April 2019

⁴² IATA Annual Review, (2013) <<https://www.iata.org/about/documents/iata-annual-review-2013-en.pdf>> p 8

⁴³ Brian F. Havel 'Beyond Open Skies; A New Regime for International Aviation' (Kluwer Law International 2009) 5. , Olivier Onidi, 'A Critical Perspective on ICAO' (2008) Vol.33 Issue 1. Air and Space Law 38,38.

⁴⁴ Ruwantissa Abeyratne 'Competition in Air Transport- The Need for a Shift in Focus' (2005-2007) Vol.33 Issues1-2 Transportation Law Journal 29,32. see also Pat Hanlon 'Global Airlines' (3rd ed. Routledge 2007) 8.

Saba underlines each state's responsibility of ensuring compliance with safety standards constitutes the global system and should be out of political dynamics of national interest.⁴⁵

However, while air transport market has been developing globally, the governing system of civil aviation remains international. Critical views regarding current international governing system are viewed, such as Abeyratne, R. (2014) called ICAO a 'powerless organisation'⁴⁶. Havel, B. F. (2009) points out, developments in the air transport market are driven by restrictive or unrestrictive state policies towards the market and are the industry's way of responding to those policies. "an accidental product of the nationality rule, not of optimal strategic planning".⁴⁷ Scholarly views are supporting the need for developing a global system to govern global civil aviation to answer rising challenges.⁴⁸

1.3 Innovative Approach

The literature review covers the governance of global fields and challenging issues to address a gap in traditional international legal norms in these fields. Rather than simply critiquing the current international legal system, the review contains an analysis of alternative theories that address contemporary issues that would apply to govern global civil aviation safety.

Therefore, the review explores and presents the administrative law type structure that the GAL theory recommends.

1.3.1 Administrative law type mechanisms for global governance of civil aviation safety

An innovative approach of this research to the global governance of aviation safety is suggesting administrative law type mechanisms for global governance of aviation safety as the GAL theory proposes. Therefore, as part of the administrative structure, national courts may apply global aviation safety standards.

⁴⁵ John Saba 'Aviation Safety in Crisis: The Option of the International Financial Facility for Aviation Safety (IFFAS)' (2002) Vol.30 Issue 1. Transportation Law Journal 1, 52.

⁴⁶ Ruwantissa Abeyratne '*Regulation of Air Transport : The Slumbering Sentinels*' (Springer International Publishing 2014) 2.

⁴⁷ See Brian F. Havel '*Beyond Open Skies; A New Regime for International Aviation*' (Kluwer Law International 2009) 164.

⁴⁸ See Steven Truxal '*Economic and Environmental Regulation of International Aviation: From Inter-national to Global Governance*' (Kindle ed. Routledge 2017), Brian F. Havel '*Beyond Open Skies; A New Regime for International Aviation*' (Kluwer Law International 2009)

The major issue is addressed as the global governance of aviation safety and the applicability of the administrative structure of global administrative law in the governance of global aviation safety. It is asserted that the global governance of aviation safety is an example of the joint administrative action of international and national public powers through multiple actors, which is an executive structure that the global administrative law theory offers. ICAO is acting as a global regulatory body and its development through cooperation with national administrations and other actors in the international civil aviation field, as well as how this applies to the Global Administrative Law (GAL) theory's definition of a 'global administrative space'.

In order to address the global governance of aviation safety and the applicability of the administrative structure of global administrative law in the governance of global aviation safety, literature review first aimed to cover the complexity of increasing global governance in international legal order and changing role of states in global governance in general.

The existing literature on theories reconceptualising the role of states and increasing global governance help to emphasise growing interconnected global governance.⁴⁹ The claim is the concept of state sovereignty is being transformed, not demolished.⁵⁰

One analysis that applies to the global governance of aviation safety is that globalised social and economic life makes states willing to share their previously sovereign rights within global governance and, rather than invoke sovereignty⁵¹ to resist cooperation.

The emerging legal theories regarding states' role and sovereignty in the contemporary world are reviewed. Although states remain as the main actors, global rulemaking regimes in global institutions are increasing in many sectoral fields such as intellectual property rights, forest preservation, food safety, financial institutions, environmental protection, labour standards, and antitrust policies taking place in global institutions.⁵² The aim of a state is to participate in global matters, which involves tolerating and accepting the regulations of global

⁴⁹ See Steven Truxal '*Economic and Environmental Regulation of International Aviation: From Inter-national to Global Governance*' (Kindle ed. Routledge 2017)134.

⁵⁰ See David Held and Anthony McGrew (ed) '*The Global Transformations Reader; An Introduction to the Globalization Debate*' (Polity Press 2000)

⁵¹ See Chayes, A., & Chayes Handler, A. '*The New Sovereignty, Compliance with International Regulatory Agreements*' (Harvard University Press 1995)

⁵² Joshua Cohen and Charles F. Sabel 'Global Democracy?' (2004-2005) Vol.37 Issue 4 New York University Journal of International Law and Politics 763

institutions.⁵³ Such collaborations among states have resulted in the decreased use of the traditional consent-based system and the increased adoption of the global common system.⁵⁴

Empirical evidence and academic reviews are given in the subject of increasing global regulatory regimes in general such as ISA (International Seabed Authority)⁵⁵, World Bank Inspection Panel⁵⁶, Codex Alimentarius Codex.⁵⁷

Accordingly, it is asserted that global regimes can impose legal rules upon individuals and national administrations as their members without requiring advance state authorisation. As Macchia asserts, 'States and individuals, therefore, are the subjects of the same legal system.'⁵⁸ This observation raises the critical issues to justify: the legitimacy of the sources of global regulations to apply in nation states. The legitimacy of the global safety standards is reviewed through the application of global administrative law principles in global governance of aviation safety. Therefore, transparency, consultation, participation, review mechanisms, and reasoned decision making of ICAO standard setting system are reviewed with the aim to establish the legitimacy and accountability of the aviation safety regulations within the domestic order.

⁵³ Karsten Nowrot 'Global Governance and International law'(November 2004) Heft 33 <<http://telc.jura.uni-halle.de/sites/default/files/altbestand/Heft33.pdf> > accessed 28 March 2019

⁵⁴ See Karsten Nowrot 'Global Governance and International law'(November 2004) Heft 33 <<http://telc.jura.uni-halle.de/sites/default/files/altbestand/Heft33.pdf> > accessed 28 March 2019; also see James N. Rosenau 'Governance in the Twenty-first Century' (Winter 1995) Vol. 1, No. 1, 13-43 ,Global Governance <<http://www.jstor.org/stable/27800099>> 39.

⁵⁵ Aline Jaeckel, 'Developments at the International Seabed Authority' (2016) Vol. 31, Issue 4. International Journal of Marine and Coastal Law,706; Caitlyn Antrim, 'The International Seabed Authority Turns Twenty' (2015) Vol. 16 Geo. J. OF Int'l. Aff. 188

⁵⁶ Enrique R. Carrasco & Alison K. Guernsey, 'World Bank's Inspection Panel: Promoting True Accountability through Arbitration' (2008) Vol. 41, Cornell International Law Journal, 577 <<https://scholarship.law.cornell.edu/cilj/vol41/iss3/1> > accessed 30 August 2019; Peter L. Lallas, 'Citizen driven Accountability: The Inspection Panel and other Independent Accountability Mechanisms' (2013) Vol. 107, American Society of International Law,308, 308. <<https://www.cambridge.org/core/journals/proceedings-of-the-asil-annual-meeting/article/div-classtitlecitizen-driven-accountability-the-inspection-panel-and-other-independent-accountability-mechanismsdiv/4CADE152ECCCC453FF73A6C36DCBD43F> > accessed 6 September 2019

⁵⁷ Michael A Livermore, 'Authority and Legitimacy in Global Governance: Deliberation, Institutional Differentiation, and the Codex Alimentarius' (2006) Vol.81 NYU Law Review 766; Joost Pauwelyn, Ramses A. Wessel, Jan Wouters, 'When Structures Become Shackles: Stagnation and Dynamics in International Law Making' (2014) Vol.25 No. 3 European Journal of International Law 733

⁵⁸ Marco Macchia 'The Rule of Law and Transparency in the Global Space' in Sabino Cassese (Ed.) '*Research Handbook on Global Administrative Law*' Edward Elgar Publishing (2017) 261.

Literature review in the field of GAL theory includes scholars' law journal articles, and books are reviewed to address how to establish the legitimacy of global regulations of global regulatory organisations in nation states.

The review further explores the 'publicness' criterion proposed by the GAL theory, which goes beyond the common interest definition for aviation safety. Generally, global regulatory developments as multi-level international governance in different sectors are controversial.

Aviation safety can be considered as a common interest. But the argument is whether or not being a common interest of the international community provides access for individuals, in the case of state non-compliance with aviation safety standards. GAL theory offers a new approach at this point by asking 'how a community interest of all individuals can be articulated through, and against, a structure of international law designed to accommodate the interest of states.'⁵⁹

The scholarly articles that have a critical view regarding the notion of publicness are addressed. Although the definition of publicness is a controversial subject, the researcher applies Huang's perspective of aviation safety as fundamental human rights - the rights to life. Aviation safety as fundamental human right complies with the perspective of publicness as suggested by Kingsbury 'the claim made for law that it has been wrought by the whole society, the public, and the connected claim that law addresses matters of concern to the society'.⁶⁰

1.3.2 Global aviation safety standards in national courts

This thesis explores the possibility of using national courts to invoke global aviation safety standards by applying Global Administrative Law (GAL) principles on the grounds that GAL theory recognises individuals as the real addressees of global regulatory regimes.⁶¹

Firstly, the literature review aims to define critical reviews of international law in domestic courts in general in the current system. It is underlined that people are too remote to have

⁵⁹ Benedict Kingsbury, Megan Donaldson 'From Bilateralism to Publicness in International Law' (January 2011) New York University School of Law, Public Law & Legal Theory Research Paper Series, Working Paper No.11-07 < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1753063 > accessed April 25 2019

⁶⁰ Benedict Kingsbury 'The Concept of 'Law' in Global Administrative Law' (2009) Vol.20 No.2 The European Journal of International Law 31. < <http://www.ejil.org/pdfs/20/1/1784.pdf> > accessed April 25 2019

⁶¹ Benedict Kingsbury, Nico Krisch & Richard B. Stewart, 'The Emergence of Global Administrative Law' (2005) Vol.68 Law and Contemporary Problems 15,23-24.

effective role in processing global regulations that have an impact on the daily life of people in the contemporary world. Traditional methods in which treaty obligations translated into domestic law based on the dualist and monist methods are reviewed critically. The review indicates that there are not specific different approaches in practice in different legal systems are commonly used.⁶² Then the analysis explores the changing role of national courts in global governance.

The review starts with the UNDP Human Development Report (1997) which underlined strongly global integration by calling ‘Shrinking World’. The view covers books and law journal articles that emphasise the changing role of national courts in global governance.

The case study also includes sources supporting the claim of the changing position of national courts is changing. One of the landmark cases is *Baker v. Canada (Minister of Citizenship and Immigration)* [1999] 2 S.C.R 817⁶³ which illustrates how national courts’ interpretations of international law can extend beyond a strictly dualist approach. The case also shows how a domestic court recognised the fundamental human rights values in its interpretation of international law rather than focusing on whether the international treaty was binding.

Furthermore, the Glenister Case⁶⁴ is analysed to set up an excellent example of national courts invoking international law directly, although it had not been incorporated directly. In the Glenister case, the individual applied to national court and requested state to comply with internationally agreed standard. The Constitutional Court of South Africa found that corruption is a threat to the society and undermines the democratic ethos, institutions of democracy and the rule of law⁶⁵. The Court determined that the independence of the anti-corruption entity was a standard with which international treaties obliged the state to comply. The Supreme Court decision in Glenister Case also illustrates the applicability of publicness principle suggested by the GAL theory.

⁶² See also Ruwantissa Abeyratne ‘The Law and Practice Relating to Aeronautical Treaties and Agreements’ (2012) XXXVII *Annals of Air and Space Law* 169, 178-179.

⁶³ *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, Judgments of the Supreme Court of Canada < <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1717/index.do>> accessed 10 May 2019

⁶⁴ (*Glenister v President of the Republic of South Africa and Others* CCT 41/08) [2008] ZACC 19; 2009 (1) SA 287 (CC); 2009 (2) BCLR 136 (CC) (22 October 2008) and *Glenister v. President of the Republic of South Africa and Others (CCT 48/10)* [2011] ZACC 6; 2011 (3) SA 347 (CC); 2011 (7) BCLR 651(CC) (17 March 2011))

⁶⁵ *Glenister v. President of the Republic of South Africa and Others (CCT 48/10)* [2011] ZACC 6; 2011 (3) SA 347 (CC); 2011 (7) BCLR 651(CC) (17 March 2011) prg.166

The literature review is extended to illustrate the impact of globalisation and human rights as a universal value on the application of international law by national courts. Furthermore, literature regarding judicial dialogue between national courts and theories on judicial globalisation are explored.⁶⁶

The general view of changing approach of national courts to universal values illustrated by different national courts decisions in different regions of the world such as; *State v. Makwanyane*, 1995; *Lawrence v. Texas*, 539 U.S 558 (2003); *Dudgeon v. the United Kingdom*, Appl. No. 7525/76, Council of Europe: European Court of Human Rights, 22 October 1981.; *Roper v. Simmons*, 125 S.Ct. 1183 (2005); 543 U. S. ____ (2005), United States Supreme Court, 1 March 2005; *Tavita v Minister of Immigration* [1994] 2 NZLR 257 (CA); *Minister for Immigration & Ethnic Affairs v. Teoh* (1995) 183 A.L.R 353,372-73(Australia); *The Queen v. Dir. Of Public Prosecutions ex parte Kabilene*, [2000] 2 A.C 326,353 (H.L. 1999)

The problem arising in establishing common international aviation safety standards is due to differences in the levels of the transformation of safety regulations into domestic law and the reliance on this process for implementation. The latest report, “*Universal Safety Oversight Audit Programme -Continuous Monitoring Approach Results*” covering January 1, 2013, to December 2015,⁶⁷ concerns in the legislative area. It states that “More than 70 per cent of the States have not established comprehensive procedures for the timely amendment of their civil aviation regulations to keep pace with amendments to the Annexes to the Chicago

⁶⁶ Among them Domingo, R. (2010) *The New Global Law*; Slaughter, A.-M. (1994, December) *A Typology of Transjudicial Communication*; Slaughter, A.-M. (2004). *A New World Order*; Mak , E. (2013) *Judicial Decision-Making in a Globalised World: A Comparative Analysis of the Changing Practices of Western Highest Courts*; Mak, E. (2013, March) *Globalisation of the National Judiciary and the Dutch Constitution*; Held, D., & McGrew, A. (Eds.) (2000) *The Global Transformations Reader* (2nd ed.); Henkin, L. (1995-1996) *Human Rights and State Sovereignty*. *Georgia Journal of International and Comparative Law*; Shestack, J. J. (1997, December) *Globalization of Human Rights Law*; Falk, R. A. (1998) *Law in Emerging Global Village: A Post-Westphalian Perspective*; Slaughter, A.-M. (Summer 2000) *Judicial Globalisation*. *Virginia Journal of International Law*, 40(4), 1103-1124; Waters, A. M. (2005, January) *Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law*; Benvenisti, E., & Harel, A. (2017, January 1) *Embracing the tension between national and international human rights law; The case for discordant parity*; Benvenisti, E., & Downs, G. W. (2014) *Democratizing Courts: How National Courts Promote Democracy in Era of Global Governance*; Benvenisti, E., & Harel, A. (2017, January 1) *Embracing the tension between national and international human rights law; The case for discordant parity*. *International Journal of Constitutional Law*.

⁶⁷ ICAO Universal Safety Oversight Audit Programme, Continues Monitoring Approach Results 1 January 2013 to 31 December 2015 <http://www.icao.int/safety/CMAForum/Documents/USOAP_REPORT_2013-2016.pdf> accessed 2 May 2019

Convention.”⁶⁸ Moreover, “[m]ore than 75 per cent of the States have not established an effective system for the identification and notification of the differences between the SARPs and their national regulations and practices to ICAO.”⁶⁹ The results indicate that states’ uncooperative attitude to compliance with the Annexes as an obstacle to the establishment of a unified global aviation safety regime.

The global nature of the air transport industry makes an adequate level of safety compliance of states necessary. One state’s high-level compliance doesn’t mean that citizens of that state are protected when they fly to another country with lower safety compliance level.

The literature review regarding the changing approach of national courts to common values is extended to the application of global aviation safety standards in national courts. Firstly, the shortcomings of the traditional approach of domestic courts in applying SARPs are addressed. The shortcomings are classified in two headlines. These are lack of precedent and the impact of the state’s political interest on domestic courts.

Cases are very limited to illustrate the application of Annexes in national courts such as *Public Prosecutor and Customs Administration v. Schreiber and Air France*, Court of Appeal Dakar, 15 May 1957, 24 ILR 54(1957); *Belgium v. Marquise de Croix de Maillie de la Tour Landry et. Al.*, Cour de cassation (Belg.), 3 Oct. 1957,24 ILR 9 (1957) ; *Hurwits v. State of the Netherlands, Dist. Ct. of The Hague*, 12 June 1958, 6 NTIR 195 (1959)

State political interest in on domestic courts is illustrated in establishing the independence of air accident investigation body by *ITAVIA SPA v. Ministry of Defence, Ministry of Transport and Ministry of Interior*, on 26 November 2003.

After exploring shortcomings of current international legal order in applying global aviation safety standards, literature review covers the field that suggests bases to apply global aviation safety standards in national court by referring the rule of law, establishing the legitimacy of the global regulatory body in the state and publicness character of aviation safety.

States are responsible for implementing international regulations. Therefore states should not be deemed free to act or not to act. Waldron suggests that decisive influence on state

⁶⁸ ibid 25 Chapter 4, 4.1.1.1

⁶⁹ ibid 25 Chapter 4, 4.1.2.1

behaviour should be the ‘wellbeing of human individuals rather than the freedom of states’⁷⁰. Furthermore, governments are responsible as a trustee for its people’s interests.⁷¹ In line with these perspectives, contracting states of the Chicago Convention (1944) are part of the ICAO decision-making system and responsible for incorporating aviation safety regulations into their domestic legal system.

Benvenisti draws attention states’ obligation in an interdependent world, to take foreign stakeholders’ interests, as well as the interests of their citizens, into account in creating and implementing policies that might affect foreign interests.⁷² Benvenisti asserts that states are trustees of humanity and that they also have certain duties towards non-citizens.⁷³

These perspectives apply to the global governance of aviation safety. In compliance with safety standards, states are responsible towards citizen of other states as well as their citizens.

At this point, Frishman and Benvenisti suggest that national courts in their interpretation of international law need to take global interest into account.⁷⁴ Although the idea of globalism does not motivate national courts,⁷⁵ there are some confirming decisions from national courts that could present global interest as the decisive criteria for the decision.

For instance, the landmark decision of the Indian Supreme Court in *Novartis AG v. Union of India*⁷⁶ provides an example of a national court standing up for “social and economic welfare for the masses”.⁷⁷ In *Novartis* case, national court, the Supreme Court of India, moved forward from technical legal issues regarding trade-related obligations of India and addressed

⁷⁰ Jeremy Waldron ‘The Rule of International Law’ (Fall 2006) Vol.30 Issue 1 Harvard Journal of Law & Public Policy 15, 25. <http://www.rexresources.com/uploads/6/5/2/1/6521405/vol30_no1_waldrononline.pdf>

⁷¹ ibid 25

⁷² Eyal Benvenisti, Olga Frishman ‘National Courts and Interpretative Approaches to International Law: The Case Against Convergence’ (August 14, 2014). Interpretation of International Law by Domestic Courts, Helmut Philip Aust and Georg Nolte (eds) Oxford University Press, Forthcoming 17.

Available at SSRN: <<https://ssrn.com/abstract=2504988>> accessed 13 October 2019

⁷³ Eyal Benvenisti ‘Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders’ (April 2013) Vol. 107, No. 2 The American Journal of International Law 295,314.

⁷⁴ Eyal Benvenisti, Olga Frishman ‘National Courts and Interpretative Approaches to International Law: The Case Against Convergence’ (August 14, 2014). Interpretation of International Law by Domestic Courts, Helmut Philip Aust and Georg Nolte (eds) Oxford University Press, Forthcoming 17.

Available at SSRN: <<https://ssrn.com/abstract=2504988>> accessed 13 October 2019

⁷⁵ Eyal Benvenisti, George W. Downs ‘Democratizing Courts ‘How National and International Courts are Promoting Democracy in an Era of Global Governance’ (May 1, 2013) NYU J. Int’l L. & Pol’y, 791.

Available at SSRN <<https://ssrn.com/abstract=2646879>> accessed 13 October 2019

⁷⁶ *Novartis AG v. Union of India* (2013) 6 SCC 1, Civil Appeal Nos. 2706-16 of 2013, with 2728 of 2013 and 2717-2727 of 2013 (Apr. 1, 2013).

⁷⁷ Saby Ghosray ‘View of India’s Patent Law: Social Justice Aspiration Meets Property Rights in *Novartis v. Union of India & Others*’ (2014) 3(d) 13 J. Marshall Rev. Intell. Prop. L. 719, 727.

the collective interest of society.⁷⁸ Therefore, the Novartis case supports the claim that national courts could present global interest, such as aviation safety as the decisive criteria for their decision.

Furthermore, the literature review extends to global judicial cooperation and applies to global aviation safety. The thesis suggests that national differences in the implementation of aviation safety standards could be improved by establishing the vision of a global aviation safety community of law through judicial dialogue.

Benvenisti underlines the state motivation for developing judicial connections which derive from the demand for intergovernmental coordination of global governance. He asserts that states need to act in line with global trends in certain fields to be part of the global harmony, and so do national courts.⁷⁹ This assertion applies to civil aviation. In civil aviation, many different domains, such as airports, immigration, air navigation service providers and counterterrorism measures, need to be regulated on the basis of intergovernmental cooperation⁸⁰ and intergovernmental cooperation requires global standards.

National courts are becoming more involved in global issues and relying more on global standards to achieve conformity with domestic law in their decisions. Therefore national courts need to take a “global approach” to global issues.⁸¹

This study asserts that national differences in the implementation of aviation safety standards could be reduced by establishing a vision of a global aviation safety community of law through judicial dialogue. Through this vision, national courts can take a global judicial approach to aviation safety.

⁷⁸Eyal Benvenisti ‘Ensuring Access to information: International Law’s Contribution to Global Justice’ in Heike Kreiger, George Nolte, Andreas Zimmermann (eds) *‘The International Rule of Law: Rise or Decline?’* (Oxford University Press 2019)

⁷⁹ Eyal Benvenisti, George W.Downs ‘Toward Global Checks and Balances’ (September 2009) Volume 20 Issue 3-4 Constitutional Political Economy 366

⁸⁰ Ruwantissa Abeyratne ‘The Role of the International Civil Aviation Organisation (ICAO) in the Twenty First Century’ (2009) Vol.34 Annals of Air and Space Law 529,543.

⁸¹ Carl Baudenbacher ‘Judicial Globalization: New Development or Old Wine in New Bottles’ (2003) Vol.38 Issue 3 Texas International Law Journal 505,523.

1.4 The Research Methodology

Before introducing the methodology that was employed in this legal research, it is essential to emphasise the difference between scientific research and doctrinal legal research with regard to the methodology applied.

The common struggle of legal researchers is to explain the nature of their research methods to academics in other disciplines. Scholars emphasize this issue. In his article, Paul Chynoweth⁸² presents the methodological framework for legal research that distinguishes legal scientific research from scientific research in other fields.

Furthermore, Chynoweth describes the contrast between scientific research and doctrinal research. Accordingly, while natural and social scientific research relies on the collection of empirical data as a base for theories or testing them, doctrinal research focuses on legal doctrines in textbooks or journal articles in the context of “what is the law”. Therefore on the contrary to scientific research in other fields, findings of the empirical investigation are not affecting the validity of doctrinal legal research.⁸³

The dominant form of academic legal research mainly focuses on the discovery of legal doctrines and covers textbooks as well as journal articles in specific contexts.⁸⁴ Christopher Langdell’s note in Harvard Law School Annual Report (1873-74) states the defining nature of the legal research and the difference of its nature from other researchers as below:

The work is done in the Library is what the scientific men call original investigation. The Library is to us what a laboratory is to the chemist or the physicist, and what a museum is to the naturalist.⁸⁵

However, since then by the impact of globalised advanced electronic technology the doctrinal research methodology is transitioning and employing methods and using statistics, comparative perspectives, social science evidence within the legal research framework.”⁸⁶

⁸² Paul Chynoweth ‘Legal Research in the Built Environment: A Methodological Framework, University of Salford Manchester (2008) <http://usir.salford.ac.uk/id/eprint/12467/1/legal_research.pdf > accessed 3 May 2019

⁸³ *ibid* 672.

⁸⁴ *ibid* 672.

⁸⁵ Quoted from Terry Christine M. Hutchinson ‘The Doctrinal Method: Incorporating Interdisciplinary Methods in Reforming the Law’ (2015) Vol. 8, No. 3 *Erasmus Law Review* 130, 132.

Available at SSRN< <https://ssrn.com/abstract=2734131> > accessed 10 October 2019 132

⁸⁶ *ibid* 130.

The law needs to be reformed according to the development of society and needs of the community. Scholars suggest that legal researchers should broaden their views and assess economic implications in the relevant research areas of law. Since social life has a dynamic nature by the impact of advanced technology, fundamental transformations in the economy worldwide, existing law in a certain area requires reform accordingly.⁸⁷

This research is a legal research project that analyses the shortcomings of the current international legal system surrounding public international aviation law, international law, civil aviation safety and the practice of state compliance with global aviation safety standards. The thesis indicates that the global administrative legal theory proposes a more responsive administrative structure for the current governance system of international civil aviation safety based on documented research. This is a qualitative doctrinal legal research to investigate the global governance of civil aviation safety through administrative legal mechanisms as suggested by GAL theory.

The qualitative character of doctrinal research⁸⁸ method is defined as ‘the interpretative study of a specified issue or problem in which the researcher is central to the sense that is made’.⁸⁹ Furthermore, the nature of qualitative research is that the researcher studies phenomena as they occur in the real world.⁹⁰ As such, this study aims to identify the shortcomings of the current international legal system to secure state compliance with aviation safety standards and explores an emerging legal theory as a more responsive remedy to safety compliance issues. The original idea derived from witnessing the legal process that families of air-crash victims encountered within the state legislative system.

The rationale behind this research, essentially, is the endeavour to discover how the international legal system could work for individuals who could achieve, control and check state compliance with global aviation safety standards.

The thesis starts with the current international legal system to secure state compliance with aviation safety standards placed in SARPs as an annex to the Chicago Convention (1944).

⁸⁷ Albert Sanchez-Graells ‘Economic Analysis of Law, or Economically-Informed Legal Research’ in Dawn Watkins, Mandy Burton (eds) *Research Methods in Law* (Second Edition, Kindle ed. Routledge 2017)

⁸⁸ Terry Christine M. Hutchinson ‘The Doctrinal Method: Incorporating Interdisciplinary Methods in Reforming the Law’ (2015) Vol. 8, No. 3 *Erasmus Law Review* 130,130.

Available at SSRN < <https://ssrn.com/abstract=2734131> > accessed 10 October 2019

⁸⁹ Peter Banister, Erica Burman, Ian Parker, Maye Taylor & Carol Tindall *Qualitative Methods in Psychology: A Research Guide* (Philadelphia: Open University Press 1994) 2.

⁹⁰ Gerald F. Hess ‘Qualitative Research on Legal Education: Studying Outstanding Law Teachers’ (2014) Vol.51 Issue 4 *Alberta Law Review* 925, 926.

Therefore this part of the analysis is based on asking “what is the law?”. The normative analysis of the current international regulatory system, the Chicago Convention System (1944), also extends to the historical background to explain the social conditions that led to an international consensus on certain principles such as state sovereignty.

The methodology of this research is doctrinal. It examines the Convention on International Civil Aviation (Chicago Convention 1944) to explore the current legal system. The main sources of the doctrinal approach are the Chicago Convention (1944) and the international civil aviation system derived from the principles of the convention. In the thesis, I examine the history of the convention to contextualise the social and political environment at the time the convention was signed. Also, to reflect scholars’ views, I examine reviews of commentaries regarding principles of civil aviation, particularly sovereignty before and after the 1944 Convention was signed. I also explain differences in the air transport market between the time the Chicago Convention was signed in 1944 and the contemporary world in which globalisation, air transport liberalisation and deregulation are occurring.

At this point, the distinction between method and methodology needs to be underlined. The distinction between method and methodology defined by Henn et al. as such: ‘Method refers to the range of techniques that are available to us to collect evidence about the social world. Methodology, however, concerns the research strategy as a whole’.⁹¹

The use of different methods within a doctrinal approach is increasingly common for legal researchers. Hutchinson describes this shift as a transition in the doctrinal approach among academic lawyers who are ‘increasingly infusing evidence (and methods) from other disciplines into their reasoning to bolster their reform recommendation’.⁹²

For instance, in the third chapter of the research economic analysis regarding the impact of globalisation and liberalisation on the air transport market and the impact of markets developments on aviation safety are analysed. An analysis includes published statistics from international organisations such as International Civil Aviation Organisation (ICAO) and International Air Transport Association (IATA), which reveal the level of state compliance

⁹¹ Matt Henn, Mark Weinstein & Nick Foard ‘*A Critical Introduction to Social Research*’ (2nd ed., Sage Publication 2009) 10.

⁹² Terry Christine M. Hutchinson ‘The Doctrinal Method: Incorporating Interdisciplinary Methods in Reforming the Law’ (2015) Vol. 8, No. 3 *Erasmus Law Review* 130,130.
Available at SSRN< <https://ssrn.com/abstract=2734131> > accessed 10 October 2019

with safety standards, such as the *Universal Safety Oversight Audits* report. The method includes an exploration of worldwide economic developments in the air transport market due to the impact of globalisation, liberalisation, deregulation and air transport practices that are employed in a liberalised market.

One of the findings is that emerging markets have more growth than others, however, their effective implementation of safety standard is lower than the global average. An analysis of the *IATA Safety Report 2016*⁹³ facilitates a discussion of the link between accident rates and region. The analysis leads to another finding, which is that the level of air accidents is higher in regions with developing countries and emerging markets. These findings support that aviation safety is a global issue, and state compliance with global aviation safety standards is a concern of the global community.

However, these economic analyses do not render the research is interdisciplinary. These analyses were used as interpretative tools and methods to assess changes in the air transport environment that could require reforms in the aviation safety governance system.

After addressing the global governance of aviation safety within the administrative structure that GAL theory proposes in Chapter IV, the role of national courts in applying global aviation safety standards are explored in Chapter V. At this point, the thesis turns to national court decisions in different jurisdictions –common law or civil law – with monist and dualist approaches to incorporating international law in a domestic context. A link arises between aviation safety and the fundamental human ‘right to life’. The analysis includes a discussion of national courts’ decisions that apply to international human rights law as a common value and foreign courts’ decisions on common values not as an increasing global trend but as an existing practice that can become a starting point for a global judicial view on aviation safety.

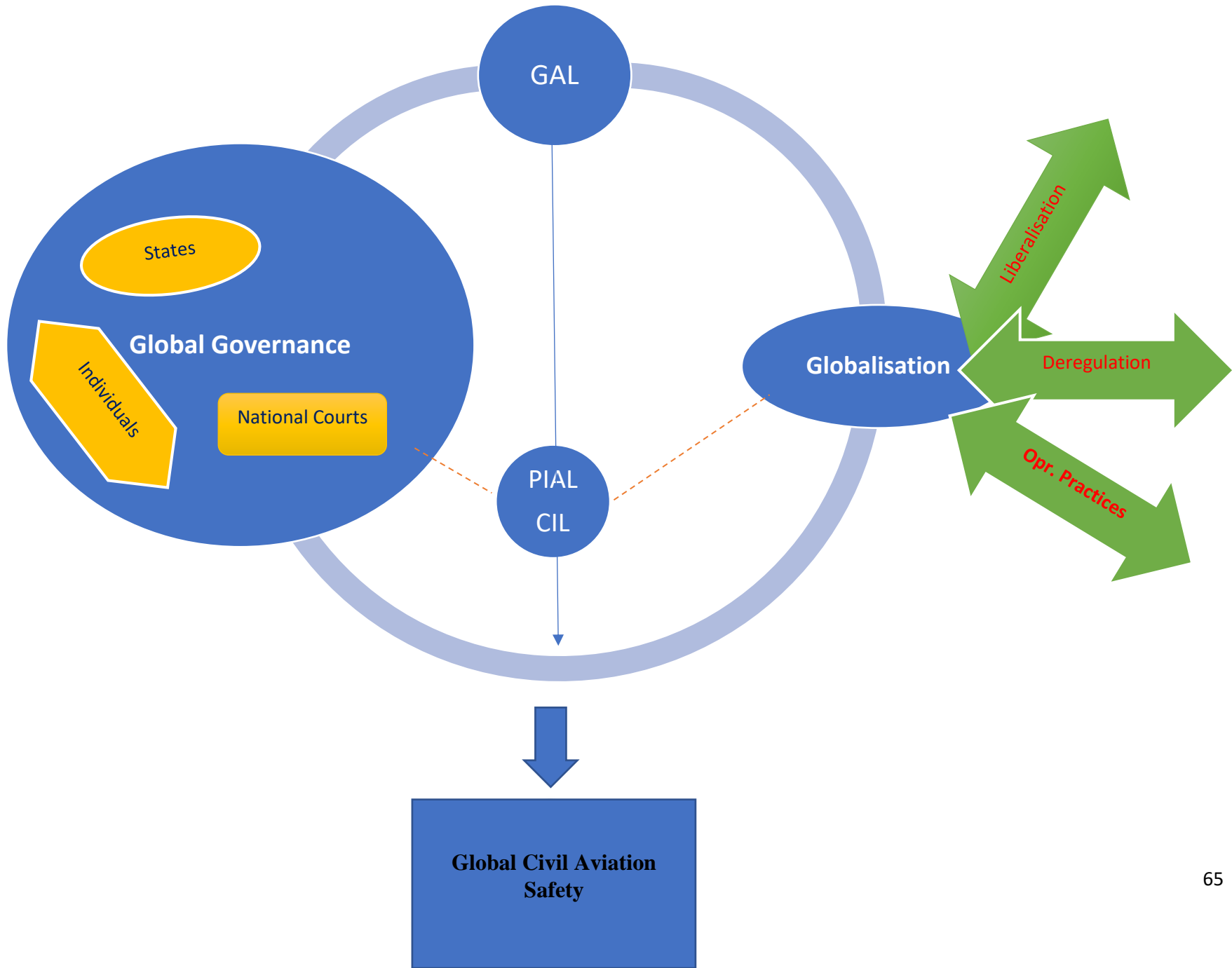
Aviation safety is a shared concern not only of states but industry, private organisations, the academic community and the travelling public around the world. Accordingly, state

⁹³ IATA Safety Report 2016 ‘SKYbrary is an electronic repository of safety knowledge related to flight operations, air traffic management (ATM) and aviation safety in general. It is also a portal, a common entry point, that enables users to access the safety data made available on the websites of various aviation organisations - regulators, service providers, industry’ <<https://skybrary.aero/bookshelf/books/3875.pdf> > accessed 21 April 2019

compliance with aviation safety standards is becoming more vital in securing aviation safety not only for citizens of certain states but for the global community.

It is argued that global aviation safety is influenced by the following: independent variables; lack of efficiency of traditional international legal norms when facing globalisation and liberalisation and operational flight practices that were invented by the air transport market dominators. Administrative law type mechanisms as another independent variable have an impact on aviation safety by addressing global governance which includes individuals and national courts as part of the global governance of aviation safety.

The relation between dependent and independent variables is shown in the diagram below. Legal norms of public international aviation law (PIAL) and customary (CIL) international law are a central part of international civil aviation safety. The shortcomings of (PIAL) and (CIL) for global governance of aviation safety and air transport market developments are represented by red dotted lines. Generally, the shortcomings are the lack of efficiency to address contemporary issues such as air transport liberalisation, deregulation and operational practices and the limits to address changing concepts in international law as global governance that includes not only states but private organisations and individuals as well. Therefore, shortcomings need to be supplemented by global civil aviation safety with the administrative law type structure as the GAL theory suggests. This includes individuals and national courts that will provide a more effective check and balance system on state compliance with aviation safety standards. This establishes a comprehensive legal system of civil aviation safety.



CHAPTER II – CURRENT INTERNATIONAL LEGAL SYSTEM FOR ENSURING STATE COMPLIANCE WITH INTERNATIONAL AVIATION SAFETY STANDARDS SET BY ICAO

Introduction

International aviation law is divided into two major categories as public international aviation law and private international aviation law.¹ This distinction is based on the identity of the parties and the forum for the enforcement of the rules.²

Private international aviation law concerns the relations between international airlines and their passengers, or the conflict of law principles applicable to the rights and liabilities of air carriers³ in case of death, personal damages and loss or damage to property on international flights.⁴

In turn, public international aviation law refers to agreements between nation-states, which are often in the form of international conventions, bilateral or multilateral treaties such as those setting forth the conditions for the admissibility of foreign aircraft to state territory.⁵ Through these treaties or conventions, states establish legal systems that govern the conduct of states and intergovernmental organisations.⁶

This thesis seeks to examine global aviation safety standards and state compliance issues within the limits of public international aviation law. In particular, the thesis addresses global aviation safety standards, state responsibility to comply with them, the sources of state obligations according to traditional public international law, etc. Accordingly, private matters, such as an air carrier's liability issues or conflict of laws issues between private parties, are beyond the scope of the present study.

¹ Paul Stephen Dempsey, 'The Future of International Air Law in the 21st Century' Vol. 64, (2015) German Journal of Air and Space Law 215

² Brian F Havel, Gabriel Sanchez, *The Principles and Practice of International Aviation Law* (Kindle Edition, Cambridge University Press. June 2014) location 554 of 15733

³ John Cobb Cooper, 'The Institute of International Air Law' (1953) Vol. 2, Issue 2. Journal of the Society of Public Teachers of Law (New Series) 122–124.

⁴ Carl H. Fulda, 'International Aspects of Aviation' Vol. 33, Issue 1 (Winter 1967) Journal of Air Law and Commerce 64.

⁵ *ibid*

⁶ Brian F Havel, Gabriel Sanchez, *The Principles and Practice of International Aviation Law* (Kindle Edition, Cambridge University Press. June 2014) 9.

International aviation law particularly the public international aviation system was developed based on complete and exclusive state sovereignty. Exclusive state sovereignty principle was emphasised in Article 1 of the Chicago Convention of 1944.⁷The reasons for the international community reached such a strong consensus on the principle of exclusive state sovereignty were grounded in the impact of two World Wars.

However, since 1944, the interconnection or interdependence among nation states has been transforming political, social, and economic life in the world. The concept of sovereignty has been the subject of debate from the global world perspective. Increasing global trade and global markets, market liberalisation, the use of advanced technology and its impact on domestic markets, the response of nation states to these developments, the delegation of state authority to international organisations and the regulations of international organisations, and their impact on domestic regulations, which is described as the ‘new international law’⁸ are changing the dynamics of the world. Civil aviation is one of the sectors that is increasing globally as a result of the impact of these global issues.

The concept of sovereignty has been the subject of many different approaches by scholars of law, political social scientists and jurists. Sovereignty has been characterised in different circumstances and in different periods which have been influenced by historical developments.

This chapter first reviews the early evolution of international civil aviation, which led to the establishment of the Chicago Convention in 1944. Then examines the governance capacity of the current international legal system to secure state compliance with the international aviation safety standards set by the International Civil Aviation Organization (ICAO).

Particularly, the chapter examines the legal concept of international aviation safety obligations, which are derived from Standards and Recommended Practices (SARPs) and the system of the ICAO to govern international aviation safety with special reference to international law and customary international legal norms.

Next, the binding effect of SARPs on the contracting States is examined. The chapter demonstrates the norm-setting function of the ICAO. Then, critically examines these norms

⁷ Convention on International Civil Aviation, opened for signature, Dec.7, 1944, 61 State 1180, T.I.A.S No.1 59 [herein after cited as Chicago Convention]

⁸ Julian Ku and John Yoo, *Globalization and Sovereignty*, 31 (2013) Berkeley J. Int'l Law 210.

in line with customary international legal norms, i.e., *jus cogens* and *erga omnes*. It attempts to demonstrate contemporary global developments in general, particularly in air transport and the lack of effectiveness of traditional international legal theories which plays predominant role in explaining the shortcomings in compliance with the aviation safety standards by nation states.

Public international affairs have traditionally been managed between states. However, as a result of the impact of globalisation, actors other than states have become more active in regulatory mechanisms that have a transnational impact. Therefore, ‘the boundaries between public and private, and domestic and international have been blurred.’⁹ At this point, the question of whether the current international legal system can be responsive to contemporary issues such as securing state compliance with aviation safety regulations is argued.

Finally, the changing perspective of international law in line with the dynamics of international relations and the impact of economics and globalisation on civil aviation systems are examined. In line with these developments novel legal theories are presented which explain the global governance of issues such as global aviation safety. In sum, this chapter addresses the problem of state compliance with aviation safety regulations and the insufficiency of traditional international law¹⁰ theories to produce a system applicable to the new challenges arising from developments in the globalised civil aviation field.

2.1 Law of air space

The idea of flying can be traced back to ancient times.¹¹ As Schmitt et al. suggested ‘the dream of flying is as old as mankind.’¹² Technical and scientific innovations for air navigation devices have been developing for centuries. However, the focus of this part of the thesis is the

⁹ Mitchell, Andrew D. and Sheargold, Elizabeth, Global Governance: The World Trade Organization's Contribution (January 4, 2010). *Alta. Law Review*, Vol. 46, pp. 1061-1080, 2008-2009; U of Melbourne Legal Studies Research Paper No. 426; Georgetown Law and Economics Research Paper No. 1477544. Available at SSRN: <<https://ssrn.com/abstract=1477544> or <http://dx.doi.org/10.2139/ssrn.1477544>> 1061.

¹⁰ Harold Hongju Koh, ‘“Why Do Nations Obey International Law?”’ (1997) Vol.106 Issue 8, *Yale Law Journal*, 2599

“traditional International law” addressed “Treaty of Westphalia as an advent of traditional international law based on principles of territoriality and state autonomy” 2607.

¹¹ Dieter Schmitt and Volker Gollnick, *Air Transport System* (Springer-Verlag Wien 2016) 19.

¹² *ibid*

early development of the legal regulations applicable to air navigation safety. As Huang stated ‘the history of aviation is the history of improving safety.’¹³

Therefore, an overview of the early development of regulations on air navigation is a starting point for an understanding of the current system that regulates global civil aviation safety.

In the beginning of the 19th century, when the science of air navigation was engaged in the development of balloons, the steering of lighter-than-air aircraft or heavier-than-air devices with passengers began to be controlled by man. The necessity for legal regulations in the newly emerging field of ‘aerial navigation’¹⁴ was emphasised by Kuhn in 1909 as follows:

Whenever mechanical, chemical, or electrical science introduce new forces into the life of man, it may reasonably be conceived to be the task of jurisprudence to adjust and coordinate the legal relations of both states and individuals under the new conditions.¹⁵

The terminology that has been used to address the law of the air is varied. In the early stage of the legal development of air navigation regulations, some scholars preferred the terms ‘aerial law,’¹⁶ ‘aeronautical law,’¹⁷ or later, ‘air law,’ in the literature.¹⁸ Havel and Sanchez preferred the term ‘international aviation law,’ to ‘international air law’ for the reason that the word of ‘aviation’, unlike the word of ‘air’, can be used independently of the word ‘law’ to address the industry.¹⁹

On the other hand, in the International Civil Aviation Organization’s Manual on the Regulation of International Air Transport [hereinafter the ICAO MANUAL], the term ‘aviation’ includes more topics, e.g. military, state, and private flying, aircraft manufacturing,

¹³ Jiefeng Huang, *Aviation Safety through the Rule of Law; ICAO’s Mechanisms and Practices*, (Kluwer law International 2009) 8.

¹⁴ Arthur K. Kuhn ‘Aerial Navigation in its Relation to International Law’ (1909) Proceedings of the American political Science, 5.

¹⁵ *ibid* 83-84.

¹⁶ Roger F Williams, ‘Developments in Aerial Law’ (1926-1927) University of Pennsylvania Law Review and American Law Register, 75 (2), 139-153.

¹⁷ John A. Eubank, ‘Who Owns the Airspace’ (1929) Vol. 63, Issue 1, United States Law Review, 1

¹⁸ John Cobb Cooper, ‘Roman Law and the Maxim *Cujus Est Solum* in International Law’ (1952) Vol. 1 Issue.1, McGill Law Journal, 23. See also Isabella H. Ph. Diederiks-Verschoor, *An Introduction to Air Law* (9th ed. P. M.-M. Butler, Ed. Kluwer Law International 2012); Brian F Havel, Gabriel Sanchez, *The Principles and Practice of International Aviation Law* (Kindle Edition, Cambridge University Press. June 2014) 1

¹⁹ Brian F Havel, Gabriel Sanchez, *The Principles and Practice of International Aviation Law* (Kindle Edition, Cambridge University Press. June 2014) 1 fn.3

and air navigation, than the term ‘air transport,’ which is more specific, referring to the aspects related to carriage by air (usually commercial air transport).²⁰

This thesis focuses more on the legal and regulatory issues regarding global air transport; therefore, the term aviation is preferred throughout the thesis.

2.1.1 The interpenetrative character of aviation law

Addressing regulations on civil aviation, particularly aviation safety, as global is not solely a terminological choice. There is no purely domestic body of aviation law that disregards international aviation law. Also, international aviation law consists of rules and regulations that are ‘domestic, bilateral, or multilateral in their origin,’ which govern global air transport.²¹

Havel and Sanchez explain why international commercial aviation can and should support a separate body of law as follows;

a massive industry, heavily regulated, structurally borderless, and treated by governments (e.g. through creation of a separate United Nations (U.N) organ to frame common global aviation rules) not as an ordinary part of international trade but as singular and exceptional.²²

Historically, at the beginning of the 20th century, the doctrinal discussion started with a debate about whether the air was free.²³ After two World Wars, a conclusion regarding the definition of airspace sovereignty was reached. Article 1 of the Chicago Convention of 1944 states:

The contracting States recognize that every state has complete and exclusive sovereignty over the airspace above its territory.

²⁰ICAO Manual on the Regulation of International Air Transport, Doc.9626 (Second Edition 2004) iv. <http://www.icao.int/Meetings/atconf6/Documents/Doc%209626_en.pdf > accessed 9 May 2019

²¹ Brian F Havel, Gabriel Sanchez, *The Principles and Practice of International Aviation Law* (Kindle Edition, Cambridge University Press. June 2014) location 810 of 15733

²² *ibid*, location 398 of 15733

²³ Hugh H. L. Bellot, ‘The Sovereignty of the Air’ Vol.3 Issue 27, *International Law Notes*, (1918, December)

This was a virtually unchanged restatement of the provisions of the Paris Convention of 1919²⁴ and the Havana Convention of 1928²⁵.

On the other hand, the definition of exclusive state sovereignty also means ‘a state’s exclusive jurisdiction’ over its airspace to regulate the use of its airspace through the adoption of laws, regulations and domestic administrative decisions in line with international regulations.²⁶

However, states are not free to regulate domestic aviation in the airspace over their territory. There is a dynamic regulatory relation between states’ domestic aviation laws and international aviation laws.

It is commonly recognised among scholars that ‘aviation is, by its very nature, an international activity.’²⁷ States that are engaged with commercial aviation activity will inevitably fly beyond their borders where their national law does not apply.²⁸

In the ICAO Manual, national regulation of air transport is defined as follows:

Regulation is undertaken by a state within its territory in its exercise of sovereignty over that territory and the airspace above it.²⁹

However, it also states that;

National regulation extends to both domestic and international air services and to both national and foreign air carriers. The national regulation of international air services **must take into account the State’s international obligations** pursuant to

²⁴ ‘the groundwork laid at the 1910 Paris Diplomatic Conference, this Aeronautical Commission drew up a Convention Relating to the Regulation of Aerial Navigation, which was signed by 27 of the 38 States on 13 October 1919 in the Salon de l’Horloge of the Ministry of Foreign Affairs at Paris.

This new Convention (with texts in French, English and Italian) consisted of 43 articles that dealt with all technical, operational and organizational aspects of civil aviation and also foresaw the creation of the International Commission for Air Navigation (ICAN, Commission internationale de Navigation Aérienne or CINA), under the direction of the League of Nations, to monitor developments in civil aviation and to propose measures to States to keep abreast of developments.’

<https://www.icao.int/secretariat/PostalHistory/1919_the_paris_convention.htm> accessed June 7, 2019

²⁵ ‘the Pan American Convention on Commercial Aviation had been finalized in Havana early 1928 under the auspices of the Sixth Pan-American Conference (held in Havana, Cuba, from 16 January to 20 February 1928.’ <https://www.icao.int/secretariat/PostalHistory/1928_the_havana_convention.htm> accessed June 7, 2019

²⁶ Michael Milde, *International Air Law and ICAO* (2nd Edition, Eleven International Publishing 2012) “The concept of complete and exclusive air sovereignty means, in the first place, the exclusive Jurisdiction of the State concerned to adopt laws and regulations relating to the status and uses of its air space and to implement such law by administrative decisions and sanctions – all to the exclusion of any other State’s jurisdiction.” 34.

²⁷ Carl H. Fulda, ‘International Aspects of Aviation’ Vol. 33, Issue 1 (Winter 1967) *Journal of Air Law and Commerce* 63. fn .1

²⁸ *ibid* 63.

²⁹ ICAO Manual on the Regulation of International Air Transport, Doc.9626 (Second Edition 2004)

<http://www.icao.int/Meetings/atconf6/Documents/Doc%209626_en.pdf> accessed 9 May 2019 Chapter 1 1.0-1

bilateral and multilateral agreements and arrangements and **should give due regard to the actions and concerns of other states.**³⁰

Therefore, states have national regulations to regulate domestic aviation, but because they also engage in transnational air activities, states have rules to regulate other air services in their territory. It is clear that national aviation laws address international aviation law as well.³¹

Accordingly, the regulations that govern global air transport are very interpenetrated.

As Havel and Sanchez emphasised,

(...)international aviation law is comprised of the rules and regulations (whether domestic, bilateral, or multilateral in their origin) that affect global air transport. The fount of this body of law includes not only the widely recognized sources of international law but also the national and supranational legal and political cultures of the world community of States.³²

Having established the interpenetrative character of Aviation Law, the chapter next demonstrate the evolution of public international aviation law in more detail than private international aviation law in order to clarify the principles underlying the current governing system for public international aviation law matters.

2.1.2 Evolution of public international aviation law

The need for legal controls to regulate activities in the air emerged in the very early period of flying history with products built up by a human.³³ One of the earliest regulations on air activities goes back to the time when hot air balloons were first placed in the air. The Montgolfier brothers built a hot air balloon and demonstrated it before the King at Versailles on June 4 of 1783. Although it was deemed useful for military purposes, a disadvantage of the balloon was soon discovered. The problem was that the hot air balloon was

³⁰ *ibid* (emphasis added)

³¹ Brian F Havel, Gabriel Sanchez, *The Principles and Practice of International Aviation Law* (Kindle Edition, Cambridge University Press. June 2014) location 403 of 15733

³² *ibid* Location 403 of 1573

³³ Bin Cheng, 'The Right to Fly [notes]' Part II: Papers Read before the Society in the Year 1956, 1956) Vol. 42 Transactions for the Year 99 99.

uncontrollable.³⁴ Therefore, in 1784, a decree was issued by the Paris Prefecture of Police forbidding the ascent of balloons without a specially issued permit.³⁵ The efforts to realise the dream of flying with a controllable air vehicle enthusiastically continued.³⁶

Air navigation was recognised by jurists as a developing legal field. Havel characterised it as ‘one of those rare instances the legal profession was ahead of technological innovation.’³⁷ In 1900, before the first aeroplane flight, at an annual conference of the Institute of International Law, French jurist Paul Fauchille proposed the creation of a code of air navigation, “*le régime juridique des aerostats,*” by the Institute Droit International. A detailed study and a proposed legislative draft presented by Fauchille were accepted during the following session.³⁸ In Fauchille’s view, ‘the air is free, and States possess only such rights as are necessary to their national existence.’³⁹ But no further action was taken based upon his suggestion, which was predicated on the theory of freedom of the airspace.⁴⁰

On December 17, 1903, the American Wright brothers (Orville Wright and Wilbur Wright) invented the first flying aeroplane which was heavier than air and controllable. In the following years, they developed a flying machine which was the first practical fixed-wing aircraft.⁴¹ In 1909, French aviator Louis Bleriot made the first international flight, crossing the English Channel from France to England.⁴²

As a result of these scientific accomplishments in air navigation, ‘air traffic has entered in the life of man’⁴³ and was recognised as an emerging field between states that would need to be regulated by law. In 1910, Arthur K. Kuhn emphasised:

As with all other advances in material science of a worldwide and permanent character, new relationships between states and individuals are imminent and to

³⁴ Dieter Schmitt and Volker Gollnick, *Air Transport System* (Springer-Verlag Wien 2016) 20.

³⁵ Bin Cheng, ‘The Right to Fly [notes]’ Part II: Papers Read before the Society in the Year 1956, 1956) Vol. 42 Transactions for the Year 99 99.

³⁶ Peter W. Brooks, ‘The Development of Air Transport’ (1967) Retrieved from The University of Bath, Journal of Transport, Economics and Policy:< http://www.bath.ac.uk/e-journals/jtep/pdf/Volume_1_No_2_164-183.pdf > accessed 9 May 2019

³⁷ Brian F Havel, Gabriel Sanchez, *The Principles and Practice of International Aviation Law* (Kindle Edition, Cambridge University Press. June 2014) location 1237 of 15733

³⁸ Arthur K. Kuhn, ‘The Beginnings of an Aerial Law’ Vol 4. Issue 1 (1910) American Journal of International Law 109 111.

³⁹ Hugh H. L. Bellot, ‘The Sovereignty of the Air’ Vol.3 Issue 27, International Law Notes, (1918, December) 135.

⁴⁰ Roger F Williams, ‘Developments in Aerial Law’ (1926-1927) University of Pennsylvania Law Review and American Law Register, 75 (2), 140.

⁴¹ Dieter Schmitt and Volker Gollnick, *Air Transport System* (Springer-Verlag Wien 2016) 24.

⁴² *ibid* 25.

⁴³ Arthur K. Kuhn, ‘The Beginnings of an Aerial Law’ Vol 4. Issue 1 (1910) American Journal of International Law 109 110.

adjust and control them in an orderly manner is the task of government through law.⁴⁴

2.1.2.1 The International Air Navigation Conference, Paris 1910

The developing international character of air navigation made it quite apparent that international regulations were necessary. It became clear that the legal problems that were emerging in the air navigation field could not be resolved only through the regulations of individual nation states.⁴⁵

Therefore, the first attempt to address the use of airspace based on an international treaty occurred in 1910 in Paris.⁴⁶ The aim of ‘the world’s first international civil aviation conference’⁴⁷ was declared by M. Louis Renault, the president of the Conference, ‘to be the examination of the problem as to the rules by which the freedom of circulation of aeroplanes could be reconciled in the best way possible, with the legitimate interest of states.’⁴⁸

However, the lack of a scholarly plan in international law⁴⁹ regarding how to regulate international flights⁵⁰ and the different, primarily politically motivated⁵¹ approaches of the German, French and British delegations⁵² on the issue of the discrimination between foreign and national aircraft prevented the Conference from succeeding.⁵³ The German and French delegations were in favour of the recognition of freedom of passage. Accordingly, they believed that freedom of passage should be recognised and should only be restricted for security reasons. The British delegation asserted absolute state sovereignty over the airspace⁵⁴

⁴⁴ *ibid*

⁴⁵ Peter H. Sand, Freitas Jorge de Sousa, Geoffrey N. Pratt, ‘An Historical Survey on International Air Law Before the Second World War’ (1961) Vol.7 Issue 1 McGill Law Journal 125 127.

⁴⁶ Bin Cheng, ‘The Right to Fly [notes]’ Part II: Papers Read before the Society in the Year 1956, 1956) Vol. 42 Transactions for the Year 99 106.

⁴⁷ Christer Jönsson, ‘Sphere of Flying: The Politics of International Aviation. International Organization’ (1981) Vol.35 No.2 273 Retrieved from <<http://www.jstor.org/stable/2706476>> accessed 9 May 2019 276.

⁴⁸ D. Goedhuis, ‘Civil Aviation After the War’ (1942, October) Vol. 36 Issue 4 American Journal of International Law 594 597.

⁴⁹ Manley O. Hudson, ‘Aviation and International Law’ (1930, April) Vol. 24, Issue 2 American Journal of International Law 228 228.

⁵⁰ Albert I. Jr Moon, ‘A Look at Airspace Sovereignty’ (Autumn 1963) Vol. 29, Issue 4 Journal of Air Law and Commerce 328 331.

⁵¹ *ibid*

⁵² For further information regarding discussions see John Cobb Cooper, ‘Roman Law and the Maxim *Cujus Est Solum* in International Law’ (1952) Vol. 1 Issue.1, McGill Law Journal

⁵³ see Hugh H. L. Bellot, ‘The Sovereignty of the Air’ Vol.3 Issue 27, International Law Notes, (1918, December) for early discussions on the problem of the sovereignty of the air

⁵⁴ D. Goedhuis, ‘Civil Aviation After the War’ (1942, October) Vol. 36 Issue 4 American Journal of International Law 594 598.

and was concerned about the necessity of reserving the possibility of discrimination in the case of war, thus opposing a rule to prohibit discrimination.⁵⁵

Despite the failure to achieve the initial aim, the Paris Conference was an important venue for the discussion of ideas ‘regarding the regime of the air’⁵⁶ in international civil aviation before the First World War.⁵⁷ ‘The principle of freedom of passage was unanimously recognized, the only restriction on that principle being the security of the state and of its habitants.’⁵⁸

Based on this principle, Cooper opined that the conference ‘first evidenced general international agreement that usable space above the lands and waters of a state is part of the territory of that state.’⁵⁹

Since then, worldwide uniformity in regulations, standards and procedures has been crucial for development in international air navigation.⁶⁰ Therefore, since the 1910 Paris Conference, many international civil aviation conferences and agreements have emerged to regulate the field.⁶¹

However, Milde underlined the fact that ‘codified international air law has developed in the shadow of two devastating world-wide armed conflicts and is marked by them.’⁶²

Diplomatic negotiations on civil aviation were interrupted by World War I. The large scale of the defence budgets in the industrialised countries for aviation in the military field played an essential role in the air transport developments⁶³ during World War I.⁶⁴ During the war, the

⁵⁵ *ibid* 599.

⁵⁶ D. Goedhuis, ‘The Air Sovereignty Concept and United States Influence on its Future Development’ Vol.22 Issue 2 (1955) *Journal of Air Law and Commerce* 209 210.

⁵⁷ Albert I. Jr Moon, ‘A Look at Airspace Sovereignty’ (Autumn 1963) Vol. 29, Issue 4 *Journal of Air Law and Commerce* 328 “When the conference adjourned, it had completed a draft convention of fifty –five articles and three annexes, including such subjects as aircraft, nationality, registration, rules of the road and photographic and radio equipment in aircraft.” 331.

⁵⁸ D. Goedhuis, ‘Civil Aviation After the War’ (1942, October) Vol. 36 Issue 4 *American Journal of International Law* 594 599.

⁵⁹ John Cobb Cooper, ‘Roman Law and the Maxim *Cujus Est Solum* in International Law’ (1952) Vol. 1 Issue.1, *McGill Law Journal*, 23 127.

⁶⁰ Michael Milde ‘Enforcement of Aviation Safety Standards Problems of Safety Oversight’ Vol. 45 Issue 1 (1996) *Zeitschrift für Luft- und Weltraumrecht - German Journal of Air and Space Law* 3 4.

⁶¹ Milestones in International Civil Aviation. Retrieved from ICAO Official Website <<http://www.icao.int/about-icao/History/Pages/Milestones-in-International-Civil-Aviation.aspx>> accessed 9 May 2019

⁶² Michael Milde, ‘The International Civil Aviation Organisation: After 50 Years and Beyond’(1996) *Australian International Law Journal* 60 60.

⁶³ Peter W. Brooks, ‘The Development of Air Transport’(1967) The University of Bath, *Journal of Transport, Economics and Policy* <http://www.bath.ac.uk/e-journals/jtep/pdf/Volume_1_No_2_164-183.pdf> 165.

⁶⁴ *ibid* 164.

use of air navigation produced advancements in it.⁶⁵ Ultimately, at the end of World War I, civil air transport had begun to evolve as a ‘product of military aviation.’⁶⁶

On the other hand, World War I led to a change in the positions of state governments towards governmental support for commercial air transport.⁶⁷ The necessity for international cooperation in international aviation in the post-war era was stressed.⁶⁸

One impact of World War I was on the definition of a state’s sovereignty over its airspace.⁶⁹ In the debate regarding whether airspace should be free and open to the use of nations or the state should have absolute sovereignty over its airspace, the doctrine of absolute sovereignty prevailed.⁷⁰ State practices during World War I recognised and firmly applied the principle of exclusive state sovereignty to air activities over states’ territory.⁷¹

Another landmark event in air navigation development was the first scheduled commercial airline flight, which took place in the U.S.A on January 1, 1914. The flight took passengers from St. Petersburg, Florida to Tampa, Florida.⁷² Therefore, the potential influence of air transport on nations’ wealth, strength and military value, including ancillary services, began to have an impact on the external policy of states.⁷³

⁶⁵ Arthur K. Kuhn, ‘International Aerial Navigation and the Peace Conference’ (1920) Vol. 14, Issue 2, American Journal of International Law, 369 see also Howard S. LeRoy ‘International Air Law Trends’ Symposium: Aviation Law Looks at the Future (1944-1945) Vol. 31, Issue 2, Virginia Law Review, 448

⁶⁶ Peter W. Brooks, ‘The Development of Air Transport’ (1967) The University of Bath, Journal of Transport, Economics and Policy’ <http://www.bath.ac.uk/e-journals/jtep/pdf/Volume_1_No_2_164-183.pdf> 164 also see Roger F Williams, ‘Developments in Aerial Law’ (1926-1927) University of Pennsylvania Law Review and American Law Register, 75 (2), 139 145

⁶⁷ Christer Jönsson, ‘Sphere of Flying: The Politics of International Aviation. International Organization’ (1981) Vol.35 No.2 273 Retrieved from <<http://www.jstor.org/stable/2706476>> accessed 9 May 2019 278.

⁶⁸ Peter H. Sand, Freitas Jorge de Sousa, Geoffrey N. Pratt, ‘An Historical Survey on International Air Law Before the Second World War’ (1961) Vol.7 Issue 1 McGill Law Journal 125 31.

⁶⁹ John A. Eubank, ‘Who Owns the Airspace’ (1929) Vol. 63, Issue 1, United States Law Review, 1 5 ; see also Howard S. LeRoy ‘International Air Law Trends’ Symposium: Aviation Law Looks at the Future (1944-1945) Vol. 31, Issue 2, Virginia Law Review, 449

⁷⁰ Hugh H. L. Bellot, ‘The Sovereignty of the Air’ Vol.3 Issue 27, International Law Notes, (1918, December) 137

⁷¹ Peter H. Sand, Freitas Jorge de Sousa, Geoffrey N. Pratt, ‘An Historical Survey on International Air Law Before the Second World War’ (1961) Vol.7 Issue 1 McGill Law Journal 125 “On August 3, 1914, the Netherlands prohibited flights over their territory. During the war, the Dutch Government protested several times against violations of its national airspace and shot down foreign aircraft which did not comply with the interdiction.Denmark, Sweden, Norway, Greece , and Spain, Italy, Bulgaria and China , while still neutral, also protested by words or acts ,or both, against every violation of their airspace by foreign aircraft.’32.

⁷² 100 Years of Commercial Aviation (2014) <<https://www.sita.aero/globalassets/docs/brochures/100-years-of-commercial-aviation-2014.pdf>> accessed 8 December 2015, 21

⁷³ D. Goedhuis, ‘Civil Aviation After the War’ (1942, October) Vol. 36 Issue 4 American Journal of International Law 594 597

2.1.2.2 The Convention Relating to the Regulation of Aerial Navigation, 1919

Eventually, an urge to regulate international civil aviation in peacetime arose.⁷⁴ A Peace Conference was held after World War I from 1918-1919, which was aimed at regulating civil aviation. The first international agreement was reached by the signing of the Convention Relating to the Regulation of Aerial Navigation on October 13, 1919.⁷⁵ The Convention consisted of 43 articles and was signed by 27 states at that time.⁷⁶

The Convention mainly dealt with the practical problems of air navigation,⁷⁷ such as the technical, operational and organisational aspects of civil aviation. One of the achievements of the Convention was the creation ‘of the International Commission for Air Navigation (ICAN, Commission Internationale de Navigation Aérienne or CINA), under the direction of the League of Nations, to monitor developments in civil aviation and to propose measures to States to keep abreast of developments.’⁷⁸

Kuhn emphasised the intention of the Convention to establish uniformity in the regulations of air navigation as ‘laws common to the world’. Accordingly, the intentions of the Convention regarding technical and operational regulations were adaptable to national requirements.⁷⁹

For the first time, the Convention Relating to the Regulation of Aerial Navigation –without defining what was meant by it– underlined the term ‘airspace’⁸⁰ as the area where these regulations would apply to flights. Exclusive state sovereignty was emphasised in what Havel and Sanchez described as the ‘codification of airspace sovereignty’⁸¹ in Article 1 of the Convention:

⁷⁴ Christer Jönsson, ‘Sphere of Flying: The Politics of International Aviation. International Organization’ (1981) Vol.35 No.2 273,277. Retrieved from <<http://www.jstor.org/stable/2706476>> accessed 9 May 2019

⁷⁵ ICAO Official Website ‘Milestones in International Civil Aviation’ <<http://www.icao.int/about-icao/History/Pages/Milestones-in-International-Civil-Aviation.aspx>> accessed 12 May 2019

⁷⁶ ICAO Official Website, ‘The Postal History of ICAO ;The 1919 Paris Convention: The Starting Point for the Regulation of Air Navigation’ <https://www.icao.int/secretariat/PostalHistory/1919_the_paris_convention.htm> “The Convention was ultimately ratified by 37 States, of which four countries (Bolivia, Chile, Iran and Panama) denounced it; therefore, in all, the Convention was in force for thirty-three States in 1940.” accessed 12 May 2019

⁷⁷ Arthur K. Kuhn, ‘International Aerial Navigation and the Peace Conference’ (1920) Vol. 14, Issue 2, American Journal of International Law, 369 380

⁷⁸ ICAO Official Website ‘Milestones in International Civil Aviation’ <<http://www.icao.int/about-icao/History/Pages/Milestones-in-International-Civil-Aviation.aspx>> accessed 12 May 2019

⁷⁹ Arthur K. Kuhn, ‘International Aerial Navigation and the Peace Conference’ (1920) Vol. 14, Issue 2, American Journal of International Law, 369381

⁸⁰ Albert I. Jr Moon, ‘A Look at Airspace Sovereignty’ (Autumn 1963) Vol. 29, Issue 4 Journal of Air Law and Commerce 328 331

⁸¹ Brian F Havel, Gabriel Sanchez, *The Principles and Practice of International Aviation Law* (Kindle Edition, Cambridge University Press. June 2014) location 1247 of 15733

The High Contracting States recognize that every Power has complete and exclusive sovereignty over the airspace above its territory. For the purpose of the present Convention the territory of a State shall be understood as including the national territory, both that of the mother country and of the colonies and the territorial waters adjacent thereto.⁸²

The Convention, which was called ‘The Magna Carta of the Air,’⁸³ only addressed peacetime and ‘had lasting effects on public international aviation law, including the Chicago Convention (1944).’⁸⁴ The Peace Conference of 1919 has been deemed as the starting point of the efforts that led to the establishment of global aviation law.⁸⁵

At that time, due to the high cost of investments in aviation, instead of private airline companies, governments supported the aviation industry to gain the benefits of developed aviation, such as enhancing their ability to conclude foreign airmail contracts or their ability to provide transport to overseas colonies.⁸⁶ In 1925, in order to reduce the cost, the US government withdrew airmail from the official “post office” and left it to private competitors. With the enactment of the US “Air Commerce Act” in 1925, air navigation, the licencing of pilots and air vehicles, and the investigation of air accidents were placed under the government’s control. ‘This was the first step in pushing a ‘safety’ in place.’⁸⁷

As aviation was embracing the whole world, the French Government called the International Aviation Conference in 1929.⁸⁸ The principle of sovereignty, which was unanimously accepted in 1919,⁸⁹ was again favoured by the majority of states in 1929.⁹⁰

⁸² Convention Relating to The Regulation of Aerial Navigation, signed at Paris, October 19th, 1919

⁸³ Roger F Williams, ‘Developments in Aerial Law’ (1926-1927) University of Pennsylvania Law Review and American Law Register, 75 (2), 139 148.

⁸⁴ Brian F Havel, Gabriel Sanchez, *The Principles and Practice of International Aviation Law* (Kindle Edition, Cambridge University Press. June 2014) location 1257 of 15733

⁸⁵ Manley O. Hudson, ‘Aviation and International Law’ (1930, April) Vol. 24, Issue 2 American Journal of International Law 228 231.

⁸⁶ Christer Jönsson, ‘Sphere of Flying: The Politics of International Aviation. International Organization’ (1981) Vol.35 No.2 273 Retrieved from <<http://www.jstor.org/stable/2706476>> accessed 9 May 2019 278.

⁸⁷ Dieter Schmitt and Volker Gollnick, *Air Transport System* (Springer-Verlag Wien 2016) 27.

⁸⁸ D. Goedhuis, ‘Sovereignty and Freedom in the Air Space Part II: Papers Read before the Society in the Year 1955’ Vol. 41 (1955) Transactions for the Year 137 142.

⁸⁹ D. Goedhuis, ‘Civil Aviation After the War’ (1942, October) Vol. 36 Issue 4 American Journal of International Law 594 606.

⁹⁰ D. Goedhuis, ‘Sovereignty and Freedom in the Air Space Part II: Papers Read before the Society in the Year 1955’ Vol. 41 (1955) Transactions for the Year 137 143.

However, developments in aviation were related to the political aspects of international relations. In the period after the end of World War I and before World War II, the increasing ‘economic disintegration’ of the world had an impact on the development of civil aviation.⁹¹

The narrow nationalistic trends which became more and more apparent, particularly after 1929, and the threat of a new war, in the general economic and political field were reflected in international aviation. The social factor in aviation vanished from the stage and the element of power was left in sole control of the scene. Rational appreciation of the value of aviation as a stimulator towards higher levels of economic activity in the world became lost.⁹²

As a result of the development of technology in aircraft making it possible for them to fly between continents,⁹³ the development of intercontinental air navigation between 1929-1939 meant that air communications problems were no longer regional, but ‘had become a world problem.’⁹⁴ At the same time, there were many economic, political and military factors that caused concern about possible conflicts between states over the freedom of air traffic. As a result of the growing concern about protecting national interests against foreign competitors, states strongly embraced exclusive sovereignty and took charge over the aviation activities in their countries.⁹⁵

During World War II, air traffic and aircraft technology expanded enormously.⁹⁶ At the end of World War II, the ‘unlimited prospects of human welfare in peacetime’ began to emerge as the predominant consideration, raising the issue of which legal regime for civil aviation could best serve the entire world.⁹⁷

⁹¹ D. Goedhuis, ‘The Role of Air Transport in European Integration (Summer 1957) Vol. 24, Issue 3 Journal of Air Law and Commerce, 273 274.

⁹² *ibid*

⁹³ Dieter Schmitt and Volker Gollnick, *Air Transport System* (Springer-Verlag Wien 2016) “Charles A. Lindbergh opened the new transatlantic area with his direct solo flight in 1927 from New York to Paris. This spectacular flight got a lot of public interest and also helped a lot of shoe the new capabilities of modern aircraft and make flying more popular for ordinary people. The Australian Charles Kingsford Smith was the first to fly across the larger Pacific Ocean in the Southern Cross. His crew left Oakland, California to make the first trans-Pacific flight to Australian in the three stages to Brisbane in 20h, where they landed on 9 June 1928 after approx. 7400miles total flight. Direct mail routes from Europe to Africa and South from Europe to Africa and South America were opened in 1930.” 28.

⁹⁴ D. Goedhuis, ‘Civil Aviation After the War’ (1942, October) Vol. 36 Issue 4 American Journal of International Law 594 597.) 603.

⁹⁵ D. Goedhuis, ‘Sovereignty and Freedom in the Air Space Part II: Papers Read before the Society in the Year 1955’ Vol. 41 (1955) Transactions for the Year 137 143.

⁹⁶ ICAO Official Website, The Postal History of ICAO :1944; The Chicago Conference <http://www.icao.int/secretariat/PostalHistory/1944_the_chicago_convention.htm>, ; also see Dieter Schmitt and Volker Gollnick, *Air Transport System* (Springer-Verlag Wien 2016) 25-30.

⁹⁷ D. Goedhuis, ‘Sovereignty and Freedom in the Air Space Part II: Papers Read before the Society in the Year 1955’ Vol. 41 (1955) Transactions for the Year 137 144. ; see also Paul Stephen Dempsey, ‘Compliance and

2.1.2.3 The Chicago Convention of 1944

In November 1943, with his liberal ideas⁹⁸ regarding post-war air transport in mind, President Roosevelt called a meeting at the White House.

‘As in war, the safety of the world, so in peace, its prosperity depends on aviation.’

President Roosevelt⁹⁹

Roosevelt intended to focus on solving political, technical and economic problems through international negotiations. Fifty-two nations attended the International Civil Aviation Conference in Chicago in November of 1944.¹⁰⁰

The Chicago Convention was opened for signature on 7 December 1944 and entered into force on 4 April 1947. Initially, 52 states signed the Convention, which was recognised as a ‘major landmark and fundamental source of law’¹⁰¹ in the developing international civil aviation field. During the final stages of World War II, the rules for an International Civil Aviation regime were created based on the political interest and will of the states that were wartime allies which signed the Chicago Convention (1944).¹⁰²

However, the Convention was signed when the world and civil aviation conditions were very different from those that exist today. Technological developments in aviation and their use by states to destroy each other through air attacks during World War II caused devastation across large parts of the world. The shadow of the devastation caused by air attacks during the war and the vulnerability of states to these air attacks had an impact on the regulatory developments regarding the use of airspace.¹⁰³ States, in order to gain more prestige

Enforcement in International Law: Achieving Global Uniformity in Aviation Safety’ (2004) Vol. 30, Issue 1, North Carolina Journal of International Law and Commercial Regulation 1 6.

⁹⁸ D. Goedhuis, ‘The Air Sovereignty Concept and United States Influence on its Future Development’ Vol.22 Issue 2 (1955) Journal of Air Law and Commerce 209 “The Report on the meeting clearly shows that Roosevelt wished air sovereignty to be limited by a considerable freedom of air traffic-unrestricted 5th freedom rights to be recognized, only cabotage traffic to be reserved.” 213.

⁹⁹ D. Goedhuis, ‘Sovereignty and Freedom in the Air Space Part II: Papers Read before the Society in the Year 1955’ Vol. 41 (1955) Transactions for the Year 137 144.

¹⁰⁰ Paul Stephen Dempsey, ‘Compliance and Enforcement in International Law: Achieving Global Uniformity in Aviation Safety’ (2004) Vol. 30, Issue 1, North Carolina Journal of International Law and Commercial Regulation 1 6.

¹⁰¹ Michael Milde, *International Air Law and ICAO* (2nd Edition, Eleven International Publishing 2012)14.

¹⁰² *ibid*, “As always, it was not the legal theory that created the rules of international law but the interests and the political will of sovereign states.” 33.

¹⁰³ *ibid* 13-14.

militarily, sought great influence in aviation. This historical background was an obstacle to the liberal idea of the free development of air transport as an ‘international common interest’;¹⁰⁴ instead, nationalism and its restrictive approach had more influence on defining airspace sovereignty from the Paris Convention of 1919 to the Chicago Convention of 1944.¹⁰⁵ In line with these historical conditions, the main principles that were recognised by the Chicago Convention (1944) are the sovereignty of each¹⁰⁶ state in its airspace, freedom of flight over the high seas, the nationality of aircraft as transport instrumentalities, special limitations on the flight of state aircraft.¹⁰⁷

2.1.2.3.1 Conventional consensus on states’ air space sovereignty

In fact, there is no absolute consensus on the definition of state sovereignty. Sovereignty is defined in a law dictionary as ‘the supreme, absolute and unconditional power.’¹⁰⁸ Moreover, the definition of sovereignty may differ based on different cultures, different periods in history, and various intellectual disciplines such as political science, philosophy and jurisprudence.¹⁰⁹ As Henkin stated, sovereignty ‘means many things, some essential, some insignificant; some agreed, some controversial; some that are not warranted and should not be accepted.’¹¹⁰

¹⁰⁴ D. Goedhuis, ‘The Role of Air Transport in European Integration (Summer 1957) Vol. 24, Issue 3 Journal of Air Law and Commerce, 273 274. ; see also D. Goedhuis, ‘Sovereignty and Freedom in the Air Space Part II: Papers Read before the Society in the Year 1955’ Vol. 41 (1955) Transactions for the Year 137 “..great majority of states being concerned solely which they believed , could be safeguarded only by rules which could be invoked against any competition of foreign airlines.” 145

¹⁰⁵ D. Goedhuis, ‘The Role of Air Transport in European Integration (Summer 1957) Vol. 24, Issue 3 Journal of Air Law and Commerce, 273 275.

¹⁰⁶ John Cobb Cooper, ‘The Chicago Convention - After Twenty Years’ (Spring 1965) , Vol. 19, Issue 3 University of Miami Law Review 333. Not only “contracting states “but each states’ airspace sovereignty was recognized. “..thereby accepting again this principle the principle of airspace sovereignty as an existing part of international law applicable world-wide.” 335.

¹⁰⁷ *ibid* 335-337.

¹⁰⁸ *Black's Law Dictionary* (Abridged 6th Ed. West Goup 1991)“The supreme , absolute ,and uncontrollable power by which any independent state is governed ; supreme political authority ; the supreme will; paramount control of the constitution and frame of government and its administration; the self-sufficient source of political power ,from which all specific political power, from which all specific political powers are derived; the international independence of a state , combined with the right and power of regulating its internal affairs without foreign dictation ; also a political society , or state , which is sovereign and independent”.

¹⁰⁹ Winston P. Nagan, Craig Hammer ‘The Changing Character of Sovereignty in International Law and International Relations’ (2004) Vol. 43, Issue 1, Columbia Journal of Transnational Law 141 143.

¹¹⁰ Quoted by Winston P. Nagan, Craig Hammer ‘The Changing Character of Sovereignty in International Law and International Relations’ (2004) Vol. 43, Issue 1, Columbia Journal of Transnational Law 141 142. fn.3 “ Louis Henkin , International Law: Politics and Values 8 (1995)

Although there is no clear statement of the principle of sovereignty¹¹¹ in the treaty,¹¹² the significant idea of sovereignty emerged from the Peace of Westphalia of 1648.¹¹³ It is asserted that the idea of international society based on sovereign states was juridicalised by the treaty of Westphalia.¹¹⁴

Generally, the concept of state sovereignty refers to the capacity of the state to exert exclusive control and authority over its territory and citizens.¹¹⁵ Although it includes no definition of sovereignty, the United Nations Charter addresses sovereignty and the limits on the sovereignty of its member states.¹¹⁶ Article 1 of the UN Charter underlines the scope of the international concern and the limits on state sovereignty:¹¹⁷

‘The Organization is based on the principle of the sovereign equality of all its Members.’¹¹⁸

Article 2(7) provides more clarity in defining state sovereignty by emphasising:

Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state.¹¹⁹

States have an exclusive authority over their territory to exercise judicial, legal and executive powers. Further, they have ‘complete and exclusive state sovereignty over airspace.

However, the existence of public and private rights in the space above land can be traced back to Roman times.¹²⁰ The rights in the air above private and public lands provided by

¹¹¹ Derex Croxton, ‘The Peace of Westphalia of 1648 and the Origins of Sovereignty’ (September 1999) Vol. 21, No. 3 *The International History Review* 569 569.

<https://www.jstor.org/stable/40109077?seq=1#page_scan_tab_contents> 12 May 2019

¹¹² Treaty of Westphalia Peace Treaty between the Holy Roman Emperor and the King of France and their respective Allies signed at Munster on October 24th of 1648).

<http://avalon.law.yale.edu/17th_century/westphal.asp> last visited January 30th 2017

¹¹³ Winston P. Nagan, Aitza M. Haddad, ‘Sovereignty in Theory and Practice’ (2012) Vol. 13, Issue 2 *San Diego International Law Journal* 429 “It is commonly understood that the Peace of Westphalia was the decisive political and juridical event for establishing a European System of authority based on sovereignty of the nation state..... the rooting of sovereign authority in secular terms would also imply that the limitations (...) would no longer be relevant to a form of sovereignty that was meant to separate itself from religion.” 446-447.

¹¹⁴ *ibid* 432.

¹¹⁵ Michael Milde, ‘Contemporary State Sovereignty under the Microscope’ (Spring 2002) Vol. 52, Issue 2 *University of Toronto Law Journal* 275 276.

¹¹⁶ Winston P. Nagan, Craig Hammer ‘The Changing Character of Sovereignty in International Law and International Relations’ (2004) Vol. 43, Issue 1, *Columbia Journal of Transnational Law* 141 154.

¹¹⁷ *ibid* 156.

¹¹⁸ United Nations Charter. Retrieved from United Nations < <http://www.un.org/en/sections/un-charter/chapter-i/index.html>> accessed 12 May 2019

¹¹⁹ *ibid*

¹²⁰ John Cobb Cooper, ‘Roman Law and the Maxim *Cujus Est Solum* in International Law’ (1952) Vol. 1 Issue.1, *McGill Law Journal*, 23 26.

Roman law were asserted to protect the legitimate use of land, not the use of the sky.¹²¹ This principle of Roman law has created the assertion that states also have unlimited jurisdiction over their superjacent airspace¹²² in both common law and civil law.¹²³

In ancient times, under Roman law, the exclusive rights of the landowner were recognised as ‘*cujus est solum, ejus est usque ad coeloum et ad inferos,*’ which means that ‘he who owns the soil also owns everything from the center of the earth to sky.’¹²⁴ This principle of an exclusive sovereign right was accepted and followed by the courts before the time of aircraft when nuisance and trespassing were most often the issues in legal conflicts.¹²⁵

Later, when aeroplanes started to use passages in the airspace, courts changed their views regarding airspace ownership and defined landowners’ rights to the airspace above their land as ‘only within the realm that was necessary to the reasonable use and enjoyment of the surface.’¹²⁶

For instance, In *Hinman v Pacific Air Transport*,¹²⁷ the court held that ‘the landowner owns so much of the space above the ground as he can occupy or make use of, in connection with the enjoyment of the land.... As regard trespass, the court held that traversing the airspace above the land was not a trespass at all but was a lawful act unless it causes the injury.’¹²⁸

In another case, *United States v Causby*,¹²⁹ Mr Justice Douglas stated that the ancient doctrine ‘*cujus est solum, ejus est usque ad coeloum et ad inferos*’ had no place in the modern world. Rather, the air is a public highway.¹³⁰

¹²¹ F. B. Shick, ‘Space Law and Space Politics’ Vol. 10 Issue 4 (1961) *International and Comparative Law Quarterly* 681–681.; see also John Cobb Cooper, ‘Roman Law and the Maxim *Cujus Est Solum* in International Law’ (1952) Vol. 1 Issue.1, *McGill Law Journal*, 23 “Modern writers are generally in accord that Roman Law thus recognized and protected rights in space. Unanimity of opinion does not...” 26.

¹²² F. B. Shick, ‘Space Law and Space Politics’ Vol. 10 Issue 4 (1961) *International and Comparative Law Quarterly* 681–681.

¹²³ Peter H. Sand, Freitas Jorge de Sousa, Geoffrey N. Pratt, ‘An Historical Survey on International Air Law Before the Second World War’ (1961) Vol.7 Issue 1 *McGill Law Journal* 125 ‘French Civil Code (1804), art.552 “The ownership of land includes the ownership of everything above and below the surface” 24. fn 3.

¹²⁴ John A. Eubank, ‘Who Owns the Airspace’ (1929) Vol. 63, Issue 1, *United States Law Review*

¹²⁵ John A. Eubank, ‘The Adjudication of Rights in Air Space by Judicial Process’ Vol. 31 No.2 (1947) *Marquette Law Review* 113–113.

¹²⁶ *ibid* 114.

¹²⁷ Albert I. Jr Moon, ‘A Look at Airspace Sovereignty’ (Autumn 1963) Vol. 29, Issue 4 *Journal of Air Law and Commerce* 328–330. case quoted at footnote 17, 84 F.2d 755 (9th Cir. 1936), cert. denied, 300 U.S. 654 (1936)

¹²⁸ *ibid* 330.

¹²⁹ *ibid* 330. quoted at footnote 19-20, 328 U.S 256 (1945) 260-261

¹³⁰ *ibid* 330. quoted at footnote 19-20, 328 U.S 256 (1945) 260-261

States' exclusive sovereignty over their airspace was first stated in Article 1 of the Convention Relating to the Regulation of Aerial Navigation (Paris Convention of 1919). Later, the same principle was adopted in Article I of the Convention on International Civil Aviation (Chicago Convention) of 1944.

Accordingly, the main focus was to underline state sovereignty, not only in the use of states' territory but also to regulate the use of the airspace above that territory. Hence, exclusive state sovereignty over the airspace above state territory was placed in Article 1 of the Chicago Convention (1944).

The contracting States recognize that every State has complete and exclusive sovereignty over the airspace above its territory.¹³¹

The scope of 'state territory' is defined in Article 2 of the Convention:

For the purpose of this convention the territory of a state shall be deemed to be the land areas and territorial waters adjacent thereto under the sovereignty, suzerainty, protection or mandate of each state.

The limits of the state territorial sea, however, were defined, after several conferences in the period from 1973 to 1982,¹³² in Article 3 of the United Nations Convention on the Law of the Sea, which came into force in 1994.¹³³

Accordingly, states can claim sovereignty over no more than 12 nautical miles as their territorial seas. Therefore, states' exclusive sovereignty extends over their territorial seas.¹³⁴

¹³¹ Michael Milde, *International Air Law and ICAO* (2nd Edition, Eleven International Publishing 2012) 3.3 – Complete and exclusive sovereignty was first recognised by the 1919 Paris Conference, which is the first legal instrument to enter into force in the province of air law. It was ratified by 32 nations. See also Isabella H. Ph. Diederiks-Verschoor, *An Introduction to Air Law* (9th ed. P. M.-M. Butler, Ed. Kluwer Law International 2012) 3.

¹³² Dean N. Reinhardt, 'The Vertical Limit of State Sovereignty' Vol. 72, Issue 1 (Winter 2007) *Journal of Air Law and Commerce* 65–79.

¹³³ United Nations Convention on the Law of the Sea, 10 December 1982, entry into force: 16 November 1994, Signatories : 157. Parties available at

https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=en > accessed 19 October 2019

Article 3, Breadth of the territorial sea "Every state has right to establish the breadth of territorial sea up to a limit not exceeding twelve nautical miles measured from baselines determined in accordance to this Convention." <https://www.un.org/depts/los/convention_agreements/texts/unclos/closindx.htm accessed 13 May 2019

¹³⁴ Chicago Convention Article 2

As a result of the development of advanced aircraft technology that is capable of reaching high altitudes,¹³⁵ spurring commercial space tourism¹³⁶ to be scheduled into future projects and space activities, the question of the limits on the vertical airspace sovereignty that states can claim has been raised.¹³⁷

There has not been any international consensus about where a state's airspace ends, and outer space begins.¹³⁸ The need for a definition of the limits on vertical airspace has been emphasised because of the legal issues that can arise from a variety of uses of near space.¹³⁹

The international convention regarding outer space, the UN Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies was adopted by the General Assembly Resolution 1962 (XVIII) in 1963 and entered into force in October 1967.¹⁴⁰

The treaty did not define the limits of state sovereignty over outer space; instead, it states that outer space is not subject to a claim of sovereignty.¹⁴¹ The treaty encourages international cooperation¹⁴² and establishes free access to all areas of celestial bodies.¹⁴³ Accordingly, outer space, including the moon and other celestial bodies, can be used by all states without discrimination for peaceful purposes.¹⁴⁴

2.1.2.3.2 Limits on complete and exclusive state sovereignty over airspace

In civil aviation, starting from the earliest times, state sovereignty has been defined by the Convention¹⁴⁵ based on the impact of states' considerations about economic benefits and

¹³⁵ Dean N. Reinhardt, 'The Vertical Limit of State Sovereignty' Vol. 72, Issue 1 (Winter 2007) *Journal of Air Law and Commerce* 6594.

¹³⁶ *ibid* 88.

¹³⁷ *ibid* 69.

¹³⁸ Brian F Havel, Gabriel Sanchez, *The Principles and Practice of International Aviation Law* (Kindle Edition, Cambridge University Press. June 2014) location 1405 of 15733

¹³⁹ Dean N. Reinhardt, 'The Vertical Limit of State Sovereignty' Vol. 72, Issue 1 (Winter 2007) *Journal of Air Law and Commerce* 65 "The include relatively low-cost suborbital vehicles capable of providing short flights for tourists, vehicles operating at high altitude with intercontinental ranges, and autonomous long endurance high altitude vehicles used to conduct surveillance or as communication platforms. Some of these vehicles have moved beyond paper and demonstrated their capabilities." 88.

¹⁴⁰ Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (1962)

<<http://www.unoosa.org/oosa/en/ourwork/spacelaw/treaties/introouterspacetreaty.html>> accessed 13 May 2019

¹⁴¹ *ibid* Art.2

¹⁴² *ibid* Art.3

¹⁴³ *ibid* Art.1

¹⁴⁴ *ibid* Art.1

¹⁴⁵ The Convention Relating to the Regulation of Aerial Navigation (1919)

political concerns.¹⁴⁶ The Chicago Convention of 1944 underlines that the exclusive sovereignty of states over their territory means that access to the airspace of another state depends on permission given by that state.¹⁴⁷ However, the state sovereignty approach of the Chicago Convention (1944) is not absolutist.¹⁴⁸ The Contracting States do not have unlimited freedom in their airspace as the Convention's wording may imply.

International air service is defined as 'an air service that passes through the airspace of more than one state.'¹⁴⁹ The Convention limits the power of the principle of absolute state sovereignty in international air services based on the character of scheduled or non-scheduled international air services.

Article 5 of the Convention regulates the 'rights of non-scheduled flights.'¹⁵⁰ Accordingly, the contracting States grant each other the right to make flights into or in transit non-stop across their territory and to make stops for non-traffic purposes without the necessity of obtaining permission.

On the other hand, Article 6 of the Convention regulates scheduled air services. Scheduled flights require special permission to cross the air borders of another state. Accordingly, no 'scheduled international air service'¹⁵¹ may be operated over or into the territory of a Contracting State, except with the special permission or other authorisation of that State.

In Article 7, the cabotage rights of the Contracting States are regulated as another indication of the principle of state sovereignty. Accordingly, 'each contracting State shall have the right to refuse permission to the aircraft of other Contracting State to take on its territory passengers, mail and cargo carried for remuneration or hire and destined for another point within its territory.'

¹⁴⁶ Alan P. Dobson, Joseph A. McKinney, 'Sovereignty, Politics, and U.S. International Airline Policy' (Summer 2009) Vol. 74, Issue 3 *Journal of Air Law and Commerce* 527

¹⁴⁷ Chicago Convention (1944) Article 1

¹⁴⁸ Brian F Havel, Gabriel Sanchez, *The Principles and Practice of International Aviation Law* (Kindle Edition, Cambridge University Press. June 2014) location 1448 of 15733

¹⁴⁹ ICAO Manual on the Regulation of International Air Transport, Doc.9626 (Second Edition 2004) 5.3.1 <http://www.icao.int/Meetings/atconf6/Documents/Doc%209626_en.pdf > accessed 9 May 2019

¹⁵⁰ *ibid* "non-scheduled air service is a commercial air transport service performed as other than a scheduled service" 4.6.1

¹⁵¹ *ibid*, "scheduled air service is typically an air service open to use by the general public and operated according to a published timetable or with such a regular frequency that it constitutes an easily recognizable systematic series of flights" 5.3.1

Another right is given to the contracting States which allows them to establish prohibited areas. Article 9 of the Convention states that ‘prohibited areas shall be of reasonable extent and location so as not to interfere unnecessarily with air navigation.’ However, the contracting States shall not discriminate ‘between the aircraft of the State whose territory is involved.’¹⁵²

One landmark amendment to the idea of unlimited state sovereignty in the Convention was the adoption of Article 3 bis¹⁵³ after a Soviet military aircraft shot down Korean Airlines flight 007, which was flying over Soviet territory, killing the 269 people aboard.

The new article, Article 3 *bis* paragraph a) states:

The contracting States recognize that every state must refrain from resorting to the use of weapons against civil aircraft in flight and that in case of interception, the lives of persons on board and the safety of aircraft must not be endangered. This provision shall not be interpreted as modifying in any way the rights and obligations of states set forth in the Charter of the United Nations.¹⁵⁴

Article 3 *bis* applies and reaffirms the customary international law. This means that the duty to refrain from the use of weapons against civil aircraft in flight had already existed, regardless of the amendment to the Convention.¹⁵⁵

Article 8 also applies the sovereignty principle to regulate permission for pilotless aircraft to fly over the territory of another state, and Article 10 applies it to regulate the admission to and departure from state territory.

2.2. The International Civil Aviation Organization (ICAO)

By signing the Chicago Convention (1944), the contracting States also agreed on the creation of the International Civil Aviation Organization (ICAO) described in Articles 43-47 of the

¹⁵² Chicago Convention (1944) Article 9

¹⁵³ ICAO Document (9436) Protocol Relating to Amendment to the Convention on International Civil Aviation Article 3 *bis*, was adopted by unanimous consensus by the 25th Session (extraordinary) of the ICAO Assembly at Montreal on May 1984 entered into force on October 1st 1998.

<http://www.icao.int/secretariat/legal/List%20of%20Parties/3bis_EN.pdf > accessed 13 May 2019

¹⁵⁴ Convention On International Civil Aviation 1944

(Doc.7300)<<https://www.icao.int/publications/pages/doc7300.aspx> > accessed 13 May 2019

¹⁵⁵ Michael Milde, ‘*International Air Law and ICAO*’ (Eleven International Publishing, 2008) 57

Convention. ICAO came into being on 4 April 1947¹⁵⁶ in order to provide for safe and orderly international air transport by establishing certain principles and arrangements.¹⁵⁷

The International Civil Aviation Organization (ICAO) is a United Nations (UN) specialised agency¹⁵⁸ in the field of civil aviation. The aims and objectives of the International Civil Aviation Organization (ICAO) were laid down in Article 44 of the Convention.¹⁵⁹ The objective outlined in Article 44 to ‘insure the safe and orderly growth of international aviation throughout the world’ is still given the highest priority in the ICAO’s work.¹⁶⁰

Since its establishment, ICAO has been responsible for implementing the responsibilities given to it by the Convention. However, ICAO is now a very different organisation from the one originally established. At present, ICAO has 191-member states, rather than the original 52, and conditions, such as the volume of air activity, the level of advanced technology used in air transport, and the impact of globalisation, are very different than the time it was established.

¹⁵⁶ Convention On International Civil Aviation 1944

(Doc.7300)<<https://www.icao.int/publications/pages/doc7300.aspx>> accessed 13 May 2019

¹⁵⁷ ibid Article 43- 47

¹⁵⁸ UN Official Website, ‘Funds, Programmes, Specialized Agencies and Others’ “The UN system, also known unofficially as the "UN family", is made up of the UN itself and many affiliated programmes, funds, and specialized agencies, all with their own membership, leadership, and budget. The programmes and funds are financed through voluntary rather than assessed contributions. The Specialized Agencies are independent international organizations funded by both voluntary and assessed contributions”< <http://www.un.org/en/sections/about-un/funds-programmes-specialized-agencies-and-others/index.html>> accessed 13 May 2019

¹⁵⁹ Convention On International Civil Aviation 1944

(Doc.7300)<<https://www.icao.int/publications/pages/doc7300.aspx>> accessed 13 May 2019

Article 44 :The aims and objectives of the Organization are to develop the principles and techniques of international air navigation and to foster the planning and development of international air transport so as to:

- a) Insure the safe and orderly growth of international civil aviation throughout the world;
- b) Encourage the arts of aircraft design and operation for peaceful purposes;
- c) Encourage the development of airways, airports, and air navigation facilities for international civil aviation;
- d) Meet the needs of the peoples of the world for safe, regular, efficient and economical air transport;
- e) Prevent economic waste caused by unreasonable competition;
- f) Insure that the rights of contracting States are fully respected and that every contracting State has a fair opportunity to operate international airlines;
- g) Avoid discrimination between contracting States;
- h) Promote safety of flight in international navigation;
- i) Promote generally the development of all aspects of international civil aeronautics.

¹⁶⁰ ICAO Official Website, ‘Global Aviation Safety Plan. (2014-2016)’

<<https://www.icao.int/safety/scan/Documents/GLOBAL%20SAFETY%20AVIATION%20PLAN%202013.pdf>> accessed 13 May 2019 11.

Furthermore, compared to the modern global developments in air transport, air transport deregulation, liberalisation, open skies agreements, advanced technology and the total volume of aviation in world transport, it would not be wrong to describe the conditions of civil aviation in those days as elementary.

Recent studies have revealed the growth of air passenger traffic trends globally.¹⁶¹ According to the figures below (Figure 2.I), despite shock events that caused declines between the years of 1950-2010, global air passenger traffic increased by over 10% per year.

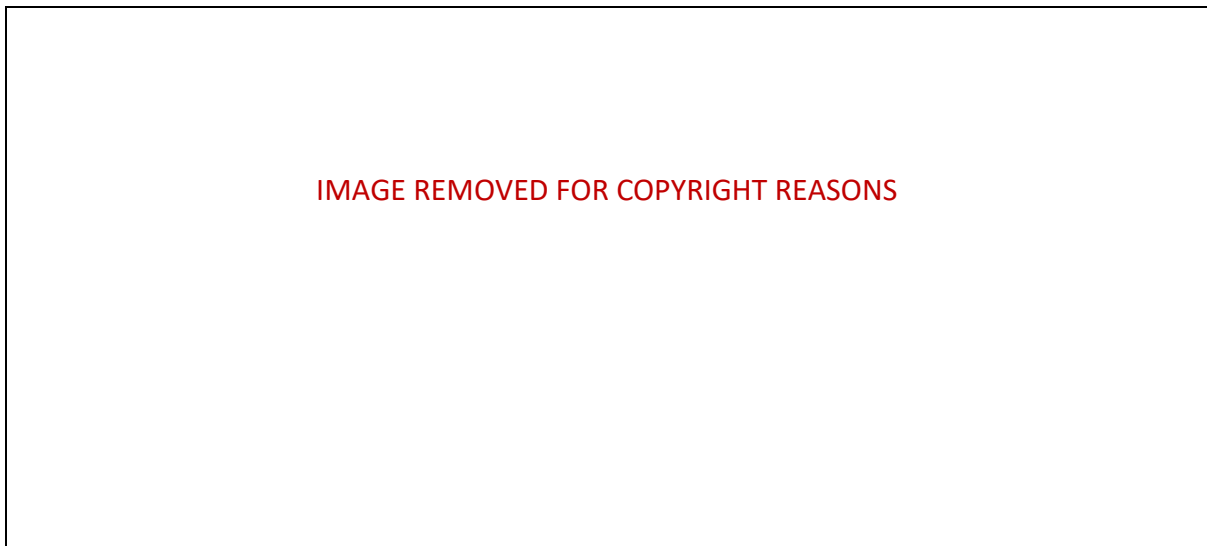


Figure 2.1 World Aviation 1950 to 2012¹⁶²

¹⁶¹ International Air Transport Association (IATA) Publications, David Oxley & Jain Chaitan ‘ IATA Global Air Passenger Markets: Riding Out Periods of Turbulence Chapter I.4 (2015) 59-60. <https://www.iata.org/publications/economic-briefings/WEF_TTCR_Chapter1.4_2015.pdf> accessed 13 May 2019

¹⁶² ICAO Official Website, World Aviation and World Economy, <http://www.icao.int/sustainability/Pages/Facts-Figures_WorldEconomyData.aspx> accessed 8 July 2019

Another report, the Global Report on Aviation of the World Tourism Organization, indicated that the growth of international tourism increased from 25 million tourists in 1950 to 990 million in 2011. The report stated that the expectation for 2030 is 1.8 billion passengers.¹⁶³

The report also indicated that “the number of international tourists’ arrivals worldwide is expected to increase by an average 3.3% a year over the period 2010 to 2030.”¹⁶⁴ The main reason for the growth of international tourism is explained as in the report due to the advances in air transport.¹⁶⁵

The Figure 2.2 from the Report shown below, which is based on regional assessments, shows that

[i]nternational tourist arrivals in emerging economy destinations of Asia, Latin America, Central and Eastern Europe, Eastern Mediterranean Europe, the Middle East and Africa will grow at double the pace (+4.4 a year) of advanced economy destinations (+2.2% a year). As a result, arrivals to emerging economies are expected to surpass those to advanced economies by 2015. In growth, 57% of international arrivals will be in emerging economy destinations (versus 30% in 1980) and 43% in advanced economy destinations (versus 70% in 1980).¹⁶⁶

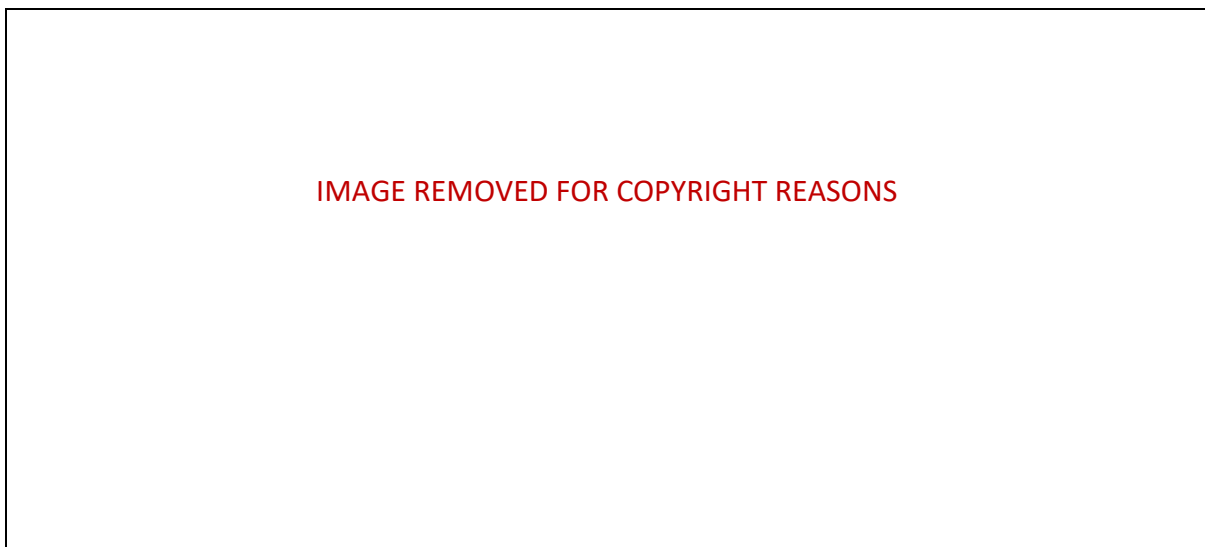


Figure 2.2 UNWTO Tourism Towards 2030: Actual trend and forecast 1950-2030¹⁶⁷

¹⁶³ World Tourism Organisation ‘Global Report on Aviation’ Volume 5 (2012).
<http://cf.cdn.unwto.org/sites/all/files/pdf/unwto_globalreportonaviation_lw_eng_0.pdf> accessed 13 May 2019

¹⁶⁴ ibid

¹⁶⁵ ibid

¹⁶⁶ ibid 42-43.

¹⁶⁷ ibid 43.

In line with global market developments in civil aviation, such as the growth in air traffic, air transport market liberalisation, the use of advanced new technologies, regional integrations in the governance of civil aviation, need for a reform of the Chicago Convention (1944) and the role and functions of the ICAO have been the subject of scholarly discussions.¹⁶⁸

Aviation safety still is a priority in ICAO's work, and safety is a common interest with priority in the hierarchical order of the aviation field. However, the question is whether the provisions of the Convention and the regime of the International Civil Aviation Organization established by the Convention are responsive enough to the current regulatory issues in global air transport.

Havel proposed a reform of the Chicago system. The necessity for reform is explained as follows:

the global air transport regulatory system, a hodge-podge of inter-State bilateral treaties based on archaic domestic and international rules of nationality and citizenship, is so inadequate to the commercial demands of modern industry that the imperatives for its reform transcend domestic debates about incremental public intervention in the business of providing air transport.¹⁶⁹

At this point, the research examines how the ICAO should constitute one of its objectives that were laid down in the Convention, to ensure the safe and orderly growth of international civil aviation throughout the world, under the impact of the forces of globalisation.

Therefore, the regulatory authority delegated by the Convention and the legal concept of the regulations of the ICAO needs to be analysed first. The aim for this analysis is to indicate whether the current international system provides an adequate legal framework for the ICAO to achieve the objective of ensuring the safe and orderly growth of international civil aviation throughout the contemporary world despite the impact of globalisation.

¹⁶⁸ Brian Havel, *Beyond Open Skies; A New Regime for International Aviation* (Kluwer Law International 2009); Oliver Onidi, 'A Critical Perspective on ICAO' (2008, February) Vol. 33, Issue 1. *Air & Space Law*, 38.; Ruwantissa Abeyratne, 'The Role of the International Civil Aviation Organization (ICAO) in the Twenty First Century' Vol.34 (2009) *Annals of Air and Space Law* 529

¹⁶⁹ Brian Havel, *Beyond Open Skies; A New Regime for International Aviation* (Kluwer Law International 2009) Preface, 5

The analysis starts with the norm-setting capacity of the ICAO and the legal concept of the regulations, particularly the Standards and Recommendation (SARPs), in line with international legal theories.

2.2.1 The Statute of ICAO as a UN Specialised Agency

ICAO was created by a treaty (the Chicago Convention (1944)) signed by the States and governed by international law.¹⁷⁰ The status of the International Civil Aviation Organization (ICAO) is defined as ‘a UN specialized agency, established by States in 1944 to manage the administration and governance of the Convention on International Civil Aviation (Chicago Convention (1944)).’¹⁷¹

The Convention on the Privileges and Immunities of the United Nations was adopted by the General Assembly of the United Nations in February 1946¹⁷² and a separate Convention on the Privileges and Immunities of the United Nations was approved by the General Assembly on 21 November 1947.¹⁷³ The Convention defines the standard privileges and immunities that apply to all specialised agencies. “The Convention is applicable, subject to variations set forth in the annexes for each agency, which are subject to approval by the respective specialised agencies in accordance with their constitutional procedures, to all specialised agencies one of which is the International Civil Aviation Organisation (Annex III).”¹⁷⁴

The Agreement between the United Nations and the International Civil Aviation Organization came into force in May 1947. The ‘ICAO became a Specialized Agency in a relationship with the UN, and thereby joined the UN family. By this agreement, each organisation undertakes to fulfil certain requirements whereby the other may participate in its work in the measure

¹⁷⁰ Vienna Convention on the Law of Treaties (1969) signed on May 23rd of 1969, entered into force on January 27th of 1980, UN Doc. A/CONF.39/27, 4th Annex, reprinted in 8 ILM 679 (1969) Article 2.1 (a) <https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf> accessed 13 May 2019

¹⁷¹ ICAO Official Website <<http://www.icao.int/about-icao/Pages/default.aspx>> accessed 13 May 2019

¹⁷² Convention on the Privileges and Immunities of the United Nations (1946) <<http://www.un.org/en/ethics/pdf/convention.pdf>> accessed May 13 2019

¹⁷³ Peter H. Bekker, ‘The *Legal Position of Intergovernmental Organisations- A Functional Necessity Analysis of Their Legal Status and Immunities*’ Martinus Nijhoff Publishers, 1994) 132.

¹⁷⁴ *ibid* 133

required for the fulfilment of certain articles of the Chicago Convention and the Charter of the UN.¹⁷⁵

In the agreement, the UN recognises ICAO as a specialised agency ‘responsible for taking such action as may be appropriate under its basic instrument for the accomplishment of the purposes set forth therein.’¹⁷⁶ Also, as a United Nation’s specialised agency, ICAO was given privileges and immunities¹⁷⁷ under the Agreement between ICAO and Canada.¹⁷⁸

Milde emphasised the other functions of the ICAO as a UN specialised agency as follows:

ICAO is committed to assist the UN Security Council in carrying out decisions of the Security Council for the maintenance of international peace and security. ICAO is also authorised to request advisory opinions from the International Court of Justice.¹⁷⁹

2.2.2 ICAO as an intergovernmental organisation

An international organisation is generally defined as a ‘form of cooperation founded on an international agreement creating at least one organ with a will of its own, established under international law, ... such an organisation has a legal personality.’¹⁸⁰

¹⁷⁵ ICAO and United Nations http://www.icao.int/secretariat/PostalHistory/icao_and_the_united_nations.htm accessed 13 may 2019

¹⁷⁶ Michael Milde, ‘*International Air Law and ICAO*’ (Eleven International Publishing, 2008) “The agreement provides for reciprocal representation and participation, without vote, in meetings of different bodies and ICAO accepts to put on the agenda of its Assembly and Council items proposed by the United Nations and exchange information.” 129.

¹⁷⁷ Elmar Giemulla & Ludwig Weber, ‘*International and EU Aviation Law. Selected Issues*’ (Kluwer Law International, 2011) “The privileges and immunities under the Headquarter Agreement are in line with those enjoyed by other UN specialised agencies, and include in particular immunity of the Organisation’s property and assets, inviolability of its headquarters premises, and recognition of the Organisation’s juridical personality.” 81.

¹⁷⁸ The Headquarters Agreement between ICAO and Canada (1964) <<https://www.cambridge.org/core/journals/canadian-yearbook-of-international-law-annuaire-canadien-de-droit-international/article/headquarters-agreement-between-canada-and-the-international-civil-aviation-organization/A358A7C243AFE18ABF925E49681C75D7>> accessed 14 May 2019

¹⁷⁹ Michael Milde, ‘*International Air Law and ICAO*’ (Eleven International Publishing, 2008) 129.

¹⁸⁰ Gerhard Loibl, ‘The Role of International Organisations in International Law-Making International Environmental Negotiations - An Empirical Study’ Vol. 1, Issue 1 (2001) *Non-State Actors and International Law* 41 43.

Klabbers asserted that it is impossible to define structurally what an international organisation is. 'International organisations are social constructs, created by people, in order, presumably, to help them achieve some purpose, whatever the purpose may be.'¹⁸¹

However, the Vienna Convention on the Law of Treaties defines an international organisation as an 'intergovernmental organisation.'¹⁸²

The basic characteristic of intergovernmental organisations is that they are created by a treaty signed by sovereign states. Accordingly, intergovernmental organisations generally must have three elements. These elements are legal personality, capacity and competence.¹⁸³

Article 47 of the Chicago Convention (1944) defines the legal capacity of the International Civil Aviation Organization at the level of both international and national law as follows :

The organisation shall enjoy in the territory of each contracting State such legal capacity as may be necessary for the performance of its functions.

The underlined aspect is a legal personality, which gives the intergovernmental organisation the capacity to perform its functions in its name. Bekker points out that 'the existence of legal capacity confirms that an international organisation can perform a potential scale of international acts as an international person.'¹⁸⁴ Furthermore, many activities in the field that international organisation be responsible and entitle for managing to the pursuit of its purposes describe the competence of the international organisation.¹⁸⁵

On the other hand, Article 47 also underlines that '[f]ull juridical personality shall be granted wherever compatible with the constitution and laws of the State concerned.' Accordingly, states recognise the legal capacity of the ICAO to perform its functions.¹⁸⁶

¹⁸¹ Jan Klabbers, *'An Introduction to International Institutional Law'* (3rd ed. Cambridge University Press, 2015)

¹⁸² Vienna Convention on the Law of Treaties (1969) signed on May 23rd of 1969, entered into force on January 27th of 1980, UN Doc. A/CONF.39/27, 4th Annex, reprinted in 8 ILM 679 (1969)

¹⁸³ Peter H. Bekker, *'The Legal Position of Intergovernmental Organisations- A Functional Necessity Analysis of Their Legal Status and Immunities'* Martinus Nijhoff Publishers, 1994) 54.

¹⁸⁴ *ibid* 63.

¹⁸⁵ *ibid* 75.

¹⁸⁶ Michael Milde, *'International Air Law and ICAO'* (Eleven International Publishing, 2008) 125.

In line with the above definitions, ICAO is an intergovernmental organisation endowed with norm-setting powers by an international treaty, i.e. the Chicago Convention (1944).

2.3. The Norm-Setting capacity of the ICAO Council as an executive committee

The General Assembly, comprised of all the Member States of the ICAO, meets not less than once every three years and is convened by the Council at a suitable time and place.¹⁸⁷ Also, the Convention provides the condition of the extraordinary meeting for the General Assembly. Accordingly, at any time upon request of not less than one-fifth of the total number of Member States, an extraordinary meeting may be held.¹⁸⁸

The Council, on the other hand, is also a permanent body of the Organization that is responsible to the Assembly. The Council functions as the Organization's executive committee.

The Council is composed of 36 Member States elected by the Assembly for a three-year term.¹⁸⁹ In the election, adequate representation is given to States of chief importance in air transport, to States not otherwise included but which make the largest contribution to the provision of facilities for international civil air navigation, and finally, to States not otherwise included whose designation will insure that all major geographic areas of the world are represented on the Council.¹⁹⁰

One of the substantial competences of the ICAO Council is that authorised to adopt binding decisions. Generally, the functions of the Council are to submit annual reports to the

¹⁸⁷ Convention On International Civil Aviation 1944 Article 48 (Doc.7300)<<https://www.icao.int/publications/pages/doc7300.aspx>> accessed 13 May 2019

¹⁸⁸ *ibid* Article 48 (a)

¹⁸⁹ *ibid* Article 50 a) The Council shall be a permanent body responsible to the Assembly. It shall be composed of thirty-six contracting States elected by the Assembly. An election shall be held at the first meeting of the Assembly and thereafter every three years, and the members of the Council so elected shall hold office until the next following election.

¹⁹⁰ *ibid* Article 50 (b) specifies the composition of the Council.

In electing the members of the Council, the Assembly shall give adequate representation to 1) the States of chief importance in air transport; 2) the States not otherwise included which make the largest contribution to the provision of facilities for civil air navigation; and 3) the States not otherwise included whose designation will insure that all navigation the major geographic areas of the world are represented on the Council. Any vacancy on the Council shall be filled by the Assembly as soon as possible; any contracting State so elected to the Council shall hold office for the unexpired portion of its predecessor's term of office.

Assembly; to carry out the directions of the Assembly, and to discharge the duties and obligations which are placed on it by the Chicago Convention (1944). It also administers the finances of the ICAO appoints and defines the duties of the Air Transport Committee, as well as the Committee on Joint Support of Air Navigation Services, the Finance Committee, and the Committee on Unlawful Interference, the Technical Co-operation Committee and the Human Resources Committee. It appoints the members of the Air Navigation Commission, and it elects the members of the Edward Warner Award Committee.¹⁹¹ A majority vote of its members takes council decisions.¹⁹² The other function of the Council is to appoint the chief executive officer, known as the Secretary-General.¹⁹³ Sochor drew attention to these functions of the ICAO Council, which are generally assigned to the assembly in other organisations.¹⁹⁴ Clearly, the Council's status in the ICAO is its primary source of authority.¹⁹⁵

Another function of the Council is judicial, as laid down in Article 84 of the Convention. Accordingly, the Council may settle disputes between two or more contracting States on matters concerning aviation and the implementation of the provisions of the Convention; it may investigate any situation which presents avoidable obstacles to the development of international air navigation, and in general, it may take necessary steps to maintain the safety and regularity of international air transport.¹⁹⁶ However, the dispute settlement function of the Council has been criticised. The main criticism focuses on the structure of the Council. Since the Council is a political body and does not consist of judges, but of representatives of the states, the decisions of the Council will not be totally objective on legal grounds.¹⁹⁷ This is another moot

¹⁹¹ "The Edward Warner Award consists of a solid gold medal inscribed with the recipient's name, and a certificate of recognition citing the reasons for the Award. It is recognised throughout the world as the greatest single honour the international civil aviation community can bestow, for its importance is derived from the fact that it is given by ICAO on behalf of its Member States. No other international award offers such wide recognition." ICAO Official Website < <https://www.icao.int/about-icao/assembly/Pages/warner.aspx> > accessed 14 May 2019

¹⁹² Convention On International Civil Aviation 1944 (Doc.7300) < <https://www.icao.int/publications/pages/doc7300.aspx> > accessed 13 May 2019 Article 52

¹⁹³ *ibid* Article 54 (h)

¹⁹⁴ Eugene Sochor, ' *The Politics of International Aviation* ' (Palgrave MacMillan Press Ltd.UK. 1991) 57.

¹⁹⁵ *ibid* "such wide executive and legislative authority provided by the Convention without prior approval of the Assembly, suggests the Council's status as a primary rather than a secondary source of authority." 58.

¹⁹⁶ ICAO Official Web Page, < <http://www.icao.int/Pages/governance.aspx> >

¹⁹⁷ Michael Milde, *Dispute Settlement in the Framework of the International Civil Aviation Organization (ICAO), Settlement of Space Law Disputes*, Dordrecht Kluwer 1979" .. The Council is composed of States (not independent individuals) and its decisions would always be based on policy and equity considerations rather than purely legal grounds" 93-95.

point regarding the Council's role in the dispute settlement provision of the Convention because it underlines the influence of politics on ICAO.

Article 84 of the Convention, which regulates the settlement of disputes, states: "If any disagreement between two or more contracting States relating to the interpretation or application of this Convention and its Annexes cannot be settled by negotiation, it shall, on the application of any State concerned in the disagreement, be decided by the Council." This provision has been controversial among aviation professionals and scholars. Michael Milde, the principal legal officer of the ICAO opined:

The Council of ICAO cannot be considered as a suitable body for adjudication in the proper sense of the word-i.e., settlement of disputes by judges and solely on the basis of respect for law. The Council is composed of States (not independent individuals) and its decisions would always be based on policy and equity considerations rather than purely legal grounds.¹⁹⁸

Milde addressed the International Court of Justice for the settlement of legal disputes.

truly legal disputes (recognised by States conceived as being purely legal) can be settled only by a true judicial body which can bring into the procedure full judicial detachment, independence and expertise. The under-employed ICJ is the most suitable body for such type[s] of disputes.¹⁹⁹

Abeyratne noted that the controversial subject of ICAO's unsuitability to decide on disputes between States could only be alleviated by the consideration that the members of the Council are presumed to be well versed in matters of international civil aviation. Therefore, it could be deemed to be better equipped to comprehend the issues placed before them than the distinguished members of the International Court of Justice, some of whom may not be experts in international aviation law.²⁰⁰

On the other hand, Dempsey asserted that the member states should apply to the ICAO Council for dispute settlements that particularly involve economic, regulatory matters. He states that if

¹⁹⁸ Paul Stephen Dempsey, *'Law & Foreign Policy in International Aviation'* (Transnational Pub Inc. 1987) 300, see also Michael Milde, *Dispute Settlement in the Framework of the International Civil Aviation Organization (ICAO), Settlement of Space Law Disputes*, (Dordrecht Kluwer 1979) 87-88.

¹⁹⁹ Paul Stephen Dempsey, *'Law & Foreign Policy in International Aviation'* (Transnational Pub Inc. 1987) 300.

²⁰⁰ Ruwantissa Abeyratne, 'Law Making and Decision-Making Powers of the ICAO Council- A Critical Analysis. *Zeitschrift fur Luft- und Weltraumrecht'* Vol. 41 issue 4 (1992) German Journal of Air and Space Law 387 394.

the losing party is not satisfied with the Council's decision, it still can appeal to a more neutral body (the ICJ or an ad hoc arbitration board) under Article 86 of the Convention.²⁰¹

However, the complexity of the technical issues in aviation disputes necessitates expert perspectives in both international and domestic aviation disputes. When there is a controversial subject, judges who have no expert knowledge in aviation apply expert opinions in any case. Therefore, the Council's role in regulating dispute settlement can still be deemed functional.

As one of the two governing bodies of the ICAO, the Council continuously gives direction to the work of the ICAO. In this regard, a principal function of the Council is the adoption of Standards and Recommended Practices (SARPs) and their incorporation as Annexes to the Chicago Convention (1944).²⁰² The Council may also amend existing Annexes "that are glue which binds together a cooperative and integrated global civil aviation infrastructure"²⁰³ as necessary.²⁰⁴

Article 37 of the Convention regulates the authority of the ICAO to adopt international standards and procedures – SARPs – on a number of subjects,²⁰⁵ as well as other matters that are defined as concerned with the safety, regularity, and efficiency of air navigation as may from time to time appear appropriate. Because civil aviation cannot safely and properly grow without worldwide uniformity in the standards and regulations for air navigation, Article 37 also imposes responsibility on the contracting States to comply with SARPs "in securing the highest practicable degree of uniformity."²⁰⁶

²⁰¹ Paul Stephen Dempsey, *Law & Foreign Policy in International Aviation* (Transnational Pub Inc. 1987) 302.

²⁰² Michael Milde, 'The International Civil Aviation Organisation: After 50 Years and Beyond' (1996) *Australian International Law Journal* 60 "The quasi legislative function of the ICAO Council in the adoption of international standards and recommended practices is a vital function. It is actually unique within the organisational structure of the United Nations system." 64.

²⁰³ Duane Freer, 'ICAO at 50 Years Riding the Flywheel of Technology' (1994, September) *ICAO Journal* 28.

²⁰⁴ *ibid* "In its first 10 years the ICAO Council adopted 378 amendments to the annexes to the Convention. Today the numbers of amendments to annexes has risen to nearly 800. A high percentage of them have been driven solely by advancing technology applications.

²⁰⁵ a) Communications systems and air navigation aids, including ground marking; b) Characteristics of airports and landing areas; c) Rules of the air and air traffic control practices; d) Licensing of operating and mechanical personnel e) Airworthiness of aircraft; f) Registration and identification of aircraft; g) Collection and exchange of meteorological information; h) Log books; i) Aeronautical maps and charts j) Customs and immigration procedures; k) Aircraft in distress and investigation of accidents;

²⁰⁶ Convention On International Civil Aviation 1944

(Doc.7300)<<https://www.icao.int/publications/pages/doc7300.aspx>> accessed 13 May 2019 Article 37 "Each

2.3.1 Safety and security standards for safe flight

Air transport is a very complex system, and it involves many risks for its users on the ground and in the air. The international aviation safety standards (now called global aviation safety standards)²⁰⁷ that are produced to reduce the risk of accidents have a direct link to the national regulative activity of states.

The need for safety in international civil aviation was emphasised strongly in the preamble of the Chicago Convention (1944):

having agreed on certain principles and arrangements in order that international civil aviation may be developed in a safe and orderly manner.²⁰⁸

The International Standards and Recommended Practices (SARPs) contained in 19 Annexes²⁰⁹ have been developed by ICAO to establish a high degree of technical uniformity to develop civil aviation in a safe, efficient and orderly manner as stated in Article 44 of the Convention.

The Annexes, which contain the standards and recommended practices regarding the safety and security of civil aviation, aim to establish uniformity to enhance safe and orderly international civil aviation. At this point, to avoid confusion regarding the concepts of safety and security in civil aviation, the terminology needs to be clarified to enhance the discussion of the concepts of aviation safety addressed in this research.

The concepts of aviation safety and aviation security refer to different types of dangers.

contracting State undertakes to collaborate in securing the highest practicable degree of uniformity in regulations, standards, procedures, and organization in relation to aircraft, personnel, airways and auxiliary services in all matters in which such uniformity will facilitate and improve air navigation. To this end the International Civil Aviation Organization shall adopt and amend from time to time, as may be necessary.”

²⁰⁷ ICAO Official Website, ‘Global Aviation Safety Plan. (2014-2016)’

<https://www.icao.int/safety/scan/Documents/GLOBAL%20SAFETY%20AVIATION%20PLAN%202013.pdf>
> accessed 13 May 2019

²⁰⁸ Convention On International Civil Aviation 1944

(Doc.7300)<<https://www.icao.int/publications/pages/doc7300.aspx>> accessed 13 May 2019

²⁰⁹ Annex 1 Personnel Licensing Annex 2 Rules of the Air Annex 3 Meteorological Service for International Air Navigation Annex 4 Aeronautical Charts Annex 5 Units of Measurement to be Used in Air and Ground Operations Annex 6 Operation of Aircraft Annex 7 Aircraft Nationality and Registration Marks Annex 8 Airworthiness of Aircraft Annex 9 Facilitation Annex 10 Aeronautical Telecommunications Annex 11 Air Traffic Services Annex 12 Search and Rescue Annex 13 Aircraft Accident and Incident Investigation Annex 14 Aerodromes Annex 15 Aeronautical Information Services Annex 16 Environmental Protection Annex 17 Security: Safeguarding International Civil Aviation Against Acts of Unlawful Interference Annex 18 The Safe Transport of Dangerous Goods by Air Annex 19 Safety Management
<http://www.icao.int/Documents/annexes_booklet.pdf> accessed 14 May 2019

The concept of safety is defined in the ICAO Safety Management Manual²¹⁰ as;

the state in which the possibility of harm to persons or of property damage is reduced to, and maintained at or below, an acceptable level through a continuing process of hazard identification and safety risk management.

Therefore, aviation safety regulations mainly focus on ‘preventing accidental harm.’²¹¹

Aviation security is subject of Annex 17 to the Convention²¹². Annex 17 regulates aviation security by safeguarding international aviation against acts of unlawful interference.²¹³

Therefore, the security measures regulated in Annex 17 focus on ‘preventing intentional harm’²¹⁴ carried out by an individual/individuals.

Although the concepts of aviation safety and aviation security address two different kinds of threats to flight safety, Prof. Dempsey clarified this by using the metaphor that ‘safety and security are two sides of the same coin,’²¹⁵ indicating that aviation security is an important aspect of flight safety.

Huang explained that ‘aviation safety also includes security.’²¹⁶

²¹⁰ ICAO Safety Management Manual (SMM), Doc.9859 AN/474, 3rd Edition 2013, 2.1
<<http://www.icao.int/safety/SafetyManagement/Documents/Doc.9859.3rd%20Edition.alltext.en.pdf> > accessed 26 June 2019

²¹¹ Paul Stephen Dempsey, ‘Compliance and Enforcement in International Law: Achieving Global Uniformity in Aviation Safety’ Vol. 30 Issue 1 (2004). North Carolina Journal of International Law and Commercial Regulation, 1 4.

²¹² ICAO, Security and Facilitation Annex 17, “International aviation security were first adopted by the ICAO Council in March 1974 and designated as Annex 17 to the Chicago Convention. The latest Amendment to Annex 17 – Amendment 14 – became applicable on 14 November 2014.”
<<http://www.icao.int/Security/SFP/Pages/Annex17.aspx>> accessed 14 may 2019

²¹³ These are acts or attempted acts such as to jeopardise the safety of civil aviation and air transport, i.e.:

- unlawful seizure of aircraft in flight,
- unlawful seizure of aircraft on the ground,
- hostage-taking on board aircraft or aerodromes,
- forcible intrusion on board an aircraft, at an airport or on the premises of an aeronautical facility,
- introduction on board an aircraft or at an airport of a weapon or hazardous device or material intended for criminal purposes,
- communication of false information such as to jeopardise the safety of an aircraft in flight or on the ground, of passengers, crew, ground personnel or the general public at an airport or on the premises of a civil aviation facility. (emphasis added)

²¹⁴ Paul Stephen Dempsey, ‘Compliance and Enforcement in International Law: Achieving Global Uniformity in Aviation Safety’ (2004) Vol. 30, Issue 1, North Carolina Journal of International Law and Commercial Regulation 1 4.

²¹⁵ *ibid*

²¹⁶ Jiefeng Huang, *Aviation Safety through the Rule of Law; ICAO’s Mechanisms and Practices*, (Kluwer law International 2009) 5.

No matter how airworthy an aircraft is, and how competent its crew members are, air travel will not be safe if it is subject to terrorists' attacks, which have become the most serious threat to the safety of civil aviation.²¹⁷

Since the tragic events on September 11, 2001, aviation security has received considerable focus in civil aviation.²¹⁸ Right after September 11, 2001, at the 33rd session of the ICAO Assembly, Resolution A33-1 (*Declaration on Misuse of Civil Aircraft as Weapons of Destruction and other Terrorist Acts Involving Civil Aviation*) was adopted.²¹⁹ Security procedures have been elevated and detailed for airport screenings on domestic and international flights.²²⁰ The focus was primarily on preventing physical attacks on the crew and hijacking.²²¹ Although these security measures have drastically improved flight safety,²²² the safety of the aviation system has a dynamic character. The risks that threaten the safety of aviation, including its security, must be continuously mitigated.²²³ For instance, although increased security measures against physical terrorist attacks have been efficient, terrorist attacks on the cyberinfrastructure that could damage the aviation industry are of increasing concern as a potential target for a large-scale cyber-attack²²⁴ and are being described as a “new risk to aviation safety.”²²⁵

²¹⁷ *ibid*

²¹⁸ Jiefeng Huang, *Aviation Safety through the Rule of Law; ICAO's Mechanisms and Practices*, (Kluwer law International 2009), Paul Stephen Dempsey, ‘Compliance and Enforcement in International Law: Achieving Global Uniformity in Aviation Safety’ Vol. 30 Issue 1 (2004). North Carolina Journal of International Law and Commercial Regulation, 1, John Saba, ‘Aviation Safety in Crisis: The Option of the International Financial Facility for Aviation Safety (IFFAS)’ (2002) Vol. 30 Issue 1, Transportation Law Journal 1

²¹⁹ Resolutions Adopted at the 33rd Session of the ICAO General Assembly (25 September - 5 October 2001) <http://www.icao.int/Meetings/AMC/MA/Assembly%2033rd%20Session/plugin-resolutions_a33.pdf> accessed 13 may 2019

²²⁰ Jeffrey C. Price & Jeffrey S. Forrest, *Practical Aviation Security, Predicting and Preventing Future Threats*’ (2nd ed. Elseiver 2013) “...the United States did not screen checked baggage *at all* before 9/11. When the United States started screening checked baggage following the Aviation and Transportation Security Act of 2001 (ATSA 2001) legislation, the baseline for screening was established at a higher standard.” 94.

²²¹ Resolutions Adopted at the 33rd Session of the ICAO General Assembly (25 September - 5 October 2001) <http://www.icao.int/Meetings/AMC/MA/Assembly%2033rd%20Session/plugin-resolutions_a33.pdf> accessed 13 may 2019

²²² IATA, The Impact of September 11 2001 on Aviation, < <http://www.iata.org/pressroom/Documents/impact-9-11-aviation.pdf> > accessed 13 May 2019

²²³ ICAO Safety Management Manual (SMM), Doc.9859 (n 205) 2.1.2

²²⁴ London Cyber Security (LCD), ‘Hackable at any Height Cybersecurity in the Aviation Industry’ (April 2015)7.

<https://static1.squarespace.com/static/56d0212027d4bde627db544/t/56e00f379f7266ed7f057f97/1457524543915/LCS_Report_April.pdf> accessed 14 may 2019

²²⁵ Sion Camilleri, ‘Current State of Cyber Security Readiness in the Aviation Industry’ A Matter of Time and Money (2014, September 21) Durasee Services Limited. 3.

<<http://nebula.wsimg.com/b9f9913b47044fb2a2e256a86762c8d3?AccessKeyId=8E0A7E654AC170A0FBBD&disposition=0&alloworigin=1>> accessed 14 May 2019

As Dempsey emphasised, both safety and security regulations are designed “to avoid injuries to persons and property, and the deprivation of man’s most valuable attribute – life.”²²⁶

Therefore, the standards and recommended practices which are set up to regulate both safety and security are about safe flights and the safety of civil aviation.

2.3.2 Standards and Recommended Practices (SARPs)

Article 54 of the Convention authorises the Council of the ICAO to adopt international standards and recommended practices and to designate them as Annexes of the Convention for the convenience of the contracting States.²²⁷ In addition to the administrative functions that international organisations’ bodies generally possess, the ICAO Council has a “quasi-legislative function.”²²⁸ The ICAO Council had adopted 19 Annexes as of the time of writing.

Although the SARPs are placed under Chapter VI, Article 37 of the Convention, there is no definition of SARPs in the Convention. SARPs were first defined by the First Assembly of the ICAO in 1947 in Resolution A1-31, and the contracting States’ obligation of uniformity concerning the SARPs was underlined.²²⁹

The Council addressed the adoption of the SARPs as a “priority” in its second session.²³⁰ The current definition of SARPs was adopted by the 29th Session of the Assembly on October 8, 1992, by Resolution A 29-7 Appendix A.²³¹ The terms “*Standard*” and “*Recommended Practice*” were defined as follows:

Standard- any specification for physical characteristics, configuration, material, performance, personnel or procedure, the uniform application of which is recognized **as necessary for the safety or regularity** of international air navigation and to which the--Contracting States will conform in accordance with

²²⁶ Paul Stephen Dempsey, ‘Compliance and Enforcement in International Law: Achieving Global Uniformity in Aviation Safety’ Vol. 30 Issue 1 (2004). North Carolina Journal of International Law and Commercial Regulation, 1 4.

²²⁷ Thomas Buergenthal, ‘Principles of Public International Law’ (1st ed., Vol. 7 Syracuse University Press. T. 1969) 58.

²²⁸ Michael Milde, *International Air Law and ICAO* (2nd Edition, Eleven International Publishing 2012) 149.

²²⁹ ICAO Resolution A1-EC/31 Document 4193, ICAO Resolution A1-31, ICAO Doc. 4411 A1-P/45 (1947)

²³⁰ Ruwantissa Abeyratne, ‘Law Making and Decision-Making Powers of the ICAO Council- A Critical Analysis. Zeitschrift für Luft- und Weltraumrecht’ Vol. 41 issue 4 (1992) German Journal of Air and Space Law 387 388.

²³¹ ICAO Resolutions adopted by the Assembly and Index to Documentation. 29th Session of the ICAO Assembly (Montreal, 22 September – 8 October 1992), Doc.9600, A9-RES. (1992). Retrieved from ICAO <<https://www.icao.int/Meetings/AMC/ArchivedAssembly/en/A29/index.html>> 14 May 2019

the Convention; in the event of impossibility of compliance, notification to the Council is compulsory under Article 38 of the Convention; and,

Recommended Practice- any specification for physical characteristics, configuration, material performance, personnel or procedure, the uniform application of which is recognized **as desirable in the interest of safety**, regularity or efficiency of international air navigation and to which Contracting States will endeavour to conform in accordance with the Convention.”²³²

The adoption of the Annexes by the Council is regulated by Article 90 of the Convention. A vote of two-thirds of the Council is required in a special meeting called for that purpose. Adopted annexes shall be submitted to each contracting State.

Although there have been criticisms regarding inadequacy among the member States’ participation in the decision-making process for the Council regulations, the regulatory powers of the organisation are still exercised according to the aims of the member States. Scholars have emphasised that the ICAO’s law-making power through the Council should not be taken as an act independent of the member States’ will.²³³

Although some commentators have drawn attention to a ‘potential conflict of interest’²³⁴ among the Contracting States regarding the worldwide application of the regulations, standards and procedures, it is generally accepted that the process of making SARPs embraces the participation of the contracting States. Buergenthal explained the participation of the contracting States in the process of making SARPs:

All Contracting States have a voice in the formulation and development of SARPS at two different stages of the drafting process. First, each Contracting State is free to participate in the divisional meetings and conferences, where it has an opportunity to initiate and help develop proposals for SARPS. Second, all proposals for SARPs or amendments thereto, must be submitted to the Contracting States for their comments after they have been reviewed by the Air Navigation Commission to the Air Transport Committee.²³⁵

²³² (emphasis added)

²³³ Roderick van Dam, ‘Regulating International Civil Aviation- an ICAO Perspective’ in T. Masson-Zwaan, & P. Mendes de Leon (eds) *Annals of Air and Space Law: De Lege Ferenda*, Essays in Honour of Henri A. Wassenberg 11-25. (1992) 12.

²³⁴ Michael Milde ‘Enforcement of Aviation Safety Standards Problems of Safety Oversight’ Vol. 45 Issue 1 (1996) *Zeitschrift für Luft- und Weltraumrecht - German Journal of Air and Space Law* 3 7.

²³⁵ Thomas Buergenthal, *Principles of Public International Law* (1st ed., Vol. 7 Syracuse University Press. T. 1969) 63.

Another outstanding distinguishing characteristic of the law-making process of the ICAO is that the Council acts unilaterally, and there is no ratification or approval of the standards by the member countries.²³⁶ Therefore, states' adoption the ICAO's regulations into national law do not require a treaty-making process when Annexes are adopted.²³⁷

The ICAO has been exercising its regulatory functions since it was established. Further, it has been establishing standards or amending the existing standards in the field of civil aviation to respond to the developments in a globalised world and the advances in technology and growth in aviation transport around the world. Establishing worldwide uniformity in the application of safety standards is the main purpose of the ICAO's regulations.

In addition to describing the legal capacity of the ICAO, the Chicago Convention (1944) also imposes obligations on the contracting States. The main obligations for the Contracting States are stipulated by Articles 37 and 38 of the Convention. Article 37 regulates States' obligations in adopting international standards and procedures.²³⁸, and Article 38 regulates States' obligations in departing from international standards and procedures.²³⁹

While Article 37 imposes on each state an obligation 'to collaborate in securing the highest practicable degree of uniformity in regulations, standards, procedure', Article 38 requires a certain time in which the ICAO must be notified regarding different practices or standards that state cannot comply with. In the case of amendments to international standards, any state which does not make the appropriate amendment to its regulations or practices shall give

²³⁶ Eugene Sochor, *The Politics of International Aviation* (Palgrave MacMillan Press Ltd.UK. 1991) 58.

²³⁷ Robert W. Schaaf, 'International Civil Aviation Organization (ICAO): Legal Activities and Documentation' (Winter 1991) Volume 19, Issue 3, *International Journal of Legal Information*, 248 'as is the case for standards adopted by UNESCO, the International Labour Organization and Food and Agriculture Organization. Thus, ICAO's regulatory process is through legislation rather than through a treaty- making process.'²⁴⁸.

²³⁸ Article 37 (Adoption of international standards and procedures of the Chicago Convention) ' Each contracting State undertakes to collaborate in securing the highest practicable degree of uniformity in regulations, standards, procedures, and organization in relation to aircraft, personnel, airways and auxiliary services in all matters in services in which such uniformity will facilitate and improve air navigation.'

²³⁹ Article 38 (Departures from international standards and procedures) of the Chicago Convention 'Any State which finds it impracticable to comply in all respects with any such international standard or procedure, or to bring its own regulations or practices into full accord with any international standard or procedure after amendment of the latter, or which deems it necessary to adopt regulations or practices differing in any particular respect from those established by an international standard, shall give immediate notification to the International Civil Aviation Organization of the differences between its own practice and that established by the international standard. In the case of amendments to international standards, any State which does not make the appropriate amendments to its own regulations or practices shall give notice to the Council within **sixty days** of the adoption of the amendment to the international standard, or indicate the action which it proposes to take. In any such case, the Council shall make immediate notification to all other states of the difference which exists between one or more features of an international standard and the corresponding national practice of that State' (emphases added)

notice to the Council of the ICAO within 60 days of the adoption of the amendment to the international standard or indicate the action which it proposes to take. The importance of this requirement lies in the fact that the obligation to notify the Council of the different practices will enable the Council to notify all the other states about the different practice or features of the international standard and the corresponding national practice of that state.²⁴⁰

However, in practice, informing the ICAO regarding compliance with standards is not working as it should be based on the Convention. Milde explained this lack of communication between the ICAO and the contracting States using a metaphor:

ICAO moves ahead like a fast locomotive, happy with its speed but without noticing that many wagons of the train may have become unhitched and stay behind.²⁴¹

After the process of becoming an Annex of the Convention, the next issue to analyse is when these standards become applicable in the States.

2.4. Integration of SARPs into national Law

National constitutional provisions which define how international regulations can be integrated into domestic law are different among states.²⁴² Traditionally, two theoretical models apply to the relation between international law and national law: monism and dualism.²⁴³

In the monist approach, international law and domestic legal systems are part of the same legal order. On the other hand, according to the dualist approach, international legal obligations require transposition into the domestic order to take effect.²⁴⁴

However, taking into consideration the ascendance of supranational, transnational organisations in the contemporary world and the effect of their regulations, the general concept of the relationship between international law and domestic law has not been left

²⁴⁰ Article 38 of Convention On International Civil Aviation 1944

(Doc.7300)<<https://www.icao.int/publications/pages/doc7300.aspx>> accessed 13 May 2019 Article 38

²⁴¹ Michael Milde 'Enforcement of Aviation Safety Standards Problems of Safety Oversight' Vol. 45 Issue 1 (1996) Zeitschrift für Luft- und Weltraumrecht - German Journal of Air and Space Law 3 - 8.

²⁴² Tom Gingsburg, 'Locking in Democracy: Constitutions, Commitment, and International Law' Vol. 38, Issue 4 (Summer 2006), New York University Journal of International Law and Politics, 707 - 717.

²⁴³ Malcom N. Shaw, '*International Law*' (6th ed. Cambridge University Press. 2008) 122.

²⁴⁴ Tom Gingsburg, 'Locking in Democracy: Constitutions, Commitment, and International Law' Vol. 38, Issue 4 (Summer 2006), New York University Journal of International Law and Politics, 707 - 713.

‘untouched.’²⁴⁵ The concept that addresses the two main approaches of monism and dualism is considered to be ‘out-dated.’²⁴⁶

The growing complexity in international lawmaking has had an impact on domestic legal systems’ interpretation of their constitutions and statutes.²⁴⁷ Verdier and Versteeg asserted that the ‘difference between monist and dualist systems is less pronounced than traditionally thought.’ The result of their research revealed that:

[e]very single one of the monist countries in our sample (i.e., countries in which ratified treaties automatically become part of domestic law) requires legislative approval for ratification of at least some treaties. By contrast, such requirements are less frequent in dualistic countries, although they have become more popular.²⁴⁸

Therefore, scholars have argued that there are no certain two poles among the legal systems regarding the integration of international regulations into domestic law.²⁴⁹ Some legal systems fall between two poles²⁵⁰ and have the elements of both. Many different methods exist in states’ national legal systems regarding how international law and the domestic obligations derived from them should be treated.²⁵¹

2.4.1 The concept of state obligation derived from the Chicago Convention (1944)

²⁴⁵ G. Ferreira; A. Ferreira-Snyman, ‘The Incorporation of Public International Law into Municipal Law and Regional Law against the Background of the Dichotomy between Monism and Dualism’ Vol. 17 Issue 4 (2014) Potchefstroom Electronic Law Journal 1470–1490.

²⁴⁶ Lando Kirschmair, ‘The Theory of The Law Creator’s Circle: Re-conceptualising the Monism – Dualism – Pluralism Debate’ Vol. 17, Issue 2 (April 1, 2016) German Law Journal 179–180.

²⁴⁷ Dinah Shelton, *International Law a Domestic Legal Systems: Incorporation, Transformation, and Persuasion* (Oxford University Press 2011) Introduction 1-2.

²⁴⁸ Pierre-Hugues Verdier and Mila Versteeg, ‘International Law in Domestic Legal Systems: An Empirical Perspective’ 108 (2014) Am. Soc’y Int’l L. Proc. 376 See Figure 3 and Figure 4 on page 379-380.

²⁴⁹ Dinah Shelton, *International Law a Domestic Legal Systems: Incorporation, Transformation, and Persuasion* (Oxford University Press 2011) 3-4.

²⁵⁰ Brian F Havel, Gabriel Sanchez, *The Principles and Practice of International Aviation Law* (Kindle Edition, Cambridge University Press. June 2014) location 11585 of 15733

²⁵¹ G. Ferreira; A. Ferreira-Snyman, ‘The Incorporation of Public International Law into Municipal Law and Regional Law against the Background of the Dichotomy between Monism and Dualism’ Vol. 17 Issue 4 (2014) Potchefstroom Electronic Law Journal 1470 “South African approach is a combination of both monist and dualist schools...” 1472, 1473-1485., Tom Gingsburg, ‘Locking in Democracy: Constitutions, Commitment, and International Law’ Vol. 38, Issue 4 (Summer 2006), New York University Journal of International Law and Politics, 707 “A further complexity is that monism and dualism can vary with the type of obligation, meaning that state can be monist with regard to treaty law but dualist with regard to customary international law (the Netherlands). In Germany, Italy and Austria, by contrast, customary international law is superior to domestic status, but treaties are equal to domestic statutes, with the last in time rule determining which is valid.” 714.

The definition of a treaty was established in Article 1 of the Vienna Convention on the Law of Treaties (with annexes) concluded on 23 May 1969. The Convention defines the scope of the treaty as ‘treaties between States.’ Treaties are the most crucial source of international aviation law.²⁵² The Convention on International Civil Aviation (1944) is the governing treaty for public international aviation law.

The Chicago Convention (1944) set up the system that aims to establish uniformity in the law to achieve safe international air transport through the formation of the ICAO, an international organisation with quasi-legislative power to govern the international aviation system.²⁵³

Articles 37 and 38 of the Convention impose obligations²⁵⁴ on the contracting States to achieve uniformity in the practices and standards in civil aviation worldwide; accordingly, the States must integrate Annexes that contain the standards and practices adopted by the ICAO into their national legislation in their legislative way.²⁵⁵ Therefore, the enforcement and implementation of the regulations are established on the national level. The issue is whether or not the system works smoothly and whether States are integrating the SARPs through the enactment of national regulations.

Because the Convention did not use clear language, the effect of the Council’s annexes and amendments, which are stated in Convention Article 90 (a) to ‘become effective’ and Article (b) ‘come into force’, has been controversial.²⁵⁶ Rather, this was an issue that needed to be interpreted. Eventually, the Council passed the resolution ‘Revise of Adoption of an Annex.’²⁵⁷ In this resolution, the wording used was ‘shall become applicable’ instead of ‘shall come into force and implemented.’

It should be noted that the International Standards and Procedures differ from the Recommended Practices in a way that has the capacity to have a legal impact on the Member

²⁵² Brian F Havel, Gabriel Sanchez, *The Principles and Practice of International Aviation Law* (Kindle Edition, Cambridge University Press. June 2014) location 660 of 15733

²⁵³ Paul Stephen Dempsey, ‘The Role of the International Civil Aviation Organisation on Deregulation, Discrimination and Dispute Resolution’ Vol.52 Issue 3 (1987) *Journal of Air Law and Commerce* 529,530. <<https://scholar.smu.edu/jalc/vol52/iss3/2>> accessed 14 May 2019

²⁵⁴ Paul Stephen Dempsey, ‘Compliance and Enforcement in International Law: Achieving Global Uniformity in Aviation Safety’ (2004) Vol. 30, Issue 1, *North Carolina Journal of International Law and Commercial Regulation* 1 “ICAO’s 188-member states (now 191) have an affirmative obligation to conform their domestic law, rules, and regulations to the international levelling standards adopted by ICAO.” 10.

²⁵⁵ Tim Unmack, *Aviation Practical Guides, Civil Aviation Standards and Liabilities (Aviation Practical Guides)* (LLP Professional Publishing 1999) “Each Contracting State should comply with Article 37 and 38 by way of its constitution.” 22.

²⁵⁶ Thomas Buergenthal, *Principles of Public International Law* (1st ed., Vol. 7 Syracuse University Press. T. 1969) 69.

²⁵⁷ *ibid* 70. , ICAO Council, 18th Sess. (1953), Doc.7361(C/858), 162.

States. The International Standards and Procedures shall be complied with by a State unless the State notifies a departure or indicates a difference. The recommended practices are only recommendations, and the contracting States do not have a compulsory notification obligation in case compliance with them is impossible.

However, there are different perspectives among commentators regarding the contracting States' obligations to comply with the standards. Among them, Milde has a strong position and asserted that 'the term 'annex' could lead to a conclusion that it is an indivisible part of the Convention and that the standards in the Annexes have same legal status as the Convention itself.'²⁵⁸ In his analysis of the ICAO's resolutions, Buergenthal has a different approach and contended that the Council used this language under the 'erroneous assumption' that the contracting States were under an obligation to implement an Annex as soon as it entered into force.²⁵⁹ Therefore, the obligation of the contracting States to comply with the Annexes is explained by Buergenthal as follows:

Contracting States **have no legal obligation** to implement or to comply with the provisions of a duly promulgated Annex or amendment thereto, unless they find it 'practicable' to do so. This conclusion is supported both by the language of the Convention as well as by the practice of the Organization. 'With regard to the standards promulgated by the Organization for the purpose of facilitating international air transport, a Contracting State merely undertakes to give effect to these regulations so far as it may find [it] practicable.'²⁶⁰

Weber referred to Articles 37 and 38 of the Convention as the governing articles regarding the status of the Annexes to the Convention and explained that the Annexes do not have the same legally binding force as the Convention. The reason for giving this status to the Annexes is that they are not subject to ratification, and they are a form of 'technical international legislation.'²⁶¹

An option to depart from international standards and procedures provided by Article 38 of the Convention. But also, Article 38 imposed an obligation on states to notify the International Civil Aviation Organisation of the differences between states' own practice and established international standard. This will allow the Council to notify all other states regarding the

²⁵⁸ Michael Milde 'Enforcement of Aviation Safety Standards Problems of Safety Oversight' Vol. 45 Issue 1 (1996) *Zeitschrift für Luft- und Weltraumrecht - German Journal of Air and Space Law* 3 5.

²⁵⁹ Thomas Buergenthal, *Principles of Public International Law* (1st ed., Vol. 7 Syracuse University Press. T. 1969) 75.

²⁶⁰ *ibid* 77. (emphasis added)

²⁶¹ Elmar Gjemulla & Ludwig Weber, *International and EU Aviation Law. Selected Issues* (Kluwer Law International, 2011) 96.

differences. Thus, Abeyrate considered all these procedures ‘making all SARPs regulatory in nature.’²⁶²

On the other hand, Dempsey asserted that this opt-out provision arguably makes the SARPs only ‘soft law.’²⁶³ The state obligation Under the Convention to comply with the standards by codifying them into their domestic law characterised by Dempsey as an ‘affirmative duty.’²⁶⁴

Other commentators also assert that the standards can be deemed as ‘guidance material’ or ‘soft law’ and that the states may choose to not to comply with them.²⁶⁵ Havel argued that with the ‘absence of a strong sanction to punish scofflaws,’ SARPs cannot be classified as ‘hard law.’²⁶⁶

Milde underlined that Articles 37, 54(1) and 90 of the Convention are not unconditional. The scope of the obligation is limited to ‘the highest practicable degree.’²⁶⁷ Moreover, Milde described Article 33 of the Convention as providing ‘strong motivation’²⁶⁸ Article 33 regulates the recognition of certificates and licences by the contracting States according to the requirement that such certificates or licences, to be issued or rendered valid, must be equal to or above the minimum standards established under the Convention.²⁶⁹

²⁶² Ruwantiusa Abeyratne, ‘*Legal and Regulatory Issues in International Aviation*’ (Transnational Publishers 1996) ‘It is interesting that at least one ICAO document requires states under Article 38 of the Convention to notify the ICAO of all significant differences from both Standards and Recommended Practices, thus making all SARPS regulatory in nature.’ 16.

²⁶³ Paul Stephen Dempsey, ‘Compliance and Enforcement in International Law: Achieving Global Uniformity in Aviation Safety’ (2004) Vol. 30, Issue 1, North Carolina Journal of International Law and Commercial Regulation 1 4.

²⁶⁴ Paul Stephen Dempsey, ‘Compliance and Enforcement in International Law: Achieving Global Uniformity in Aviation Safety’ (2004) Vol. 30, Issue 1, North Carolina Journal of International Law and Commercial Regulation 1 16.

²⁶⁵ Isabella H. Ph. Diederiks-Verschoor, *An Introduction to Air Law* (9th ed. P. M.-M. Butler, Ed. Kluwer Law International 2012) 36.

²⁶⁶ Brian F Havel, Gabriel Sanchez, *The Principles and Practice of International Aviation Law* (Kindle Edition, Cambridge University Press. June 2014) location 1768 of 15733

²⁶⁷ Michael Milde ‘Enforcement of Aviation Safety Standards Problems of Safety Oversight’ Vol. 45 Issue 1 (1996) *Zeitschrift für Luft- und Weltraumrecht - German Journal of Air and Space Law* 3 5.

²⁶⁸ Michael Milde ‘Enforcement of Aviation Safety Standards Problems of Safety Oversight’ Vol. 45 Issue 1 (1996) *Zeitschrift für Luft- und Weltraumrecht - German Journal of Air and Space Law* 3 6.

²⁶⁹ Convention On International Civil Aviation Doc.7300 (n 149) Article 33 of the Convention (Recognition of certificates and licenses) Certificates of airworthiness and certificates of competency and licenses issued or rendered valid by the Contracting State in which the aircraft is registered, shall be recognized as valid by the other contracting States, provided that the requirements under which such certificates or licences were issued or rendered valid are equal to or above the minimum standards which may be established from time to time pursuant to this Convention.

On the other hand, Huang pointed out that the Convention provides enforcement tools for sanctions against state non-compliance which are ‘by no means comparable to the enforcement procedure of a court.’²⁷⁰ For instance, under Article 54 (j) of the Convention, one of the mandatory functions of the Council of the ICAO is to report to ‘contracting states any infraction of this Convention, as well as any failure to carry out recommendations or determinations of the Council.’²⁷¹ This power of the Council, which has rarely been used,²⁷² could have an effect on the vital economic interests of a state that commits an infraction.²⁷³

Furthermore, Abeyratne drew attention to the possible impact of the EU’s policy on blacklisting²⁷⁴ on the aviation industry and the global economy.²⁷⁵ He instead underlined the state responsibility to ensure safety, not only within the state’s boundaries but as an international responsibility to protect the travelling public.²⁷⁶

Dempsey and Havel also underlined that ‘reputational losses’ and being isolated from ‘the global economy’ are real perils for states, and that they are incentivised to comply with the standards to avoid this peril.²⁷⁷

In fact, bad reputation in compliance with aviation safety standards in the global air transport market would be very definitive for global business. Firstly, in a global air transport market where partnership and alliances are growing, ICAO audit programs

²⁷⁰ Jiefang, Huang, ‘Aviation Safety, ICAO and Obligations Erga Omnes Vol. 8, Issue 1 (March 2009) Chinese Journal of International Law 63 78.

²⁷¹ *ibid* Article 54 (j) of the Convention

²⁷² also see Michael Milde ‘Enforcement of Aviation Safety Standards Problems of Safety Oversight’ Vol. 45 Issue 1 (1996) *Zeitschrift für Luft- und Weltraumrecht - German Journal of Air and Space Law* 3 16.

²⁷³ Jiefang, Huang, ‘Aviation Safety, ICAO and Obligations Erga Omnes Vol. 8, Issue 1 (March 2009) Chinese Journal of International Law 63 79. also see Ruwantissa Abeyratne, ‘Blacklisting of Airlines by the European Union and the Disclosure of Safety Critical Information’ Vol. 2004-2008 *Aviation Safety/Security Issues in Aviation Law and Policy*, 1135 1135-1136.

²⁷⁴ “Regulation 21117 2005 of December 2005 of the European Parliament and Council required that a list be established within the European Community of air carriers that would be subject to an operating ban within the territory of the community.” Reconstructed form Ruwantissa Abeyratne, ‘Blacklisting of Airlines by the European Union and the Disclosure of Safety Critical Information’ Vol. 2004-2008 *Aviation Safety/Security Issues in Aviation Law and Policy* 1135 1135. endnote 2

²⁷⁵ Ruwantissa Abeyratne, ‘Blacklisting of Airlines by the European Union and the Disclosure of Safety Critical Information’ Vol. 2004-2008 *Aviation Safety/Security Issues in Aviation Law and Policy*, 1135 “the greatest damage that would be caused by outright and peremptory blacklisting would be to the development of the aviation industry and its contribution to the global economy” 1141.

²⁷⁶ *ibid* 1140.

²⁷⁷ Paul Stephen Dempsey, ‘Compliance and Enforcement in International Law: Achieving Global Uniformity in Aviation Safety’ (2004) Vol. 30, Issue 1, *North Carolina Journal of International Law and Commercial Regulation* 13.; also see Brian F Havel, Gabriel Sanchez, *The Principles and Practice of International Aviation Law* (Kindle Edition, Cambridge University Press. June 2014) location 1777 of 15733

have an important role in monitoring international state compliance with SARPs.²⁷⁸ For instance, when the audits indicate a serious lack of compliance with SARPs for a State, this would cause other states to issue a warning for their airlines and passengers.²⁷⁹ State compliance with SARPs is not only the subject of ICAO audits, USA and EU also have audit programs to monitor international compliance with SARPs to enable civil authorities to issue necessary warnings.²⁸⁰

2.4.2 Binding effect of SARPs

The binding effect of SARPs has been a controversial subject. There have been different legal analyses regarding the binding effects of SARPs among scholars. Generally, the sources of international law (treaties, customs, and general principles of law, judicial decisions or the regulations of international organisations) are determining factors regarding how international law will be effective in domestic legal systems.²⁸¹ In order to assess state compliance with the aviation safety regulations of the ICAO, especially the legal status of the aviation safety standards that are placed in the Annexes, the sources of international law in this context need to be defined.

²⁷⁸ Brian F Havel, Gabriel Sanchez, *The Principles and Practice of International Aviation Law* (Kindle Edition, Cambridge University Press. June 2014) location 1768 of 15733

²⁷⁹ *ibid*

²⁸⁰ U.S.A, FAA (Federal Aviation Administration) have IASA (International Aviation Safety Assessment)Program. Under the International Aviation Safety Assessment (IASA) program, the FAA determines whether another country's oversight of its air carriers that operate, or seek to operate, into the U.S., or codeshare with a U.S. air carrier, complies with safety standards established by the International Civil Aviation Organization (ICAO).< <https://www.faa.gov/about/initiatives/iasa/> > accessed 25 June 2019

EU also has Commission Regulation (EC) No 2111/2005 of the European Parliament and of the Council of 14 December 2005 on the establishment of a Community list of air carriers subject to an operating ban within the Community and on informing air transport passengers of the identity of the operating air carrier, and repealing Article 9 of Directive 2004/36/EC

<<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32005R2111> > accessed 25 June 2019

²⁸¹ Dinah Shelton, *International Law a Domestic Legal Systems: Incorporation, Transformation, and Persuasion* (Oxford University Press 2011) 5.

2.4.2.1 State obligations based on customary international law

The sources of international law have been identified by definition in Article 38 of the Statute of the International Court of Justice.²⁸² Article 38 defines the sources of international law as:

- a. international conventions, whether general or particular, establishing rules expressly recognised by the contesting states;
- b. international custom, as evidence of a general practice accepted as law;
- c. the general principles of law recognised by civilised nations; and
- d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Furthermore, Article 38 of the Vienna Convention²⁸³ defines when international treaties become binding on third states through international custom. Accordingly: ‘a rule set forth in a treaty would become binding upon a third State as a customary rule of international law if it is generally recognised by the States concerned as such.’

The international custom, on the other hand, is defined in Article 38 (b) of the Statute of the International Court of Justice as ‘evidence of a general practice accepted as law.’²⁸⁴ Brownlie explained that the sense of legal obligation ‘is real enough, and the practice of states recognises a distinction between obligation and usage.’²⁸⁵ Therefore, when states act in the acceptance of certain norms together with the whole international community, international customary law could be established as an obligatory law. These rules become peremptory norms of international law, i.e., jus cogens, which are binding on all states.²⁸⁶

²⁸² Ian Brownlie, *Principles of International Law* (5th ed. Oxford University Press. 1998) 3.

²⁸³ Vienna Convention on the law of treaties (with annex). Concluded at Vienna on 23 May 1969, Came into force on 27 January 1980, i.e., on the thirtieth day following the date of deposit of the thirty-fifth instrument of ratification or accession with the Secretary-General of the United Nations, <<https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf>> accessed 25 June 2019

²⁸⁴ Statute of International Court of Justice <<https://www.icj-cij.org/en/statute>> 25 June 2019

²⁸⁵ Ian Brownlie, *Principles of International Law* (5th ed. Oxford University Press. 1998) 7.

²⁸⁶ Jonathan I. Charney, ‘Universal International Law’ Vol. 87, Issue 4 (October 1993) *The American Journal of International Law* 529 541.

The first official recognition of *jus cogens* as a concept of international law was in the 1969 Vienna Convention on the Law of Treaties.²⁸⁷ According to Article 53, a peremptory norm of general international law is defined as:

a norm accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.²⁸⁸

The International Court of Justice (ICJ), in the North Sea Continental Shelf Case,²⁸⁹ held that legal principles that are incorporated in treaties become customary international law by virtue of Article 38 of the 1969 Vienna Convention on Law of Treaties.

In line with above definitions, the legal principles of the safety obligations established in the Chicago Convention (1944) have been referred to as ‘customary international law’ by virtue of Article 38 of the 1969 Vienna Convention on Law of Treaties. Therefore, legal principles, such as the one in Article 37 of the Chicago Convention (1944) calling for each State to collaborate in securing uniformity in the ICAO regulations, are deemed customary international law.²⁹⁰

Abeyrante drew attention to the application of customary practice in international law during the process of adopting the Annexes, including the international standards and recommended practices, to make them presentable in the law of the States:

The ICAO Assembly has ensured that the Council follows an established customary practice in international law to ensure that SARPs had the effect of legal principles, by making inroads into the laws of states and introducing a uniform regulatory structure within a particular community of states.²⁹¹

²⁸⁷ UN Treaty Series. (1987). Retrieved from United Nations , The Vienna Convention on the Law of Treaties, May 23,115 UNTS 331. As of February, 13 2012 111 States were members 331. <<https://treaties.un.org/doc/publication/unts/volume%201155/v1155.pdf>> accessed 10 May 2019

²⁸⁸ Ian Brownlie, ‘*Principles of International Law*’ (5th ed. Oxford University Press. 1998) 516.

²⁸⁹ *North Sea Continental Shelf, Germany v Denmark*, Order, [1968] ICJ Rep 9, ICGJ 149 (ICJ 1968), 26th April 1968, United Nations [UN]; International Court of Justice [ICJ] <<https://www.icj-cij.org/files/case-related/52/052-19680426-ORD-01-00-EN.pdf>> accessed 10 May 2019

²⁹⁰ Ruwantissa Abeyratne, ‘ICAO’s Strategic Action Plan. *Zeitschrift für Luft- und Weltraumrecht*’ – Vol. 45 Issue 3 (1996) German Journal of Air and Space Law 231 243.

²⁹¹ Ruwantissa Abeyratne, ‘*Legal and Regulatory Issues in International Aviation*’ (Transnational Publishers 1996) 22.

Moreover, the purpose of the International Standards and Recommended Practices (SARPs) that are described in Article 37 of the Chicago Convention (1944) is to serve not only contracting states but for ‘the common good of humanity’ and therefore as Abeyratne states that ‘arguably [it] becomes a principle of customary international law or *jus cogens*.’²⁹²

Accordingly, further analysis should address the ‘nature of aviation safety obligations.’²⁹³ Whether or not these obligations are based on reciprocity or obligations toward the international community, which would mean that the states owe a duty to the world community to comply with the obligations, derives from Article 37 of the Convention.²⁹⁴

After the concept of *jus cogens* was defined in the 1969 Vienna Convention on the Law of Treaties, the International Court of Justice applied the concept of obligations *erga omnes* in the *Barcelona Traction* case.²⁹⁵

The most important characteristic of obligations *erga omnes* is that they are obligations of a state towards all states. In the *Barcelona Traction* case, the International Court of Justice held that²⁹⁶

[w]hen a State admits into its territory foreign investments or foreign nationals, whether natural or juristic persons, it is bound to extend to them the protection of the law and assumes obligations concerning the treatment to be afforded them. These obligations, however, are neither absolute nor unqualified. In particular, an essential distinction should be drawn between **the obligations of a State towards the international community as a whole**, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations **erga omnes**.²⁹⁷

Although controversial among scholars, the concepts of *jus cogens* and *erga omnes* have become widely accepted in international law. Byers described the development of the *jus cogens* and *erga omnes* norms as ‘important milestones in the evolution of the international

²⁹² Ruwantissa Abeyratne, ‘ICAO's Strategic Action Plan. Zeitschrift fur Luft- und Weltraumrecht’ – Vol. 45 Issue 3 (1996) German Journal of Air and Space Law 231 243.

²⁹³ Jiefang Huang, ‘Aviation Saafety and ICAO’ (Dphil thesis, Leiden University, Netherland 2009) <<https://openaccess.leidenuniv.nl/bitstream/handle/1887/13688/000-huang-diss-28-01-09.pdf?sequence=1>> 163.

²⁹⁴ Ruwantissa Abeyratne, ‘ICAO's Strategic Action Plan. Zeitschrift fur Luft- und Weltraumrecht’ – Vol. 45 Issue 3 (1996) German Journal of Air and Space Law 231 243.

²⁹⁵ *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain); Second Phase*, International Court of Justice (ICJ), 5 February 1970, available at: <http://www.refworld.org/cases,ICJ,4040aec74.html> accessed 2 March 2017

²⁹⁶ *ibid*

²⁹⁷ (emphasis added)

legal order.’²⁹⁸ Byers drew attention to the key role of *jus cogens* rules in the international legal system by underlining the ‘extreme difficulty for States to change the way *jus cogens* rules apply to them.’²⁹⁹ Furthermore, Byers emphasised the resemblance of *jus cogens* rules to the constitutional rules of national legal systems.

On the other hand, Huang asserts that safety standards within the framework of the Chicago Convention (1944) built up the global normative structure for civil aviation safety and aimed to protect the common interest of the international community³⁰⁰. Moreover, States’ common interests are ‘the *raison d’être* of the convention’ Therefore, compliance with aviation safety obligations, regardless of what other nations do, serves the common interest of the international community as a whole or at least towards all of the member states of ICAO.³⁰¹

In light of these arguments, the aviation safety standards that have been regulated by the ICAO under Article 37 can commonly be considered *jus cogens* rules and the states’ obligation to comply with them is an *erga omnes* obligation.³⁰²

For instance, ICAO adopted Resolution A36-2 declaring that the primary objective of ICAO is ensuring the safety of civil aviation and underlying States’ collective and individual responsibility to ensure the safety of civil aviation. Hence, aviation safety standards are to serve the common interest of the international civil aviation community as a whole.³⁰³ Huang

²⁹⁸ Michael Byers, ‘Conceptualising the Relationship between *Jus Cogens* and *Erga Omnes*’ Vol. 66, Issues 2-3 (1997) *Nordic Journal of International Law* 211–239

²⁹⁹ *ibid* 219.

³⁰⁰ Jiefang Huang, ‘Aviation Saafety and ICAO’ (Dphil thesis, Leiden University, Netherland 2009) <<https://openaccess.leidenuniv.nl/bitstream/handle/1887/13688/000-huang-diss-28-01-09.pdf?sequence=1>> 166.

³⁰¹ *ibid* 167.

³⁰² Ruwantissa Abeyratne, ‘ICAO’s Strategic Action Plan. *Zeitschrift fur Luft- und Weltraumrecht*’ – Vol. 45 Issue 3 (1996) *German Journal of Air and Space Law* 231 ‘The views of the ICJ and the International Law Commission which has supported the approach taken by the ICJ, give rise to two possible conclusions relating to *jus cogens* and its resultant obligations *erga omnes*:

Obligation *erga omnes* affect all States and thus cannot be made inapplicable to a States or group of States by an exclusive clause in a treaty or other document reflecting legal obligations without the consent of the international community as a whole;

Obligations *erga omnes* pre-empt other obligations which may be incompatible with them.

If it can be accepted that a principle of *jus cogens* creates obligations *erga omnes*, it becomes an undeniable fact that Article 37 of the Chicago Convention could be considered a preemptory norm of international law.” 243-244.

³⁰³ Resolutions Adopted by ICAO General Assembly - 36th Session Montréal, 18–28 September 2007 Retrieved from ICAO:

<https://www.icao.int/Meetings/AMC/MA/Assembly%2036th%20Session/A36_res_prov_en.pdf> accessed 15 May 2019 ‘Resolution A36-2: Unified strategy to resolve safety-related deficiencies. Whereas a primary objective of the Organization continues to be that of ensuring the safety of international civil aviation

went further and noted that safety obligations have quasi-universal character,³⁰⁴ and they are not limited to the contracting States of the Chicago Convention (1944) but apply to the international community as a whole³⁰⁵ to ensure safe and orderly development in international civil aviation.³⁰⁶

At this point, the question that arises is whether declaring aviation safety obligations as *erga omnes* and imposing a duty to comply with them on a state creates the same notion of obligation within the nation states.

There is no doubt that aviation safety is a global concern and ensuring safety is a state obligation of the international community. In its reasoning in *the Reservations to the Genocide Convention case*, the ICJ stated that, under conventions such as the Genocide Convention,

contracting States do not have any interest of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the convention. Consequently, in a convention of this type one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties.³⁰⁷

We cannot assume a specific state approach to aviation safety obligations. Ensuring compliance with aviation safety obligations within the framework of customary international law might be challenged on the basis of theories applicable to global developments in the contemporary world.

Therefore, after defining the states' obligations to comply with aviation safety standards as *erga omnes* to the world community, the next step is to question whether or not these rules and obligations are defined as legal principles of customary international law, and whether they really work in practice in the contemporary world. In particular, the practicality of these rules for individuals should be questioned. Ultimately, compliance with international aviation standards is in the interest of all states and people around the world.

worldwide; whereas ensuring the safety of international civil aviation is also the responsibility of Contracting States both collectively and individually.' 2.

³⁰⁴ Jiefang Huang, 'Aviation Saafety and ICAO' (Dphil thesis , Leiden University, Netherland 2009) <<https://openaccess.leidenuniv.nl/bitstream/handle/1887/13688/000-huang-diss-28-01-09.pdf?sequence=1>> 167.

³⁰⁵ *ibid* 166.

³⁰⁶ *ibid* 167.

³⁰⁷ Reservation to the Convention on the Prevention of the Crime of Genocide Advisory Opinion I.C.J Reports 1951, <<https://www.icj-cij.org/files/case-related/12/012-19510528-ADV-01-00-EN.pdf>> 12.

2.4.2.2 Aviation safety and fundamental human rights ; the right to life

Unlike bilateral obligations, which are in debt by states to each other on a contractual basis, *erga omnes* obligations give states responsibility to the international community as a whole. These obligations are accepted as the concern of all states, and therefore, the subjects of *erga omnes* obligations need to be protected by requiring states to comply with them. *Erga omnes* obligations are mostly found in humanitarian law and human rights law.³⁰⁸

In these fields, the law does not create reciprocal obligations between States in the bilateralism manner... under such a norm a State assumes a responsibility in relation to all persons under its jurisdiction.³⁰⁹

Obligations which are related to human rights law have the specific character of making states responsible to the international community as a whole. Therefore, state responsibility is not limited to an individual state's jurisdiction. For instance, in the *Pfunders Case* [1961],³¹⁰ the European Commission for Human Rights made the states' responsibility regarding obligations to establish a common public order clear:

[T]he purpose of the High Contracting Parties in concluding the [European] Convention was not to concede to each other reciprocal rights and obligations in pursuance of their individual national interest... but to establish a common public order of the free democracies of Europe with the object of safeguarding their common heritage of political tradition, ideals, freedom and the rule of law.³¹¹

Civil aviation activities are international in nature and involve cross-border activities. They also involve a variety of nationals as passengers and crews. Therefore, non-compliance with aviation safety obligations, particularly those not designed with reciprocal purposes, such as the standards for certificates of airworthiness,³¹² will have an effect on other states.³¹³

When safety standards and procedures are involved on international flights, one cannot even take the position that non-compliance by a sovereign State affects

³⁰⁸ Martti Koskenniemi, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law. UN General Assembly A/CN.4/L.682, International Law Commission Study Group 58th session (2006) 198. Retrieved from <http://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf> accessed 15 May 2019

³⁰⁹ *ibid* 198.

³¹⁰ *ibid* fn.562, *Austria v. Italy*, 11 January 1961 App no 788/60, YBECHR vol.4, 138-140.

³¹¹ *ibid* 198. and 203.

³¹² Convention On International Civil Aviation Doc.7300 (n 149) Article 33

³¹³ Jiefang, Huang, 'Aviation Safety, ICAO and Obligations Erga Omnes Vol. 8, Issue 1 (March 2009) Chinese Journal of International Law 63 73.

only the citizens of that State. Any other State that receives flights of aircraft registered in the noncomplying State has every reason to be concerned about whether international standards and procedures are in fact being followed with respect to such aircraft and crews.³¹⁴

Erga omnes obligations are recognised as an obligation towards the whole of society, which includes a state's own citizens. This consensus has been underlined by the ICAO member States as a "unified strategy to resolve safety-related deficiencies" in General Assembly Resolution A36-2:

Whereas a primary objective of the Organization continues to be that of ensuring the safety of international civil aviation worldwide.³¹⁵

Thus, ensuring the safety of international civil aviation is also the responsibility of the contracting States, both collectively and individually:

Whereas in accordance with Article 37 of the Convention on International Civil Aviation each **Contracting State undertakes to collaborate in securing the highest practicable degree of uniformity in regulation, standards, procedures** and organization in relation to aircraft, personnel, airports, airways and auxiliary services in all matters in which uniformity will facilitate and improve air navigation.³¹⁶

Therefore, the contracting States of the Chicago Convention (1944) have the responsibility, collectively and individually, to ensure the safety of international aviation.

Huang emphasized that some safety obligations directly linked to the right to life, 'and in a broader sense, to elementary considerations of humanity.'³¹⁷

'Elementary consideration of humanity' was underlined by the ICAO General Assembly On May 10, 1984. The General Assembly of ICAO adopted by consensus the protocol relating to

³¹⁴ Assad Kotaite, 'Sovereignty under great pressure to accommodate the growing need for global cooperation' ICAO Journal, (1995, December) 20.

³¹⁵ Resolutions Adopted by General Assembly, 2007 (n 289) A36-2, see also Jiefang Huang, 'Aviation Saafety and ICAO' (Dphil thesis , Leiden University, Netherland 2009) <<https://openaccess.leidenuniv.nl/bitstream/handle/1887/13688/000-huang-diss-28-01-09.pdf?sequence=1>>

173.

³¹⁶ (emphasis added) see also Jiefang Huang, 'Aviation Saafety and ICAO' (Dphil thesis , Leiden University, Netherland 2009) <<https://openaccess.leidenuniv.nl/bitstream/handle/1887/13688/000-huang-diss-28-01-09.pdf?sequence=1>> 173. Resolutions Adopted by General Assembly, 2007 (n 289) I-91

³¹⁷ Jiefang, Huang, 'Aviation Safety, ICAO and Obligations Erga Omnes Vol. 8, Issue 1 (March 2009) Chinese Journal of International Law 63 73.

an amendment to the Convention on International Civil Aviation [Article 3 *bis*]. The General Assembly of ICAO declared that

the use of weapons against civil aircraft in flight is incompatible with **elementary considerations of humanity** and the norms governing international behaviour. Article 3 *bis* embodies fundamental principles essential for the safe development of international civil aviation.³¹⁸

Furthermore, elementary considerations of humanity was underlined after witnessing the terrorist acts in the United States on September 11, 2001. The following resolution was adopted by the ICAO General Assembly during the 33rd session:

Recognizing that such terrorist acts are not only contrary to **elementary considerations of humanity** but constitute also use of civil aircraft for an armed attack on civilized society and are incompatible with international law.

Urges all contracting states to intensify their efforts in order to achieve **the full implementation and enforcement of the multilateral conventions on aviation security, as well as of the ICAO Standards and Recommended Practices (SARPs) and Procedures** relating aviation security, to monitor such implementation, and to take within their territories appropriate additional security measures commensurate to the level of threat in order to prevent and eradicate terrorists acts involving civil aviation.³¹⁹

In fact, air passengers are very vulnerable in any situation that affects safety. Threats to civil aviation safety are also threats to human life. Therefore, air passengers very much rely on the states' compliance to implement the safety and security standards established by the international regulatory organisations but without having any control over the system.

However, the focus on the state in international law has been changing. Under the theories applicable to the study of the concept of human rights in contemporary international law, scholars have argued that there has been a transformation in general international law because of the impact of human rights.³²⁰

³¹⁸ (emphasis added) The protocol relating to an amendment to the Convention on International Civil Aviation [Article 3 *bis*] Doc.9436 'Administrative Package for Ratification of the Protocol on Article 3 *bis*' (1984, May 10)

<https://www.icao.int/secretariat/legal/Administrative%20Packages/3bis_en.pdf> accessed 15 may 2019

³¹⁹ (emphasis added) Resolution Adopted at the 33rd Session of the Assembly Provisional Edition; Assembly Resolution A33-1. (2001). Retrieved from ICAO<https://www.icao.int/Meetings/AMC/MA/Assembly%2033rd%20Session/plugin-resolutions_a33.pdf> 15 May 2019

³²⁰ Thomas Buergenthal, 'The Normative and Institutional Evolution of International Human Rights' Vol. 19, Issue 4 (1997) 703, Zeng Lingliang, 'Humanizing Tendency of Contemporary International Law' , Vol. 4, Issue

Ramcharan emphasised that unlike the early history of international law, when the protection of the rights of the individual was a secondary concern, “in modern times there has been rising global insistence that states, governments institutions and laws exist to serve the people.”³²¹

Scholars have highlighted the humanisation of international law. Tzevelekos stated that ‘international law is, literally, ‘humanized’ as it now contains a mature set of substantive rules as well as an institutional apparatus, both regional and universal, for the safeguard of human rights and an individual subject of international law who is, under certain conditions entitled to protection.’³²²

Therefore, contemporary international law no longer focuses only on the interests of states, but also on individuals’ interests and the fundamental rights that derive from the human rights of mankind.³²³ Human beings have increasingly become the subject of international law because of the growing number of internationally recognised rights and the obligation to respect those rights.³²⁴

Most significantly, it has been underlined in contemporary international law that “a state sovereignty-oriented approach has been gradually supplanted by a human being-oriented approach.”³²⁵

States primarily have the responsibility to establish national systems to prevent the violation of human rights accepted under the United Nations Charter and pursuant to worldwide conferences and summits.³²⁶

1 (March 2009), *Frontiers of Law in China* 1, Vassilis Tzevelekos, ‘Revisiting the Humanisation of International Law: Limits and Potential: Obligations Erga Omnes, Hierarchy of Rules and the Principle of Due Diligence as the Basis for Further Humanisation’ Vol. 6, Issue 1 (June 2013) *Erasmus Law Review* 62-[i], Bertrand G. Ramcharan, ‘The Concept of Human Rights in Contemporary International Law [comments]’ *Canadian Human Rights Yearbook*, Vol. 1983 267., Theodor Meron, ‘The Humanization of Humanitarian Law’ Vol. 94, Issue 2 (April 2000), *American Journal of International Law* 239

³²¹ Bertrand G. Ramcharan (ed), *The Right to Life in International law* (Martinus Nijhoff Publishers 1985) 1.

³²² Vassilis Tzevelekos, ‘Revisiting the Humanisation of International Law: Limits and Potential: Obligations Erga Omnes, Hierarchy of Rules and the Principle of Due Diligence as the Basis for Further Humanisation’ Vol. 6, Issue 1 (June 2013) *Erasmus Law Review* 62–66.

³²³ Zeng Lingliang, ‘Humanizing Tendency of Contemporary International Law’, Vol. 4, Issue 1 (March 2009), *Frontiers of Law in China* 1–27.

³²⁴ Thomas Buergenthal, ‘The Normative and Institutional Evolution of International Human Rights’ Vol. 19, Issue 4 (1997) 703 “this development gives meaning to the proposition that the last half century has witnessed the internationalisation of human rights and humanisation of international law.” 722.

³²⁵ Zeng Lingliang, ‘Humanizing Tendency of Contemporary International Law’, Vol. 4, Issue 1 (March 2009), *Frontiers of Law in China* 1–3.

³²⁶ World Conference on Human Rights, 14-25 June 1993, Vienna, Austria <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G93/142/33/PDF/G9314233.pdf?OpenElement>, UN General Assembly Resolution, United Nations Millennium Declaration, A/Res/55/2, 18 September 2000, UN Resolution, A/Res/60/1:2005

The legal obligation of states towards individuals was recalled by the Human Rights Committee's Eightieth Session General Comment No. 31 [80], which was adopted on 29 March 2004 (2187th meeting), "*The Nature of the General Legal Obligation Imposed on States Parties to the Covenant.*" Furthermore, the contractual dimension of the treaty involves any State Party to a treaty being obligated to every other State Party to comply with its undertakings under the treaty.

Article 2 is couched in terms of the obligations of State Parties towards individuals as the right-holders under the Covenant, every State Party has a legal interest in the performance by every other State Party of its obligations. This follows from the fact that the 'rules concerning the basic rights of the human person' are *erga omnes* obligations and that, as indicated in the fourth preambular paragraph of the Covenant, there is a United Nations Charter obligation to promote universal respect for, and observance of, human rights and fundamental freedoms.³²⁷

States' obligation to protect the human rights of individuals also includes preventive measures.³²⁸ Article 6 of the International Covenant on Civil and Political Rights (1966) protects the right to life.

'Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.'³²⁹

The Human Rights Committee emphasised the states' obligation to engage in the preventive protection of the right to life.³³⁰

World Summit Outcome .Quoted by Bertrand G. Ramcharan, 'The National Responsibility to Protect Human Rights' Vol. 39 Issue 2 (2009) Hong Kong Law Journal 361 362.

³²⁷(emphasis added) International covenant on civil and political rights, CCPR/C/21/Rev.1/Add. 1326 May 2004, Human Rights Committee Eightieth session General Comment No. 31 [80]The Nature of the General Legal Obligation Imposed on States Parties to the Covenant Adopted on 29 March 2004 (2187th meeting), <<http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPrICAqhKb7yhsjYoiCfMKoIRv2FVaVzRkMjTnjRO%2Bfud3cPVrcM9YR0iW6Txaxgp3f9kUFpWoq%2FhW%2FTpKi2tPhZsbEJw%2FGeZRASjdFuuJQRnbJEaUhby31WiQPI2mLFD6ZSwMMvmQGVHA%3D%3D>> accessed 16 May 2019

³²⁸ Bertrand G. Ramcharan, 'The National Responsibility to Protect Human Rights' Vol. 39 Issue 2 (2009) Hong Kong Law Journal 361 374.

³²⁹ International Covenant on Civil and Political Rights Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 23 March 1976, in accordance with Article 49 < <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>> accessed 16 may 2019

³³⁰The Human Rights Committee is the body of independent experts that monitors implementation of the International Covenant on Civil and Political Rights by its State parties. <<http://www.ohchr.org/EN/HRBodies/CCPR/Pages/CCPRIndex.aspx>> accessed 16 May 2019

‘States have the supreme duty to prevent wars, acts of genocide and other acts of mass violence causing arbitrary loss of life.’³³¹

Building on from the idea that addresses state obligation to prevent an arbitrary loss of life shall be applied to state obligation to comply with aviation safety and security standards. As Huang rightfully emphasised, an unwarranted deprivation of life could also result from a preventable failure to comply with safety standards, as well as from terrorist attacks or the mistaken use of military force.³³²

States responsibility regarding aviation safety includes the implementation of aviation safety standards in their states and the provision of safety oversight.³³³ Huang suggested that *erga omnes* obligations do not have to be prohibitory in content. Furthermore, he asserted that there is no doctrinal consensus defining state responsibility for safety oversight as an *erga omnes* obligation, but that there is no legal obstacle to prevent such a duty from becoming an obligation *erga omnes*, particularly in view of its intrinsic link with the right to life.³³⁴

Aviation safety has a direct link to human rights, i.e., the right to life. From this perspective, this thesis suggests that national courts might appraise state obligations more broadly.

Civil aviation safety standards are adopted in the Annexes under the Chicago Convention (1944). Annexes are not international treaties themselves, and their binding effects are controversial. On the other hand, SARPs that are adopted by Annexes need to be transformed into national legislation to be implemented. While strong state sovereignty is an issue in transforming aviation safety standards into state legal orders, it would be complicated to establish an *erga omnes* character for this obligation. The aviation safety standards in SARPs need to be addressed in a more practical way to be applicable in the national courts.

³³¹ General Comment 6/16 of 27 July 1982. Citation reproduced in Bertrand G. Ramcharan, ‘The National Responsibility to Protect Human Rights’ Vol. 39 Issue 2 (2009) Hong Kong Law Journal 361 375.

³³² Jiefang, Huang, ‘Aviation Safety, ICAO and Obligations Erga Omnes Vol. 8, Issue 1 (March 2009) Chinese Journal of International Law 63 74.

³³³ Jiefang Huang, ‘Aviation Saafety and ICAO’ (Dphil thesis , Leiden University, Netherland 2009) <<https://openaccess.leidenuniv.nl/bitstream/handle/1887/13688/000-huang-diss-28-01-09.pdf?sequence=1>> 163.

³³⁴ *ibid* 174.

The thesis suggests that to address aviation safety standards based on publicness, which the GAL theory defines as a criterion, might be more practical to consider these standards as state obligations. The publicness criterion will be analysed in subsequent chapters.

2.4.2.3 Oversight responsibility of contracting states

Member States have an obligation, under the Convention,³³⁵ to collaborate in securing the highest practicable degree of uniformity in the regulations, standards, procedures and organisation in relation to aircraft, personnel, airways and auxiliary services in all matters in which such uniformity will facilitate and improve air navigation.³³⁶ In practice state compliance with these obligations and compulsory notification to the Council of different state practices have not been complied by many states. Demsey asserted that ‘these notifications are hollow, as they have been ignored by most states.’³³⁷

Milde also emphasized that between 1984-1994 statistics indicate ‘only some 25% of States responded to new or amended Annexes by a notification of compliance or difference – with 75% of States not responding in any manner at all.’³³⁸

The obvious problem of non-compliance has caused serious concern about aviation safety, and the necessity for further action by the ICAO was recognised in 1992 at the 29th Session of the Assembly. Resolution A29-13 (Improvement of Safety Oversight) was adopted, and

³³⁵ Convention On International Civil Aviation Doc.7300 (n 149) Article 37

³³⁶ Article 37 of the Chicago Convention states “Each contracting State undertakes to collaborate in securing the highest practicable degree of uniformity in regulations, standards, procedures, and organization in relation to aircraft, personnel, airways and auxiliary services in all matters in which such uniformity will facilitate and improve air navigation. To this end the International Civil Aviation Organization shall adopt and amend from time to time, as may be necessary, international standards and recommended practices and procedures dealing with: (a) Communications systems and air navigation aids, including ground marking; (b) Characteristics of airports and landing areas; (c) Rules of the air and air traffic control practices;(d) Licensing of operating and mechanical personnel; (e) Airworthiness of aircraft; (f) Registration and identification of aircraft; (g) Collection and exchange of meteorological information; (h) Log books; (i) Aeronautical maps and charts; (j) Customs and immigration procedures; (k) Aircraft in distress and investigation of accidents; and such other matters concerned with the safety, regularity, and efficiency of air navigation as may from time to time appear appropriate.”

³³⁷ Paul Stephen Dempsey, ‘Compliance and Enforcement in International Law: Achieving Global Uniformity in Aviation Safety’ Vol. 30 Issue 1 (2004). North Carolina Journal of International Law and Commercial Regulation, 1 16. also see Jiefang, Huang, ‘Aviation Safety, ICAO and Obligations Erga Omnes Vol. 8, Issue 1 (March 2009) Chinese Journal of International Law 63 67.

³³⁸ Michael Milde ‘Enforcement of Aviation Safety Standards Problems of Safety Oversight’ Vol. 45 Issue 1 (1996) Zeitschrift fur Luft- und Weltraumrecht - German Journal of Air and Space Law 3 8. fn. 19

effective oversight for the implementation of SARPs was recognised.³³⁹ However, the programme was voluntary and did not achieve the success expected.

In response to the growing safety concerns, the ICAO General Assembly adopted Resolution A32-11 in January 1999, establishing an ICAO Universal Safety Oversight Programme.³⁴⁰ The Universal Safety Audit Programme's (USOAP) activities initially consisted of regular and mandatory audits of the ICAO Member States' safety oversight systems. Initially, audits were limited to reviewing state compliance with Annexes 1, 6 and 8. However, in 2005, the programme was expanded to the USOAP Comprehensive Systems Approach (CSA) to include the safety-related provisions contained in all the safety-related Annexes to the Chicago Convention (1944).³⁴¹

In 2010, the 37th Session of the Assembly adopted Resolution A37-5,³⁴² affirming that the evolution of the USOAP to the Continuous Monitoring Approach (CMA) should continue to be a top priority for the ICAO to ensure the availability of information on the safety performance of the Member States.³⁴³ In 2013, the programme moved from periodic audit to a continuous monitoring approach.³⁴⁴

The latest Safety Audit Report, 'Universal Safety Oversight Audit Programme -Continuous Monitoring Approach Results,' for the term from January 1, 2013, to December 2015,³⁴⁵

³³⁹ Resolution A29-13 (Improvement of Safety Oversight) (1992). Retrieved from ICAO: <https://www.icao.int/secretariat/PostalHistory/the_universal_safety_oversight_audit_programme.htm> accessed 16 may 2019

³⁴⁰ Assembly Resolutions in Force (Doc 9848) Published by authority of the Secretary General International Civil Aviation Organization (as of 8 October 2004) <https://www.icao.int/publications/Documents/9848_en.pdf> accessed 16 may 2019

³⁴¹ The USOAP Continuous Monitoring Approach (CMA) Website <<https://www.icao.int/safety/CMAForum/Pages/default.aspx>> accessed 16 may 2019 "The USOAP CSA cycle which ended in December 2010 entailed about 40 safety oversight audits annually, with each ICAO Member State required to host an audit at least once during the cycle."

³⁴² ICAO Assembly – 37th Session Montréal, 28 September—8 October 2010, Resolutions Adopted by the Assembly <https://www.icao.int/Meetings/AMC/Assembly37/Documents/ProvisionalEdition/a37_res_prov_en.pdf> accessed 16 may 2019

³⁴³ The USOAP Continuous Monitoring Approach (CMA) Website <<https://www.icao.int/safety/CMAForum/Pages/default.aspx>>

³⁴⁴ Universal Safety Oversight Audit programme (USOAP) Continuous Monitoring Approach Results (1 January 2013 to 31 December 2015) <http://www.icao.int/safety/CMAForum/Documents/USOAP_REPORT_2013-2016.pdf> 6. accessed 25 June 2019

³⁴⁵ *ibid*

revealed not only statistical data but also highlighted the main issues and challenges which States continue to face³⁴⁶ in the eight audit areas.³⁴⁷

Chapter 4 of the Report highlights the issues in the legislative area: ‘More than 70 per cent of the States have not established comprehensive procedures for the timely amendment of their civil aviation regulations to keep pace with amendments to the Annexes to the Chicago Convention.’³⁴⁸ Another highlighted issue was the finding that ‘[m]ore than 75 per cent of the States have not established an effective system for the identification and notification of the differences between the SARPs and their national regulations and practices to ICAO.’³⁴⁹

At this point, it should be noted that the implementation of and compliance with international norms refer to different concepts. The implementation of international norms refers to their incorporation into domestic law, while compliance refers to a broader aspect.

Compliance includes implementation, but is broader, concerned with factual matching of state behaviour and international norms: compliance refers to whether countries in fact adhere to the provisions of the accord and to the implementing measures that they have instituted.³⁵⁰

Effectiveness, however, is regarded as ‘the degree to which a rule improves the state of the underlying problem or the degree to which a rule achieves its inherent policy objectives.’³⁵¹

The USOAP report confirms the difference between implementation and compliance in its findings:

In more than 40 per cent of the States, the established legal framework, based on the applicable legislation, regulations and procedures, does not enable an effective enforcement of the applicable primary aviation legislation and specific operating regulations...It is important that the established legal framework provide clear enforcement powers to the State’s CAA and include inter alia, effective penalties to serve as a deterrent.³⁵²

³⁴⁶ *ibid*, Foreword

³⁴⁷ *ibid* 9. Audit areas have been identified in the USOAP 1- Primary aviation legislation and civil aviation legislation (LEG), 2- Civil aviation organisation(ORG)3- Personnel licencing and training (PEL) 4- aircraft operations (OPS), 5- Airworthiness of aircraft (AIR), 6- Aircraft accident and incident investigation (AIG) 7- Air navigation services(ANS) and 8- Aerodromes and ground aids (AGA)

³⁴⁸ *ibid* 25. Chapter 4, 4.1.1.1

³⁴⁹ *ibid* 25 Chapter 4, 4.1.2.1

³⁵⁰ Introduction 5.

³⁵¹ Kal Raustiala, ‘Compliance & Effectiveness in International Regulatory Cooperation’ Vol. 32, Issue 3 (Summer 2000) Case Western Reserve Journal of International Law 387 393.

³⁵² Universal Safety Oversight Audit programme (USOAP) Continuous Monitoring Approach Results (1 January 2013 to 31 December 2015)

On the other hand, after the terrorist attacks using aircraft in the United States on September 11, 2001, the 33rd Session of the ICAO Assembly adopted Resolution A33-1 in October 2001: *Declaration on misuse of civil aircraft as weapons of destruction and other terrorist acts involving civil aviation*. Accordingly, the ICAO established the Universal Security Audit Programme (USAP).³⁵³

The objective of the programme is ‘to promote global aviation security through continuous auditing and monitoring of Member States’ aviation security performance, in order to enhance their aviation security compliance and oversight capabilities.’³⁵⁴

In 2013, the 37th Session of the ICAO Assembly adopted Resolution A37-17, Appendix E refers) and requested that the ICAO Council assess the feasibility of extending the Continuous Monitoring Approach (CMA) that was being applied by the Universal Safety Oversight Audit Programme (USOAP) to the USAP.³⁵⁵ The Council formally approved the USAP-CMA and the transition plan.³⁵⁶ This decision was later endorsed by the 38th Session of the ICAO Assembly.³⁵⁷ Full implementation of the USAP-CMA began on 1 January 2015. The aim of the aviation security oversight is underlined as follows:

Aviation security oversight is a function which enables States to ensure the effective implementation of security-related Standards and Recommended Practices (SARPs) contained in the Annexes to the Chicago Convention (primarily Annex 17 but including the security-related provisions of Annex 9) and related ICAO documents.³⁵⁸

The programme applies the principle of confidentiality to prevent the unauthorised disclosure of the weakness of state security.³⁵⁹

<http://www.icao.int/safety/CMAForum/Documents/USOAP_REPORT_2013-2016.pdf > 25. accessed 25 June 2019

³⁵³ The Creation of the USAP. Retrieved from ICAO: <<https://www.icao.int/Security/USAP/Pages/The-Creation-of-the-USAP.aspx>> accessed 16 May 2019

³⁵⁴ *ibid*

³⁵⁵ The Move to a USAP-CMA. (n.d.). Retrieved from ICAO:

<<https://www.icao.int/Security/USAP/Pages/The-Future-of-the-Programme.aspx> > accessed 16 May 2019

³⁵⁶ ICAO Council Working Paper A38-WP712 Ex/7 ,2275/2013, Assembly -38 th Session Executive Committee, Agenda Item 13: Aviation Security — Policy

Outcomes of the High level Conference on Aviation Security (HILCAS) (Presented by the Council of ICAO)

³⁵⁷ Resolutions Adopted by the Assembly , ICAO Assembly – 38th Session Montréal, 24 September—4 October 2013 <https://www.icao.int/Meetings/a38/Documents/Resolutions/a38_res_prov_en.pdf > accessed 25 June 2109

³⁵⁸ ICAO Official Website , Security and Facilitaion < <https://www.icao.int/Security/USAP/Pages/The-Critical-Elements.aspx> > accessed 25 June 2109

³⁵⁹ ICAO Official Website ‘Confidentiality’ <https://www.icao.int/Security/USAP/Pages/Confidentiality.aspx> . > accessed 15 May 2019, see also Doc.10022, ICAO Assembly Resolutions in Force (as of 4 October 2013)

It should be noted that a threat to international aviation safety can also be a threat to international peace and security,³⁶⁰ which is the primary responsibility of the UN Security Council to maintain.³⁶¹ The ICAO is recognised as a ‘specialised agency’ in the UN family.³⁶² The ICAO is committed to assist the UN Security Council in carrying out the decisions of the Security Council for the maintenance of international peace and security.³⁶³ The agreement came into force between the UN and the ICAO on May 13, 1947.³⁶⁴ Accordingly,

[t]he agreement provides for reciprocal representation and participation, without a vote, in meetings of different bodies and ICAO accepts to put on the agenda of its Assembly and Council items proposed by the United Nations and to exchange information.³⁶⁵

The UN Charter and the Chicago Convention (1944) are two separate international treaties, neither of which is superior to the other.

[T]he international community had opted to establish the UN as a general organization and ICAO as a special body for international civil aviation, which subsequently became one of the UN specialized agencies. This implies that they have different competencies, which should not overlap.³⁶⁶

Global aviation safety is a common concern of all States. One recent example indicates how the work of these two institutions is well coordinated. The UN Security Council adopted Resolution 2309 (2016) on September 22, 2016, at its 7775th meeting. According to the UN Security Council:

Noting the global nature of aviation means that States are dependent on the effectiveness of each other, aviation security systems for the protection of their

ICAO Secretary General (2013) <https://www.icao.int/publications/documents/10022_en.pdf> accessed 17 May 2019 Appendix E “recognizing importance of a limited level of transparency with respect to ICAO aviation security results, balancing the need for states unresolved security concerns with the need to keep sensitive security information out of the public realm.”

³⁶⁰ Jiefeng Huang, *Aviation Safety through the Rule of Law; ICAO's Mechanisms and Practices*, (Kluwer law International 2009) 219

³⁶¹ UN Security Council < <http://www.un.org/en/sc/about/>> accessed 17 May 2019

³⁶² Funds, Programmes, Specialized Agencies and Others Retrieved from UN <http://www.un.org/en/sections/about_un/funds-programmes-specialized-agencies-and-others/index.html> 17 May 2019

³⁶³ Michael Milde, *International Air Law and ICAO* (Eleven International Publishing, 2008) 129

³⁶⁴ *ibid* 128. fn. 16 “ICAO Doc. 7970 Agreement between the UN and the International Civil Aviation Organisation 8 UNTS 315-343

³⁶⁵ *ibid* 128 -129.

³⁶⁶ Jiefeng Huang, *Aviation Safety through the Rule of Law; ICAO's Mechanisms and Practices*, (Kluwer law International 2009) 136

citizens and nationals...affirming the role of the International Civil Aviation Organisation (ICAO) as the United Nations organisation responsible for developing international aviation security standards, monitoring their implementation by States and its role in assisting states in complying with these standards.³⁶⁷

It also expressed concern that terrorist groups continue to target civil aviation and called on all states to strengthen and promote the effective application of ICAO standards and recommended practices and to assist in continuing to participate in audits effectively, technical assistance technology transfers and training programmes.³⁶⁸

ICAO Secretary General Dr Fang Liu underlined at the Ministerial Meeting on September 23, 2016, that the,

Security Council's focus will serve to heighten the efforts by the global community on aviation security, encourage intensified political engagement by the States to effectively implement ICAO's Security Standards and to support ICAO's technical assistance activities to the States in need.³⁶⁹

The importance of uniformity in compliance with SARPs has been underlined in many areas to establish a safe and secure global aviation safety system. However, as the ICAO's state oversight audit reports indicate, achieving the general aims of the obligations and the uniformity of certain standards for safe air navigation worldwide, is not easy for many reasons.

2.5 The problem of ensuring state compliance with SARPs

Since the statement in the Lotus case by the Permanent Court of International Justice in 1927³⁷⁰ that '[i]nternational law governs relations between independent States,' international law has changed precisely.³⁷¹ In particular, actors other than states, such as intergovernmental

³⁶⁷(emphasis added) UN Security Council Resolution , Resolution S/RES/2309 (2016), Adopted by the Security Council at its 7775th meeting, on 22 September 2016
<[http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2309\(2016\)&referer=http://www.un.org/en/sc/documents/resolutions/2016.shtml&Lang=E](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2309(2016)&referer=http://www.un.org/en/sc/documents/resolutions/2016.shtml&Lang=E) > accessed 17 May 2019

³⁶⁸ *ibid*

³⁶⁹ ICAO New Releases 'Further cooperation and progress on aviation security essential, ICAO SG declares at UN Security Council' (2016, September 23). Retrieved from ICAO:
<<https://www.icao.int/Newsroom/Pages/ICAO-SG-declares-at-UN-Security-Council.aspx>> accessed 17 May 2019

³⁷⁰ S.S. "Lotus", France v Turkey, Judgment, (1927) PCIJ Series A no 10, ICGJ 248 (PCIJ 1927), 7th September 1927, League of Nations (historical) [LoN]; Permanent Court of International Justice (historical) [PCIJ] 18. < https://www.icj-cij.org/files/permanent-court-of-international-justice/serie_A/A_10/30_Lotus_Arret.pdf > accessed 17 May 2019

³⁷¹ Rosalyn Higgins 'International Law in a Changing International System' Vol. 58, No. 1 (1999) Cambridge Law Journal 78

organisations, non-governmental organisations, transnational organisations, and professional associations, have emerged to play an effective role in the international area through their rules and institutions.³⁷² The growing complexity and interactions in international society have had a decisive influence on international law.³⁷³ The development of international relations has had an impact on international cooperation and has led to the creation of international regimes, such as the international civil aviation regime.³⁷⁴

On the other hand, the role and the impact of international organisations on the international legal system have transformed their capacity as advisors to a capacity for international law making. An empirical study in the field of international environmental law demonstrated that international organisations and institutions are gaining an increasing law-making capacity, especially “in the area of protection of the ozone layer and climate change.”³⁷⁵

The increasing capacity of international organisations to make a law that has a binding effect on states has also urged states to reform their domestic legal systems to comply with the obligations set up by those international organisations.³⁷⁶

Inevitably, the same challenges will apply to developments in international civil aviation. There have been many significant developments in civil aviation. Among them, the increasing volume of air transport in worldwide transportation, advanced technology, the number of people who use air transport daily, the increased number of States that have signed the Chicago Convention (1944), liberalised air transport, privatised airlines, and open skies

³⁷² Dinah Shelton, ‘*Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System*’. (D. Shelton, ed. 2000) 6. ; Rosalyn Higgins ‘International Law in a Changing International System’ Vol. 58, No. 1 (1999) Cambridge Law Journal 78–84.

³⁷³ Louis Henkin, *How Nations Behave; Law and Foreign Policy* p.15 “Although there is no international “government” there is an international “society”; law includes the structure of that society, its institutions, forms, and procedure for daily activity, the assumption on which the society is founded and the concepts which permeate it, the status, rights, responsibilities, obligations of the nations which comprise that society, the various relations between them and the effects of those relations” quoted by Stephen D. Krasner, ‘International Law and International Relations: Together, Apart, Together [comments] What’s Wrong with International Law Scholarship, Vol. 1, Issue 1 (2000) Chicago Journal of International Law, 93–97.

³⁷⁴ Kenneth W. Abbot ‘Modern International Relations Theory: A Prospectus for International Lawyers’ Vol.14 (1989) Yale Journal of Int’l Law 335–338. Retrieved from <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1402758> accessed 17 May 2019

³⁷⁵ Gerhard Loibl, ‘The Role of International Organisations in International Law-Making International Environmental Negotiations - An Empirical Study’ Vol. 1, Issue 1 (2001) *Non-State Actors and International Law* 41–61.

³⁷⁶ Jose E. Alvarez, ‘Governing the World: International Organizations as Lawmakers [comments] Distinguished Speaker Series’ Vol. 31, Issue 3 (Summer 2008), *Suffolk Transnational Law Review* 591–598.

agreements. All these developments indicate that the overall picture of civil aviation today is very different from that in 1944. In its 2014-2016 Global Aviation Safety Plan, the ICAO stated:

For an industry that directly and indirectly supports the employment of 56.6 million people, contributes over \$2 trillion to global gross domestic product (GDP), and carries over 2.5 billion passengers and \$5.3 trillion worth of cargo annually, safety must be aviation's first and overriding priority.³⁷⁷

According to global statistics of ICAO, the total number of passengers carried on scheduled services rose to 4.3 billion in 2018, which is 6.4 per cent higher than the previous year, while the number of departures reached 37.8 million in 2018, a 3.5 per cent increase in the world of air transport in 2018.³⁷⁸ Below Figure 2.3 clearly indicates that total number of passengers in air transport have been increasing.



Figure 2.3 Passenger- Kilometres Performed Total Scheduled Traffic 2009-2018 ³⁷⁹

³⁷⁷ ICAO Official Website, 'Global Aviation Safety Plan. (2014-2016) 2. <<https://www.icao.int/safety/scan/Documents/GLOBAL%20SAFETY%20AVIATION%20PLAN%202013.pdf>> accessed 13 May 2019

³⁷⁸ ICAO Official Website, 'The World of Air Transport in 2018' <<https://www.icao.int/annual-report-2018/Pages/the-world-of-air-transport-in-2018.aspx>> accessed 25 october 2019

³⁷⁹ ICAO Official Website, 'The World of Air Transport in 2018' 'Passenger- Kilometres Performed Total Scheduled Traffic 2009-2018,' <<https://www.icao.int/annual-report-2018/Pages/the-world-of-air-transport-in-2018.aspx>> accessed 25 october 2019

Comparing the above figures with the growth figures of the early years of civil aviation provides a clear vision of the overall growth of global civil aviation. In 1937, the number of passengers carried by scheduled airlines was 2.5 million. ICAO statistics from March 1953 indicate that between 1937-1952, the number of passengers carried by the scheduled airlines increased from 2.5 million to 45 million. The statistics also show that passenger kilometres³⁸⁰ in 1937 were 1.410 (million), but in 1952, this figure increased to 39.500 (million), which emphasised that ‘it is not easy to picture’ the great amount of growth.³⁸¹ The number of carried passengers has already been estimated at 2.5 billion for 2016. Moreover, the air transport industry is currently able to predict that there will be 7.3 billion passengers by 2034.³⁸²

It is foreseen that global air traffic will again double in size within the next 15 years, as has occurred since 1977.³⁸³ However, the ICAO also underlined that air transport growth could be a ‘double-edged sword’³⁸⁴ and may lead to increasing safety risks in circumstances in which the growth of air transport regulation and infrastructure is not continuously supported. Accordingly, it is no longer about a member State’s commitment to accept and comply with the ICAO’s aviation safety obligations. Today, it is not possible for a state to be part of the international air transport business without being in the ICAO’s system. The ICAO regulates the international civil aviation field globally and has a role in global aviation safety. Its assumption of the standards-setting function in aviation safety is one of the most important progressions that the ICAO has achieved since it was established.

³⁸⁰ *Passenger-kilometres performed*. A passenger-kilometre is performed when a passenger is carried one kilometre. Calculation of passenger-kilometres equals the sum of the products obtained by multiplying the number of revenue passengers carried on each flight stage by the stage distance. The resultant figure is equal to the number of kilometres travelled by all passengers.

<www.icao.int/dataplus_archive/Documents/GLOSSARY.docx> 17 May 2019

³⁸¹ Doc 7367- A7-P/I 31/3/1953 Report of the Council to the Assembly on the Activities of the Organisation in 1952, 1953, Chart on 3. by ICAO Statistics Branch -March 1953 3. <https://www.icao.int/assembly_archive/Session7/A.7.REP.3.P.EN.pdf>

³⁸² New IATA Passenger Forecast Reveals Fast-Growing Markets of the Future. (2014, October 10). Retrieved January 2017, from IATA: <<http://www.iata.org/pressroom/pr/Pages/2014-10-16-01.aspx>> accessed 17 May 2019

³⁸³ Doc 9750-AN/963, 2.-2. G. (2013) ‘Global Air Navigation Plan 2013-2018’ 2. Retrieved from [www.icao.int: <http://www.icao.int/publications/documents/9750_4ed_en.pdf>](http://www.icao.int/publications/documents/9750_4ed_en.pdf) accessed 17 May 2019

³⁸⁴ *ibid* 8.

Furthermore, the global function of the ICAO in civil aviation safety is not limited to setting standards. In order to have an effective system, consistency in global compliance with aviation safety standards must be achieved. As in many other fields of international law, many studies have examined the reasons for and consequences of non-compliance and have analysed various factors regarding compliance or non-compliance with international aviation safety regulations.³⁸⁵

Accordingly, the ICAO is adapting and responding to major challenges and meeting the needs of the contracting States. These challenges include the globalisation and transnationalisation of markets and operations; the commercialisation of government service providers; the diversification of fiscal measures to respond to budgetary needs; the liberalisation of economic regulation; the emergence of new technology; and other global developments.³⁸⁶ Assad Kotaite, the former President of the Council, underlined the importance of uniformity in the implementation of the safety and security standards and recommended practices specified in the Convention and its Annexes:

Indeed, the time may have come for ICAO to play a more active role in the uniform application of the safety and security Standards and Recommended Practices in the Convention and its Annexes. ICAO, as the world body responsible for civil aviation, needs to be empowered to check closely the implementation of safety and security standards and to carry out regular inspections. The new focus of the Organization contained in its Strategic Action Plan,³⁸⁷ incorporating ICAO's Safety Oversight and Unlawful Interference programmes as fundamental elements, already provides a quantum step forward in the continued efforts of the Organization to ensure a safe, orderly and efficient international air transport system.³⁸⁸

³⁸⁵ John Saba, 'Worldwide Safe Flight: Will the International Financial Facility for Aviation Safety Help It Happen' Vol. 68, Issue 3 (Summer 2003), *Journal of Air Law and Commerce*, 537 "The results of these initial audits have been analyzed and submitted to the audited States. As expected, there were many cases of aviation safety deficiencies resulting from State noncompliance with the SARPs including: improper and insufficient inspections by State authorities before the certification of air operators; maintenance organizations and aviation training schools; licenses and certificates improperly issued, validated, and renewed without due process; procedures and documents improperly approved; failure to identify safety concerns; and failure to follow-up on identified safety deficiencies and take remedial action to resolve such concerns." 544.

³⁸⁶ Strategy, 'Guiding International Civil Aviation into the 21st Century'7. Retrieved from ICAO: <<https://www.icao.int/Documents/secretary-general/rpereira/strategy.pdf>> accessed 17 May 2019

³⁸⁷ The strategic action plan was adopted by the ICAO Council on 7th February 1997

³⁸⁸ Strategy , Guiding International Civil Aviation into the 21st Century (n 371) foreword by the President Assad Kotaite <<https://www.icao.int/Documents/secretary-general/rpereira/strategy.pdf>> accessed 17 May 2019

Since the ICAO's declaration of the problem with state compliance and its emphasis on the global issues in air transport, it has initiated worldwide programmes to enhance uniformity in compliance with aviation safety standards.

However, global developments and the responses to these developments are still governed by traditional international legal norms, and the contracting States are responsible for and expected to fulfil their international legal obligations in good faith.³⁸⁹ As Saba pointed out, the Chicago Convention (1944) imposes an obligation to regulate and enforce the SARPs established by the ICAO on the states, not on the ICAO.³⁹⁰

In November 1997, the Conference of Directors General of Civil Aviation on a Global Strategy for Safety Oversight was held in Montreal. The conference emphasised the impact of globalisation on international civil aviation operations, including:

mergers, alliances and transnational ownership of airlines; global satellite-based communication and navigation systems; and the multinational manufacturing and maintenance of aircraft and other aeronautical products,³⁹¹

Also, in response to these challenges, it stressed the need for the harmonisation and coordination of the principles and procedures at a global level. These developments were the original points, measures and strategies to ensure compliance with aviation safety standards and the necessity for their global implementation.

In contemporary global civil aviation, state compliance with SARPs cannot be only based on the principle of 'good faith'. Although good faith is defined in international law as a basic obligation that treaties must be kept, it is difficult to determine the scope and function of the good faith principle in relation to the Chicago Convention (1944).³⁹² On the other hand, in claiming sanctions for enforcement, it is also hard to establish a system to secure compliance

³⁸⁹ Michael Milde 'Enforcement of Aviation Safety Standards Problems of Safety Oversight' Vol. 45 Issue 1 (1996) *Zeitschrift für Luft- und Weltraumrecht - German Journal of Air and Space Law* 3 15.

³⁹⁰ John Saba, 'Aviation Safety in Crisis: The Option of the International Financial Facility for Aviation Safety (IFFAS)' (2002) Vol. 30 Issue 1, *Transportation Law Journal* 1 28.

³⁹¹ Doc.9734 AN/959 Safety Oversight Manual, Part A: The Establishment and Management of a State's Safety Oversight System (2nd ed. 2006) Retrieved from ICAO: <https://www.icao.int/WACAF/AFIRAN08_Doc/9734_parta_cons_en.pdf> 1-1 accessed 17 May 2019

³⁹² John F. O'Connor, 'Good Faith in International Law' (Dartmouth Pub Co. April 1, 1991) 108.

with SARPs. In contemporary global civil aviation, which is based on multilateral agreements, it is difficult to coordinate and monitor such harsh actions.³⁹³

[E]ven though States may evade SARP compliance and incur no direct penalties, defections attract secondary sanctions such as reputational loss and damage to aeropolitical relations. Experience offers no reason to believe that a more invasive dispute settlement and enforcement system will yield superior results.³⁹⁴

Increasing global challenges and threats are beyond the states' capacity to regulate.³⁹⁵ Therefore, taking into consideration their failure to respond to the contemporary issues regarding the implementation and compliance with global aviation safety standards, it can be said that traditional international legal norms, which only address states, are outdated. In a globalised world, a state's obligation to comply with aviation safety standards is no longer only a concern for single states and should be considered to be a global concern of all states, and not only as a concern of the state as an entity, but as a concern of the people of the states.³⁹⁶ Therefore, the law should develop to enhance the global normative system for civil aviation safety, including that of individuals. Saba underlined the global civil aviation safety and security that concerns not only the interest of states but passengers too.

Civil aviation security and safety each constitute a global and indivisible system such that if civil aviation security and/or safety are threatened in one country or region, security and/or safety breaks down and is threatened worldwide. The sovereign and international political will must be directed to recognize that state interests and passenger lives depend upon channelling sufficient resources to both objectives at the same time and, at a minimum, with equal priority.³⁹⁷

However, the issue of state compliance in aviation cannot be evaluated without considering global changes. Air transport has been growing rapidly and globally. In the field of

³⁹³ Brian F. Havel & Sanchez, Gabriel Sanchez 'Do We Need a New Chicago Convention? Vol. 11 (2011-2012) Issues in Aviation Law and Policy 7 21.

³⁹⁴ *ibid*

³⁹⁵ Stephan Hobe, 'The Era of Globalisation as a Challenge to International Law', Vol. 40, Issue 4 (Summer 2002) *Duquesne Law Review* 655 "the phenomenon of globalisation can be defined as an increase of transnational actors with political negotiation power, global threats, challenges beyond the capacity of states to regulate, and far-reaching changes in societal and political integration. It is against this background that we now must evaluate the quality and the effects of international law in this new globalised environment" 656.

³⁹⁶ Markus Petsche, '*Jus Cogens* as a Vision of the International Legal Order' Volume 29 Number 2 (2010) *Penn State International Law Review* 233

<<https://elibrary.law.psu.edu/cgi/viewcontent.cgi?article=1161&context=psilr>> 'Wars, international disputes or economic sanctions between States ultimately affect not the States as an abstract entity, but the people. In a sense, this understanding has allowed the 'veil' of statehood in international law to be lifted.' 270.

³⁹⁷ John Saba, 'Aviation Safety in Crisis: The Option of the International Financial Facility for Aviation Safety (IFFAS)' (2002) Vol. 30 Issue 1, *Transportation Law Journal* 1 52.

international aviation, the enforcement of state compliance through the use of the coercive measures provided by international law, in theory, is limited; in fact, no coercive measures are being used to enforce states' compliance with their obligations. Instead, there are only theories asserted that they are supposed to comply. Next, the effectiveness of traditional international legal norms in ensuring state compliance will be analysed.

2.5.1. The effectiveness of traditional international legal norms in ensuring state compliance with SARPs

The regulation of worldwide standards for safe global civil aviation is crucial. As Raustiala stated 'treaties, like all regulatory institutions, are purposive.'³⁹⁸ By signing the Chicago Convention (1944), states agree to comply with the regulatory framework for international civil aviation. Milde described the Chicago Convention (1944) as 'the backbone of the international legal regulatory framework of civil aviation.'³⁹⁹ The ICAO Standards and Recommended Practices (SARPs) are viewed as 'the essential building blocks of a sound regulatory aviation system and their implementation is essential.'⁴⁰⁰

According to the hierarchy of international norms, *erga omnes* obligations are obligations of a state 'towards the international community as a whole,' and are the concern of all states.⁴⁰¹

However, uniformity in compliance with international aviation safety obligations has not been achieved in practice, despite its suggestion in theory. Compliance with aviation safety obligations has always been the main point of discussion among scholars and aviation professionals.

The theories and arguments generally analyse and underline the legal or practical obstacles to state compliance with SARPs. The lack of enforcement power of the ICAO over the contracting States, its ineffectiveness, the lack of coercive measures for non-compliant states

³⁹⁸ Kal Raustiala, 'Compliance & Effectiveness in International Regulatory Cooperation' Vol. 32, Issue 3 (Summer 2000) Case Western Reserve Journal of International Law 387 387.

³⁹⁹ Michael Milde, 'The International Civil Aviation Organisation: After 50 Years and Beyond'(1996) Australian International Law Journal 60 60.

⁴⁰⁰ The Future of Safety, ICAO's proactive and collaborative approach (2012) Vol.67 No.1 ICAO Journal <https://www.icao.int/publications/journalsreports/2012/6701_en.pdf> accessed 18 May 2019

⁴⁰¹ Jiefang Huang, 'Aviation Saafety and ICAO' (Dphil theisis , Leiden University, Netherland 2009) <<https://openaccess.leidenuniv.nl/bitstream/handle/1887/13688/000-huang-diss-28-01-09.pdf?sequence=1>> 165.

and the political unwillingness or ‘lack of political courage’ of the ICAO⁴⁰² are cited as potential reasons for the states’ failure to comply with their aviation safety obligations. As Huang asserted, Article 37 of the Chicago Convention (1944) could be a peremptory norm of international law, and the state obligations derived from SARPs could be considered *erga omnes* obligations created by the principle of *jus cogens*.

However, the question arises here; even the state obligation derives from SARPs is *erga omnes* obligations created by the principle of *jus cogens*, whether *erga omnes* character of obligation would ensure the state compliance in practice? This thesis questions the practicality of these traditional legal norms in ensuring state compliance with global aviation safety standards. Next section critically examines the limits of customary international law in this regard.

2.5.1.1 Limits of customary international law in ensuring state compliance with SARPs

Significant shifts since the beginning of the 21st century in the international system, international law and its impact on the sovereign territorial state needs to be taken into consideration to address limits of customary international law.

The development in the international regimes and the capacity is given to international organisations to regulate the field worldwide have changed the sources of the international legal norms, particularly the concept of the international treaties and the norms establishing obligations derived from multilateral treaties.⁴⁰³

The issue has arisen as to whether or not the traditional international law theories for state compliance are still effective in the newly developing structure of international law, which

⁴⁰² Michael Milde ‘Enforcement of Aviation Safety Standards Problems of Safety Oversight’ Vol. 45 Issue 1 (1996) *Zeitschrift für Luft- und Weltraumrecht - German Journal of Air and Space Law* 8.

⁴⁰³ Jose E. Alvarez , ‘Governing the World: International Organizations as Lawmakers [comments] Distinguished Speaker Series’ Vol. 31, Issue 3 (Summer 2008), *Suffolk Transnational Law Review* 591 ‘modern multilateral treaties no longer the same as they were in the nineteenth century. Modern forms of customs or of so called ‘general principles of law’ are no longer the same as they were before these organizations’ 593. See also Jost Delbruck ‘Structural Changes in the International System and Its Legal Order: International Law in the Era of Globalization.’ Vol.11, Issue 1 (2001) *Swiss Review of International and European Law*. 1 ;⁴⁰³ Stephan Hobe, ‘The Era of Globalisation as a Challenge to International Law’, Vol. 40, Issue 4 (Summer 2002) *Duquesne Law Review* 655

does not address states alone, but also other actors that have significant roles, including individuals,⁴⁰⁴ within its scope.

Generally, State obligations that have been derived from international treaties address states' promises and the obligation to act in good faith. The function of the treaty is 'to record bilateral (or sometimes regional) political settlements and arrangements.'⁴⁰⁵ Therefore, the role of the states as the main actors in international treaties, and the ways to enforce their promises under international law have been defined within this framework. These treaties were entered during a time when international agreements depended on state-to-state agreements, and the parties affected by the compliance and noncompliance of the states were limited to the circle of states within the agreement. States' failure to comply with the obligations were sanctioned based on reciprocity. However, it is difficult to sustain the customary international law (CIL)⁴⁰⁶ based on the Westphalian order in the current international system, in which states agree in advance to delegate some of their sovereign authority to institutions established by agreement, such as the UN Charter and the World Trade Organization.⁴⁰⁷

The underlined issue here is the actors in the international field are no longer limited to states. Although nation states are still dominant actors, intergovernmental organisations started to have an important political role in the international field and legal subjects with the legislative/rule-making power under international law. Furthermore, a growing number of non-governmental organizations (NGO's) appear in international relations and have a significant role.⁴⁰⁸

The globalised world environment has increased powerful transnational actors.⁴⁰⁹ The technological revolution has made people around the world aware of any developments. Fields such as the environment, health, finance, human rights, and civil aviation safety,

⁴⁰⁴ Harol Hongju Koh, A World Transformed [comments] Vol. 20, Issue 2 (Summer 1995), Yale Journal of International Law, ix. xi.

⁴⁰⁵ Abram Chayes and Antonia Handler Chayes, *The New Sovereignty, Compliance with International Regulatory Agreements* (Harvard University Press 1995) 1.

⁴⁰⁶ Hereinafter CIL

⁴⁰⁷ Samuel Estreicher, 'Rethinking the Binding Effect of Customary International' Vol. 44, Issue 1 (Fall 2003) Virginia Journal of International Law 5 11-13.

⁴⁰⁸ Jost Delbruck 'Structural Changes in the International System and Its Legal Order: International Law in the Era of Globalization.' Vol.11, Issue 1 (2001) Swiss Review of International and European Law. 1 17-18

⁴⁰⁹ Stephan Hobe, 'The Era of Globalisation as a Challenge to International Law', Vol. 40, Issue 4 (Summer 2002) Duquesne Law Review 656.

among others, have become the concern of all states and the people of all states.⁴¹⁰ In parallel with these developments, there has been a growing awareness to focus on the common interest of people around the world. Therefore the significant result of globalisation has been noted ‘process of denationalization/deterritorialization of clusters of political, economic and social transactions involving national and international actors, public and private, leading to a global interconnectedness of these actors in time and space including individuals.’⁴¹¹

In addition to states, international organisations, private international organisations and citizens have started to play an active role by organising and cooperating in the international field to regulate and resolve issues that are the concern of all the parties.⁴¹² Accordingly, new forms of international cooperation have been the subject of international law.⁴¹³

Consequently, the theories in international law that have been used to explain the normative character of the state obligations of modern international organisations by invoking the sources of traditional international law have been challenged among scholars⁴¹⁴

Cohen suggested that the doctrine of the sources of international law should be rethought, asserting that a ‘revised doctrine of sources will better capture which rules are actually treated as law in the international system, blunting scepticism about international law and placing international law on firmer footing.’⁴¹⁵

⁴¹⁰ Abram Chayes and Antonia Handler Chayes, ‘*The New Sovereignty, Compliance with International Regulatory Agreements*’ (Harvard University Press 1995) 1.

⁴¹¹ Jost Delbrück ‘Structural Changes in the International System and Its Legal Order: International Law in the Era of Globalization.’ Vol.11, Issue 1 (2001) *Swiss Review of International and European Law*. 1-16.

⁴¹² Rosalyn Higgins ‘International Law in a Changing International System’ Vol. 58, No. 1 (1999) *Cambridge Law Journal* 78-85.

⁴¹³ Stephan Hobe, ‘The Era of Globalisation as a Challenge to International Law’, Vol. 40, Issue 4 (Summer 2002) *Duquesne Law Review* 655 ‘The interdependency of societies and mobility of the populations of all states is greater than before. So-called global threats like overpopulation, the destruction of the environment, underdevelopment, migration, international terrorism, and global threats from nuclear weapons, as well as their uncontrolled possession and proliferation, demand solutions that transcend single nation-states and require new forms of international co-operation.’ 656.

⁴¹⁴ Jose E. Alvarez, ‘Governing the World: International Organizations as Lawmakers [comments]

Distinguished Speaker Series’ Vol. 31, Issue 3 (Summer 2008), *Suffolk Transnational Law Review*

591 ‘... the move to International Organizations has changed the character of international obligations. It is no longer enough to look to examine only treaties, custom, and general principles. There are now many more obligations on the relevant factors that are harder to fit into those old categories....today’s international organisations generated international law is no longer subject to the ‘on’ or ‘off’ switch suggested by traditional treaties, custom, or general principles. It is no longer the *lex lata* versus *lex ferenda* of old, either binding law or not.’ 593.

⁴¹⁵ Harlan Grant Cohen, ‘Finding International Law: Rethinking the Doctrine of Sources [article] Vol. 93, Issue 1 (November 2007) *Iowa Law Review* 65 ‘...the traditional doctrine of sources –with its focus on consent and formality and its idolization of treaties-is outdated and needs to be revised. The doctrine was designed to describe a late –nineteenth –century world.But changes in the international system since that time – the rapid inclusion of new states into the system, the rise of human rights, the creation of international and transnational

One of the sources of international law, customary international law, which is described in Article 38 of the Statute of International Court of Justice, has been the subject of one of the core arguments among international law scholars.

Goldsmith and Kosner asserted that the main components of the CIL, i.e., ‘widespread and uniform practice among nations and sense of legal obligation (*opinio juris*),’ only occur in limited conditions.⁴¹⁶

Guzman⁴¹⁷ drew attention to the critiques regarding the imprecise character of CIL. Quoting Karol Wolfke,⁴¹⁸ he stated that ‘the problem with custom lies in the intangibility of custom, in the numerous factors which come into play, in the great number of various views, spread over centuries, and in the resulting ambiguity of the terms involved.’ Goldsmith and Posner argued that ‘CIL has real content, but it is much less robust than traditional scholars think; states do not comply with the norms of CIL because of a sense of moral or legal obligation.’⁴¹⁹

Estreicher emphasised the difference of CIL in a Westphalian world and in an increasingly interdependent world ‘with multistate pacts like the UN Charter and World Trade Organization (WTO), where states agree in advance to delegate some of their sovereign authority to the institutions established by these agreements. Such a world is not the same.’⁴²⁰ Danilenko asserted that ‘some of the criteria of custom are in need of further elaboration and

bodies, and the resultant changes in the nature and subject matter of treaties- have put great strain on the doctrine.” 69-70.

⁴¹⁶ Jack L. Goldsmith, Eric A. Posner, ‘Understanding the Resemblance between Modern and Traditional Customary International Law’ Vol. 40, Issue 2 (Winter 2000) 639–641, 671. see also Jack L. Goldsmith, Eric A. Posner, ‘A Theory of Customary International Law’ Vol. 66, Issue 4 (Fall 1999) University of Chicago Law Review 1113 “States do not comply with norms of CIL because of a sense of moral or legal obligation, rather, their compliance and the norms themselves emerge from the states’ pursuit of self-interested policies on the international stage” 1115.

⁴¹⁷ Andrew T. Guzman, ‘Saving Customary International Law’ Vol. 27, Issue 1 (Fall 2005) Michigan Journal of International Law 115 “lack of precision in CIL rules does indeed undermine the force of the rules and generate skepticism about their importance” 124.

⁴¹⁸ Karol Wolfke, ‘*Custom in Present International Law*’ (2nd Revised ed. Springer 1993) xiii. cited in Andrew T. Guzman, ‘Saving Customary International Law’ Vol. 27, Issue 1 (Fall 2005) Michigan Journal of International Law 115 124.

⁴¹⁹ Jack L. Goldsmith, Eric A. Posner, ‘A Theory of Customary International Law’ Vol. 66, Issue 4 (Fall 1999) University of Chicago Law Review 1113 1177.

⁴²⁰ Samuel Estreicher, ‘Rethinking the Binding Effect of Customary International’ Vol. 44, Issue 1 (Fall 2003) Virginia Journal of International Law 5–12-13.

specification. The continued disagreement over the precise content of a number of criteria creates the danger that the notion of custom could be misused for political purposes.⁴²¹

Furthermore, from the practical point of view, the concept of *jus cogens* in international law has been challenged by scholars. One of the questions raised addresses the ‘workability’⁴²² of the *jus cogens* rule in international law. Petsche claimed that *jus cogens* has a limited impact on the actual practice of international law. The level of compliance with SARPs supports the argument that *jus cogens* has a limited impact on the practice of compliance with SARPs.

As previously discussed, ICAO’s aviation safety obligations have been defined as *erga omnes* obligations in the normative system of international law by scholars.⁴²³ Accordingly, a state has a duty to comply with these obligations. Huang explained that in the definition of *erga omnes*, the duty ‘is not for the interest of an individual state’, but ‘for a higher purpose of safe and orderly development of international civil aviation.’⁴²⁴ However, in practice, the states are not in full compliance with their duties.

Abyreatne also emphasised the differences between theory and practice in complying with SARPs: ‘Unfortunately, in practical application, SARPs do not carry the full importance that is theoretically expected of them.’⁴²⁵

The ICAO system is based on encouraging States to comply with SARPs and the expectation that, if they do not comply, they will comply with an obligation to notify the ICAO.⁴²⁶

⁴²¹ Gennady M. Danilenko, ‘The Theory of International Customary Law’. Vol.31, German Yearbook of International Law, 9 47.

⁴²² Markus Petsche, ‘*Jus Cogens* as a Vision of the International Legal Order’ Volume 29 Number 2 (2010) Penn State International Law Review 233
<<https://elibrary.law.psu.edu/cgi/viewcontent.cgi?article=1161&context=psilr>> 236.

⁴²³ Jiefang Huang, ‘Aviation Saafety and ICAO’ (Dphil thesis , Leiden University, Netherland 2009)
<<https://openaccess.leidenuniv.nl/bitstream/handle/1887/13688/000-huang-diss-28-01-09.pdf?sequence=1>>

⁴²⁴ Jiefang Huang, ‘Aviation Saafety and ICAO’ (Dphil thesis , Leiden University, Netherland 2009)
<<https://openaccess.leidenuniv.nl/bitstream/handle/1887/13688/000-huang-diss-28-01-09.pdf?sequence=1>>

‘In view of the importance of the rights involved, the obligations in the first rank, namely, obligations *erga omnes*, could not comprise a long list but would at least include the duties of a State to provide safety oversight, to refrain from the use of weapons against civil aircraft in flight, and to prevent and punish certain acts endangering the safety of civil aviation. These obligations are laid down not for the interest of an individual State, but for a higher purpose: safe and orderly development of international civil aviation. They ‘are grounded not in an exchange of rights and duties but in an adherence of a normative system.’ 236-237.

⁴²⁵ Ruwantissa Abeyratne, ‘ICAO’s Strategic Action Plan. Zeitschrift fur Luft- und Weltraumrecht’ – Vol. 45 Issue 3 (1996) German Journal of Air and Space Law 231 237.

⁴²⁶ Emily Kadens, Ernest A. Young, ‘How Customary is Customary International Law?’ , Vol. 54, Issue 3 (February 2013), William & Mary Law Review, 885 “The contemporary practice of customary international law derives much of its force from the assumption that it is a continuation of long-standing theories and practices. That is quite true, but perhaps not in the way that modern scholars have assumed.” 920.

However, years of experience have indicated that this system is not working as planned.⁴²⁷ There have been many different factors identified as the causes of non-compliance with SARPs by the contracting States, including differences in economic and technical standards, lack of expert personnel,⁴²⁸ and the abilities of the states.⁴²⁹ The problem of compliance with SARPs was summarised by Milde, the former Director of ICAO: ‘while everybody was praising the clothes, the Emperor was actually naked.’⁴³⁰

The evidence such as the results of the ICAO’s audit programmes and the Safety Oversight highlights that there is a problem of state non-compliance with safety standards. Therefore, it is not difficult to agree with Petsche’s definition of *jus cogens* as ‘the vehicle of a particular ‘vision’ of the international legal order and international law’⁴³¹ and with scholars who have suggested the reconsideration of CIL and the role of CIL as an effective source of international law.⁴³²

2.5.1.2 Changing the concept of state sovereignty in international law

The impact of economic globalisation, liberalisation, advance communication and transportation have created a global environment for the issues that touch people’s daily lives worldwide. As a result, ‘exclusive and absolute’ national sovereignty has changed.⁴³³ The

⁴²⁷ Paul Stephen Dempsey, ‘Compliance and Enforcement in International Law: Achieving Global Uniformity in Aviation Safety’ Vol. 30 Issue 1 (2004). North Carolina Journal of International Law and Commercial Regulation, 1 4.

⁴²⁸ Jiefang Huang, ‘Aviation Saafety and ICAO’ (Dphil thesis , Leiden University, Netherland 2009) <<https://openaccess.leidenuniv.nl/bitstream/handle/1887/13688/000-huang-diss-28-01-09.pdf?sequence=1>> ‘In some cases, certain developing countries did not have an adequate expertise fully to appreciate the contents of Annexes, let alone the capability to determine whether there were differences to be fulfilled with ICAO’ 70.

⁴²⁹ Paul Stephen Dempsey, ‘Compliance and Enforcement in International Law: Achieving Global Uniformity in Aviation Safety’ Vol. 30 Issue 1 (2004). North Carolina Journal of International Law and Commercial Regulation, 1 38

⁴³⁰ Jiefang, Huang, ‘Aviation Safety, ICAO and Obligations *Erga Omnes* Vol. 8, Issue 1 (March 2009) Chinese Journal of International Law 63 70. referred Michael Milde ‘Enforcement of Aviation Safety Standards Problems of Safety Oversight’ Vol. 45 Issue 1 (1996) Zeitschrift fur Luft- und Weltraumrecht - German Journal of Air and Space Law 3 9.

⁴³¹ Markus Petsche, ‘*Jus Cogens* as a Vision of the International Legal Order’ Volume 29 Number 2 (2010) Penn State International Law Review 233 <<https://elibrary.law.psu.edu/cgi/viewcontent.cgi?article=1161&context=psilr>> 258.

⁴³² Andrew T. Guzman, ‘Saving Customary International Law’ Vol. 27, Issue 1 (Fall 2005) Michigan Journal of International Law 115 “If traditional notions of CIL are deeply flawed and the modern skeptics’ claims are unpersuasive, we are left with a challenge. Legal scholars must reconsider CIL to determine what a proper theory of CIL should look like and whether there is a role for this source of law.” 131.

⁴³³ Jack Goldsmith, ‘Sovereignty, International Relations Theory, and International Law [reviews] Book Review, Vol. 52, Issue 4 (April 2000), Stanford Law Review 959 959.

dominant role of the sovereign state that focuses on national interests have been declined instead the international community become more aware of the value of cooperative effort to meet with global issues as the common/public interest.⁴³⁴

However, the concept of 'sovereignty' in international law has been challenged by scholars since legality first came into observance. Many have asserted that sovereignty must be redefined, taking globalisation and international cooperation into consideration.⁴³⁵

Berman is among them; he referred to Henkin, who stressed that 'sovereignty talk pollutes the air' by causing resistance to international cooperation.⁴³⁶ From this perspective, when universal human values are considered, state values such as sovereignty should not take priority over universal values. Other scholars, such as Petito, have taken a softer approach on national sovereignty issues and have focused on altering the definition to a 'modernised definition of sovereignty' which 'demands concern for a wide range of social issues, cultural identity, ethnic identity, and justice, which affords individual connections to the society, politics, and culture of each individual situation, not abolishing it.'⁴³⁷

However, both approaches underline the need to amend the definition of state sovereignty in accordance with the developments in the world and the international legal rules that apply to them. The need to redefine sovereignty in accordance with global developments makes sense.⁴³⁸

The starting point of most of the arguments regarding sovereignty is that the world has changed. To explain the need to redefine sovereignty, academics have stressed the differences between the current and future world, and the world of a century ago, when customary international norms were established. Among them, Alvarez has challenged the traditional international law norms based on the idea that such norms no longer respond to the needs of

⁴³⁴ Jost Delbruck 'Structural Changes in the International System and Its Legal Order: International Law in the Era of Globalization.' Vol.11, Issue 1 (2001) *Swiss Review of International and European Law*. 1 31.

⁴³⁵ Danielle S. Petito, 'Sovereignty and Globalization; Fallacies, Truth and Perception' Vol. 17, Issue 3 (Summer 2001) *New York Law School Journal of Human Rights* 1139 "Globalization.... represents the perception of the world as an interconnected whole and the consciousness that a number of issues can no longer be addressed purely at a local level." 1142.

⁴³⁶ Paul Schiff Berman, 'From International Law to Law and Globalization' Vol. 43, Issue 2 (2005) *Columbia Journal of Transnational Law* 485 525.

⁴³⁷ Danielle S. Petito, 'Sovereignty and Globalization; Fallacies, Truth and Perception' Vol. 17, Issue 3 (Summer 2001) *New York Law School Journal of Human Rights* 1139 1141.

⁴³⁸ Kofi Annan, Two Concepts of Sovereignty, *The Economist*, Sept.18, 1999 p. 49 Quoted by Jack L. Goldsmith, Eric A. Posner, 'A Theory of Customary International Law' Vol. 66, Issue 4 (Fall 1999) *University of Chicago Law Review* 1113 Goldsmith (n 414) '[s]tate sovereignty, in its most basic sense, is being redefined ... by the forces of globalisation and international co-operation.' 960.

the contemporary world. He drew attention to the fact that the ‘sources, content and principal actors of international law’ in the nineteenth century are not the same, as most treatises suggest, as those in the twenty-first century.⁴³⁹

On the other hand, Berman emphasised the way in which the definition of sovereignty should be changed in international law. According to him, scholars should focus ‘[on] which ways sovereignty might be changing,’ instead of arguing about the existence of Westphalian sovereign nation states.⁴⁴⁰ He went on to refer to Chayes and Chayes’ definition of ‘new sovereignty,’ which addresses;

nation-state participation in a wide range of international and trans-governmental regimes, networks, and institutions, all of which have become necessary for governments to accomplish what they once could do on their own within a defined territory.⁴⁴¹

The constructive theory developed by Chayes and Chayes of ‘new sovereignty’ explains the need for the amendment of the definition of sovereignty to match contemporary developments. They also proposed a ‘managerial model’⁴⁴² to enhance compliance with international law, which would be more responsive to the compliance problem in practice than the theories that address legal norms. The theory accentuates the economical, social and political penetration of international relations in the contemporary world. Consequently, the traditional notion of sovereignty that ‘a state has complete autonomy to act as it chooses without legal limitation by any superior entity’ is challenged by Chayes and Chayes.⁴⁴³

⁴³⁹ Jose E. Alvarez , ‘Governing the World: International Organizations as Lawmakers [comments] Distinguished Speaker Series’ Vol. 31, Issue 3 (Summer 2008), Suffolk Transnational Law Review 591 ‘This article is an edited version of a speech that Professor Alvarez presented at Suffolk University Law School on November 5, 2007 as part of the Suffolk Transnational Law Review’s Distinguished Speaker series.’ ‘..basic sources of international law, namely treaties, customs, and general principles. The treatises suggest that the sources, content, and principle actors of international law remain basically the same as they were in the nineteenth century. The assumptions most treatise writers make is that a treaty in the twenty-first century still remains an interstate compact not structurally different from that found in the nineteenth century; that custom still remains the familiar source grounded in historical state practice and academic writing but only rarely in the real world.’ 592.

⁴⁴⁰ Paul Schiff Berman, ‘From International Law to Law and Globalization’ Vol. 43, Issue 2 (2005) Columbia Journal of Transnational Law 485 – 526.

⁴⁴¹ *ibid* 527.

⁴⁴² Abram Chayes and Antonia Handler Chayes, ‘*The New Sovereignty, Compliance with International Regulatory Agreements*’ (Harvard University Press 1995) “The managerial model works based on a cooperative, problem-solving approach instead of a coercive one. The theory proposes a more effective model to enhance compliance which seeks to ‘induce compliance through interacting processes of justification, discourse, and persuasion.’ Finally, the theory asserts that “most compliance problems will yield to the management process because states need to be a member in good standing on the international system.” 27-28.

⁴⁴³ *ibid* ‘if sovereignty in such terms ever existed outside books on international law and international relations, however, it no longer has any real world meaning.’

According to them, sovereignty ‘no longer consists in the freedom of states to act independently, but freedom is to be absorbed in international relations as a good standing member of international regimes.’⁴⁴⁴

The theory does not use territorial control or a government’s liberty to define sovereignty; rather, denotes the definition of sovereignty as a ‘vindication of the state’s existence as a member of the international system.’⁴⁴⁵ Furthermore, it suggests that the self-determination of a state will be regarded as the ability to become a respected member of the international system, which can be accomplished by acting cooperatively.

Higgins drew attention to the globalisation as a reality that sovereignty is no protection ‘against movements of capital, labour, information and ideas-nor can they provide effective protection against harm and damage.’⁴⁴⁶

Koh described the world we live in “era of global law’ referring to the mutation of the transnational actors, sources of law, allocation of decisional functions, and modes of regulation into fascinating hybrid forms.⁴⁴⁷

Havel and Sanchez noted that globalisation and privatisation of markets had changed the meaning of national sovereignty the way it was meant in the Chicago Convention (1944). Hence, ‘sovereignty is not only a claim of freedom from external interference, but also the liberty to permit some kinds of external interference.’⁴⁴⁸

Indeed, states have sought to find a way to adjust to global economic air transport developments and relaxed control over air transport based on the claim of absolute sovereignty.⁴⁴⁹ On the other hand, in the international civil aviation field, as Havel and Sanchez rightfully emphasized ‘ these epistemological shifts in the understanding of sovereignty have gone largely unnoticed’.⁴⁵⁰ Hence the legal norms that govern air transport, particularly international civil aviation, remain international, not global.

⁴⁴⁴ *ibid*

⁴⁴⁵ *ibid* ‘In today’s setting the only way most states can realise and express their sovereignty is through participation in the various regimes that regulate and order the international system’

⁴⁴⁶ Rosalyn Higgins ‘International Law in a Changing International System’ Vol. 58, No. 1 (1999) Cambridge Law Journal 78–82.

⁴⁴⁷ Harol Hongju Koh, A World Transformed [comments] Vol. 20, Issue 2 (Summer 1995), Yale Journal of International Law, xi.

⁴⁴⁸ Brian F. Havel & Gabriel S. Sanchez, ‘Restoring Global Aviation’s “Cosmopolitan Mentalit’e’, Vol.11, Issue 1 (2011) Boston University International Law Journal 1–28-29.

⁴⁴⁹ See Chapter III

⁴⁵⁰ Brian F. Havel & Gabriel S. Sanchez, ‘ Restoring Gloabal Aviation’s “Cosmopolitan Mentalit’e’, Vol.11, Issue 1 (2011) Boston University International Law Journal 1–29.

2.5.1.3 The role of soft law

The classic use of international law refers to international treaties and customary international law based on state-to-state relations. However, this ‘homogenous character of international order’⁴⁵¹ has changed, and the international system is comprised not only of states but also of international institutions and non-state actors.⁴⁵²

However, the focus, in analysing the binding impact of the regulations which are the product of non-state actors, such as international organisations, is often exclusively on treaties and custom.⁴⁵³ Accordingly, international legal rules, standards, and commitments set by international organisations, and the promises in states’ agreements to pursue legislation are described as ‘soft law.’⁴⁵⁴ However, soft law is excluded from the framework of the study of international legal scholars. Defining international regulation as soft law has generally led to a presumption that soft law is a ‘lesser law’ than the hard law of treaties and custom.⁴⁵⁵

On the other hand, SARPs are designated as Annexes of the Convention, and not as part of the treaty.⁴⁵⁶ Therefore, the states’ obligation to comply with SARPs is not a treaty obligation. In analysing the binding effect of SARPs, scholars in the civil aviation field have also referred to them not as hard law, ‘but [they] can be deemed as soft law or guidance material.’⁴⁵⁷

⁴⁵¹ Dinah Shelton, ‘Compliance with International Human Rights Soft Law’ Vol. 29 (1997) *Studies in Transnational Legal Policy* 119 127.

⁴⁵² Robert O.Keohane, ‘Global Governance and Democratic Accountability’ (October 2011) Retrieved from Researchgate:

<https://www.researchgate.net/publication/228582436_Global_Governance_and_Democratic_Accountability> accessed 18 may 2019

⁴⁵³ Andrew T. Guzman, ‘A Compliance –Based Theory of International Law’ Vol. 90, Issue 6 (December 2002) *California Law Review* 1823 1879.

⁴⁵⁴ *ibid*

⁴⁵⁵ *ibid* “The focus of international legal scholars is often exclusively on treaties and custom, as if soft law either does not exist or has no impact. Although only occasionally stated explicitly, the general presumption appears to be that soft law is less binding than the traditional sources of international law, and states are accordingly less likely to comply” 1879-1880.

⁴⁵⁶ Ruwantissa Abeyratne, ‘Blacklisting of Airlines by the European Union and the Disclosure of Safety Critical Information’ Vol. 2004-2008 *Aviation Safety/Security Issues in Aviation Law and Policy* 1135 1146.

⁴⁵⁷ Paul Stephen Dempsey, ‘Compliance and Enforcement in International Law: Achieving Global Uniformity in Aviation Safety’ Vol. 30 Issue 1 (2004). *North Carolina Journal of International Law and Commercial Regulation*, 1 14. See also Isabella H. Ph. Diederiks-Verschoor, *An Introduction to Air Law* (9th ed. P. M.-M. Butler, Ed. Kluwer Law International 2012) 36., Brian F Havel, Gabriel Sanchez, *The Principles and Practice of International Aviation Law* (Kindle Edition, Cambridge University Press. June 2014) location 1770 of 15733 Dempsey asserts that this opt out provision ‘arguably makes the SARPs only ‘soft law. Other commentators also assert that the standards can be deemed as ‘guidance material’ or ‘soft law’ and the state may choose to not to comply with them. Havel argues that with the ‘absence of a strong sanction to punish scofflaws’ SARPs cannot be classified as ‘hard law’.

Nevertheless, today, the agreement on common interests and the respect for states' common interests by compliance with these provisions stabilises a state's position in the global community, especially in the global economy, by providing it with a reputation as a 'reliable partner.'⁴⁵⁸ Because of this, according to Kirsner, soft law provisions provide an 'extra-legal'⁴⁵⁹ motivation for compliance. The sanction for non-compliance would be the possible damage to the state's status and reputation in the international arena, which would cause isolation, 'meaning that the state's potential for economic growth and political influence will not be realised.'⁴⁶⁰ Kirsner explained:

The absence of legally binding effect and explicit enforcement measures should not be viewed as a peculiar omission and fatal weakness. All international agreements, whether formal or informal, involve a reciprocal exchange of obligation and the attendant price of non-compliance.⁴⁶¹

Guzman went further and proposed a 'functional definition of international law' in which there is no clear distinction between treaties and other promises, which recognises that the traditional separation of treaties from soft law is difficult to maintain and acknowledges the tension between the classical theory of international law and practice.⁴⁶²

The proposed functional definition of international law reflects the fact that international obligation comes in many different forms, with varying levels of compliance pull. This is a significant departure from the conventional view of international law, which simply declares law to be binding. The new theory recognizes that the discrete categories of treaties, CIL, and soft law, though perhaps useful, do not themselves define international law or present the only possible levels of commitment. Rather they are attempts to describe the spectrum of commitment from which states choose the level that suits their purposes at any given time.⁴⁶³

Criticisms about the sources of international law and the subjects of emerging theories to govern international society primarily derive from evolving international relations and the

⁴⁵⁸ Matthew B. Kirsner, 'Consumer's Union of U.S., Inc. v. Kissinger: A Domestic Response to Soft Law in the International Normative System' Vol. 2, Issue 1 (Winter 1996) *Journal of International Legal Studies*, 41 '...soft law provisions have extra-legal motivations for compliance. Failing to fulfil even informal commitments may result in a damaged reputation as a reliable partner.' 44.

⁴⁵⁹ *ibid*

⁴⁶⁰ Abram Chayes and Antonia Handler Chayes, *The New Sovereignty, Compliance with International Regulatory Agreements* (Harvard University Press 1995) 27.

⁴⁶¹ Matthew B. Kirsner, 'Consumer's Union of U.S., Inc. v. Kissinger: A Domestic Response to Soft Law in the International Normative System' Vol. 2, Issue 1 (Winter 1996) *Journal of International Legal Studies*, 41

⁴⁶² Andrew T. Guzman, 'A Compliance-Based Theory of International Law' Vol. 90, Issue 6 (December 2002) *California Law Review* 1823-1881-1882.

⁴⁶³ *ibid* 1882-1883.

increasing role and activities of international organisations. Particularly, they acknowledge the regulations and standards set by international organisations and non-treaty multilateral agreements that are not captured by the definition of Article 38 of the Statute of the International Court of Justice.⁴⁶⁴

However, these instruments, which are not considered to be ‘law’ under the definition of the traditional concept, have an impact on the behaviour of states. Accordingly, the general presumption is that soft law is less binding than the traditional international sources of international law. Guzman drew attention to the idea that ‘if the term ‘law’ used to identify promises that are particularly difficult to break, there is nothing to distinguish treaties and CIL from soft law.’⁴⁶⁵ Ezeudu cited Frans Schram, who stressed that soft law equally enjoys the general principle of ‘*pacta sunt servanda*,’ and therefore, a state’s failure to comply with soft law does not mean that a state is free to violate or not to comply with it.⁴⁶⁶

The views of legal scholars vary with regard to the changes in international law. As Higgins stated, ‘the role of international law in this unprecedented change’⁴⁶⁷ needs to be examined from a wider perspective. Therefore, we must not limit ourselves only to traditional views; rather, creative new approaches to contemporary issues such as global aviation safety need to be explored.

It is not difficult to state that the classical definition of international law and the sources of international law do not adequately apply to the issues in the contemporary world, particularly to the issue of state compliance. As Thomas Jefferson stated: ‘[W]hile the laws shall be obeyed all will be safe.’⁴⁶⁸ Aviation safety is a common value, and thus, all states

⁴⁶⁴ Martin- Joe Ezeudu, M.-J. ‘From a Soft Law Process to Hard Law Obligations: The Kimberley Process and Contemporary International Legislative Process’ Vol. 16, Issue 1 (2014) European Journal of Law Reform 104, see also Stephan Hobe, ‘The Era of Globalisation as a Challenge to International Law’, Vol. 40, Issue 4 (Summer 2002) Duquesne Law Review 655 “one can ask whether the description of the sources of international law, given in the Statute of the International Court of Justice, which refers to the traditional sources of public international law, still adequately describes those sources” 662.

⁴⁶⁵ Andrew T. Guzman, ‘A Compliance –Based Theory of International Law’ Vol. 90, Issue 6 (December 2002) California Law Review 1823–1886.

⁴⁶⁶ Martin- Joe Ezeudu, M.-J. ‘From a Soft Law Process to Hard Law Obligations: The Kimberley Process and Contemporary International Legislative Process’ Vol. 16, Issue 1 (2014) European Journal of Law Reform 104–116. fn.53

⁴⁶⁷ Rosalyn Higgins ‘International Law in a Changing International System’ Vol. 58, No. 1 (1999) Cambridge Law Journal 78–84.

⁴⁶⁸ Thomas Jefferson, The Works of Thomas Jefferson, Vol.IX (in 12 volumes) 1799-1803, Cosimo Classics (2009), Inaugural Address, (March 4, 1801) 193., quoted by John Norton Moore, ‘Enhancing Compliance with International Law: A Neglected Remedy’ Vol. 39, Issue 4 (Summer 1999) Virginia Journal of International Law 881–1016 fn.217

depend upon each other to enhance it. However, overall, we can come to one conclusion: As Guzman stated, '[w]e can no longer be satisfied with the simple conclusion that 'treaties are to be obeyed.'⁴⁶⁹

⁴⁶⁹ Andrew T. Guzman, 'A Compliance –Based Theory of International Law' Vol. 90, Issue 6 (December 2002) California Law Review 1823 "See Vienna Convention on the Law of Treaties, May 23, 1969, art. 26, 1155 U.N.T.S. 331, ("Every treaty in force is binding upon the parties to it and must be performed by them in good faith." 1887. fn.33

CHAPTER III – THE IMPACTS OF GLOBALIZATION ON CIVIL AVIATION SAFETY

Introduction

In aviation safety, the term commonly used has changed from ‘international aviation safety’ to ‘global aviation safety’.¹ There is not only a different word being used here: the word ‘global’ also introduces a new understanding of the worldwide system.²

This part of the study explores the impact of globalisation on the global air transport market developments such as liberalisation and deregulation and its consequences for aviation safety. It is necessary, therefore, to set out clearly the terminology that is to be used in this research.

The term globalisation in this research is used as Yergin at all. refers to as ‘an accelerating integration and interweaving of national economies through the growing flows of trade’.³ Therefore national economies need to find a way to have access to the international markets.⁴ Particularly in air transportation, developments in advanced technology and worldwide information networks support the globalised economy.⁵ Fiorilli explained the linkage between globalisation and air transport as follows:

The emergence of such phenomena (globalization) is usually attributed to the opening of new markets to competition, the liberalization of trade, the development of new rules for market access, and technological innovations, including, of course,

¹ Global Aviation Safety Plan (GASP) Retrieved from ICAO Official Web site <<https://www.icao.int/safety/Pages/GASP.aspx>> accessed 4 July 2019

² According to the Oxford Dictionary, the word ‘global’ means ‘relating to the whole world; worldwide’. This definition points to a geographical space only. However, the term ‘global’ not only represents a geographical space, but also refers to systems that economically, socially and legally address the whole world, and especially ‘the people of the whole world’ Ken Button, *The Impacts of Globalisation on International Air Transport Activity ‘Past trends and future perspectives’* (2008, November 10-12), Global Forum on Transport and Environment in a Globalising World, Retrieved from www.oecd.org/greengrowth/greening-transport/41373470.pdf > 4 July 2019 ‘as a process by which the people of the world are unified into a single society and function together. This process is a combination of economic technological socio cultural and political forces.’ 9.

³ Daniel Yergin, Peter C. Evans, Richard H. K. Vietor, (2000, October 10), *Daily Arline Filings*, Retrieved from *Fettered Flight: Globalisation and the Airline Industry*, (Cambridge, Mass.: Cambridge Energy Research Associates, 2000) <<http://www.airlineinfo.com/ostpdf25/853.pdf> > 2.

⁴ Antogni Lykotrafiti, *Liberalization on international Civil Aviation, Charting the Legal Path* (2015, September). International Transport Forum Paris (OECD) Discussion Paper 18 Retrieved from <<https://www.itf-oecd.org/sites/default/files/docs/dp201518.pdf> > 4 July 2019 5.

⁵ Teruo Sakamoto, ‘Globalization of the International Air Transport System’ in C.-J. Cheng (Ed.), *The Use of Air and Outer Space Cooperation and Competition (1st ed.)*. Kluwer Law. (1998) 119.

the development of international air transport, which allows faster and cheaper transactions on a global scale.⁶

Air transport, with its global networks, is also one of the catalysts for globalisation.⁷ The interdependence of the global economy and global air transport is underlined in the following statement:

The global economy and the global air transportation networks could complement each other. The expansion of the global economy could help to the expand global air transportation network; the expansion of global air transportation could, in turn, help to expand the global economy. They are interdependent.⁸

IATA 2019 Annual Review of the International Air Transport Association (IATA)⁹ reveals that:

‘[I]n 2018 the world’s airlines provided about 4 billion passengers the freedom to travel over a global network of some 22,000 routes. . . ., airlines also enabled the freedom to do business globally by transporting 64 million tonnes of cargo to markets around the world. This activity supported a third of global trade by value, generated 65 million jobs and underpinned \$2.7 trillion of GDP. In 2018 the world’s airlines earned a collective net profit of \$30 billion. Industry revenues topped \$812 billion and 8% return on invested capital was generated.’¹⁰

The liberalisation of air transport is associated with the market forces of the global economy.¹¹ The globalised air transport market creates pressure on the aviation industry to adapt to demand from consumers around the world and to create more and more sophisticated services of higher quality and at lower prices.¹²

⁶ Francesco Fiorilli, ‘Ensuring Global Competitiveness in the Airline Industry’ (Autumn 2011) Vol. 11, Issue 1, *Issues in Aviation Law and Policy*, 101,101

⁷ Brian F Havel, Gabriel Sanchez, *The Principles and Practice of International Aviation Law* (Kindle Edition, Cambridge University Press. June 2014) location 355 of 15733

⁸ Teruo Sakamoto, ‘Globalization of the International Air Transport System’ in Jiarui Cheng (Ed.), *The Use of Air and Outer Space Cooperation and Competition (1st ed.)*. Kluwer Law. (1998) 119-120

⁹ The International Air Transport Association (IATA) ‘The International Air Transport Association (IATA) is the trade association for the world’s airlines, representing some 290 airlines or 82% of total air traffic’ <<https://www.iata.org/about/pages/index.aspx>> accessed 4 July 2019

¹⁰ IATA Annual Review 2019< <https://www.iata.org/publications/Documents/iata-annual-review-2019.pdf> > 8. accessed 4 July 2019

¹¹ Antigoni Lykotrafiti, *Liberalization on international Civil Aviation, Charting the Legal Path* (2015, September). International Transport Forum Paris (OECD) Discussion Paper 18 Retrieved from <<https://www.itf-oecd.org/sites/default/files/docs/dp201518.pdf>> 4 July 2019 7.

¹² Mario A. Marconini, ‘The Globalisation of the Economic Regulations of Air Transport’ in Jiarui Cheng (Ed.), *The Use of Air and Outer Space Cooperation and Competition*’ (1st ed.) Kluwer Law. (1998) 29

Inevitably, global economic factors have an impact on the national approaches to market access ‘as a critical element in air service agreements between States’.¹³

Regulations for competitive market have been presented to the commonly preserved sectors from the competition, such as air transport, as deregulation.¹⁴ Ultimately, these developments have encouraged free trade and increasing competition, which have resulted in the removal of trade barriers and a worldwide process of air transport deregulation.

Livermore observed that the deregulation process in the air transport market progressively diminishing national borders and changes ‘international air transport market into a ‘domestic’ type of market’.¹⁵

A common agreement on air transport liberalization was introduced by a request from the ICAO General Assembly to the Council:

to develop and adopt a long-term vision for international air transport liberalization, including examination of an international agreement by which States could liberalize market access, taking into account the past experience and achievements of States, including existing market access liberalization agreements concluded at bilateral, regional, multilateral levels, as well as the various proposals during the Sixth Worldwide Air Transport Conference (ATConf/6).¹⁶

Generally, the impact of the global air transport market developments can be addressed in two significant areas. The first is the changing approach to sovereignty-based air transport market regulations that embrace protectionism. The regulatory approach regarding the state’s exclusive sovereignty over its airspace has changed and adapted to the liberalised global air transport market structure.¹⁷ These developments will be explored under air transport liberalisation.

¹³ Ruwantissa Abeyratne, ‘Liberalization of Trade in Air Transport Services’ (2003) 4 J. World Investment 639, 639.

¹⁴ Antigoni Lykotrafiti, Liberalization on international Civil Aviation, Charting the Legal Path (2015, September). International Transport Forum Paris (OECD) Discussion Paper 18 Retrieved from <<https://www.itf-oecd.org/sites/default/files/docs/dp201518.pdf>> 4 July 2019 7.

¹⁵ John Livermore, ‘Airline Deregulation in the Asia Pacific Region’ in Jiarui Cheng (Ed.), *The Use of Air and Outer Space Cooperation and Competition* (1st ed.) Kluwer Law. (1998) 132.

¹⁶ ICAO Resolutions Adopted by the Assembly (Provisional Edition) Resolution A38-14 (2013, November). Retrieved from ICAO: <http://www.icao.int/Meetings/a38/Documents/Resolutions/a38_res_prov_en.pdf> accessed 4 July 2019

¹⁷ ‘National sovereignty cannot be delegated. However, the responsibility for the performance of functional responsibilities, such as the provision of air navigation services, can be delegated. In fact, delegation of service provision is an act of sovereignty. Within the context of globally harmonised and seamless air navigation

The second area is the deregulation of air transport. In line with market liberalisation, the air transport industry has created air transport practices such as Open Skies agreements, code-sharing and worldwide alliances to bypass sovereignty-based protectionism and the nationality restrictions imposed by conservative governments.¹⁸

3.1 Air transport liberalisation

Air transport is predominantly governed by a system of bilateral agreements. Bilateral systems mainly rely on the governments involved and on managed trade. International aviation is governed by the complex web of bilateral air services agreements that were first developed according to the principles of the 1944 Chicago Convention, and by rigid rules on national ownership and control.¹⁹ Most countries have implemented bilateral systems by putting certain restrictions on commercial aviation services; these restrictions are generally contained in the bilateral air services agreements (ASAs), and they are usually applied by governments to protect their national airlines from the competition. A state has the right to withhold, revoke or impose conditions on a foreign air carrier that applies for permission to operate in its airspace. Bilateral agreements allow air services to be operated by an agreed and limited number of airlines designated by each state. The criterion is the so-called ‘nationality clause’.²⁰ In the days when many airlines around the world were owned by states

services, sovereignty should be seen as an enabler, not a barrier, in making the required changes for a more efficient management of the global air navigation system. Used in a constructive way, sovereignty can proactively drive the necessary improvements in global and regional air traffic management (ATM) performance. This more mature understanding of sovereignty should be actively promoted by all stakeholders in the aviation industry’ Working Paper, ATConf/6-WP/80. (2013, March 4). International Civil Aviation Organisation. Retrieved from Worldwide Air Transport Conference: presented by the Civil Air Navigation Services (CANSO) (emphases added)

<<http://www.icao.int/Meetings/atconf6/Documents/WorkingPapers/ATConf.6.WP.080.1.en.pdf>> 3.

¹⁸ Henri A. Wassenbergh, *The Future of International Air Transportation Law*, 20 ANNALS AIR & SPACE L. (1995) 383, 388.

¹⁹ Mark Smyth, Brian Pearce, (2007, April), ‘Economics Briefing No.7, Airline Liberalisation’ IATA documents < https://www.iata.org/whatwedo/Documents/economics/IATA_AirlineLiberalisation.pdf > accessed 8 July 2019 7.

²⁰ ‘The rationale for the nationality clause is that it provides a convenient link between the carrier and the designating State by which parties to the agreement can: a) implement a ‘balance of benefits’ policy for the airlines involved; b) prevent a non-party State through its carrier from gaining, indirectly, an unreciprocated (‘free rider’) benefit; and c) identify the country that is responsible for safety and security oversight. National defence considerations are also a factor in some cases. The nationality clause made obvious sense in the days when most airlines were State-owned.’

ICAO Worldwide Air Transport Conference (ATCONF) 6th Meeting, Working Paper Presented by Secretariat (ATConf/6-WP/12 10/12/12), (18 to 22 March 2013), ‘Liberalisation of Air Carrier Ownership and Control’

and almost monopolies, the restrictions on ownership and control created by bilateral agreements were not of great economic concern.

3.1.1 Chicago bilateral system

To demonstrate the progress towards liberal air transport market, the bilateral system of Chicago Convention (1944) needs to be closely examined.

As previously discussed in Chapter II, at the end of the Second World War, states focused on the potential contribution of international air transport to economic development and not on its contribution to military purposes. The Chicago Convention ('the Convention') was signed, and the International Civil Aviation Organization (ICAO) was established in 1944 by 52 signatory states. The fundamental principle of respect for the national sovereignty of states was emphasized in the Convention, which strongly underlined the sovereign rights of states over their own airspace.²¹ The main aim was to regulate the use by the contracting parties of other states' airspace.²²

One of the significant patterns that was introduced into commercial air transport by the Convention was bilateral air service agreements (ASAs). Traditionally, bilateral air service agreements (ASAs) have been restrictive.²³ The protectionist conditions of ASAs were underlined as 'caps on the number of flights flown over a given time period (frequencies), predetermined limits on the number of passengers and/or cargo carried (capacity), and rate of return (pricing or airfare) regulations.'²⁴

Two international agreements on air traffic rights were signed as part of the Chicago Convention (1944) to create a base for the privilege for commercial aviation. The first of these is the 'International Air Services Transit Agreement' or 'Two Freedom' agreement.

https://www.icao.int/Meetings/atconf6/Documents/WorkingPapers/ATConf6-wp012_en.pdf accessed 8 July 2019 appendix

²¹ Convention On International Civil Aviation Doc.7300 Article 1 Sovereignty: 'The Contracting States recognize that every State has complete sovereignty over the airspace above its territory'

²² See Chapter II

²³ ICAO Assembly 39th Session (2016) Working Paper (Presented by the Air Transport Research Society (ATRS)) (A39-WP/189 EC/20 11/8/2016), 'Air Transport Liberalisation and the Economic Development of the Countries' <https://www.icao.int/Meetings/a39/Documents/WP/wp_189_en.pdf> accessed 8 July 2019

²⁴ Brian F Havel, Gabriel Sanchez, *The Principles and Practice of International Aviation Law* (Kindle Edition, Cambridge University Press. June 2014) location 2495 of 15733

According to this agreement, each contracting state must grant every other state the privilege of flying across its territory without landing and the privilege of landing for non-traffic purposes (refuelling, maintenance, or in an emergency).²⁵ The other agreement is the ‘International Air Transport Agreement’ or ‘Five Freedom’ agreement, in which additional three freedoms concerning commercial transport rights are enacted.²⁶

States that do not sign one or both of these agreements have to sign bilateral air services agreements with states over whose territory they want to operate commercial air services. These market access privileges are referred to as ‘traffic rights’.²⁷ One of the limits on flights, based on Article 6 of the Convention which regulates scheduled air services, prohibits a scheduled international air operator from operating air services into the territory of a contracting state except with the special permission or other authorisation of that state and in accordance with the terms of such permission or authorization.

An additional restriction is found in Article 7 of the Convention, which introduced cabotage, and states that ‘each contracting state shall have the rights to refuse permission to the aircraft of other contracting States to take on its territory passengers, mail and cargo carried for remuneration or hire and destined for another point within its territory’.

Therefore, the Chicago System created a bilateral civil aviation treaty system, which means that trade in air services has been carried out on a strictly bilateral (state to state) basis since the close of the Second World War.²⁸

In 1946, the United States and the United Kingdom signed an agreement, known as the Bermuda I Agreement.²⁹ The Bermuda I is a bilateral agreement for air services between the

²⁵ The International Air Services Transit Agreement signed at Chicago on 7 December 1944 by 133 States, entered into force on 30 January 1945 <https://www.icao.int/secretariat/legal/List%20of%20Parties/Transit_EN.pdf> accessed 8 July 2019

²⁶ International Air Transport Agreement signed at Chicago on 7 December 1944, by 11 States entered into force on 8 February 1945 <http://www.icao.int/secretariat/legal/List%20of%20Parties/Transport_EN.pdf> accessed 8 July 2019

²⁷ For the nine freedoms of the air see Appendix A

²⁸ Brian F. Havel and Gabriel S. Sanchez, ‘The Emerging *Lex Aviatica*’ (2011) Vol. 42, Issue 3 *Georgetown Journal of International Law*, 639–642-644.

²⁹ Agreement between the Government of the United States of America and the Government of the United Kingdom Relating to Air Services Between Their Respective Territories, 60 Stat. 1499. (1946, February 11) <<https://www.state.gov/documents/organization/171560.pdf>>

territories of the US and the UK and represents the agreement reached between the US and the UK to establish a ‘free market’ approach.³⁰

The Bermuda I Agreement became a model for bilateral air services agreements between states.³¹ However, it collapsed after thirty years. Its shortcomings have been explained as follows:

One of the main disadvantages of the Bermuda model has been that it gave government a basis to formulate their civil aviation policies and sometimes adopt an unduly restrictive stance on their sovereignty in airspace, frequently leading States to withdraw air traffic rights enjoyed by airlines.³²

In 1976, the British government denounced the Bermuda I Agreement because of the imbalance in capacity between US and UK carriers. In 1977, the Bermuda II Agreement was signed.³³ However, the Bermuda II Agreement was considered more restrictive than the Bermuda I Agreement.³⁴

The protectionist approach of states towards negotiations, which was created by the Chicago Convention (1944), was deemed to be a barrier to the liberalisation of air transport services between states.

Nations are free to negotiate any level of liberalisation in air services, and inevitably, protectionist influences creep into process. The impediments to free trade take several forms, ranging from overt acts, such as restricted landing rights or state subsidies of national airlines, to more subtle discrimination against foreign competitors, such as the imposition of burdensome domestic regulatory systems.³⁵

³⁰ Ruwantissa Abeyratne, ‘Would Competition in Commercial Aviation Ever Fit into the World Trade Organisation’ (1995-1996) Volume 61, Issue 4, *Journal of Air Law and Commerce*, 793–805.

³¹ ICAO Manual on the Regulation of International Air Transport, Doc.9626 (Second Edition 2004) <http://www.icao.int/Meetings/atconf6/Documents/Doc%209626_en.pdf> accessed 9 May 2019 “Many agreements of the Bermuda type were subsequently signed by each of the original partners with other States, and by other pairs of States” p.2.0-1

³² Ruwantissa Abeyratne, ‘Would Competition in Commercial Aviation Ever Fit into the World Trade Organisation’ (1995-1996) Volume 61, Issue 4, *Journal of Air Law and Commerce*, 793–806.

³³ Air Service Agreements Between the United Kingdom and the United States (Bermuda II) (1977, July 23) entered into force in 1978. Bermuda II agreement was amended in April 1978, December 1980 and November 1982. <<https://publications.parliament.uk/pa/cm199900/cmselect/cmenvtra/532/53206.htm>> accessed 8 July 2019

³⁴ *ibid* “it placed additional restrictions on services from Heathrow, in terms of the airlines permitted to operate trans-Atlantic services from the airport (initially British Airways, Pan American and TWA) and the gateways in the United States which could be served from Heathrow, and it instituted controls on fares, which had to be approved by regulatory authorities from both countries...”

³⁵ Randall D. Lehner, ‘Protectionism, And National Security: The Alliance Against Multilateral Trade in International Air Transport’ Vol. 45, Issue 2 (November 1995) *Duke Law Journal*, 436–445.

The 1990s were the years of rapid changes in both the regulatory and operating environments for international air transport. “Liberalization became widespread.”³⁶ Following a decision was taken by the ICAO Council on June 11, 1991, the World-Wide Air Transport Colloquium was held from April 6 to April 10, 1992. One of the discussions was held at the colloquium concerned the strengths and weaknesses of the bilateral system, and the disadvantages of the bilateral system were identified as follows:

the system has not always been adapted to changing market and political systems; the fact that costs are incurred in maintaining a bilateral system as opposed to a free market system which would run by itself³⁷

Another significant defect of bilateral agreements addressed by Zylicz is the lack of harmonization, which is crucial for globalised air transport safety.³⁸

Evidently, the bilateral aviation treaty system is very complex. In 2010 the World Trade Organization created an online analytical database of thousands of air services treaties. This is called the Air Services Agreements Projector and indicates the complexity of the system.³⁹ ICAO also published a Database of World’s Air Services Agreements as ICAO Doc. 9511.⁴⁰ In fact, the current number of bilateral air services agreements is difficult to estimate.⁴¹

Clearly, the globalisation process has created pressure for international air transport systems to respond effectively to the global demands for the international movement of people and of goods to be consumed by people.⁴² Growing international trade has caused a parallel growth in international air transport. It has had an effect not only on demand but also on the supply side.

³⁶ ICAO Manual on the Regulation of International Air Transport, Doc.9626 (Second Edition 2004) <http://www.icao.int/Meetings/atconf6/Documents/Doc%209626_en.pdf > accessed 9 May 2019 2.01

³⁷ Ruwantissa Abeyratne, ‘Would Competition in Commercial Aviation Ever Fit into the World Trade Organisation’ (1995-1996) Volume 61, Issue 4, Journal of Air Law and Commerce, 793 at 811. fn. 55 “ICAO Working Paper No. WATC-5.1 at 1(Apr.6,1992)

³⁸ Marek Zylicz, ‘*International Air Transport Law*’ Springer (1992) 137.

³⁹ WTO, ‘Air Service Agreement Projector’ <<https://www.wto.org/asap/index.html>> accessed 17 April 2017

⁴⁰ ICAO Official Website, ‘Database of World’s Air Services Agreements’ <<https://www.icao.int/sustainability/Pages/Doc9511.aspx>> accessed 8 July 2019

⁴¹ Cornelia Woll, ‘The Road to External Representation: the European Commission’s activism in international air transport’ Volume 13, Issue 1 n(2006) Journal of European Public Policy, 52 ,56 ‘the global number of extant bilateral air services agreements may be as high as 10,000’ quoted from Brian F. Havel and Gabriel S. Sanchez, ‘The Emerging *Lex Aviatca*’(2011) Vol. 42, Issue 3 Georgetown Journal of International Law, 639, 642.

⁴² Ken Button, ‘The Impacts of Globalisation on International Air Transport Activity ‘Past trends and future perspectives’ (2008, November 10-12), Global Forum on Transport and Environment in a Globalising World, Retrieved from www.oecd.org: <www.oecd.org/greengrowth/greening-transport/41373470.pdf > 4 July 2019

ICAO world aviation economy statistics indicate that despite the global crisis that have a serious effect on the world economy generally, the aviation sector always recovers and continue to increase the growth rate.⁴³

Economic growth, technological change, market liberalisation, the growth of low-cost carriers, airport congestion, oil prices and other trends will continue to affect commercial aviation throughout the world.⁴⁴

Latest ICAO Annual report 2018 revealed that the total number of passengers worldwide carried on scheduled services still has been increasing steadily.⁴⁵

the total number of passengers carried on scheduled services rose to 4.3 billion in 2018, which is 6.4 per cent higher than the previous year, while the number of departures reached 37.8 million in 2018, a 3.5 per cent increase⁴⁶

Ultimately, transnational market developments have led nations to deregulate their aviation policies and reduce restrictions that were obstacles to accessing global capital. Many states have made regulatory changes, such as new bilateral agreements called ‘Open Skies’ agreements⁴⁷ that remove all restrictions on market access, capacity and pricing, and have adopted more liberal policies.⁴⁸ Also, regionalism has also been effective in converting some bilateral regulations into regional or sub-regional⁴⁹ multilateral regulations.⁵⁰

3.1.2 Air transport liberalisation and the General Agreement on Trade in Services (GATS)

After the world trade negotiations that were held between 1986 and 1994, which are called the Uruguay Round and were held under the auspices of GATT (the General Agreement on Tariffs and Trade (1947), the WTO (the World Trade Organization) was established in

⁴³ See Chapter II, Figure 2.1 World Aviation 1950 to 2012

⁴⁴ ICAO Official Website, World Aviation and World

Economy, <http://www.icao.int/sustainability/Pages/Facts-Figures_WorldEconomyData.aspx> accessed 8 July 2019

⁴⁵ See Chapter II Figure 2.3 Passenger-Kilometres Performed Total Scheduled Traffic, 2009-2018

⁴⁶ ICAO ‘The World of Air Transport in 2018’ <<https://www.icao.int/annual-report-2018/Pages/the-world-of-air-transport-in-2018.aspx>> accessed 11 November 2019

⁴⁷ See subsection 2.2 for detailed Open Skies agreements

⁴⁸ ICAO Manual on the Regulation of International Air Transport, Doc.9626 (Second Edition 2004) <http://www.icao.int/Meetings/atconf6/Documents/Doc%209626_en.pdf> accessed 9 May 2019 2.0-1

⁴⁹ See subsection 2.2.3 for detailed regional Open Skies agreements

⁵⁰ Ruwantissa Abeyratne, ‘Liberalization of Trade in Air Transport Services’ (2003) 4 The Journal of World Investment, 639, 644.

1994.⁵¹ The overriding purpose of this system was stated as: ‘to help trade flow as freely as possible – so long as there are no undesirable side effects – because this is important for economic development and well-being’.⁵²

The creation of GATS (the General Agreement on Trade in Services),⁵³ on the other hand, was one of the landmark achievements of the Uruguay Round. GATS entered into force on January 1, 1995. GATS was inspired by GATT⁵⁴ and has essentially the same objectives as its counterpart for merchandise trade.

An increasing number of global productions have created a need for service for consumers. Services become not domestic only but ‘internationally mobile’.⁵⁵ Therefore regulatory introduction in this field built up the ‘tradeability’ of services.⁵⁶ The significant importance of GATS that it provided, for the first time, a multilateral framework of rules and principles for trade in services.⁵⁷

GATS was incorporated as one of the annexes to the agreement establishing the WTO.⁵⁸ GATS includes annexes for different sectors. The air services are regulated by a specific annexe, the Annex on Air Transport Services.⁵⁹

⁵¹ ‘164 members since 29 July 2016, with dates of WTO membership.’ World Trade Organisation (WTO), ‘Members and Observers’ <https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm> accessed 9 July 2019

⁵² World Trade Organisation (WTO), ‘Who We are’

<https://www.wto.org/english/thewto_e/whatis_e/who_we_are_e.htm> accessed 9 July 2019

⁵³ ‘All WTO Members, some 140 economies at present, are at the same time Members of the GATS and, to varying degrees, have assumed commitments in individual service sectors.’ World Trade Organisation (WTO), ‘The General Agreement on Trade in Services (GATS): objectives, coverage and disciplines’

<https://www.wto.org/english/tratop_e/serv_e/gatsqa_e.htm#2> accessed 9 July 2019

⁵⁴ *ibid* “creating a credible and reliable system of international trade rules; ensuring fair and equitable treatment of all participants (principle of non-discrimination); stimulating economic activity through guaranteed policy bindings; and promoting trade and development through progressive liberalization.”

⁵⁵ World Trade Organisation (WTO), ‘The General Agreement on Trade in Services (GATS): objectives, coverage and disciplines’ <https://www.wto.org/english/tratop_e/serv_e/gatsqa_e.htm#2> accessed 9 July 2019

⁵⁶ *ibid*

⁵⁷ IATA Discussion Paper, ‘Liberalization of Air Transport and the GATS. (Government Affairs External Relations Division International Air Transport Association Geneva

October 1999)’ <https://www.wto.org/english/tratop_e/serv_e/iacposit41.pdf> 1. accessed 9 July 2019

⁵⁸ General Agreement on Trade in Services Annex 1B <https://www.wto.org/english/docs_e/legal_e/26-gats.pdf> accessed July 9 2019

⁵⁹ *ibid* 307.

However, it should be noted that the coverage of the Annex on Air Transport Services is limited. The Annex excludes from its scope of traffic rights and services directly related to the exercise of traffic rights.⁶⁰ Its application is limited to the following services:

- aircraft repair and maintenance;
- the selling and marketing of air transport services; and
- computer reservation system (CRS) services.⁶¹

The reasons why traffic rights that were excluded from the scope of the Annex were defined in Article 6(d) in the widest sense as follows:

Traffic rights' mean the right for scheduled and non-scheduled services to operate and/or to carry passengers, cargo and mail for remuneration or hire from, to, within, or over the territory of a Member, including points to be served, routes to be operated, types of traffic to be carried, capacity to be provided, tariffs to be charged and their conditions, and criteria for designation of airlines, including such criteria as number, ownership, and control.⁶²

Evidently, the reasons for the limited GATS coverage of air transport are directly linked to the historical regulation of the air industry and the so-called Chicago bilateralism.⁶³

However, the main focus of GATS is liberalisation, and therefore, the core principles of GATS are market access,⁶⁴ national treatment⁶⁵ and most-favoured (MFN) nation treatment.⁶⁶

The statement on MFN treatment reads:

With respect to any measure covered by this Agreement, each Member State shall accord immediately and unconditionally to services and service suppliers of any

⁶⁰Antigoni Lykotrafiti, Liberalization on international Civil Aviation, Charting the Legal Path (2015, September). International Transport Forum Paris (OECD) Discussion Paper 18 Retrieved from <<https://www.itf-oecd.org/sites/default/files/docs/dp201518.pdf> > 4 July 2019 11.

⁶¹ General Agreement on Trade in Services Annex 1B <https://www.wto.org/english/docs_e/legal_e/26-gats.pdf> 307. accessed July 9, 2019

⁶²General Agreement on Trade in Services Annex 1B <https://www.wto.org/english/docs_e/legal_e/26-gats.pdf> 307. accessed July 9, 2019

⁶³ Antigoni Lykotrafiti, Liberalization on international Civil Aviation, Charting the Legal Path (2015, September). International Transport Forum Paris (OECD) Discussion Paper 18 Retrieved from <<https://www.itf-oecd.org/sites/default/files/docs/dp201518.pdf> > 4 July 2019 11.

⁶⁴ ICAO Manual on the Regulation of International Air Transport, Doc.9626 (Second Edition 2004) <http://www.icao.int/Meetings/atconf6/Documents/Doc%209626_en.pdf > accessed 9 May 2019

“.. or specification of the levels of access to be granted other parties through the four modes of supply” 3.3-5

⁶⁵ ibid 3.3-5 “treatment of foreign services and suppliers of services no less favourable than that accorded a party’s own services and service suppliers”

⁶⁶ ibid 3.3-5 “non-discrimination, the provision of treatment to all parties no less favourable than that accorded to any party”

other Member State treatment no less favourable than it accords to like services and service suppliers of any other country.⁶⁷

On the other hand, during negotiations, the bilateral exchange of traffic rights based on reciprocity was recognised that it had served well the needs for international civil aviation⁶⁸ However, the MFN principle which aims to ensure non-discriminatory practices between the GATS Member States stands against the existing regulation of international air transport that was based on bilateral reciprocity.⁶⁹

Application of the principle of MFN treatment of GATS to traffic rights is a complex issue. There are different approaches to extending the coverage of the GATS Annex. In fact, a global consensus has not been established on how this will be pursued.⁷⁰

Although there is limited coverage of air transport services, the inclusion of air transport services under GATS is deemed to be an import introduction to the globalisation of aviation with the global consensus on multilateral trade disciplines.⁷¹

3.1.3 Liberalised Air Transport

Global economic growth and liberalisation movements in the 1980s and 1990s eventually caused to remove the restrictions on international trade.⁷² The liberalisation of the air transport industry has had an impact on airlines, leading them to seek opportunities to expand their operations internationally and to access foreign capital.⁷³ Consequently, competition in

⁶⁷ General Agreement on Trade in Services (GATS) Article II (1)

<https://www.wto.org/english/docs_e/legal_e/26-gats_01_e.htm#ArticleII> accessed July 9 2019

⁶⁸ Antigoni Lykotrafiti, Liberalization on international Civil Aviation, Charting the Legal Path (2015, September). International Transport Forum Paris (OECD) Discussion Paper 18 Retrieved from <<https://www.itf-oecd.org/sites/default/files/docs/dp201518.pdf>> 11. accessed 4 July 2019

⁶⁹ Francesco Fiorilli, 'Ensuring Global Competitiveness in the Airline Industry' (Autumn 2011) Vol. 11, Issue 1, Issues in Aviation Law and Policy, 101, 118.

⁷⁰ ICAO Manual on the Regulation of International Air Transport, Doc.9626 (Second Edition 2004) <http://www.icao.int/Meetings/atconf6/Documents/Doc%209626_en.pdf> accessed 9 May 2019 "Whether the GATS is an effective option for air transport liberalisation remains in question" p.3.3-6

⁷¹ Mario A. Marconini, 'The Globalisation of the Economic Regulations of Air Transport' in Chia-Jui Cheng (Ed.), *The Use of Air and Outer Space Cooperation and Competition* (1st ed.) Kluwer Law. (1998) 33.

⁷² Trade Liberalisations: Why so much in controversy? 133.

<http://www1.worldbank.org/prem/lessons1990s/chaps/05-Ch05_kl.pdf> accessed 11 November 2019

⁷³ ICAO Secretariat, 'Overview of Regulatory and Industry Developments in International Air Transport' (2016, September)

<http://www.icao.int/Meetings/a39/Documents/Overview_of_Regulatory_and_Industry_Developments_in_International_Air_Transport.pdf> accessed 9 July 2019 ; see also Working Paper (A37-WP/5 EC/1) ICAO Assembly 37th Session, Presented by the Council of ICAO, 'Developments in International Air Transport Regulation and Liberalisation' (2010, June 18)

<http://www.icao.int/Meetings/AMC/Assembly37/Working%20Papers%20by%20Number/wp005_en.pdf> accessed July 9 2019; Working Paper (A39-WP/189 EC/20) ICAO Assembly 39th Session, Presented by the Air Transport Research Society (ATRS) 'Air Transport Liberalisation and the Economic Development of the

the international markets has been increasing.⁷⁴ As a result, there has been major growth in air travel, and this has contributed to the worldwide economic development of the industry.

ICAO reports on global overview of regulatory and industry trends and developments of international air transport provides a clear view of global growth. One of the major findings of the ICAO Regulatory and Industry Overview 2013 is that ‘there has been a steady development of air transport liberalisation (with 35 per cent of country pairs and 58 per cent of frequencies covered by liberalisation in 2012).’⁷⁵

The report (2013) indicates an increased number of frequencies in international scheduled services conducted under liberalised agreements or arrangements from 1995 to 2012.



Figure 3.1 Number of Frequencies⁷⁶

Countries’ (2016, November 8) <https://www.icao.int/Meetings/a39/Documents/WP/wp_189_en.pdf> accessed July 9 2019 ; Roberta Piermartini, Linda Rousova, ‘Liberalisation of Air Transport Services and Passenger Traffic, World Trade Organisation’ (2008, December) Staff Working Paper ERSD-2008-06- Economic Research and Statistic Division <https://www.wto.org/english/res_e/reser_e/ersd200806_e.pdf > accessed 9 July 2019

⁷⁴ Pat Hanlon, ‘*Global Airlines*’ (3rd ed) Routledge (2007) 8.

⁷⁵ ICAO Secretariat, ‘Regulatory and Industry Overview’(2013, September 20).

<<http://www.icao.int/Meetings/a38/Documents/REGULATORY%20AND%20INDUSTRY%20OVERVIEW.pdf>> A-3 Major Findings

⁷⁶ *ibid* 1.

Furthermore, the report (2013) shows the increased number of the country–pair routes from 1995 to 2012. (Figure 3.2)



Figure 3.2 – Number of the country–pair routes⁷⁷

The report also reveals that ‘about 35 per cent of country-pairs with non-stop scheduled passenger air services and about 58 per cent of the frequencies offered, through either bilateral “open skies” air services agreements (ASAs) or regional/plurilateral liberalized agreements and arrangements.’⁷⁸

ICAO Report on Overview of Regulatory and Industry Developments in International Air Transport (2016) stated that by the impact of liberalisation -as one of the main driver-, growth will continue in demand for goods and services in air transport and flight and passenger volumes will have doubled by 2030.⁷⁹

⁷⁷ *ibid*

⁷⁸ *ibid*

⁷⁹ ICAO Secretariat, ‘Overview of Regulatory and Industry Developments in International Air Transport’ (September 2016) 1.

<https://www.icao.int/Meetings/a39/Documents/Overview_of_Regulatory_and_Industry_Developments_in_International_Air_Transport.pdf> accessed 10 July 2019

One of the private international organisations that has had a significant role in the civil aviation field is the International Air Transport Association (IATA).⁸⁰ The data provided by IATA indicates increasing growth in the liberalisation driven global air industry over the years.

According to the IATA Annual Review of 2005:

Air transport has grown to provide the only worldwide transportation network essential for global business and tourism. It employs 4 million people and generates US\$400 billion in output. Indirectly, it creates a further 24 million jobs, bringing its output to nearly US\$1.4 trillion, or 4.5% of global GNP.⁸¹

IATA's 13th Annual Review (2013) reported remarkable developments up to 2012. Almost three billion people and 47 million metric tons of cargo in 2012 were transported by air transport. The report also revealed that air transport activity supported 57 million jobs and \$2.2 trillion in economic activity, which was 3.5% of global GDP.⁸² The report emphasised the expansion in global connectivity as the result of air transport, and especially the strength of the emerging markets in Asia, Latin America and Africa, and stated that 65% of the growth in passenger numbers in international markets was linked to these emerging economies.⁸³

The Chairman of IATA, Richard Anderson, emphasised the function of air transport in the life of the global community:

By turning our big planet into a **global community**, aviation has had a transformational impact on how we live together. The exchange of ideas, cultures and experiences enriches us. Prosperity is spread by people working together in global supply chains. And uncountable opportunities – human and economic – are generated by the freedom to be almost anywhere in a short 24 hours.⁸⁴

⁸⁰The International Air Transport Association (IATA) is the trade association for the world's airlines, representing some 290 airlines or 82% of total air traffic. <<https://www.iata.org/about/pages/index.aspx> > accessed 9 July 2019

⁸¹ IATA Annual Report. (2005, May). Retrieved from <http://www.iata.org>: <<http://www.iata.org/about/Documents/annual-report-2005.pdf> > 7. accessed March 5 2015

⁸² (IATA Annual Review, 2013)

IATA Annual Review (2013) Retrieved from <http://www.iata.org>: <<http://www.iata.org/about/Documents/iata-annual-review-2013-en.pdf> > 4. accessed 9 July 2019

⁸³ *ibid* 8.

⁸⁴ IATA Annual Review (2014) Retrieved from <http://www.iata.org> <<http://www.iata.org/about/Documents/iata-annual-review-2014.pdf> > accessed March 5 2015 7. (emphases added)

The latest IATA Annual Review (2019) reveals that, in 2018, the number of air passengers continued to increase and reached 4.3 billion.⁸⁵

Tourists travelling internationally by air are estimated to have spent about \$850 billion in 2018, an increase of more than 10% over 2017. The additional number of city-pair connections and the lower cost of air transport also boosts trade in goods and services and heightens foreign direct investment and other important economic flows. Air transport accounts for only a small, less than 1%, proportion of world trade by volume but for a much larger share by value, of about 33%. In 2018, the value of goods carried by air is estimated to have been \$6.7 trillion.⁸⁶

Inevitably, the more liberalised environment in air transport has created a competitive air industry. During the 1970s in particular, charter and non-scheduled services that offered much lower airfares than scheduled IATA tariffs grew, and the public press and consumer groups created pressure on the traditional bilateral regulatory regime.⁸⁷

Arguments against bilateralism took place at the ICAO World-Wide Air Transport Colloquium in Montréal in 1992,⁸⁸ where the central theme was ‘Exploring the Future of International Air Transport Regulation’. The Director of Corporate Affairs of Singapore Airlines emphasised the problem:

Generally, bilateralism tends to trade restrictions rather than opportunities. The bartering process of bilateralism tends to reduce the opportunities available to the level considered acceptable by the most restrictive party.⁸⁹

Unlike the past practice in the aviation industry, today states recognise that it is in their interests and their people’s interest to open their markets to competition rather than protecting them. Consequently, the restrictions of the bilateral system have been relaxed, and free trade has been taking place. For the future, the Airline industry drew attention to the risks of restrictive protectionist measures in aviation.⁹⁰

⁸⁵ IATA 2019 Annual Review 12-15. < <https://www.iata.org/publications/Documents/iata-annual-review-2019.pdf> > accessed October 20 2019

⁸⁶ *ibid*

⁸⁷ Rigas Doganis, *The Airline Business* (2nd ed.) Routledge (2006) 31.

⁸⁸ “The Colloquium largely reflected the trend towards the liberalization of air transport regulation and the associated need for safeguards, involving new kinds of agreements among national governments on how to develop the world’s air transport system.” The Air Transport Conferences, Retrieved from http://www.icao.int/secretariat/PostalHistory/the_air_transport_conferences.htm > accessed 9 July 2019

⁸⁹ Rigas Doganis, *The Airline Business* (2nd ed.) Routledge (2006) 38.

⁹⁰ ‘Inhibiting globalization with protectionism will see opportunities lost’ Alexandre de Juniac, IATA’s Director General and CEO, ‘IATA Forecast Predicts 8.2 Billion Air Travellers in 20137’ Press Release No.62 (24 October 2018) <<https://www.iata.org/pressroom/pr/Pages/2018-10-24-02.aspx> > accessed 10 July 2019

At this point, the perspectives on air transport liberalisation of the two major international organisations, IATA as major air transport market-dominant and ICAO as a regulatory authority, which have an impact on civil aviation regulation worldwide, need to be discussed.

3.1.3.1 IATA's position on air transport liberalisation

The air industry, as part of a global business⁹¹ where liberalisation has been growing, is seeking a more liberal business environment so that it can enjoy benefits when serving global markets. The benefits deriving from a more competitive environment include lower prices, better service, increasing employment, and increased investment.

Furthermore, IATA, taking other liberalised business sectors as a reference point, has stated that: 'airlines need to have the same access and same flexibility to structure their operations to serve global markets as those enjoyed by corporations in other sectors'.⁹² Therefore, arguments for the liberalisation of the air industry mainly focus on substantial operational and ownership restrictions. To create the global aviation industry IATA claims that the liberalisation of bilateral ownership and control rules are necessary steps to be taken.⁹³ These two issues are the main focus of the air industry when the government has the function and discretion to operate the air market.

For instance, the restrictive effect of the application of the airline nationality concept means that states have the discretion to 'allow or refuse, withhold or revoke a technical or operational permit to an airline of a designating state if this airline is not substantially owned and effectively controlled by the latter state or its nationals. This regime is supplemented with national laws that restrain foreign investment in airlines.'⁹⁴

The nationality rule in international air transport has been a controversial issue. It has been called a 'double-bolted lock' by Havel and Sanchez, who say that it 'rules out foreign airline

⁹¹ Pablo Mendes de Leon, 'Establishment of Air Transport Undertakings' Volume 15, Issue 2 (March 2009) *Journal of Air Transport Management* 96,96.

⁹² Air Transport Conference (Montreal, 24 to 29 March 2003): Challenges and Opportunities of Liberalisation, Working Paper (ATConf.5.WP.026 16/12/02) ,presented by International Air Transport Association(IATA), 'Airline Views on Liberalising Ownership and Control' 1. <http://www.icao.int/Meetings/ATConf5/Documents/ATConf5_wp026_en.pdf > accessed 10 July 2019

⁹³ *ibid*

⁹⁴ Jan Walulik, *'Progressive Commercialization of Airline Governance Culture'* (1st ed) Routledge (2017) 54-55

subsidiaries – the right of establishment that is otherwise uncontroversial exchanged in normal bilateral investment relations’.⁹⁵

Arguments in favour of liberalisation state that notions of substantial ownership and effective control have no basis in the Chicago Convention (1944).⁹⁶ Accordingly, these restrictions imposed by governments on aviation companies have evolved over the past fifty years to protect national interests.⁹⁷ However, the national interest is an alien and backwards-looking element in an otherwise liberalised industry. There is no longer any need to have these restrictions or to have government control over the air industry. The global air market demands less governmental regulatory control over the commercial operations of the air industry.⁹⁸

Inevitably, these global developments have created a market demand for air transport. In 2007 the IATA Economic Briefing No.7 underlined that the rules that limit the commercial freedom of the industry to respond to changes in market demand and to adjust capacity levels should be changed: further and fuller liberalisation was required to provide greater benefits for passengers and the airline industry as a whole.⁹⁹

IATA emphasised that the air industry should be run as a real commercial industry and that governments should have no role in shaping the commercial market. It claimed that the air industry, like other liberalised commercial sectors, should be freed from government regulation and allowed to develop its own commercial market. Four different industries – banking, energy, telecoms and media – that share some of the characteristics of the airline industry regarding government regulatory involvement were analysed in IATA’s report in

⁹⁵ Havel and Sanchez illustrated the double bolted-lock effect of the nationality rule as “If Lufthansa were permitted by Canada to establish Lufthansa –Canada and were the seek official designations to serve Montreal/New York or Toronto/Beijing, the Canadian government could not award Canadian designations to a German-owned and controlled- airline under the nationality clauses in its Canada/United States or Canada/China bilateral air transport agreements” Brian F Havel, Gabriel Sanchez, ‘*The Principles and Practice of International Aviation Law*’ (Kindle Edition, Cambridge University Press. June 2014) p. 91-92 location 2871 of 15733

⁹⁶ Pablo Mendes de Leon, ‘Establishment of Air Transport Undertakings’ Volume 15, Issue 2 (March 2009) *Journal of Air Transport Management* 96, 97.

⁹⁷ Air Transport Conference (Montreal, 24 to 29 March 2003): Challenges and Opportunities of Liberalisation, Working Paper (ATConf.5.WP.026 16/12/02), presented by International Air Transport Association (IATA), ‘Airline Views on Liberalising Ownership and Control’ 2.
<http://www.icao.int/Meetings/ATConf5/Documents/ATConf5_wp026_en.pdf> accessed 10 July 2019

⁹⁸ *ibid*

⁹⁹ Mark Smyth, Brian Pearce, (2007, April), ‘Economics Briefing No.7, Airline Liberalisation’ IATA documents <https://www.iata.org/whatwedo/Documents/economics/IATA_AirlineLiberalisation.pdf> 14. accessed 8 July 2019

relation to the impact of liberalisation.¹⁰⁰ The report claimed that the air transport industry needed greater commercial freedom enjoyed by other ‘normal’ businesses. However, IATA emphasised the importance of the established safety, security and labour standards, and stressed that the aim of the liberal approach to the ownership and control provisions of bilateral air services agreements was not to avoid the accepted standards in those areas.

Although there has been a controversial movement towards liberalisation in the air industry and a tendency to leave government out of commercial and operational regulation, the involvement of states is desired by the industry with regard to the regulatory control of safety and security. While the air industry demands more liberalisation so that it can have access to capital from across the world, the regulatory control and power of ICAO and of governments in safety and security issues are still supported.¹⁰¹ Although the air industry does not want there to be any regulatory control over the commercial aspects of air transport, it asserts that the regulatory control of airlines must remain the responsibility of the designating states.¹⁰²

IATA presented its proposals on air transport liberalisation during the Fifth Worldwide Air Transport Conference.¹⁰³ It emphasised the importance of safety and security issues in the air transport industry and proposed that the commercial control of airlines should be separated from regulatory control.¹⁰⁴ However, although many nations around the world have adopted legislation to provide new rights and opportunities by liberalising trade, bilateralism continues to govern international aviation, and governments’ decisions still influence the commercial aviation market.

3.1.3.2 ICAO’s position on air transport liberalisation

¹⁰⁰ *ibid*

¹⁰¹ Ruwantissa Abeyratne, ‘Competition in Air Transport- The Need for a Shift in Focus’ Volume 33, Issue 1-2 (2005-2007) *Transportation Law Journal* 29, 32.

¹⁰² IATA Safety Report 2014 (2015, April) Retrieved from < <http://asndata.aviation-safety.net/industry-reports/IATA-safety-report-2014.pdf> > 72. accessed 10 July 2019

IATA Safety Report 2016. (2017, April) Retrieved from <<http://www.iata.org/docx/IATA-Safety-Report-2016.pdf>> 116. accessed 10 July 2019

¹⁰³ Worldwide Air Transport Conference (Montreal, 24 to 29 March 2003): Challenges and Opportunities of Liberalisation ,Working Paper (ATConf.5.WP.026 16/12/02) ,presented by International Air Transport Association(IATA), ‘Airline Views on Liberalising Ownership and Control’ <http://www.icao.int/Meetings/ATConf5/Documents/ATConf5_wp026_en.pdf > 3. accessed 10 July 2019

¹⁰⁴ *ibid* ‘to ensure the continuation of civil aviation’s high standards of safety, and to avoid the risk of adverse developments such as ‘flags of convenience’ which have affected other industries, regulatory control of airlines must remain the responsibility of the designating States. Regulatory control in this context involves the supervision and licencing of an airline in areas such as the issuing of an Air Operators Certificate Airworthiness Certificate and crew licences, and in certain areas also the establishment of tax liability’.

In 2013, during the Sixth Worldwide Air Transport Conference, ICAO's perspective on the liberalisation of the ownership and control of air carriers was presented by the Secretariat.¹⁰⁵ ICAO stressed that ten years after the Fifth Worldwide Air Transport Conference in 2003, and despite the continuing impact of liberalisation, privatisation and globalisation on the airline industry, the legal restrictions on the ownership and control of airlines imposed by states and bilateral agreements had effectively not changed. ICAO stated that it was in favour of facilitating the liberalisation of the air transport industry. ICAO also stressed that the traditional nationality clause no longer had the same function in global business as it had had originally, and that, based on recent state practices, safety and security could be safeguarded without reliance upon this clause.¹⁰⁶ ICAO also stated that:

ICAO should play a leading role in exploring alternative solutions to modernize the regulatory regime so as to better adapt it to a globalized and liberalized business environment, thus meeting the needs of airlines to operate as a 'normal industry'.¹⁰⁷

However, it should be noted that this approach to state regulatory control over air transport as a 'normal industry' is very different from the original one, which was based on the fundamental principle of respect for national sovereignty. The controversial point is that considering air transport just as another field of the commercial industry would not be consistent with its "public utility" character that derives from Article 44 of the Convention.¹⁰⁸ It is clear that global developments have had an impact on ICAO's approach and ICAO is in favour of, and even claims a 'leading role'¹⁰⁹ in creating, a globalised and liberalised aviation business environment.

The air industry clearly states that bilateral ownership and control rules should be liberalised to establish the global aviation industry. Accordingly, states' control over commercial airlines

¹⁰⁵ Worldwide Air Transport Conference (ATCONF) Sixth Meeting (2013, March 18- 22), ICAO Working Paper (ATConf.6. WP/12 10/12/12) presented by Secretariat. Retrieved from http://www.icao.int/Meetings/atconf6/Documents/WorkingPapers/ATConf6-wp012_en.pdf accessed 10 July 2019

¹⁰⁶ *ibid*

¹⁰⁷ *ibid* 3.

¹⁰⁸ "This is a most fundamental challenge which not only draws the inference that air transport is a public utility, but also issues a challenge to ICAO, its contracting states and their carriers to ensure the [provision of a safe service satisfying fixed standards of continuity, regularity, capacity and pricing." Ruwantissa Abeyratne, *Competition and Investment in Air Transport: Legal and Economic Issues* Springer (2016) 76.

¹⁰⁹ Worldwide Air Transport Conference (ATCONF) Sixth Meeting (2013, March 18- 22), ICAO Working Paper (ATConf.6. WP/12 10/12/12) presented by Secretariat. Retrieved from http://www.icao.int/Meetings/atconf6/Documents/WorkingPapers/ATConf6-wp012_en.pdf accessed 10 July 2019

should be separated from regulatory control.¹¹⁰ Therefore the industry will be able to respond to market demands created by the dynamics of global economic developments. Despite ICAO's supportive efforts and guidance on facilitating liberalisation in the air industry, many states still maintain their regulatory power to regulate the commercial operations of the industry and are unwilling to change their laws and bilateral agreements.¹¹¹

Notwithstanding the unwillingness of states to change their laws and policy on their regulatory power over air transport operations, the competitive business environment in the field of air transport has been increasing. Consequently, international air carriers have created ways to relax the legal restrictions on ownership and state control in the air transport business, through cooperative arrangements such as alliances, code-sharing, joint ventures, and franchise operations, some of which have involved transnational investment.¹¹²

3.1.4 Air transport liberalisation and safety

The economic liberalisation of the air industry has many benefits, and the air industry demands more freedom for business. Although IATA has emphasised that states should have regulatory power over safety and security standards and that the highest safety and security standards should be maintained,¹¹³ the global liberalisation of air transport has created a controversial subject regarding safety.

In fact, the effects of a liberalised air transport market and air transport practices such as aircraft leasing arrangements, cross-border airline mergers and acquisitions, the outsourcing of ground handling and engineering by air transport operations that involve multiple parties, and code-sharing can raise serious concerns regarding safety.

¹¹⁰ Worldwide Air Transport Conference (Montreal, 24 to 29 March 2003): Challenges and Opportunities of Liberalisation, Working Paper (ATConf.5.WP.026 16/12/02), presented by International Air Transport Association (IATA), 'Airline Views on Liberalising Ownership and Control' <http://www.icao.int/Meetings/ATConf5/Documents/ATConf5_wp026_en.pdf> 3. accessed 10 July 2019

¹¹¹ Worldwide Air Transport Conference (ATCONF) Sixth Meeting (2013, March 18- 22), ICAO Working Paper (ATConf.6. WP/12 10/12/12) presented by Secretariat. Retrieved from <http://www.icao.int/Meetings/atconf6/Documents/WorkingPapers/ATConf6-wp012_en.pdf> accessed 10 July 2019

¹¹² ibid appendix

¹¹³ Mark Smyth, Brian Pearce, (2007, April), 'Economics Briefing No.7, Airline Liberalisation' IATA documents <https://www.iata.org/whatwedo/Documents/economics/IATA_AirlineLiberalisation.pdf> accessed 8 July 2019

The air industry has faced many challenges. For instance, the terrorist attacks of September 11, 2001, caused many major problems in the industry, such as more costly aviation insurance and a decline in air travel as a result of fear of flying.¹¹⁴ In the years that followed, the industry has had to cope, in addition to terrorism, with the effects of waving in oil prices, decline in economic activities.¹¹⁵

Other landmark events that have had a negative impact on the air transport industry are the wars in Iraq and Afghanistan, the outbreak of Severe Acute Respiratory Syndrome (SARS), and the failing global economy.¹¹⁶ In 2003, the President of IATA expressed the negative impact of all these by saying that ‘our industry has been hit by the four horsemen of the Apocalypse’.¹¹⁷ The negative effect of aviation emissions on the environment has been added to environmental concerns over such things as aircraft noise, air quality, energy usage, and climate change.¹¹⁸

While the air industry struggles with the economic consequences of all these, the focus on safety in the competitive environment of the air industry could receive less affection than it should be. Abeyratne drew attention to the decline of focus on flight safety as follows;

The industry’s focus on safety began to decline as competition between carriers led some carriers to expand at any cost, ignoring potential adverse consequences. Critical services required for aviation safety, such as efficient ground handling and precise engineering, were outsourced, with no guarantee of maintaining previously demanded levels of flight safety.¹¹⁹

On the other hand, changing market conditions and growing demand have led the industry to adopt more sophisticated and advanced technological systems, which also made the industry

¹¹⁴ Ruwantissa Abeyratne, ‘Competition in Air Transport- The Need for a Shift in Focus’ Volume 33, Issue 1-2 (2005-2007) *Transportation Law Journal* 29, 30.

¹¹⁵ Pat Hanlon, ‘*Global Airlines*’ (3rd ed) Routledge (2007) xv. See also the link between economic and safety Paul Stephen Dempsey ‘Transportation Deregulation- On a Collision Course?’ Volume 13, *Transportation Law Journal*, (1983-1984) 352-355

¹¹⁶ Ruwantissa Abeyratne, ‘Competition in Air Transport- The Need for a Shift in Focus’ Volume 33, Issue 1-2 (2005-2007) *Transportation Law Journal* 29, 31.

¹¹⁷ Speech of Giovanni Bisignani (2003, June 2) Director General and Chief Executive Officer of the International Air Transport Association, IATA from 2002 to 2011. Retrieved from <<http://www.iata.org/pressroom/speeches/Pages/2003-06-02-01.aspx>> accessed 10 July 2019

¹¹⁸ ICAO Symposium on Aviation and Climate Change, 24-16 May 2013), Dr Maurice Lourdes, ‘Technology and Operations-Aviation Environmental Impacts’ <<https://www.icao.int/Meetings/Green/Documents/day%201pdf/session%203/3-Maurice.pdf>> accessed 10 July 2019

¹¹⁹ Ruwantissa Abeyratne, ‘Competition in Air Transport- The Need for a Shift in Focus’ Volume 33, Issue 1-2 (2005-2007) *Transportation Law Journal* 29, 32. see also Pat Hanlon, ‘*Global Airlines*’ (3rd ed) Routledge (2007)

more costly.¹²⁰ However, when there is a need to reduce costs in the business, among the first to be reduced would be those related to safety. Robert Benzon, an aircraft accident investigator for 25 years with the National Transportation Safety Board, gave an interview to *Time Magazine* after Malaysian Airlines flight MH370 disappeared. He stated that:

In my business, there's what they call a tombstone mentality – to get things done; you have to have blood on the ground or dead people. When things go right, it's very difficult to spend money on anticipating something going wrong.¹²¹

Under the title of 'Challenges and Opportunities of Air Transport Liberalization', the impact of air transport liberalisation on safety and security was emphasized in the report on ICAO's Fifth Worldwide Air Transport Conference in 2003.¹²² The report underlined safety and security as being of paramount importance in the operation and development of air transport worldwide. ICAO strongly addressed the responsibilities of the contracting states, which are derived from the Chicago Convention (1944), in respect of compliance with standards and practices related to safety and security, and emphasised that 'states should ensure that safety and security are not compromised by commercial considerations'.¹²³ However, liberalisation has created a very hard competitive environment worldwide in air transport.¹²⁴ At this point the state's requirements for compliance with safety regulations and the responsibilities of the state authorities become crucial.

Article 1 of the Chicago Convention (1944) underlines the respect for a state's sovereignty over the airspace above its territory. States are therefore responsible for applying safety and security measures in their territories. Safety and security standards established by SARPs need to be implemented into contracting states' national regimes 'in order to become compulsory for air carriers'.¹²⁵ A state, therefore, has to maintain proper safety oversight not

¹²⁰ Ruwantissa Abeyratne, 'Competition in Air Transport- The Need for a Shift in Focus' Volume 33, Issue 1-2 (2005-2007) *Transportation Law Journal* 29, 30.

¹²¹ *Time Magazine*, (31 March 2014) 'For airlines, adopting the latest technology is prohibitively expensive. Malaysia Airlines was already teetering financially before MH 370 vanished.' 21-22

¹²² ICAO Report of the Worldwide Air Transport Opportunities of Liberalisation (Doc.9819 AtConf/5 2003) (2003, March 24-28). Retrieved from <http://www.icao.int/meetings/atconf6/documents/doc9819_en.pdf> accessed 10 July 2019

¹²³ ICAO Report of the Worldwide Air Transport Opportunities of Liberalisation (Doc.9819 AtConf/5 2003) (2003, March 24-28). Retrieved from <http://www.icao.int/meetings/atconf6/documents/doc9819_en.pdf> 12. accessed 10 July 2019

¹²⁴ Ruwantissa Abeyratne, 'Competition in Air Transport- The Need for a Shift in Focus' Volume 33, Issue 1-2 (2005-2007) *Transportation Law Journal* 29

¹²⁵ Jan Walulik, *Progressive Commercialization of Airline Governance Culture* (1st ed) Routledge (2017) 172-173.

only for its aircraft operators but also for foreign operators that operate in its territory. Before there was liberalisation, it was less complicated for a state to control the national or private air operators in its territory. Nowadays, the air transport operations for which a state has responsibility for safety oversight in its own territory are multinational. However, these multinational air operations are governed by national aviation safety regulations. Consequently, a state's policing of compliance with safety regulations and its safety oversight are major concerns for all other states in multinational flight operations.

A safety oversight audit conducted by ICAO showed that many ICAO member states had deficiencies, and follow-up missions also showed that the initial deficiencies remained.¹²⁶ ICAO declared that states should consider not only the economic benefits of market growth but also continuing safety developments to eliminate the negative impact of market growth on safety and security. While enjoying the benefits of the economic liberalisation of air transport, states are also responsible for maintaining aviation safety standards.

Notwithstanding ICAO's supportive and even leading position concerning air industry liberalisation, after ten years of ICAO Fifth Worldwide Air Transport Conference in 2003¹²⁷, at the Sixth Worldwide Air Transport Conference in 2013 ICAO again emphasised¹²⁸ certain risks of liberalisation in the air industry. Among these risks were the potential for liberalisation in air transport to cause a deterioration in safety and security standards. ICAO stated that this should be a major concern of both the air industry and regulators at the state and international level.

¹²⁶ 'The findings of the initial safety oversight audit conducted by ICAO relating to Annex 1 Personnel Licencing, Annex 6 Operation of Aircraft and Annex 8 Airworthiness of Aircraft indicated that of the 181 Contracting States had deficiencies in respect of a number of requirements under these Annexes.' ICAO Secretariat Study on the Safety and Security Aspects of Economic Liberalisation. (2005, June 1) Retrieved from <https://www.icao.int/sustainability/Documents/SafetySecurityStudy_en.pdf> 2. accessed 10 July 2019

¹²⁷ 'An Air Transport Conference is convened approximately every ten years. The purpose is to update ICAO policies for the long-term growth of international civil aviation' Sixth Worldwide Air Transport Conference Report; Sustainability of Air Transport (2013) <https://www.icao.int/Meetings/SUSDEV-AT/Documents/ATConf6_10009.pdf> accessed 13 November 2019

¹²⁸ 'such as: the potential emergence of flags of convenience' in the absence of effective regulatory measures to prevent them; potential deterioration of safety and security standards with increasing emphasis on commercial outcomes; and possible flight of foreign capital which could lead to less stable operations' Worldwide Air Transport Conference (ATCONF) Sixth Meeting (2013, March 18- 22), ICAO Working Paper (ATConf.6. WP/12 10/12/12) presented by Secretariat. Retrieved from <http://www.icao.int/Meetings/atconf6/Documents/WorkingPapers/ATConf6-wp012_en.pdf> A-2 accessed 10 July 2019

3.1.5 Determining air transport as a normal industry subject to free market or public utility with the public interest

Taking into consideration safety concerns in parallel with liberalisation movements in the air transport, the question of whether or not free-market principles should be applied in aviation as in any ‘normal industry’¹²⁹ (or, in other words, whether the operation of air transport services should be treated just like any other trading activity or as a public utility) needs to be discussed.

The preamble to the Convention states the direct link between public security and civil aviation.¹³⁰

[W]hereas the future development of international civil aviation can greatly help to create and preserve friendship and understanding among the nations and peoples of the world, yet its abuse can become a threat to the general security.

The objectives of ICAO are set out in Article 44 of the Chicago Convention (1944). One of these is;

to ensure the safe and orderly growth of international civil aviation throughout the world and to meet the needs of the people of the world for **safe**, regular and efficient and economical air transport.¹³¹

Accordingly, Abeyratne asserts that air transport is a public utility and “it is not prudent to consider air transport services as a typical economic activity”¹³². Abeyratne draws attention to the declaration of Article 44:

This fundamental declaration not only draws the inference that air transport is a public utility, but also challenges the ICAO, its contracting states, and their carriers to ensure the provision of a **safe service** that satisfies fixed standards of continuity, regularity, capacity and pricing.¹³³

¹²⁹ *ibid*

¹³⁰ Antigoni Lykotrafiti, *Liberalization on international Civil Aviation, Charting the Legal Path* (2015, September). International Transport Forum Paris (OECD) Discussion Paper 18 Retrieved from <<https://www.itf-oecd.org/sites/default/files/docs/dp201518.pdf>> 7. accessed 4 July 2019

¹³¹ (emphasises added)

¹³² Ruwantissa Abeyratne, ‘Competition in Air Transport- The Need for a Shift in Focus’ Volume 33, Issue 1-2 (2005-2007) *Transportation Law Journal* 29, 33.

¹³³ *ibid* (emphasises added)

Hanlon asserts that the ‘public utility’ definition of air transport does not fit with the ‘natural monopoly’ character of public utilities.¹³⁴ However, governments have treated airlines as ‘quasi-public utilities’ for many reasons, but mainly because of the wide effect of the benefits of air transport on the economy.¹³⁵

On the other hand, the interconnection between public security and civil aviation is considered a characteristic of air transport activities, distinguishing them from other conventional economic activities.¹³⁶ In fact, the question of safety is always a paramount concern in air transport activities. Hence, the States’ regulatory function in the air transport industry has not been challenged and has always been deemed necessary.

Abeyratne stated that the reason that international air services have survived from troubled times of the industry is that airline safety and security have never been deregulated by a single nation or global aviation community. Furthermore, governments’ oversight responsibility that includes providing funding for safety and security inspection is also an assurance for the international air services and world economy.¹³⁷

Thus, the regulatory role and the oversight responsibility of the state are crucial to ensuring that safety standards adequately applied. Therefore, a link between an airline and a state needs to be established. The reason for this link is that the state that designates the agreements (ASA)s to exercise traffic rights be held responsible for the operation of the designated airline.¹³⁸

In fact, airlines have a strong commercial interest in safety, and a well-established safety record for an airline company is crucial for enhancing the profitability of its business. If the airline has a bad safety history, no commercially profitable business can be expected. However, as Hanlon rightfully stated, passengers could not wait for the bad safety record to

¹³⁴ “Natural monopolies exist where the advantages of size are so great that a service can only be provided at least cost if it is supplied by one, and only one firm. A single firm becomes a monopolist because the average cost of providing the service reaches a minimum only when an output rate large enough to satisfy the entire market has been reached. In a situation of this sort competition will not be sustainable.” Pat Hanlon, *Global Airlines*’ (3rd ed) Kindle ed. Routledge (2007) locations 1195-1196

¹³⁵ *ibid* locations 1195-1199

¹³⁶ “but is bound to operate within a sensitive environment, while possessing also characteristic of a public utility” Antigoni Lykotrafiti, *Liberalization on international Civil Aviation, Charting the Legal Path* (2015, September). International Transport Forum Paris (OECD) Discussion Paper 18 Retrieved from <<https://www.itf-oecd.org/sites/default/files/docs/dp201518.pdf>> 7-8. accessed 4 July 2019

¹³⁷ Ruwantissa Abeyratne, ‘Competition in Air Transport- The Need for a Shift in Focus’ Volume 33, Issue 1-2 (2005-2007) *Transportation Law Journal* 29, 32.

¹³⁸ Pablo Mendes de Leon, ‘Establishment of Air Transport Undertakings’ Volume 15, Issue 2 (March 2009) *Journal of Air Transport Management* 96, 97.

be established. That would cause many people's life. Hence people expect from governments to prevent accidents by technical regulation.¹³⁹

Since flight safety is a paramount consideration, it is difficult to claim that air transport is a normal industry. Governments regulatory control over safety and security of aviation and the oversight responsibility to ensure airline companies comply with the regulations distinctive feature of the air transport industry than any other industry.

3.2. Deregulation of air transport

The growth of the air industry has created pressure on states' to change regulatory restrictions. As a response to this, regulatory changes started to be implemented worldwide. One of the remarkable changes in the approach taken by states has been defined as the 'withdrawal of the state from this interventionist role'¹⁴⁰ which has been variously termed 'deregulation', 'liberalisation' and 'regulatory reform'.¹⁴¹

The worldwide expansion of trade and developments in advance technology have had direct effects on the development of commercial aviation. IATA stated that the expected value of goods carried by air transport to exceed \$6.2 trillion in 2018, which represents more than 35% of global trade by value.¹⁴² Mainly, developments of advanced technology in air transport such as fuel-efficient engines and aerodynamic surfaces, low maintenance etc. have resulted in airlines to lower airfares and provide an opportunity for more people to use air transportation routinely.¹⁴³

The general relationship between air transport liberalisation and economic growth illustrated below Figure 3.3

¹³⁹ Pat Hanlon, 'Global Airlines' (3rd ed) Kindle ed. Routledge (2007) locations 1247-1256

¹⁴⁰ Bruce Stockfish, 'Opening Closed Skies: The Prospects for Further Liberalization of Trade in International Air Transport Services' Vol.57, Issue 3 (Spring 1992) Journal of Air Law and Commerce 599, 613.

¹⁴¹ *ibid*

¹⁴² IATA, Cargo <<https://www.iata.org/whatwedo/cargo/pages/index.aspx>> accessed 14 July 2019

¹⁴³ InterVISTAS-ga2 Consulting, Inc. 'The Economic Impact of Air Service Liberalization' (2006) Retrieved from <http://www.intervistas.com/downloads/Economic_Impact_of_Air_Service_Liberalization_Final_Report.pdf> ES -3 accessed 11 July 2019

IMAGE REMOVED FOR COPYRIGHT REASONS

Figure 3.3– The causal relationship between air service liberalisation and economic growth¹⁴⁴

Figure 3.3 illustrates the ideal link between air services and air traffic growth that the market reacts to better air services. However, this is still related to the country's economic growth, employment potential, tendency to import goods and investment choices.¹⁴⁵

Air transport has, therefore, become an important business sector worldwide. By recognising the role of air transport in economic growth, states started to review their policies of international air transport and taking actions to liberalise their air transport markets. The benefits of economic growth that come from freedom in air transport have led to more liberalisation around the world.¹⁴⁶

However, the problem has become more obvious because the rules governing air transport remained as they were in the framework of the post-Second World War era. As Walulik stated, 'this system has reached its limits'.¹⁴⁷

In international air transport, major regulatory movements towards liberalisation have been developing in the form of bilateral and regional liberalisation.¹⁴⁸ Operational air transport

¹⁴⁴ InterVISTAS-ga2 Consulting, Inc. 'The Economic Impact of Air Service Liberalization' (2006) 11. Retrieved from <http://www.intervistas.com/downloads/Economic_Impact_of_Air_Service_Liberalization_Final_Report.pdf> accessed 11 July 2019

¹⁴⁵ *ibid*

¹⁴⁶ ICAO Secretariat, 'Regulatory and Industry Overview' (2013, September 20). <<http://www.icao.int/Meetings/a38/Documents/REGULATORY%20AND%20INDUSTRY%20OVERVIEW.pdf>> accessed 10 July 2019

¹⁴⁷ Jan Walulik, *Progressive Commercialization of Airline Governance Culture* (1st ed) Routledge (2017) 79.

¹⁴⁸ Ruwantissa Abeyratne, 'Liberalization of Trade in Air Transport Services' (2003) 4 *The Journal of World Investment*, 639, 644.

practices have been changing. Most importantly, these practices are establishing a new regulatory framework for the global air transport market.¹⁴⁹

In order to ease restrictions on market access, pricing and routes so as to promote competition in the international air transport market, deregulation needed to take effect in domestic legislation.¹⁵⁰

3.2.1 Deregulation in the United States: Open Skies Agreements

As in many other countries, there were initially very restrictive regulations on commercial aviation activity in the United States, laid down in the Air Commerce Act of 1926.¹⁵¹

Following this Act, commercial air transport was regulated even more restrictively by the Civil Aeronautics Act 1938.¹⁵² The United States government played a crucial role in the competition by regulating airline fares and determining the routes for airline carriers. In 1940 the CAA (Civil Aviation Authority) was split into two agencies, the Civil Aeronautics Administration, which reported to the Department of Commerce, and the Civil Aeronautics Board (CAB).¹⁵³ Amongst other responsibilities, the CAB was responsible for the economic regulation of airlines. Although Congress intended to allow the CAB to implement a 'moderately liberal approach', permitting entrants to compete in the growing air transport market, the CAB's very restrictive policies were an obstacle to entering the airline industry between 1938 and 1975¹⁵⁴ and caused decreasing profits.

¹⁴⁹ InterVISTAS-ga2 Consulting, Inc. 'The Economic Impact of Air Service Liberalization' (2006) Retrieved from <http://www.intervistas.com/downloads/Economic_Impact_of_Air_Service_Liberalization_Final_Report.pdf> accessed 11 July 2019

¹⁵⁰ Paul Stephen Dempsey, Andrew R. Goetz, 'Airline Deregulation and Laissez-Faire Mythology' Greenwood Publishing (1992) 5.

¹⁵¹ 'Aviation industry leaders believed the airplane could not reach its full commercial potential without federal action to improve and maintain safety standards. At their urging, the Air Commerce Act was passed in 1926. This landmark legislation charged the Secretary of Commerce with fostering air commerce, issuing and enforcing air traffic rules, licensing pilots, certifying aircraft, establishing airways, and operating and maintaining aids to air navigation.' Federal Aviation Administration 'A Brief History of the FAA' <https://www.faa.gov/about/history/brief_history/> accessed 11 July 2019

¹⁵² *ibid* 'The legislation established the independent Civil Aeronautics Authority (CAA), with a three-member Air Safety Board that would conduct accident investigations and recommend ways of preventing accidents. The legislation also expanded the government's role in civil aviation by giving CAA power to regulate airline fares and determine the routes individual carriers served.'

¹⁵³ *ibid*

¹⁵⁴ 'Between 1950 and 1974, the CAB received 79 applications from firms seeking to obtain operating authority to provide scheduled domestic service. None was granted. Moreover, between 1969 and 1974, the CAB imposed a 'route moratorium,' a general policy of refusing to grant or even hear any applications to serve new routes.' 115., Paul Stephen Dempsey, 'The Rise and Fall of the Civil Aeronautics Board - Opening Wide the Floodgates of Entry' Vol. 11, issue 1, (1979) Transportation Law Journal

Later, market developments in the 1970s created pressure on air transport regulation policies, and the United States government ended its restrictive policies. The Airline Deregulation Act 1978 allowed for the competitive airline industry.¹⁵⁵ The commercial air transport market welcomed new entrants and led to consumer benefits such as reduced fares, more jobs as a result of the expansion of the industry, and new technology.

After deregulation, new strategies such as airline alliances and code-sharing agreements with European carriers were adopted by airlines to eliminate restrictions on entering the European air transport market. In the early 1990s, the United States took a step forward from alliances, to eliminate foreign market restrictions and to allow airlines to operate in foreign markets. It introduced a new flight scheme called 'Open Skies', which allowed contracting parties unlimited access to each other's markets to operate air services.¹⁵⁶ Therefore the United States anti-trust policy was amended to provide an advantage for Open Skies carriers.¹⁵⁷

Open Skies agreements are bilateral agreements between the United States and other countries and were invented to eliminate government interference in commercial strategies. The Open Skies policy was initiated in 1992, and it was announced that 'The United States would initiate Open Skies agreements initially with European countries and then with other regions of the world.'¹⁵⁸ Currently, the US has Open Skies agreements over 120 countries including many individual members of the European Union.¹⁵⁹

¹⁵⁵ Robert M. Hardaway, 'Of Cabbages and Cabotage: The Case for Opening up the US Airline Industry to International Competition' Vol. 34, Issue 1 (2007) *Transportation Law Journal*, 4-5.

¹⁵⁶ Brian Havel, '*Beyond Open Skies; A New Regime for International Aviation*' (Kluwer Law International 2009) 13.

¹⁵⁷ Jacob A. Warden, 'Open Skies' at a Crossroads: How the United States and European Union Should Use the ECJ Transport Cases to Reconstruct the Transatlantic Aviation Regime' Vol. 24, Issue 1 (Fall 2003) *North-western Journal of International Law & Business*, 237.

¹⁵⁸ Seth M. Warner, 'Liberalize Open Skies: Foreign Investment and Cabotage Restrictions Keep Noncitizens in Second Class', Vol.43, Issue 1, (1993) *American University Law*, 277, 299.

¹⁵⁹ 'The United States has reciprocal Open Skies air transport agreements with over 120 partners. In addition to bilateral Open Skies air transport agreements, the United States has negotiated two multilateral Open Skies accords: (1) the 2001 Multilateral Agreement on the Liberalization of International Air Transportation (MALIAT) with New Zealand, Singapore, Brunei, and Chile, later joined by Samoa, Tonga, and Mongolia; and (2) the 2007 Air Transport Agreement with the European Community and its Member States. The United States maintains restrictive non-Open Skies air transport agreements with a number of other countries, including China' The U.S. Department of State, Civil Air Transport Agreements <<https://www.state.gov/civil-air-transport-agreements>> accessed 14 July 2019

The new civil aviation order was welcomed by the aviation industry, and it challenged governments to change their policies, open their markets and become part of a global aviation system.

3.2.2 Deregulation in the European air transport market

Deregulation in air transport aimed to take commercial business decisions out of government control and provide economic liberalisation in a freer market. United States deregulation initiatives triggered a global trend in airline liberalisation. Air transport deregulation started to have an impact on other air markets. United States dominance in the transatlantic markets, caused by the Open Skies agreements, triggered deregulation in the EU.

3.2.2.1 Single aviation market

Liberalisation in the air transport market has developed gradually. The EU regulatory reform in air transport was rolled out between 1987 and 1992 in three packages of regulations. The relevant legislation was planned and developed by the European Commission to liberalise the air transport market. The first package was issued in 1987.¹⁶⁰ Real progress in air transport deregulation began in 1990 with the second package,¹⁶¹ which addressed market access and airfares.¹⁶² In 1992¹⁶³ the third package was enacted. By this EU legislation, bilateral agreements for air services were eliminated within the EU. However, the provisions of the

¹⁶⁰ 'Council Regulations 3975/87,3976/87(on the application of competition rules to air transport), Council Decision 87/602 on the sharing of passenger capacity between air carriers on scheduled air services between Member States and on access for air carriers to scheduled air-service routes between Member States, Community Directive 87/601 on fares for scheduled air services between Member States' < <http://eur-lex.europa.eu/homepage.html?locale=en>> accessed 11 July 2019

¹⁶¹ 'Council Regulation 2342/90 on fares for scheduled air services, Council Regulation 2343/90 on access for air carriers to scheduled intra-Community air service routes and on the sharing of passenger capacity between air carriers on scheduled air services between Member States, Council Regulation 2344/90 amending Regulation (EEC) No 3976/87 on the application of article 85 (3) of the treaty to certain categories of agreements and concerted practices in the air transport sector' <http://eur-lex.europa.eu/homepage.html?locale=en>> accessed 11 July 2019

¹⁶² Jacob A. Warden, 'Open Skies' at a Crossroads: How the United States and European Union Should Use the ECJ Transport Cases to Reconstruct the Transatlantic Aviation Regime' Vol. 24, Issue 1 (Fall 2003) North-western Journal of International Law & Business, 233.

¹⁶³ 'Council Regulation 2407/92 on licensing of air carriers, Council Regulation 2408/92 on access for Community air carriers to intra-Community air routes, Council Regulation 2409/92 on fares and rates for air services' <<http://eur-lex.europa.eu/homepage.html?locale=en>> accessed 11 July 2019

third package only became fully effective in 1997. In 1997 regional integration in the EU was completed, and a single aviation market was created in the airspace of the EU member states. Once the regional integration within the EU was completed, all commercial restrictions were removed, and cabotage (the right to operate sea, air and other transport services within a particular territory) was permitted. An airline from any EU member state has a right to operate within another member state. The single market was extended to Norway, Iceland and Switzerland in the following year.¹⁶⁴ Consequently, all commercial restrictions were removed between the EU member states and individual states' power to regulate air transport ended.

The next step was to set up common standards of safety in air transport – this had been regulated at the national level before the single market was established. The European Aviation Safety Agency (EASA) was created in 2002. 'The European Union decided on a common initiative to keep air transport safe and sustainable, allowing for growth and improved safety.'¹⁶⁵

3.2.2.2 Single European Sky

The establishment of a single aviation market changed air traffic management (ATM) within the EU. The main objective of the EU by reforming ATM in Europe is stated as; 'to cope with sustained air traffic growth and air traffic operations under the safest, more cost- and flight-efficient and environmentally friendly conditions.'¹⁶⁶

In order to reorganise European air traffic according to European air market developments, the Single European Sky (SES) was accepted and legislative measures entered into force in 2004.¹⁶⁷ The Single European Sky regulations were aimed¹⁶⁸ at supporting the expected

¹⁶⁴ European Commission, Mobility and Transport <https://ec.europa.eu/transport/modes/air/ses_en> accessed 11 July 2019

¹⁶⁵ European Aviation Safety Agency, 'The Agency promotes the highest common standards of safety and environmental protection in civil aviation in Europe and worldwide. It is the centrepiece of a new regulatory system which provides for a single European market in the aviation industry' <<http://easa.europa.eu/what-we-do.php>> accessed 17 May 2017

¹⁶⁶ European Commission, Single European Sky <http://ec.europa.eu/transport/modes/air/single_european_sky/index_en.htm> accessed 11 July 2019

¹⁶⁷ *ibid* 'The SES legislative framework consists of four Basic Regulations (N° 549/2004, 550/2004, 551/2004 and 552/2004) covering the provision of air navigation services (ANS), the organization and use of airspace and the interoperability of the European Air Traffic Management Network (EATMN). The four Regulations adopted in 2004 (the SES I Package) have been revised and extended in 2009 with Regulation (EC) n° 1070/2009 aiming at increasing the overall performance of the air traffic management system in Europe (the SES II Package).'

¹⁶⁸ *ibid* 'The overall SES objectives will be achieved through a holistic approach that encompasses 5 interrelated pillars: the performance-based regulatory framework, the safety pillar, the technological contribution, the human factor and the optimization of the airport infrastructure.'

growth in European air traffic, regardless of national boundaries, not only within the EU but also with the neighbouring countries that primarily rely on the policy of the EU in the field of international relations.¹⁶⁹

In 2004 the European Commission started negotiations with eight south-east European partners¹⁷⁰ on a 'European Common Aviation Area' (ECAA) agreement. This agreement was finalized between all the parties in December 2005. There was a requirement for the ECAA partners to implement the EC's aviation directives in full. Complying with these requirements will gradually give airlines open access to the European aviation market. By this agreement, the EU aimed to achieve integration with its neighbours by having them comply with its own regulations in an enlarged aviation market.¹⁷¹ The ECAA agreement is a multilateral agreement between EU member states and others. The EU became a party to the agreement, and also a global negotiator in air transport regulations.

3.2.2.3 Open skies agreement between the European Union and the United States

Liberalised air transport markets and their growing benefits have led state and European Community policymakers to respond to developments for a competitive air transport market. Before the Open Skies agreement between the United States and the EU, air transport had been governed since the mid-1980s by bilateral agreements between the United States and individual member states of the EU. The United States and the Netherlands signed Open Skies agreements that relaxed restrictions on air transport for both sides.

By signing Open Skies agreements with individual member states, the United States gained the right to enter the EU's internal market.¹⁷² The European air transport market no longer resisted global air transport developments.

¹⁶⁹ *ibid* '... the Cost-Effectiveness Bench Marking Reports (ACE reports) of Eurocontrol for 2009 are made for **37 States** and take into account the 28 Member States of the EU, EFTA countries (Switzerland, Norway), ECAA countries (Serbia, Montenegro, Albania, Macedonia, Croatia) and countries not covered by the SES Regulations (Ukraine, Turkey, Armenia, Moldova). Iceland is not covered.'

¹⁷⁰ Albania, Bosnia and Herzegovina, Bulgaria, Croatia, the former Yugoslav Republic of Macedonia, Romania, Serbia and Montenegro and the U.N. Mission in Kosovo. On 1 January 2007, Bulgaria and Romania joined the European Union, on 1 July 2013 Croatia joined the European Union.

¹⁷¹ European Commission International Aviation,

<https://ec.europa.eu/transport/modes/air/international_aviation/country_index/ecaa_en> accessed 11 July 2019

¹⁷² 'Sixteen Member States already had 'Open Skies' agreements in place.'

Euro-Lex access to EU Law, < <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV:124483> > accessed 11 July 2019

In 2002 the European Court of Justice (ECJ) held that for an individual EU member state to enter into a bilateral Open Skies agreement was a breach of the European Community's single market policy which traditionally covered areas governed by the bilateral agreements.¹⁷³ Following this ruling, the EU's competence to make international agreements was confirmed, and the competence of individual member states abolished. A new external aviation policy developed. The European Commission stated that "Member States that conclude bilateral deals risk creating conflicts between their commitments at the international level and their obligations under EC law".¹⁷⁴

After the ECJ ruling, Open Skies negotiations started between the EU and the United States to replace the individual bilateral agreements with a single agreement with the EU. After a long negotiation process and a European Council decision in 2007,¹⁷⁵ the EU–US Open Skies Air Transport Agreement was reached and signed on April 30, 2007. It was provisionally to apply to all 27 European member states by March 30, 2008.

The Open Skies agreement was a big achievement for the EU and the United States and provided for transatlantic routes to be opened to air transport companies from all member states of the EU and the US.¹⁷⁶ By this new external policy, the EU has become a global actor as a union that represents 27-member countries, and a global negotiator in air transport market developments.

¹⁷³ ECJ ruling :On 5 November 2002, the Court of Justice made a number of judgments in cases referred to it by the Commission , Case C-466/98, Commission of the European Communities v. United Kingdom of Great Britain and Northern Ireland, 2002 ECR I-9427; Case C-467/98, Commission of the European Communities v. Denmark, 2002 ECR I-9519; Case C-468/98, Commission of the European Communities v. Kingdom of Sweden, 2002 ECR I-9575; Case C-469/98, Commission of the European Communities v. Republic of Finland, 2002 ECR I-9627; Case C-471/98, Commission of the European Communities v. Kingdom of Belgium, 2002 ECR I-9681; Case C472/98, Commission of the European Communities v. Grand Duchy of Luxembourg, 2002 ECR I-9741; Case C-475/98, Commission of the European Communities v. Republic of Austria, 2002 ECR I-9797; Case C-476/98, Commission of the European Communities v. Federal Republic of Germany, 2002 ECR I-9855. |< https://curia.europa.eu/jcms/jcms/j_6/en/>

¹⁷⁴ European Commission Press Release. Retrieved from <http://europa.eu/rapid/press-release_IP-02-1609_en.htm. > accessed 11 July 2019

¹⁷⁵ 2007/339/EC: Decision of the Council and the Representative of the Governments of the Member States of the European Union, meeting within the Council of 25 April 2007 on the signature and provisional application of the Air Transport Agreement between the European Community and its Member states, on the one hand, and the United States of America, on the other hand.' Euro-Lex access to EU Law <http://eurlex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!DocNumber&lg=en&type_doc=Decision&an_doc=2007&nu_doc=339> accessed 11 July 2019

¹⁷⁶ 'With the new agreement, airlines in the Union can: operate flights to the United States from any European airport, regardless of their nationality (the United States recognize them as European); operate without restrictions on the number of flights, aircraft or routes; set prices in line with the market; conclude cooperation agreements.' Euro-Lex access to EU Law, <http://europa.eu/legislation_summaries/external_relations/reactions_with_third_countries/industrialised_countries/124483_en.htm> accessed 11 July 2019

3.2.3 Deregulation around the world

The movement towards liberalisation in air transport and the impact of this on economic growth has caused a chain reaction around the world. The economic benefits of a liberalised air market led states to change their protective restrictions on competition in the air transport market.

The US-initiated Open Skies agreements have had an impact on the international air transport markets. The benefit of Open Skies agreement in a competitive market environment is that unlike bilateral air transport service agreement, Open Skies agreement eliminates governments' traditional decisive role on determining routes, designating the number of airlines etc. Instead, these matters are designed mainly by market forces.¹⁷⁷ Therefore, an Open Skies agreement with one country in a region puts pressure on other states to liberalise their air transport policies to be able to compete. In the end, states could not resist liberalisation in the air transport market around the world.¹⁷⁸

3.2.3.1 Asia–Pacific

The U.S has entered into Open Skies agreements with Singapore, Taiwan and South Korea. It is called 'beachhead strategy' that playing one country in a region against another, putting pressure on Japan to liberalise its markets, for instance by inaugurating Open Skies agreements.¹⁷⁹ Eventually, air transport deregulation has spread in the Asia–Pacific markets.

A significant air transport development in the Asian region is the single aviation market project of the Association of South-East Asian Nations (ASEAN). The member states of ASEAN¹⁸⁰ signed a Multilateral Agreement on the Full Liberalization of Passenger Air

¹⁷⁷ Gabriel S. Meyer, 'U.S.-China Aviation Relations: Flight Path toward Open Skies' Vol. 35 : No. 2 , Article 5. (2002) *Cornell International Law Journal*, available <<https://scholarship.law.cornell.edu/cilj/vol35/iss2/5>> accessed 15 July 2019

¹⁷⁸ For a full list of agreements see Appendix B

¹⁷⁹ The Geography of Transport Systems, retrieved from <<https://people.hofstra.edu/geotrans/eng/ch3en/conc3en/ch3c5en.html>>

¹⁸⁰ 'The Governments of Brunei Darussalam, the Kingdom of Cambodia, the Republic of Indonesia, the Lao People's Democratic Republic, Malaysia, the Union of Myanmar, the Republic of Philippines, the Republic of Singapore, the Kingdom of Thailand and the Socialist Republic of Viet Nam' Asean Multilateral Agreement on

Services on November 12, 2010 and declared their collective commitment to building an ASEAN Single Aviation Market by 2015.¹⁸¹ The framework for the implementation of the ASEAN Single Aviation Market (ASDAM) is currently in operation.¹⁸²

Although China's approach was described as a 'proactive, orderly and safeguarded'¹⁸³ adjustment to the global developments in liberalisation, China has agreed with many liberal air transport arrangements to ensure its global connectivity. Among other individual agreements, China agreed on a regional air transport agreement with ASEAN in 2010.¹⁸⁴

In fact, China is one of the biggest and fastest-growing markets in the world. With its great economic growth and potential, China has taken steps to liberalise its air transport market. However, China has taken a more conservative approach to liberalisation than western countries. China views market liberalisation not as an end but as a process and considers that liberalisation in the international air transport market should be gradual and in accordance with the needs of the country as it expands its trade with other states.¹⁸⁵

The biggest portion of the growth in passenger numbers in international air transport is linked to the emerging economies. The IATA 2013 Annual Review stated that:

During 2012, 65% of the growth in passenger numbers in international markets took place in markets linked to emerging economies. Travel within Asia accounted for just over half of this growth. Other important growth markets were between Europe and Asia and on segments connecting Europe and Asia via the Middle East.

the Full Liberalisation of Passenger Air Services. Retrieved from
<<http://www.asean.org/images/archive/transport/Agreement-101112.pdf>> 15 July 2019

¹⁸¹ *ibid*

¹⁸² Overview of Regulatory and Industry Developments in International Air transport. (2016, September) Annex A Multilateral/Regional Agreements, Arrangements and Commitments for Liberalization by ICAO Secretariat, 5. Retrieved from
<http://www.icao.int/Meetings/a39/Documents/Overview_of_Regulatory_and_Industry_Developments_in_International_Air_Transport.pdf> 15 July 2019

¹⁸³ *ibid* 8.

¹⁸⁴ Air Transport Agreement Between the Governments of the Member States of the ASEAN and the Government of the People's Republic of China (2010) Retrieved from
<<https://www.asean.org/uploads/archive/transport/Air%20Transport%20Agreement%20between%20ASEAN+China.pdf>> accessed 15 July 2019

¹⁸⁵ Worldwide Air Transport Conference (ATCONF) Sixth Meeting, Working Paper (ATConf/6-WP/976/3/13) presented by China, 'Expansion of Market Access for International Air Transport in a Proactive, Progressive, Orderly and Safeguarded Manner'
<<http://www.icao.int/Meetings/atconf6/Documents/WorkingPapers/ATConf.6.WP.97.2.1.en.pdf>> accessed 15 July 2019

Markets from Africa to the Middle East and to Asia were also strong, reflecting the development of new South-South trade lanes.¹⁸⁶

Economic developments have an effect not only on international air transport but also on domestic air transport in China. According to IATA's air market analysis, air travel in China expanded by 11.7% in 2013.¹⁸⁷ China, with its great potential, has been establishing global air transport connectivity with all other regions in the world.

The IATA 2016 Annual Review reveals that:

7 of the top 10 increasing origin-destination (O-D) passenger markets [were] located in Asia. ... China's domestic air passenger market saw the biggest incremental rise in journey numbers in 2015, with 36 million more passenger journeys made than in 2014. This increase was more than in the next two largest-gaining markets combined: domestic Indonesia and domestic India. Popular markets for Chinese outbound tourism also grew strongly; specifically, journeys to and from Thailand and Japan.¹⁸⁸

Latest IATA Annual Review revealed that China provided the largest incremental increase in passengers by adding just under 50 million journeys in 2018. The report also underlined that the domestic markets of the United States and India once more ranked second and third, with around 30 million and 18 million more passenger journeys, respectively.¹⁸⁹

IATA Annual review 2019 also revealed that airlines from Asia-Pacific led the way in passenger growth, which increased 9.5% in the region.¹⁹⁰

Another major market is India in Asia -Pacific region. India deregulated its domestic air market in 1992 and allowed new entrants into a market that had previously been served by India's state-owned domestic carrier, Indian Airlines. 'India has also relaxed regulation of the international service by allowing multiple designations of Indian carriers in its ASA which has allowed private carriers to operate international services alongside the state-owned

¹⁸⁶ IATA Annual Review (2013) Retrieved from IATA: <<http://www.iata.org/about/Documents/iata-annual-review-2013-en.pdf> > accessed 16 July 2019 8.

¹⁸⁷ 'it is the strongest performing domestic market, buoyed by robust domestic demand.' IATA- Air Passenger Market Analysis (December 2013). Retrieved from <<https://www.iata.org/publications/economics/Documents/passenger-analysis-dec2013.pdf> >

¹⁸⁸ (IATA Annual Review , 2016) IATA Annual Review (2016) Retrieved from <http://www.iata.org> <<https://www.iata.org/publications/Documents/iata-annual-review-2016.pdf> > 11.

¹⁸⁹ IATA Annual Review (2019) Retrieved from <<https://www.iata.org/publications/Documents/iata-annual-review-2019.pdf> > 12.

¹⁹⁰ *ibid* 14.

international carrier, Air India.¹⁹¹ One of the main markets that IATA regularly tracks is India. IATA Annual review 2019 revealed that India's domestic market has the fastest growth in passenger numbers, which increased by 18.5% in 2018.¹⁹²

While China and India have adopted a gradual and progressive approach towards liberalising air transport, Japan and the Republic of Korea have followed more liberal air transport policies.¹⁹³

The government of the Republic of Korea has negotiated bilateral and multilateral agreements that follow the Open Skies principles.¹⁹⁴ A regional version of Open Skies was established between Korea and the Shandong Province in China in 2006,¹⁹⁵ and this increased traffic volume and trade activities.

Another major air transport actor in Asia is Japan. In May 2007, the Japanese government introduced a new air transport policy that has changed the Japanese air transport industry. Japan has abolished its restrictions and became a partner of many countries in the Asian region.¹⁹⁶ The government of Japan proposed a comprehensive policy package for air transport, and this accelerated the promotion of an Open Skies policy in the country. This brought about drastic changes in the Japanese air transport industry. An Open Skies agreement between Japan and the United States came into effect on November 2010, and Japan has concluded Open Skies agreements with nine other countries.¹⁹⁷

Indonesia has almost 50% of the market share among the ASEAN states. Indonesia has called its approach to liberalisation a staged approach. As a member of ASEAN, Indonesia has

¹⁹¹ The Impact of International Air Service Liberalisation on India, Prepared by InterVISTAS-EU Consulting Inc. (July 2009) retrieved from <<https://www.iata.org/publications/economics/Reports/india-report.pdf>> 15. accessed 15 July 2019

¹⁹² IATA Annual Review (2019) Retrieved from <<https://www.iata.org/publications/Documents/iata-annual-review-2019.pdf>> 12.

¹⁹³ Overview of Regulatory and Industry Developments in International Air transport. (2016, September) Annex A Multilateral/Regional Agreements, Arrangements and Commitments for Liberalization by ICAO Secretariat, 5. Retrieved from <http://www.icao.int/Meetings/a39/Documents/Overview_of_Regulatory_and_Industry_Developments_in_International_Air_Transport.pdf> 15 July 2019

¹⁹⁴ Yeon Myung Kim, Sean Seungho Lee, 'Air Transport in Korea and Northeast Asia' <[file:///C:/Users/Owner/AppData/Local/Packages/Microsoft.MicrosoftEdge_8wekyb3d8bbwe/TempState/Downloads/Air%20transport%20in%20Korea%20and%20Northeast%20Asia%20\(1\).pdf](file:///C:/Users/Owner/AppData/Local/Packages/Microsoft.MicrosoftEdge_8wekyb3d8bbwe/TempState/Downloads/Air%20transport%20in%20Korea%20and%20Northeast%20Asia%20(1).pdf)> accessed 15 July 2019

¹⁹⁵ *ibid*

¹⁹⁶ IATA Vision 2050 Report (2011, February 12) Retrieved from <http://www.iata.org/pressroom/facts_figures/documents/vision-2050.pdf> accessed 15 July 2019

¹⁹⁷ *ibid*

agreed with a binding multilateral agreement on the Full Liberalisation of Cargo and Passenger Services.¹⁹⁸

Singapore has adopted one of the most liberal aviation services policies. It has concluded over 120 air services agreements, and more than fifty of these involve unlimited third, fourth and fifth freedom traffic rights.¹⁹⁹ Singapore receives benefits from air transport liberalisation by being a party to several multilateral agreements including the Multilateral Agreement on the Liberalization of International Air Transportation (MALIAT) and the ASEAN Single Aviation Market.²⁰⁰ MALIAT is a multilateral agreement that was signed in Washington DC on May 1, 2001, by Brunei, Chile, New Zealand, Singapore and the United States. It came into force on December 21, 2001.²⁰¹ New Zealand views the agreement, not as a threat but ‘opening up opportunities.’²⁰²

3.2.3.2 Latin America

The states of Latin America have also become part of air transport liberalisation. Although it was commonly accepted that national restrictions on access to international capital should be reduced, in this region safety and security concerns were still the reason for governments to keep regulatory control of the market. However, after a long negotiation process, the Latin American Civil Aviation Commission (LACAC)²⁰³ was established in 2010 to draft a

¹⁹⁸ Worldwide Air Transport Conference (ATCONF) 6th Meeting, Working Paper (ATConf/6-WP/82 3/3/13) presented by Indonesia, ‘Indonesia’s Perspective on Liberalisation of Market Access’ <http://www.icao.int/Meetings/atconf6/Documents/WorkingPapers/ATConf6-wp082_en.pdf> accessed 15 July 2019

¹⁹⁹ Worldwide Air Transport Conference (ATCONF) Sixth Meeting, Working Paper (ATConf/6-WP/78,6/3/13) presented by Singapore ‘Benefits of Air Services Liberalisation to the Singapore Economy’ Retrieved from <https://www.icao.int/Meetings/atconf6/Documents/WorkingPapers/ATConf6-wp078_en.pdf> accessed 15 July 2019

²⁰⁰ *ibid*

²⁰¹ The agreements covers ‘open route schedules; open traffic rights, including seventh freedom cargo services; open capacity; airline investment provisions which focus on effective control and principal place of business, but protect against the flag of convenience carriers; multiple airline designation; third-country code-sharing; and minimal tariff filing regime.’ Multilateral Agreement on the Liberalisation of International Air transport. Retrieved from <www.maliat.govt.nz> accessed 15 July 2019

²⁰² Worldwide Air Transport Conference (ATCONF) Sixth Meeting, Working Paper (ATConf/6-WP/34 12/2/13) presented by New Zealand ‘The Multilateral Agreement on the Liberalization of International Air Transportation: A Basis for the Future Economic Regulation of Air Services’ Retrieved from <http://www.icao.int/Meetings/atconf6/Documents/WorkingPapers/ATConf6-wp034_en.pdf> accessed 15 July 2019

²⁰³ The civil aviation organization of Latin American States was founded on 14 December 1973 (came into force on 21 October 1975, upon approval by 12 States situated in the area) during a meeting held in Mexico City and is formally called *Comisión Latinoamericana de Aviación Civil* (CLAC). 22 Member state of LACAC

Multilateral Open Skies Agreement²⁰⁴ that was signed by Brazil, Chile, Columbia, Guatemala, Honduras, Panama, Paraguay, the Dominican Republic and Uruguay.²⁰⁵ Although this agreement underlines the regulatory control of the designating state over safety and security provisions, it includes liberal provisions on such things as code-sharing, cooperation agreements between airlines, and en route capacity changes.²⁰⁶

There are other regional air transport liberalisation agreements that took place in South America and the Caribbean. These are agreements by the Andean Open Skies Pact,²⁰⁷ the Caribbean Community (CARICOM) and the Southern Market (MERCOSUR)²⁰⁸, between 1991 and 1999; and the Air Transport Agreement of the Association of Caribbean States (ACS)²⁰⁹, in 2008²¹⁰. All these initiatives aim to harmonize air transport policies and to liberalize the granting of traffic rights and market access.²¹¹

Argentina, Aruba, Belize, Chile, Colombia, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Uruguay, and Venezuela) Latin American Civil Aviation Commission, <<http://clacsec.lima.icao.int/>> accessed 16 July 2019

²⁰⁴ ‘Member States embraced the draft Agreement and enacted it at the XIX LACAC Ordinary Assembly (Punta Cana, Dominican Republic, November 2010) opening it for signature and designating the LACAC Permanent Secretariat as its depository. Worldwide Air Transport Conference (ATCONF) Sixth Meeting, Working Paper (ATConf/6-WP/6-IP 5/3/13) Presented by 22 Members of the Latin American Civil Aviation Commission (LACAC), ‘Strategic Alliances in the Latin American Region’, <http://www.icao.int/Meetings/atconf6/Documents/WorkingPapers/ATConf6-wp056_en.pdf> accessed 16 July 2019

²⁰⁵ *ibid*

²⁰⁶ *ibid*

²⁰⁷ ‘The “Andean Group” was founded by five South American States in 1969 under the Cartagena Agreement (more often called “Andean Pact”). The original Member States were Bolivia, Chile, Colombia, Ecuador and Peru. Venezuela joined the Group in 1973, while Chile withdrew in 1976.’ Andean Open Skies Pact, <https://www.icao.int/sustainability/CaseStudies/StatesReplies/AndeanPact_En.pdf> accessed 16 July 2019

²⁰⁸ ‘The Southern Common Market (MERCOSUR for its Spanish initials) is a regional integration process, initially established by Argentina, Brazil, Paraguay and Uruguay, and subsequently joined by Venezuela and Bolivia* -the latter still complying with the accession procedure’ <<https://www.mercosur.int/en/about-mercosur/mercosur-in-brief>> accessed 16 July 2019

²⁰⁹ The Association of Caribbean States (ACS), The member states are ‘Antigua and Barbuda, Bahamas, Barbados, Belize, Colombia, Costa Rica, Cuba, Dominica, Dominican Republic, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, St Kitts and Nevis, St Lucia, St Vincent and the Grenadines, Suriname, Trinidad and Tobago, Venezuela’ <<http://www.acs-aec.org/index.php?q=about-the-ac>> accessed 16 July 2019

²¹⁰ Air Transport Agreement among the Member States and Associates Member of the Association of Caribbean States (2008), <<http://www.acs-aec.org/index.php?q=documents/transport/2012/air-transport-agreement-0>> accessed 16 July 2019

²¹¹ ICAO Secretariat, ‘Overview of Regulatory and Industry Developments in International Air Transport’ (2016, September) 5. <http://www.icao.int/Meetings/a39/Documents/Overview_of_Regulatory_and_Industry_Developments_in_International_Air_Transport.pdf> accessed 9 July 2019

3.2.3.3 Africa

One of the landmarks in the liberalisation of air transport and the impact of this on economic growth in Africa can be found in the form of the Yamoussoukro Declaration, which became the African civil aviation policy and was adopted on October 7, 1988. The aim of the Declaration was ‘to create a conducive environment for the development of intra-African and international air services.’²¹² The Yamoussoukro Declaration entered into force in 2000 and evolved from the Yamoussoukro Declaration of 1988. The Declaration provided for a continent-wide aviation agreement to liberalise African skies, with the aim of realising full liberalisation by the year 2002.

The project to create the Single African Air Transport Market (SAATM) was presented on the agenda of the African Union in 2011 and proposed the further liberalisation of African airspace. In 2014, during the African Union summit, the implementation of the Yamoussoukro Declaration was said to be vital for achieving the liberalisation of airspace in Africa.²¹³ In January 2015, at the twenty-fourth ordinary session of the Assembly of African Union, the globalisation of the world economy and the need to create safe, reliable and affordable air transport services were emphasised. The assembly member states²¹⁴ declared ‘their solemn commitment to the immediate implementation of the Yamoussoukro Decision towards the establishment of a Single African Air Transport Market by 2017.’²¹⁵

Another landmark development in Africa was the creation of a common market. COMESA is the Common Market for Eastern and Southern Africa and, as the name suggests, it is a regional economic community composed of twenty countries.²¹⁶

²¹² Economic Commission for Africa <<http://www.afcac.org/en/documents/conferences/July2012/yde.pdf>. > accessed 16 July 2019

²¹³ Overview of Regulatory and Industry Developments in International Air transport. (2016, September) 4. <http://www.icao.int/Meetings/a39/Documents/Overview_of_Regulatory_and_Industry_Developments_in_International_Air_Transport.pdf> 15 July 2019

²¹⁴ Benin, Cape Verde, Congo Republic, Cote d’Ivoire, Egypt, Ethiopia, Kenya, Nigeria, Rwanda, South Africa, Zimbabwe, ‘Decision, Declarations and Resolution of the Assembly of the African Union 24th Ordinary Session. (2015, January 30-31)’ Retrieved from African Union: <http://www.au.int/web/sites/default/files/decisions/9665-assembly_au_dec_546_-_568_xxiv_e.pdf > accessed 16 July 2019

²¹⁵ *ibid*

²¹⁶ These countries are Angola, Burundi, Comoros, D.R. Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Madagascar, Malawi, Mauritius, Namibia, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zambia and Zimbabwe. Amos Marawa, ‘Aviation in Transition: Challenges & Opportunities of Liberalization, Session 1:

COMESA's air transport liberalisation programme, 'COMESA Regulations for the Implementation of Liberalization of Air Transport Services – Legal Notice No. 2 of 1999', was introduced in May 1999.²¹⁷

Africa, as indicated in IATA's 2013 Annual Review, is one of the emerging regional markets and has shown strong economic growth.²¹⁸ Markets within and connected to Africa, South America, the Middle East, and Asia were indicated as the fastest-growing premium travel markets in IATA's 2013 Annual Review.

The Air Passenger Market Analysis of IATA for March 2017 indicates that:

despite ongoing fragility in the region's biggest economies (Nigeria and South Africa), the SA (seasonally adjusted) upward trend in international RPKs (Revenue Passenger Kilometers) flown by African airlines has strengthened in recent months. RPKs have grown at an annualized pace of nearly 10% since mid-2016. The pick-up reflects a combination of faster growth on the key market to and from Europe, and also between Africa and the Middle East.²¹⁹

Recently, in January 2018, the Single African Air Transport Market (SAATM)²²⁰ was launched 'as an initiative of the African Union to implement the principles of the Yamoussoukro Decision and create a single unified air transport market in Africa.'²²¹

3.2.3.4 Middle East

The Liberalization Experience, The COMESA Air Transport Liberalization Experience' ICAO Seminar: (2003, March 22-23). <<http://www.icao.int/Meetings/ATConf5/Documents/Marawa.pdf> > accessed 16 July 2019

²¹⁷ *ibid* 'COMESA introduced a two-phased timetable. Phase one started in October 1999 and ended in October 2000. Phase 2 started in October 2000 and ended in October 2001'

²¹⁸ IATA Annual Review (2013) Retrieved from IATA: 8. <<http://www.iata.org/about/Documents/iata-annual-review-2013-en.pdf> > accessed 16 July 2019

²¹⁹ Air Passenger Market Analysis (January 2017) Retrieved from IATA: <<http://www.iata.org/whatwedo/Documents/economics/passenger-analysis-jan-2017.pdf> > accessed 16 July 2019

²²⁰ 'To date, 28 countries have signed up to the SAATM: Benin, Burkina Faso, Botswana, Cabo Verde, Central African Republic, Chad, Congo, Côte d'Ivoire, Egypt, Ethiopia, Gabon, Gambia, Ghana, Guinea Conakry, Kenya, Liberia, Mali, Mozambique, Niger, Nigeria, Rwanda, Sierra Leone, South Africa, Swaziland, Togo, Zimbabwe, Lesotho and Cameroon. These countries represent over 80% of the existing aviation market in Africa.' The Single African Air Transport Market (SAATM), < <https://www.iata.org/policy/promoting-aviation/Pages/saatm.aspx> > accessed 17 July 2019

²²¹ IATA Annual Review (2019) Retrieved from <<https://www.iata.org/publications/Documents/iata-annual-review-2019.pdf> > 26. Accessed 17 July 2019

The Arab Civil Aviation Commission (ACAC) is a specialised organisation of the Arab League. It was established in June 1996 ‘as a regional organisation for coordination and cooperation among Arab countries and with other parts of the world in the field of civil aviation.’²²²

ACAC is the major partner of the Arab Air Carriers Organization (AACO), which represents 31 Arab air carriers based in the Middle East and North Africa.²²³

As an air carriers’ association, AACO advocates ‘liberalisation in terms of market access and ownership and control of airlines’.²²⁴ AACO, in coordination with ACAC, urged states to liberalise air transport and adopt Open Skies policies in the Arab world.²²⁵ These efforts resulted in 2004 in a multilateral agreement among Arab countries on the liberalisation of air transport, called the Damascus Convention.²²⁶ The Damascus Convention was signed by 13 Arab states and entered into force in 2007 after being ratified by only eight states, Jordan, Lebanon, Morocco, Oman, Palestine, Syria, Yemen, and the United Arab Emirates; it was not ratified by states such as Egypt and Saudi Arabia.²²⁷

The tendency by states in the Middle East region to diversify the sources of their income to sectors other than oil, such as commerce and tourism,²²⁸ is having an impact on the development of the aviation industry. Therefore ‘global transport arose as a new revenue source in the region’,²²⁹ and Middle East carriers are expanding their global networks.²³⁰

²²² Civil Aviation Commissions. Retrieved from ICAO:

<https://www.icao.int/secretariat/PostalHistory/civil_aviation_commissions.htm> accessed 16 July 2019

²²³ Arab Air Carriers Organization (AACO) <<http://aaco.org/aaco-community>> accessed 16 July 2019

²²⁴ *ibid*

²²⁵ Hamdi Chaouk, ‘Lebanon’s Experience in Air Transport Liberalization in the Middle East ICAO (ATConf/5) Seminar (2003, March 22-23) ‘Aviation in Transition: Challenges & Opportunities of Liberalization, Session 1: The Liberalization Experience <<https://www.icao.int/Meetings/ATConf5/Documents/Chaouk.pdf>> accessed 16 July 2019

²²⁶ ‘the Convention signed by 13 Arab states and entered into force in 2007 after being ratified by 8 states, Jordan, Lebanon, Morocco, Oman, Palestine, Syria, Yemen, and the United Arab Emirates.’

Arab Air Carriers Organization (AACO) <<http://aaco.org/aaco-community>> accessed 16 July 2019

²²⁷ Overview of Regulatory and Industry Developments in International Air transport. (2016, September) 4.

<http://www.icao.int/Meetings/a39/Documents/Overview_of_Regulatory_and_Industry_Developments_in_International_Air_Transport.pdf> 15 July 2019

²²⁸ Jan Vespermann, Andreas Wald, Ronald Gleich, ‘Aviation growth in the Middle East-impacts on incumbent players and potential strategic reactions’ Vol.16 Issue 6. (2008) Journal of Transport Geography, 388, 389.

²²⁹ *ibid* ‘the regional governments are strongly promoting the aviation sector, carrying out destination-marketing campaigns and ensuring the presence of the country at major international el and Transportation fairs.’ 389.

²³⁰ *ibid* ‘As a result, the Middle Eastern carriers focus on the three major long-distance routes: traffic between Europe and Asia, traffic between North America and Europe.’ 391.

These developments in the Middle East are mainly concentrated in the United Arab Emirates (UAE) and Qatar. In the UAE, for instance, liberalisation of air transport is welcomed because the benefits are recognised. The fully liberalised or Open Skies agreements have been signed with 122 countries by the UAE.²³¹

In fact, regional multilateral Open Skies agreements have been spreading among countries in many different regions. The developments as mentioned earlier are intended in this study to stand as examples of a global trend. Open Skies agreements are spreading, because once one country enters into such an agreement, other countries in the same region inevitably develop connections and need to open their skies to be able to compete and take a share of the air transport market within the region and with other regions. As Warner noted in 1993:

the future of international aviation lies in regional multilateral Open Skies agreements, and those regional Open Skies developments will lead to global and unified air transportation systems in which countries can no longer restrict access to their airports and domestic routes.²³²

Global developments in air transport indicate that Warner's assertion was realistic. There have been fundamental developments in the global air transport industry. Next, the thesis explores the effects of these developments on aviation safety.

3.3 Liberalised air transport market practices and their impacts on aviation safety

While the airline industry, states and passengers are enjoying the benefits of a liberalised air transport market, the global trend towards the liberalisation of air transport has caused major structural transformations in the airline industry worldwide as it adjusts to a deregulated air

²³¹ 'Thanks to an open approach to competition, aviation has become a core sector of the UAE's economy, driving development, diversification and aviation-related activities which are contributors to the country's non-oil GDP.' United Arab Emirates, Delegation to the International Civil Aviation Organisation, <<http://www.uae-icao.gov.ae/Contentviewer.aspx?ContentId=6&LinkPath=Home%20%3E%20THE%20UAE%20%3E%20AVIATION%20IN%20UAE>> accessed 16 July 2019

²³² Seth M. Warner, 'Liberalize Open Skies: Foreign Investment and Cabotage Restrictions Keep Noncitizens in Second Class', Vol.43, Issue 1, (1993) American University Law, 277, 318.

transport market.²³³ Establishing alliances, consolidation and cross-border investments have become a strategic focus for the airline companies.²³⁴

These practices have mostly been chosen because of the need to circumvent the national restrictions that are derived from the restrictions in Article 6 of the Chicago Convention (1944).²³⁵

One of these practices is the ‘formation by airlines of alliances.’²³⁶ There has been a global trend to form alliances as airlines aim for a global reach in a competitive global market.²³⁷

Nowadays, there is an increasing demand from air travel customers for so-called seamless services, meaning air services ‘from anywhere to anywhere’.²³⁸ However, providing these services is almost impossible for airline companies unless they have network cooperation with other airlines. Since cross-border mergers are forbidden for airlines in many jurisdictions, and because of existing cabotage restrictions in many states, new forms of network cooperation, mainly airline alliances,²³⁹ have become the standards for international flight operations.

However, practices in international flight operations as they have developed as a result of the liberalisation of air transport give rise to concerns. The impact of liberalisation on safety and security have been the subject of worldwide air transport conferences held by ICAO. The challenge for the state was underlined as to getting benefits of economic liberalisation

²³³ ICAO Secretariat, ‘Overview of Regulatory and Industry Developments in International Air Transport’ (2016, September) <http://www.icao.int/Meetings/a39/Documents/Overview_of_Regulatory_and_Industry_Developments_in_International_Air_Transport.pdf> 16. accessed 9 July 2019

²³⁴ *ibid*

²³⁵ Article 6 ‘Scheduled air services’ No scheduled international air service may be operated over or into the territory of a contracting State, except with the special permission or other authorization of that State, and in accordance with the terms of such permission or authorization.

²³⁶ ICAO Secretariat, ‘Overview of Regulatory and Industry Developments in International Air Transport’ (2016, September) <http://www.icao.int/Meetings/a39/Documents/Overview_of_Regulatory_and_Industry_Developments_in_International_Air_Transport.pdf> 16. accessed 9 July 2019

²³⁷ “A 200-survey indicated that 67 percent of European and United States carriers had formed alliances to bypass restrictive legislation and legal principles in order to gain access to the Trans-Atlantic market” Ruwantissa Abeyratne, ‘Competition in Air Transport- The Need for a Shift in Focus’ Volume 33, Issue 1-2 (2005-2007) *Transportation Law Journal* 29, 107.

²³⁸ IATA Economics Briefing; *The Economic Benefits Generated by Alliances and joint Ventures*. (2011, November) 1. <https://www.iata.org/whatwedo/Documents/economics/Economics%20of%20JVs_Jan2012L.pdf> accessed 17 July 2019

²³⁹ For a list of global alliances see Appendix C

without compromising safety and security.²⁴⁰ However, ICAO acknowledged the challenge for the states to comply with the state oversight responsibility to its aircraft operators and also foreign operators while air transport activities are getting more complex commercial arrangements as a result of market growth and liberalisation.²⁴¹

This issue was reviewed in the ICAO Secretariat Study on the Safety and Security Aspects of Economic Liberalization in 2005. The review suggested that various situations in areas such as ground handling, aircraft leasing, airline code-sharing, franchising, air carrier ownership and control, market access, and outsourcing the commercialising of airports and air navigation service providers had ‘certain implications on safety and security’.²⁴²

One of the main characteristics of the current air transport market practices is that air transport operations are multinational, which means that different state regulators are involved. Hence, state compliance with aviation safety regulations also becomes a multinational concern. To determine the implications for safety and to discuss the legal issues around liability, some of these practices that have been developed by the liberalised sector need to be explained.

For instance, airline alliances are defined as “voluntary unions of airlines held together by various commercial cooperative arrangements”.²⁴³ The forms of cooperation by carriers within alliances are varied,²⁴⁴ and include, among other things, code-share agreements.

²⁴⁰ ICAO Secretariat Study on the Safety and Security Aspects of Economic Liberalisation. (2005, June 1). Retrieved from ICAO: <http://www.icao.int/sustainability/Documents/SafetySecurityStudy_en.pdf> accessed 17 July 2019

²⁴¹ *ibid*

²⁴² ICAO Secretariat Study on the Safety and Security Aspects of Economic Liberalisation. (2005, June 1). Retrieved from ICAO: <http://www.icao.int/sustainability/Documents/SafetySecurityStudy_en.pdf> accessed 17 July 2019

²⁴³ ICAO Secretariat, ‘Overview of Regulatory and Industry Developments in International Air Transport’ (2016, September) <http://www.icao.int/Meetings/a39/Documents/Overview_of_Regulatory_and_Industry_Developments_in_International_Air_Transport.pdf> 16. accessed 9 July 2019

²⁴⁴ *ibid* “Forms of cooperation between carriers within alliances vary greatly from limited marketing agreements governing the provision of frequent flyer points to fully integrated cooperative arrangements which involve coordination of prices, capacity, schedules, as well as revenue, cost and profit pooling and sharing. From an antitrust perspective, arrangements with limited cooperation such as interline agreements, pose no concern. The highest degree of cooperation can be observed in metal-neutral joint ventures where carriers engage in revenue, cost and profit sharing; jointly determine prices, capacity and frequency of flights; and cooperate in marketing and sales. It is the latter form of cooperation that has attracted the close scrutiny of antitrust agencies around the world.” 16.

3.3.1 Code-share agreements

Airline alliances commonly give rise to code-share agreements. In order to respond to consumer demand, an airline may enter into a code-share agreement. The commercial significance of Code-sharing is that allows airline companies to sell seats on a partner airline's plane as their own.²⁴⁵ Code-share agreements can take a variety of forms that:

may involve a major carrier sharing its code with a smaller feeder carrier, it may also be an arrangement between two or, in some instances, three or more international carriers for an international flight operated cooperatively or for a connecting service which uses the same code.²⁴⁶

Code-sharing is widespread practice nowadays and serves not only to the economic satisfaction of airline companies but consumers and states as well.

By entering a code-share arrangement, an airline is able to offer customers more international destinations without having additional costs and difficulties. Code-share agreements may be of special benefit in developing countries as an instrument to facilitate the participation by their airlines in international air transport.²⁴⁷

Consumers are also enjoying benefits such as lower costs and the accessibility of a world network, with more seamless travel that requires them to buy only one ticket. However, questions have been raised about whether code-sharing is a deceptive practice or is beneficial to the customer.²⁴⁸ The information provided to the customer regarding the code-sharing of flight operations should be accurate and not misleading in any way. However, it has been underlined that 'the information provided to the public on code shared flights is in many instances not sufficient and needs to be improved'.²⁴⁹ One tragic air accident could illustrate the concerns involves codeshare agreements from the consumers perspective.

²⁴⁵ Philip G. Gayle, 'Airline Code-Share Alliances and Their Competitive Effects' Vol.50, Issue 4. (November 2007) *Journal of Law and Economics*, 781, 781.

²⁴⁶ ICAO Circular 269-AT/110, Implication of Airline Code Sharing. (1997) Retrieved from <https://www.icao.int/sustainability/Documents/C269_en.pdf > v. accessed 17 July 2019

²⁴⁷ *ibid*

²⁴⁸ ICAO Circular 269-AT/110, Implication of Airline Code Sharing. (1997) Retrieved from <https://www.icao.int/sustainability/Documents/C269_en.pdf > vi.

²⁴⁹ *ibid*

The Colgan Air Flight 3407 crashed on February 12, 2009, while preparing for landing, killing all 49 passengers and crew on board, and one person inside the house plane hit.²⁵⁰ The flight was a scheduled passenger flight from Newark, New Jersey, to Buffalo, New York and marketed as Continental Airlines connection under a codeshare agreement.

From the consumer perspective deceptive feature of codeshare practice, in this case, was identified as follows;

Under these agreements the major carrier ‘often allows the regional airline to (1) use the mainline carrier's flight designator code to identify flights and fares in the computer reservation systems, (2) use the mainline carrier's logos and uniforms, and (3) participate in joint promotion and advertising activities.’ In turn, some passengers understandably think that their flight on a regional aircraft is operated by the major airline whose logo is on the plane, such as Continental.²⁵¹

National Transport Safety Board of the United States released its report (NTSB/AAR-10/01 PB2010-910401 Notation 8090A Adopted February 2, 2010). The report revealed that the cause for the crash was due to pilot failure to respond correctly to the situation.²⁵² In this case, Continental Airlines was a major airline which had codeshare agreements with regional, Colgan Air, that consumer was not familiar with. The main problem highlighted was the lack of uniformity in safety training practices between the major carrier and its codeshare partner, and there was no law for the requirement of uniformity in safety training too.²⁵³ Under the line of the report that identifies safety issues in codeshare agreement, the United States

²⁵⁰ National Transport Safety Board of the United States (NTSB) ‘Aircraft Accident Report Loss of Control on Approach Colgan Air, Inc. Operating as Continental Connection Flight 3407 Bombardier DHC-8-400, N200WQ Clarence Center, New York February 12, 2009’ (NTSB/AAR-10/01 PB2010-910401 Notation 8090A Adopted February 2, 2010) <<https://www.nts.gov/investigations/AccidentReports/Reports/AAR1001.pdf> >

²⁵¹ Kathryn M. Podiadlo, ‘Flying under the Radar: Airline Codeshare Agreements and Their Potential Impact on Regional Airline Safety’ (2014) Vol.43 Southwestern Law Review, 455,456

²⁵² ‘The National Transportation Safety Board determines that the probable cause of this accident was the captain’s inappropriate response to the activation of the stick shaker, which led to an aerodynamic stall from which the airplane did not recover. Contributing to the accident were (1) the flight crew’s failure to monitor airspeed in relation to the rising position of the low speed cue, (2) the flight crew’s failure to adhere to sterile cockpit procedures, (3) the captain’s failure to effectively manage the flight, and (4) Colgan Air’s inadequate procedures for airspeed selection and management during approaches in icing conditions.’ National Transport Safety Board of the United States (NTSB) ‘Aircraft Accident Report Loss of Control on Approach Colgan Air, Inc. Operating as Continental Connection Flight 3407 Bombardier DHC-8-400, N200WQ Clarence Center, New York February 12, 2009’ (NTSB/AAR-10/01 PB2010-910401 Notation 8090A Adopted February 2, 2010) <<https://www.nts.gov/investigations/AccidentReports/Reports/AAR1001.pdf> > 155. accessed 19 July 2019

²⁵³ Kathryn M. Podiadlo, ‘Flying under the Radar: Airline Codeshare Agreements and Their Potential Impact on Regional Airline Safety’ (2014) Vol.43 Southwestern Law Review , 455,457.

Congress passed the law PL 111-216, The Airline Safety and Federal Aviation Administration Extension Act of 2010.²⁵⁴

Although code-share agreements are between airlines, their impact on the movement towards the liberalisation of air transport, as regards competition and economic benefits, is also welcomed by governments. Because of the current customer demand for services from anywhere to anywhere, alliances between airlines are a common operational practice in the international air transport market.²⁵⁵ By using code-sharing arrangements, airlines are able to increase their volume of business by accessing foreign markets, and consequently, this has positive effects on those markets.

However, despite all these benefits for all sides, the complexity of a code-sharing agreement raises concerns regarding the safety and security of aviation. The main character of these agreements is that it allows an international flight to be cooperated by different airlines that are under the authority of different states. At this point, the complexity starts. Concerns have been raised regarding uncertainty about the level of involvement of the safety and security authorities.²⁵⁶ Since different technical and operational regulations may apply to each air carrier partner in a code-share agreement, identifying the accountable and responsible authorities, according to the carriers' countries of registration, is essential.²⁵⁷

3.3.2 Operating with foreign-registered aircraft

Another practice that triggers safety concerns is the use of foreign-registered aircraft by airlines as their own because this means that more than one state's safety regulations govern the operation of the aircraft. In this case, the state of the operator and the state of registration are different. A problem occurs when different levels of safety compliance and different

²⁵⁴ Public Law 111-216—AUG. 1, 2010, 'Airline Safety and Federal Aviation Administration Extension Act of 2010' <<https://www.congress.gov/111/plaws/publ216/PLAW-111publ216.pdf>>

²⁵⁵ IATA Economics Briefing, 'The Economic Benefits Generated by Alliances and Joint Ventures. (2011, November) Retrieved from <https://www.iata.org/whatwedo/Documents/economics/Economics%20of%20JVs_Jan2012L.pdf> accessed 17 July 2019

²⁵⁶ Ruwantissa Abeyratne, 'Strategic Issues in Air Transport: Legal Economic and Technical Aspects' (Springer 2012) 56. see also ICAO Circular 269-AT/110, Implication of Airline Code Sharing. (1997) Retrieved from <https://www.icao.int/sustainability/Documents/C269_en.pdf>

²⁵⁷ ICAO Circular 269-AT/110, Implication of Airline Code Sharing. (1997) Retrieved from <https://www.icao.int/sustainability/Documents/C269_en.pdf> vii

applications of SARPs exist between the state of the operator and the state of registration, and this is generally the situation in these types of operation.

On October 6th, 1980 the Protocol Relating to an Amendment to the Convention on International Civil Aviation [Article 83 *bis*] (Doc 9318), signed at Montreal. The protocol provides for the transfer of certain functions and duties from the State of the registry to the State of the operator.²⁵⁸

Although (Article 83 *bis*)²⁵⁹ provides for the transfer of certain functions and duties in relation to all or some of the safety oversight responsibilities from the state of registration to the state of the operator, in practice bilateral agreements to implement Article 83 *bis* do not indicate that there is a strong commitment from the ICAO contracting states.²⁶⁰

This indicates that aircraft that have been widely used all over the world are subject to oversight from different authorities with different compliance levels with safety standards. Therefore, another situation in which consumers are not aware of.

There are mainly two practices that raise safety concerns associated with foreign-registered aircraft. These are operating with a foreign flights crew and operating under the flags of convenience.²⁶¹

²⁵⁸ ICAO (Doc 9318) 'The Protocol Relating to an Amendment to the Convention on International Civil Aviation [Article 83 *bis*] The Protocol came into force on 20 June 1997 <

https://www.icao.int/secretariat/legal/Administrative%20Packages/83bis_en.pdf > accessed 19 July 2019

²⁵⁹ Article 83 *bis* of the Chicago Convention (1944)

Transfer of certain functions and duties

- a) Notwithstanding the provisions of Articles 12, 30, 31 and 32 a), when an aircraft registered in a contracting State is operated pursuant to an agreement for the lease, charter or interchange of the aircraft or any similar arrangement by an operator who has his principal place of business or, if he has no such place of business, his permanent residence in another contracting State, the State of registry may, by agreement with such other State, transfer to it all or part of its functions and duties as State of registry in respect of that aircraft under Articles 12, 30, 31 and 32 a). The State of registry shall be relieved of responsibility in respect of the functions and duties transferred.
- b) The transfer shall not have effect in respect of other contracting States before either the agreement between States in which it is embodied has been registered with the Council and made public pursuant to Article 83 or the existence and scope of the agreement have been directly communicated to the authorities of the other contracting State or States concerned by a State party to the agreement.
- c) The provisions of paragraphs a) and b) above shall also be applicable to cases covered by Article 7

²⁶⁰ '...the reality remains far from satisfactory in that relatively few bilateral agreements implementing Article 83 *bis* have been notified to ICAO (by March 2005, 114 agreements are in force involving only 34 State) ICAO Secretariat Study on the Safety and Security Aspects of Economic Liberalisation. (2005, June 1) 3. retrieved from <https://www.icao.int/sustainability/Documents/SafetySecurityStudy_en.pdf > accessed 10 July 2019

²⁶¹ Ruwantissa Abeyratne, 'Strategic Issues in Air Transport: Legal Economic and Technical Aspects' (Springer 2012) 54.

3.3.3 Operating with a foreign flight crew

Leasing aircraft outside of State of the registry is a common practice. Use of commercial operations such as leasing aircraft in international aviation comes with economic benefit by reducing costly equipment.²⁶² Although these practices are legitimate, there are situations that safety of flight can be in question because of these practices. Mainly the safety problem occurs when operators are subject to different authorities with different implementation level of the standards and Recommended Practices SARPs of ICAO.²⁶³

For instance, there are two main kinds of an aircraft lease. These are dry leases and wet leases. A dry lease is the lease of an aircraft without a crew, and a wet lease is the lease of an aircraft with a crew. According to Article 32 of the Chicago Convention (1944), ‘the pilot and crew of every aircraft engaged in international aviation must have certificates of competency and licenses issued or validated by the state in which the aircraft is registered’.

Hence another oversight problem occurs in relation to the regulations regarding crew licensing requirements. ICAO draws attention to the increasing use of validation for flight crew licences as a safety consequence of economic liberalisation:

ICAO’s safety oversight audits have indicated a certain number of problems with validations that relate to the traceability of the original licence (in particular to the limitation or restriction that may have been attached to it) and to the extension of a privilege of the original licence (type ratings in particular).²⁶⁴

This is another situation in which consumers cannot identify the authority responsible for the safety oversight of the aircraft.

The safety (and security) concerns reported above in relation to international aircraft leasing arise from the need to define the respective safety responsibilities of the state of registration (the lessee’s state) and the state of operation (the lessor’s state). It has been emphasised that,

²⁶² Gerald F FitzGerald, 'The Lease, Charter and Interchange of Aircraft in International Operations - Article 83 BIS of the Chicago Convention (1944) on International Civil Aviation' (1981) 6 ANNALS AIR & SPACE L 49

²⁶³ Ruwantissa Abeyratne, ‘*Strategic Issues in Air Transport: Legal Economic and Technical Aspects*’ (Springer 2012) 54.

²⁶⁴ ICAO Secretariat Study on the Safety and Security Aspects of Economic Liberalisation. (2005, June 1) 7. retrieved from <https://www.icao.int/sustainability/Documents/SafetySecurityStudy_en.pdf> accessed 10 July 2019

for an aircraft lease agreement where both states (the state of registration and the state of operation) are a party to an air services agreement, safety responsibility is addressed in safety clauses contained within the agreement. However, such clauses do not generally address a number of additional jurisdictional and regulatory factors that can have an impact both on safety and security and on the economic behaviour of international airlines.²⁶⁵

3.3.4 The problem of a ‘flag of convenience’ for aircraft

A flag of convenience is a term derived from the maritime industry. In maritime industry ‘flag of convenience’ term refers a situation in which commercial vessels owned by nationals of a State, but registered in another State, and they are allowed to operate freely between and among other States.²⁶⁶ Generally, in the maritime sector, ships and fleets can be flagged out to save costs or to avoid effective regulatory control by the state in which the vessel or fleet is owned.²⁶⁷

Liberalisation and deregulation in the air transport industry have allowed airlines to register themselves and their aircraft in different countries where there is an economical and technical advantage for their operations.²⁶⁸ Hence, there has been growing concern about the impact of using the flag of convenience in the air transport market on flight safety and security.

²⁶⁵ ‘In particular, the ITF is concerned about three issues related to leasing:

- a) The potential for “social dumping”, “safety dumping” and “security dumping” arising when applicable standards and requirements of the State of Registry are lower than those of the State of Operation;
- b) The legal jurisdiction in relation to employment rights (including insurance and occupational safety) as well as consumer and passenger rights; and
- c) Jurisdictional problems associated with unlawful acts on board aircraft by disruptive passengers (air rage).’

Worldwide Air Transport Conference (ATCONF) Fifth Meeting (Montreal 24 to 29 March 2003) Working Paper (ATConf/5-WP/73 28/2/03) (Presented by International Transport Workers’ Federation (ITF) ‘Aircraft Leasing in International Air Transport and Jurisdictional Issues Associated with the Nationality of Aircraft Registration’ <https://www.icao.int/Meetings/ATConf5/Documents/ATConf5_wp073_en.pdf> accessed 17 July 2019

²⁶⁶ ICAO Secretariat Study on the Safety and Security Aspects of Economic Liberalisation. (2005, June 1). retrieved from <https://www.icao.int/sustainability/Documents/SafetySecurityStudy_en.pdf> 3. fn 1. accessed 10 July 2019

²⁶⁷ Worldwide Air Transport Conference (ATCONF) Fifth Meeting (Montreal 24 to 29 March 2003) Working Paper (ATConf/5-WP/75 February 26, 2003) Presented by International Transport Workers’ Federation (ITF) ‘Liberalizing Air Carrier Ownership and Control’ Retrieved from <https://www.icao.int/Meetings/ATConf5/Documents/ATConf5_wp075_en.pdf> accessed 17 July 2019

²⁶⁸ Allan I. Mendelson, ‘Flags of Convenience: Maritime and Aviation’ Vol.79 Issue 1. (2014) Journal of Air Law and Commerce, 151

However, flagging out, in addition to giving rise to more safety and security breaches and failures to implement international aviation safety regulations, creates some difficulties in identifying the competent legal authority.²⁶⁹

The safety concern is significantly more serious in cases when foreign-registered aircraft choose to operate under a flag of convenience with the aim to avoid strict regulations regarding technical oversight or in some cases seeking no oversight at all.²⁷⁰ This is the point that these business mind operations affect flights safety.

Especially, safety concerns arise when there is no bilateral arrangement between the State of the registry and the State of the operator regarding airworthiness²⁷¹ oversight of leased aircraft.²⁷²

Growing concerns led ICAO to take action. After reviewing the efforts to use alternative criteria for market access to the traditional ones of national ownership and control of air carriers, at the Worldwide Air Transport Conference in 2003, the ICAO Secretariat proposed a new optional criterion, based on the principal place of business and effective regulatory control by the designating state.²⁷³

²⁶⁹ “For example, following the recent Prestige sinking in Northwest Spain. This vessel was Greek beneficially owned registered through a Liberian shell company and flying the flag of Bahamas” Worldwide Air Transport Conference (ATCONF) Fifth Meeting (Montreal 24 to 29 March 2003) Working Paper (ATConf/5-WP/75 February 26, 2003) Presented by International Transport Workers’ Federation (ITF) ‘Liberalizing Air Carrier Ownership and Control’ Retrieved from

https://www.icao.int/Meetings/ATConf5/Documents/ATConf5_wp075_en.pdf > accessed 17 July 2019

²⁷⁰ Ruwantissa Abeyratne, ‘*Strategic Issues in Air Transport: Legal Economic and Technical Aspects*’ (Springer 2012) 43.

²⁷¹ ‘Airworthiness is the condition of an aircraft, aircraft system, or component in which it operates in a safe manner to accomplish its intended function.’

<https://www.icao.int/cybersecurity/Lists/Glossary/DispForm.aspx?ID=19&Source=https%3A%2F%2Fwww%2Eicao%2Eint%2Fcybersecurity%2FLists%2FGlossary%2FAllItems%2Easpx%3FPaged%3DTRUE%26p%25255FID%3D254%26PageFirstRow%3D501%26View%3D%257BACF1DB03%2D018F%2D416F%2DA359%2D39B97C2BAF6C%257D&ContentTypeId=0x0100E07A723B0BB568479D83EC18DA93FBCE> > accessed 21 July 2019

²⁷² ‘through bilateral agreements under article 83 bis, which permits states to transfer all or part of certain safety oversight responsibilities under the Convention. Even for this group, the reality remains far from satisfactory in that relatively few bilateral agreements implementing Article 83 bis have been notified to ICAO (by 1 May 2006, 148 States had ratified the provision) and numerous aircraft of all types all over the world are still subject to split oversight responsibility.’ Ruwantiss Abeyratne, ‘*Regulation of Commercial Spacer Transport> The Astorizing of ICAO*’ (Springer 2015) 19.

²⁷³ ICAO Report of the Worldwide Air Transport Conference, Challenges and opportunities of Liberalization. (2003, March 24-28) (Doc 9816 ATConf/5 2003) Retrieved from

https://www.icao.int/Meetings/atconf6/Documents/Doc9819_en.pdf > accessed 17 July 2019

The proposal for the principal place of business plus effective regulatory control was adopted in the Conference's final recommendation²⁷⁴ and has been incorporated into the ICAO guidance materials.²⁷⁵

Concerns were reported that applying the 'principal place of business' criterion in the aviation sector could be "the step into the direction of the loose regulation that so bedevils the maritime industry"²⁷⁶ and that the removal of the ownership and control requirements could jeopardise the safety and security of air transport.²⁷⁷

Some carriers could choose to reflag themselves and set up in those states that offer the most undemanding regimes in terms of safety, security or labour protection. This could result in the emergence of flags of convenience, where carriers would exploit these possibilities and it is likely that at least some states would try to attract airline investors by under-regulation ... If liberalized traffic rights were combined with unconditional removal of ownership and control restrictions, these risks could become real.²⁷⁸

²⁷⁴ 'Without prejudice to the specificities of regional agreements, the Conference agreed that States should give consideration to the following model clause as an option for use at their discretion in air services agreements.

Article X: Designation and Authorization

1. Each Party shall have the right to designate in writing to the other Party [an airline] [one or more airlines] [as many airlines as it wishes] to operate the agreed services [in accordance with this Agreement] and to withdraw or alter such designation.

2. On receipt of such a designation, and of application from the designated airline, in the form and manner prescribed for operating authorization [and technical permission,] each Party shall grant the appropriate operating authorization with minimum procedural delay, provided that:

- a) the designated airline has its principal place of business* [and permanent residence] in the territory of the designating Party;
- b) the Party designating the airline has and maintains effective regulatory control** of the airline;
- c) the Party designating the airline is in compliance with the provisions set forth in Article __ (Safety) and Article __ (Aviation security); and
- d) the designated airline is qualified to meet other conditions prescribed under the laws and regulations normally applied to the operation of international air transport services by the Party receiving the designation.

3. On receipt of the operating authorization of paragraph 2, a designated airline may at any time begin to operate the agreed services for which it is so designated, provided that the airline complies with the applicable provisions of this Agreement.'

ICAO Worldwide Air Transport Conference (ATCONF) Fifth Meeting 'Consolidated Conclusions, Model Clauses, Recommendations and Declaration'

(ATConf/5 31/3/03 Revised 10/7/2003) Retrieved from

<https://www.icao.int/Meetings/ATConf5/Documents/atconf5_conclusions_en.pdf> accessed 17 July 2019

²⁷⁵ Jan Walulik, *Progressive Commercialization of Airline Governance Culture* (1st ed) Routledge (2017) 159 fn.109

²⁷⁶ Worldwide Air Transport Conference (ATCONF) Fifth Meeting (Montreal 24 to 29 March 2003) Working Paper (ATConf/5-WP/75 February 26, 2003) Presented by International Transport Workers' Federation (ITF) 'Liberalizing Air Carrier Ownership and Control' Retrieved from

<https://www.icao.int/Meetings/ATConf5/Documents/ATConf5_wp075_en.pdf> accessed 17 July 2019

²⁷⁷ Jan Walulik, *Progressive Commercialization of Airline Governance Culture* (1st ed) Routledge (2017) 169.

²⁷⁸ *ibid* 168.

However, there is a dual requirement in the criterion that evidence of the principal place of business has to be matched by evidence of effective regulatory control by the designating state. Whether this clause is effective in ensuring that safety and security requirements are met is arguable, since ICAO's safety oversight assessment programmes indicate that the levels of application of the agreed standards could differ among contracting states:²⁷⁹

Notwithstanding the process of safety regulatory harmonization involving the Joint Aviation Authorities of Europe, the Federal Aviation Administration of the USA and the authorities of other States, there are still wide variations in cost-sensitive regulations between States. For example, prominent differences in flight and duty times, minimum crew complements, and certification and personnel licensing requirements between States risk encouraging carriers to seek the most cost or operationally beneficial regulatory regime, opening the door to 'social dumping' and '**safety dumping**'.²⁸⁰

Although at the conclusion of ICAO's Fifth Worldwide Air Transport Conference in 2003 it was strongly emphasized that states must ensure that safety and security remain of paramount importance in operations and are not compromised by commercial considerations when they introduce economic liberalisation,²⁸¹ there was a considerable amount of evidence presented at ICAO's Sixth Worldwide Air Transport Conference in 2013. It was said there that:

The growing number of parallels in today's civil aviation to traditional maritime 'flagging out' scenarios is striking. Offshore registries for civil aviation aircraft exist and are growing in Aruba, Bermuda, Ireland, Malta, Georgia and Lithuania. Offshore registries for private aircraft also exist in the Cayman Islands, the Isle of Man, and San Marino.²⁸²

²⁷⁹ Worldwide Air Transport Conference (ATCONF) Fifth Meeting (Montreal 24 to 29 March 2003) Working Paper (ATConf/5-WP/75 February 26, 2003) Presented by International Transport Workers' Federation (ITF) 'Liberalizing Air Carrier Ownership and Control' Retrieved from <https://www.icao.int/Meetings/ATConf5/Documents/ATConf5_wp075_en.pdf > accessed 17 July 2019

²⁸⁰(emphasis added) *ibid*, see also Jan Walulik, *Progressive Commercialization of Airline Governance Culture* (1st ed) Routledge (2017) 269.

²⁸¹ ICAO Secretariat Study on the Safety and Security Aspects of Economic Liberalisation. (2005, June 1). Retrieved from <https://www.icao.int/sustainability/Documents/SafetySecurityStudy_en.pdf > 9. accessed 10 July 2019

²⁸² Worldwide Air Transport Conference (ATCONF) Sixth Meeting, Working Paper (ATConf/6-WP/99) (Presented by the International Transport Workers Federation (ITF)) 'The Need for a Strategy to Address the Negative Consequences of Continued Liberalization: Would Maritime Style "Flags of Convenience" Contribute to sustainable Aviation?' (2013, June March). Retrieved from

Recent discussions especially in US Congress on the bill of ‘Flags of Convenience Don’t Fly Here Act’²⁸³ urges the Department of Transportation to consider preventing the entry of flag of convenience carriers into U.S market for the public interest and safety in air transportation and air commerce.²⁸⁴

Under the flags of convenience, airlines locate their headquarters in countries with relaxed regulatory structures. Especially airlines seek opportunities where they are allowed to hiring pilots and crew from agencies with lower wages, labour and safety standards.²⁸⁵

One of the Commentators drew attention to the link between flight safety and approach of the airline companies to hire low-cost pilots. Accordingly:

This approach undermines what we call a “safety culture,” which is centered on putting passengers first by upholding rigorous safety requirements and immediately reporting any concerns. Contract pilots flying for decentralized, flag-of-convenience airlines are incentivized by those airlines to care more about their next flight than the airline’s entire operation.²⁸⁶

3.3.5 Off-shore operations

Another problem in identifying the state that is authorised to have safety oversight arises from the practice of states agreeing bilaterally and granting to one another seventh freedom rights (the privilege to carry traffic between the territory of the granting state and a third state without any requirement for the service to connect to the recipient state).²⁸⁷ In this case, an

<https://www.icao.int/Meetings/atconf6/Documents/WorkingPapers/ATConf6-wp099-rev_en.pdf> accessed 17 July 2019

²⁸³ H.R.2150 - Flags of Convenience Don't Fly Here Act 115th Congress (2017-2018) , <<https://www.congress.gov/bill/115th-congress/house-bill/2150?overview=closed>> accessed 22 July 2019

²⁸⁴ *ibid*

²⁸⁵ William Billyray, ‘Air passengers’ safety is at risk; Senate should reject ‘flags of convenience’ June 19, 2018,< <https://www.miamiherald.com/opinion/op-ed/article213447349.html> > accessed 21 July 2019

²⁸⁶ *ibid*

²⁸⁷ ‘7th freedom right is to carry traffic from second State to/from third State(s) without need from the service to connect the home State)’ ICAO Secretariat Study on the Safety and Security Aspects of Economic

airline has an operational base in a second country and operates services to and from third countries. There may, therefore, be a problem in identifying the responsible and accountable state for safety oversight.

More complicated situations, like combinations of all the practices mentioned above, can emerge in air transport operations. For example, there may be a merger of airlines that creates a company with several operating bases that are located in different countries.²⁸⁸ Identifying the state that is responsible for safety oversight is crucial for ensuring accountability.

there should always be a clear point of contact for the safety and security oversight responsibility in a clearly identified State or its delegated authority for any given aircraft operation.²⁸⁹

Notwithstanding the fact that the Chicago Convention (1944) and its related Annexes provide a legal framework to cover the liability issues that flow from the aforementioned air transport practices, the problem that is common to all these forms of air transport operation is that there are implications for flight safety²⁹⁰ and those vulnerable consumers are left in the weakest position.

3.3.6 Mergers and acquisitions

Airlines seek the advantages of enhanced market access through mergers, acquisitions or operational integration under a single holding company, to remain competitive.²⁹¹ Cross-border mergers and acquisitions of airlines, where they are permitted, allow airline companies to have operations or places of business in different states.²⁹² The advantages for airline companies are very great, especially if the airlines can obtain cost savings in response to sharp increases in fuel prices and low fare competition.²⁹³

Liberalisation. (2005, June 1). Retrieved from ICAO:

<http://www.icao.int/sustainability/Documents/SafetySecurityStudy_en.pdf> accessed 17 July 2019

²⁸⁸ *ibid* 5

²⁸⁹ *ibid*

²⁹⁰ Annex 6 - Aircraft operations, maintenance and general aviation, Annex 8 - Type design or manufacture of aircraft

²⁹¹ Ruwantissa Abeyratne, 'Liberalisation of Trade in Air Transport Services' (2003) 4 J. World Investment, 639, 648.

²⁹² ICAO Secretariat Study on the Safety and Security Aspects of Economic Liberalisation. (2005, June 1). Retrieved from <http://www.icao.int/sustainability/Documents/SafetySecurityStudy_en.pdf> 4. accessed 17 July 2019

²⁹³ ICAO Overview of Regulatory and Industry Developments in International Air transport. (2016, September) Retrieved from

In many jurisdictions, the ‘place of business’ is the criterion that determines which state is responsible for issuing an operating licence²⁹⁴ and Air Operator’s Certificate (AOC)²⁹⁵ for the airline. It has been asserted that cross-border mergers or acquisitions might threaten the ‘purity’ of an airline’s investors.²⁹⁶ The regulatory complexity creates a risk in controlling and managing foreign carriers across the border.²⁹⁷

There is a growing trend for airline companies to engage in mergers and acquisitions “as the economy becomes globalised and many States adopt new policies on foreign investment and control in national airlines and relax the airline ownership and control conditions in their ASAs”.²⁹⁸

3.3.7 Outsourcing of activities affecting aircraft operations²⁹⁹

Nowadays, the outsourcing of activities affecting the operation of aircraft is a regular practice in the aviation industry, and also another practice that raises concerns regarding safety. In the cases of the outsourcing of ground handling, or of sending aircraft to be repaired or maintained in a foreign country, or of contracting out flight operations and/or crew administration to another airline or company, multinational firms may be involved in providing the service.³⁰⁰ In these situations, the safety challenge for the licensing and safety oversight authorities is how to ensure that the practice or firm properly complies with safety and security requirements.³⁰¹

<http://www.icao.int/Meetings/a39/Documents/Overview_of_Regulatory_and_Industry_Developments_in_International_Air_Transport.pdf> 18. accessed 15 July 2019

²⁹⁴ ‘Certifying that the airline has met the economic and commercial demands considered necessary to operate.’ UK Civil Aviation Authority, Economic Regulation Group Discussion Paper ‘CAP 769 Ownership and Control liberalization’ (2006, October) Retrieved from <<https://publicapps.caa.co.uk/docs/33/CAP769.pdf>> 1. accessed 17 July 2019

²⁹⁵ *ibid* “Certifying an airline’s compliance with safety”

²⁹⁶ *ibid*

²⁹⁷ Ruwantissa Abeyratne, ‘Liberalisation of Trade in Air Transport Services’(2003) 4 J. World Investment, 639,648.

²⁹⁸ ICAO Secretariat, ‘Overview of Regulatory and Industry Developments in International Air Transport’ (2016, September)

<http://www.icao.int/Meetings/a39/Documents/Overview_of_Regulatory_and_Industry_Developments_in_International_Air_Transport.pdf> 18. accessed 9 July 2019

²⁹⁹ Borrowed from ICAO Secretariat Study on the Safety and Security Aspects of Economic Liberalisation. (2005, June 1). retrieved from <https://www.icao.int/sustainability/Documents/SafetySecurityStudy_en.pdf> 4. accessed 10 July 2019

³⁰⁰ *ibid*

³⁰¹ Ruwantissa Abeyratne, ‘*Strategic Issues in Air Transport: Legal Economic and Technical Aspects*’ (Springer 2012) 45.

Although ICAO has established global safety standards, the level of resources, the degree of accountability of safety authorities, and maturity of the institutional structures differ around the world.³⁰² There could also be a safety problem as a result of the different interpretation of the ICAO SARPs by different states such as the state of registration and the state of the operator.³⁰³

3.4. Air transport liberalisation and emerging markets

Although there is no certain definition for an emerging market, common characteristics of an emerging market underlined as good growth prospects, but the unsettled market which refers to the high-level risk, lack of history of foreign investment establishments. Especially ‘transitional character’ of emerging markets not only in economic but also ‘political, social and demographic dimensions’ which creates challenges in policymaking, are deemed criteria to address a country as an ‘emerging market’.³⁰⁴

A global network is developing in the field of air transport. Consequently, safety concerns have also become an issue of paramount importance worldwide. Economic movements driven by globalisation have been effective all around the world. The equilibrium of the global economy has been changing. Recent developments have shown, for the first time, increasing numbers of air passengers in developing countries. The two largest markets, the United States and Europe, steered the world economy for years, but this has changed: strong economic growth in China and India and similar economic growth in other countries have created a demand for air transport services.³⁰⁵ Hence global air transport service operators have been providing air services around the world.

³⁰² UK Civil Aviation Authority, Economic Regulation Group Discussion Paper ‘CAP 769 Ownership and Control liberalization’ (2006, October) Retrieved from <<https://publicapps.caa.co.uk/docs/33/CAP769.pdf>> 3. accessed 17 July 2019

³⁰³ Ruwantissa Abeyratne, ‘*Strategic Issues in Air Transport: Legal Economic and Technical Aspects*’ (Springer 2012) 44.

³⁰⁴ Ashoka Mody, ‘What is an Emerging Market’ (2004) Vol.35 Georgetown Journal of International Law 641, 641-645

³⁰⁵ IATA Vision 2050 Report (2011, February 12) <http://www.iata.org/pressroom/facts_figures/documents/vision-2050.pdf> accessed 21 July 2019

3.4.1 Air passenger market growth and emerging markets

The growing global air transport service demands around the world are being handled by the cooperation of global airlines undertaking joint operations such as alliances and code-sharing practices.³⁰⁶ Although there has been no uniformity in the lifting of ownership restrictions and cabotage regulations on air transport operations across the world, airlines around the world have created ways to circumvent these restrictions and operate air transport via alliances or code-share agreements in each other's domestic markets.³⁰⁷

Below Figure 3.4 indicates air passengers carried include both domestic and international aircraft passengers of air carriers registered in the world since 1970. Accordingly, the data indicates that in 1970, there were 310,441,392 air passengers around the world. However, in 2017 the number of air passengers increased to 3,979 billion.³⁰⁸



Figure 3.4 1970-2018 Air Transport Passengers Carried³⁰⁹

³⁰⁶ Steven Truxal, *Competition and regulation in the Airline Industry, Puppets in Chaos* (Routledge 2012) 161.

³⁰⁷ Seth M. Warner, 'Liberalize Open Skies: Foreign Investment and Cabotage Restrictions Keep Noncitizens in Second Class', Vol.43, Issue 1, (1993) *American University Law*, 277, 318.

³⁰⁸ International Civil Aviation Organization, Civil Aviation Statistics of the World Bank and ICAO staff estimates.< https://data.worldbank.org/indicator/IS.AIR.PSGR?name_desc=true > accessed 24 July 2019

³⁰⁹ Sources of Data: International Civil Aviation Organization, Civil Aviation Statistics of the World Bank and ICAO staff estimates.< https://data.worldbank.org/indicator/IS.AIR.PSGR?name_desc=true > accessed 24 July 2019

Statistics indicate that emerging markets have an increasing share of global growth. Clearly, detailed economic market analysis is beyond the scope of this study. However, it is essential to be aware of the increasing share of the emerging air transport markets to understand the related aviation safety risks.

Looking back last years, IATA's Annual Review of 2013 revealed that in 2012, 65% of the growth in the number of air passengers in international markets took place in markets linked to emerging economies.³¹⁰ The report also revealed that air travel within Asia accounted for just over half of this growth. The economic development in air transport, which is driven by globalisation, also stimulates domestic markets. The report emphasises that the fastest growth was taking place in emerging markets such as China (9.5%) and Brazil (8.6%).

The IATA Air Passenger Market Analysis for December 2013 indicated that the greatest share of the growth in passenger travel was in the emerging markets, while Europe and North America had experienced slower rates. The reason for this was the continued strength of these regional economies and the growth in business-related travel compared with the growth in other developing markets like Africa. Even though international air travel by African airlines was lower in 2013 than in 2012, and part of the continent was weak as a result of local economic developments and continued international trading, international air travel by African airlines expanded by 5.5%. In Latin America, business-related travel increased by 8.1%, in China, the increase was 11.7%, and in Russia, it was 9.6%.³¹¹

More than half of the growth in 2014 took place for airlines in emerging markets.³¹² The IATA Annual Review 2015 indicates continuing growth as a result of the improvement in the global economy in 2014. However, there were exceptions to the global RPK (Revenue Passenger Kilometer)³¹³ trend, especially between Central and South America and within

³¹⁰ IATA Annual Review (2013) Retrieved from IATA: <<http://www.iata.org/about/Documents/iata-annual-review-2013-en.pdf>> 8 accessed 16 July 2019

³¹¹ IATA Air Passenger Market Analysis (December 2013) Retrieved from <<https://www.iata.org/publications/economics/Documents/passenger-analysis-dec2013.pdf>> accessed 21 July 2019

³¹² IATA- Air Passenger Market Analysis (December 2014) Retrieved from <<https://www.iata.org/whatwedo/Documents/economics/passenger-analysis-dec-2014.pdf>> accessed 21 July 2019

³¹³ 'Revenue passenger kilometres (RPK) – also called Passenger kilometres performed (PKP): one revenue passenger-kilometre means that one passenger is carried on one kilometre' Introduction to Air Transport Statistics, <<https://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&ved=2ahUKEwiooLjBwNTjAhXCLFAKHcGdA2wQFjABegQICxAE&url=https%3A%2F%2Fwww.icao.int%2FMIID%2FDocuments%2F2014%2FAviation%2520Data%2520Analyses%2520Seminar%2F4%2520->

Asia. In 2014 the disappearance of Malaysian Airlines flight MH370, and the later downing of flight MH17 over an active conflict zone caused a decline in tourism and a reduction in public trust.³¹⁴ By contrast, RPKs between North America and the Middle East accelerated.³¹⁵

In 2015 the global air passenger traffic grew by 6.5%.³¹⁶ The 2016 IATA Annual Review reveals that seven of the top ten increasing origin-destination (O-D) passenger markets in 2015 were located in Asia. The domestic Chinese air passenger market saw the biggest rise in journey numbers, with a rise bigger than in the next two largest-gaining markets combined: domestic Indonesia and domestic India.³¹⁷

On the other hand, the IATA Air Passenger Market Analysis for December 2015 indicates that the fastest growth was registered by Middle East carriers, with a rise of 14.2%; this is more than the increase for North American carriers (13.4%).³¹⁸ In 2015, African air carriers recorded slow traffic growth for an emerging market (3.0%) because the continent was still recovering from the Ebola outbreak of 2014.³¹⁹

The IATA Air Passenger Market Analysis, for March 2017, indicates that Latin American airlines posted the fastest year-on-year growth rate in that month, and Asia–Pacific the second-fastest.³²⁰

ICAO Annual Report 2017 stated that ‘the number of passengers carried on scheduled services increased by 4.1 billion in 2017, which is 7.2 per cent more than in 2016.’³²¹ Furthermore, the Report reveals the air transport growth of regions. Accordingly, ‘Asia/Pacific remained the largest region with 34 per cent of world traffic, posting a 10.7 per cent growth in 2017, followed by Europe with 27 per cent of world traffic and a growth of 8.6

[%2520Introduction%2520to%2520Air%2520Transport%2520Statistics.pptx&usg=AOvVaw2JN2irsz9knYp6SAk9GcLl](#) > accessed 26 July 2019

³¹⁴ ICAO Journal, ‘Safety Spotlight’, Vol.70 N.1 (2015) Retrieved from

<https://www.icao.int/publications/journalsreports/2015/7001_en.pdf > accessed 22 July 2019

³¹⁵ IATA Annual Review (2015) <<https://www.iata.org/about/Documents/iata-annual-review-2015.pdf> > accessed 21 July 2019

³¹⁶ IATA Air Passenger Market Analysis (December 2015) Retrieved from <<https://www.iata.org/whatwedo/Documents/economics/passenger-analysis-dec-2015.pdf> > accessed 21 July 2019

³¹⁷ IATA Annual Review (2016) Retrieved from IATA: <<https://www.iata.org/publications/Documents/iata-annual-review-2016.pdf>> accessed 21 July 2019

³¹⁸ IATA Air Passenger Market Analysis (December 2015) Retrieved from <<https://www.iata.org/whatwedo/Documents/economics/passenger-analysis-dec-2015.pdf> > accessed 21 July 2019

³¹⁹ *ibid*

³²⁰ *ibid*

³²¹ ICAO Annual Report 2017, The World Air Transport in 2017, <<https://www.icao.int/annual-report-2017/Pages/the-world-of-air-transport-in-2017.aspx> > accessed 24 July 2019

per cent. North America, which accounts for 23 per cent of world traffic, grew at 4.1 per cent. The Middle East region, representing 9 per cent of world traffic, recorded a growth rate of 6.5 per cent. The Latin America/Caribbean region accounted for 5 per cent of world traffic and grew at 7.4 per cent. The remaining 2 per cent of world traffic was undertaken by African region airlines, which recorded a growth of 7.2 per cent.³²²

IATA Annual report 2018 reveals global economic conditions and lower airfares demand have effected on increasing passenger numbers worldwide.³²³ The IATA report indicates that in 2017, the domestic China passenger market was the largest domestic market increased globally in the number of passenger trips, adding 59 million journeys compared with 2016.³²⁴ However, domestic markets of the United States and India once more ranking second and third, respectively.³²⁵

Latest Annual report of IATA 2019 also confirms continuing growth in air transport. The report reveals that air transport connected more cities at a lowered cost in 2018 and worldwide air passenger number continued to increase and reached 4.3 billion in 2018.³²⁶

On December 31, 2018, ICAO released preliminary figures indicating that a total of 4.3 billion passengers were carried by air transport on scheduled services in 2018 which means a 6.1 per cent increase over 2017 but still lower than from the strong 8.4 per cent recorded in 2017.³²⁷ The report shows that all regions posted slower growth than last year, with the exception of an improvement in North America. The region carried 12 per cent share of world international revenue passenger kilometre (RPKs)³²⁸. Asia/Pacific region, with an increase of 7.3 per cent of growth, is the second-largest international market. Europe recorded the second-highest growth at 6.7 per cent and was the largest international market. Latin America/Caribbean and Africa followed by 6.6 per cent and 6.5 per cent growth. The Middle

³²² *ibid*

³²³ IATA Annual Report 2018 < <https://www.iata.org/publications/Documents/iata-annual-review-2018.pdf> > accessed July 24 2019

³²⁴ *ibid*

³²⁵ *ibid*

³²⁶ IATA Annual Review 2019, < <https://www.iata.org/publications/Documents/iata-annual-review-2019.pdf> > accessed 24 July 2019

³²⁷ ICAO News Releases ‘Solid passenger traffic growth and moderate air cargo demand in 2018’ < <https://www.icao.int/Newsroom/Pages/Solid-passenger-traffic-growth-and-moderate-air-cargo-demand-in-2018.aspx> > accessed 24 July 2019

³²⁸ ‘revenue passenger-kilometre means that one passenger is carried on one kilometre.’ < <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=18&ved=2ahUKEwiXiNH7ls3jAhVLZ8AKHf5qDO8QFjARegQICBAC&url=https%3A%2F%2Fwww.icao.int%2FMID%2FDocuments%2F2014%2FAviation%2520Data%2520Analyses%2520Seminar%2F4%2520-%2520Introduction%2520to%2520Air%2520Transport%2520Statistics.pptx&usg=AOvVaw2JN2irsz9knYp6SAk9GcLl> > accessed 24 July 2019n

East received 14 per cent of world international RPKs and became the slowest growing region with a growth of 4.7 per cent by the impact of regional factors such as the geopolitical tensions, oil prices and competitive environment.³²⁹

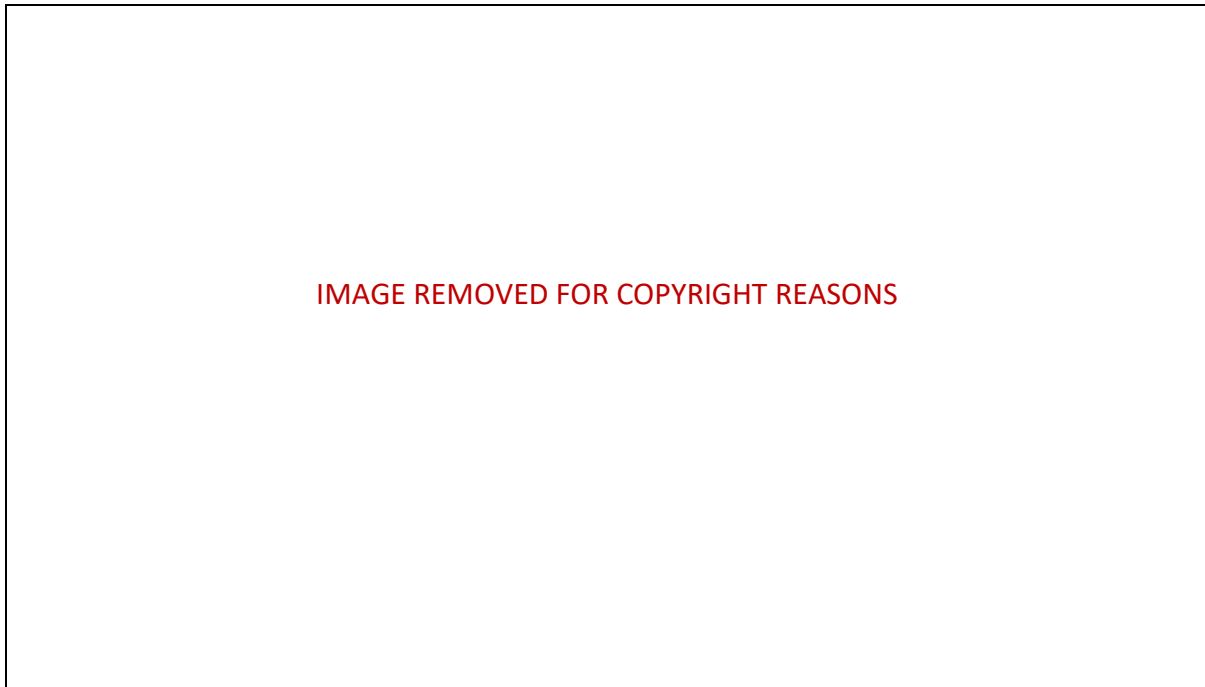


Figure 3.5 International scheduled revenue passenger-kilometres (RPK) growth in 2018³³⁰

On the other hand, IATA predicts, based on a 3.6% average Compound Annual Growth Rate (CAGR),³³¹ in 2036, with the number of passengers will almost be doubled to 7.8 billion. As it is shown below Figure 3.6 IATA also predicts ‘the future industry's center of gravity shift further eastwards towards fast-growing marketing in the Asia Pacific. Air travel frequency will flatten in developed markets and rise in emerging markets.’³³²

³²⁹ ICAO News Releases ‘Solid passenger traffic growth and moderate air cargo demand in 2018’ ,<<https://www.icao.int/Newsroom/Pages/Solid-passenger-traffic-growth-and-moderate-air-cargo-demand-in-2018.aspx> > accessed 24 July 2019

³³⁰ ‘Preliminary figures released today by ICAO showing international scheduled revenue passenger-kilometres (RPK) growth in 2018.’ <<https://www.icao.int/Newsroom/Pages/Solid-passenger-traffic-growth-and-moderate-air-cargo-demand-in-2018.aspx> > accessed 24 July 2019

³³¹ ‘the rate at which an economy, investment, company, etc. grows over a period of years, based on growth over the previous year’ Cambridge Dictionary < <https://dictionary.cambridge.org/dictionary/english/compound-growth-rate> > accessed 24 July 2019

³³² IATA 20 Year Passenger Forecast, < <https://www.iata.org/publications/store/Pages/20-year-passenger-forecast.aspx> > accessed 24 July 2019

IMAGE REMOVED FOR COPYRIGHT REASONS

Figure 3.6 Top Largest Air Transport Markets Amongst Emerging Countries in 2038³³³

On October 24, 2018, Updated Forecast of IATA reveals that 8.2 billion Air Travelers in 2037 is predicted based on present trends in air transport suggests. IATA forecast the regional growth in 2037 as follows:

Routes to, from and within Asia-Pacific will see an extra 2.35 billion annual passengers by 2037, for a total market size of 3.9 billion passengers. Its CAGR of 4.8% is the highest, followed by Africa and the Middle East.

The North American region will grow by a CAGR of 2.4% annually and in 2037 will carry a total of 1.4 billion passengers, an additional 527 million passengers.

Europe will grow at a CAGR of 2.0% and will see an additional 611 million passengers. The total market will be 1.9 billion passengers.

³³³ IATA 20 Year Passenger Forecast, < <https://www.iata.org/publications/store/Pages/20-year-passenger-forecast.aspx> > accessed 24 July 2019

Latin American markets will grow by a CAGR of 3.6%, serving a total of 731 million passengers, an additional 371 million passengers annually compared to today.

The Middle East will grow strongly with a CAGR of 4.4% and will see an extra 290 million passengers on routes to, from and within the region by 2037. The total market size will be 501 million passengers.

Africa will grow by a CAGR of 4.6%. By 2037 it will see an extra 199 million passengers for a total market of 334 million passengers.³³⁴

Authorities also drew attention to challenges that increasing demand will create. These challenges could be infrastructural, such as runways, terminals, airports, security processes.³³⁵ However, beyond these infrastructural challenges, this thesis focuses on challenges that refer to compliance with safety standards among these emerging air transport markets. Next, safety risks in emerging air transport markets will be explored.

3.4.2 Safety risks in emerging air transport markets

The Chicago Convention (1944) and its Annexes address contracting states and service providers and set out their respective responsibilities for safety and security compliance and oversight. States are expected to comply with their obligations regardless of any change in economic, regulatory arrangements. Since compliance with safety obligations is a state responsibility, and state practices have an effect on safety, and ultimately on consumers' lives, it is important to assess the state structure and ascertain whether democracy, transparency and accountability are guaranteed in governance, the rule of law is enforced in the legal system and human rights are well respected.

Global aviation safety standards cannot be divided into 'advanced' and 'developing' standards. In order to achieve compliance with safety obligations, a state should have a legal system where the rule of law applies, the right to life is recognized as a fundamental human right, and accountability in state governance is possible.

³³⁴ IATA Press Release No.: 62 (24 October 2018) 'IATA Forecast Predicts 8.2 billion Air Travelers in 2037' < <https://www.iata.org/pressroom/pr/Pages/2018-10-24-02.aspx> > accessed 24 July 2019

³³⁵ IATA Press Release No.: 55 (24 October 2017) '2036 Forecast Reveals Air Passengers Will Nearly Double to 7.8 Billion' < <https://www.iata.org/pressroom/pr/Pages/2017-10-24-01.aspx> >

Although emerging markets are generally developing democratic institutions, there are still some issues that relate to aviation safety. In these states, it is mostly economic interests that are prioritized; costs and growth are important, and respect for human rights would not be the main concern for the government.

ICAO Universal Safety Oversight Audit (USOAP) assesses eight critical elements related to the establishment and implementation of a State's safety oversight system. The focus of the USOAP audits is the State's capability in providing safety oversight. Therefore, USOAP audits assess whether the State has effectively and consistently implemented the critical elements (CEs)³³⁶ of a safety oversight system, which enable the State to ensure the implementation of ICAO's safety-related Standards and Recommended Practices (SARPs) and associated procedures and guidance material.³³⁷

According to ICAO's safety report, the Universal Safety Oversight Audit, as of December 31, 2012 "four regions have aggregate effective implementation scores above the global average of 60%, with two regions (Africa and Oceania) below the global average".³³⁸ Although the audit results indicate that some of the regions in the emerging markets score above the global average in the effective implementation³³⁹ of safety oversight, the audit results for individual states show that many states in the emerging markets are below the global average.³⁴⁰ A noteworthy indication that is relevant to consumers' rights is the effective rate of implementation of accident investigations. Although the global average is low, at 55.38%, some states score below this. For instance, India's rate is 34.26%, and Indonesia's is 32.41%.

³³⁶ See Appendix D

³³⁷ ICAO Continues Monitoring Approach, <<https://www.icao.int/safety/CMAForum/Pages/default.aspx> > accessed 25 July 2019

³³⁸ ICAO State of Global Aviation Safety (2013) 13.

<http://www.icao.int/safety/State%20of%20Global%20Aviation%20Safety/ICAO_SGAS_book_EN_SEPT2013_final_web.pdf. > accessed 21 July 2019

³³⁹ 'Effective implementation (EI) is a measure of the State's safety oversight capability. A higher EI indicates a higher maturity of the State's safety oversight system.' ICAO Universal Safety Oversight Audit Programme Continuous Monitoring Approach Results (1 January 2013 to 31 December 2015) 11. <https://www.icao.int/safety/CMAForum/Documents/USOAP_REPORT_2013-2016.pdf > accessed 24 July 2019

³⁴⁰ 'The web page provides to find a State and then compare the result of its last USOAP CMA activity with the global average or any other State on the list.' ICAO Safety Audit Results: USOAP interactive viewer <<http://www.icao.int/safety/pages/usoap-results.aspx> > accessed 21 July 2019

One of the key emerging markets is Indonesia. According to IATA's assessment, by 2034, Indonesia will be the sixth-largest market for air travel.³⁴¹ However, safety is a very big concern. Indonesia was assessed to be below the global average in ICAO's audit.³⁴² The US Federal Aviation Administration (FAA) downgraded Indonesia to Category 2 in its international aviation safety assessment programme (although it was upgraded again on August 15, 2016).³⁴³ The EU has a ban on all but five Indonesian carriers.³⁴⁴ Since 2001 there have been 43 fatal accidents reported in Indonesia.³⁴⁵ Over the same period in the UK, there have been seven fatal accidents, and in Germany, there have been eleven.³⁴⁶

Another emerging market is India.³⁴⁷ Growing concerns regarding deficiencies³⁴⁸ in the measures taken to ensure safe flights led the FAA to downgrade India's safety rating to

³⁴¹ IATA Press Release No: 11 'Developing the Potential of Indonesia's Aviation Sector' (March 12, 2015) <<http://www.iata.org/pressroom/pr/pages/2015-03-12-01.aspx>> accessed 21 July 2019

³⁴² ICAO- USOAP Continuous Monitoring Approach Retrieved from <<http://www.icao.int/safety/CMAForum/Pages/default.aspx>>

³⁴³ 'FAA announced that Indonesia complies with International Civil Aviation Organization (ICAO) safety standards and has been granted a Category 1 rating' FAA Press Release – FAA Announces Aviation Safety Rating for Indonesia. (2016, August 15). Retrieved from <https://www.faa.gov/news/press_releases/news_story.cfm?newsId=20634> accessed 21 July 2019

³⁴⁴ List of carriers which are banned from operating within the Union with exceptions. Retrieved from <https://ec.europa.eu/transport/modes/air/safety/air-ban/search_en> accessed 21 July 2019

³⁴⁵ Some of these fatal accidents are; 7 March 2007; Garuda Indonesia Airways 737-400; Yogyakarta, Indonesia: One of the seven crew members and 20 of the 133 passengers were killed. On 1st January 2007, Adam Air Flight 574, a Boeing 737-4Q8, went missing during domestic flight halfway between Surabaya and Manado³⁴⁵. 28 December 2014; AirAsia A320-216; PK-AXC; flight QZ8501; Java Sea: The aircraft crashed into the Java Sea, and there were no survivors from among the 155 passengers and seven crew members. <<http://www.airsafe.com/events/airlines/airasia.htm>> also see also <<http://www.nytimes.com/2007/01/30/world/asia/30iht-adam.4408040.html>>, <https://www.nytimes.com/2015/01/01/world/asia/airasia-flight-8501-indonesia-airline-safety.html?_r=0> <<http://www.telegraph.co.uk/travel/destinations/asia/indonesia/articles/How-dangerous-is-flying-in-Indonesia/>> <<http://www.abc.net.au/news/2016-05-03/crashed-airasia-plan-had-been-flying-with-mechanical-fault/7376776>> <http://www.dailymail.co.uk/travel/travel_news/article-2908531/Ranking-world-s-dangerous-airlines-includes-troubled-AirAsia-Malaysia-Airlines-scores-highly-safety.html>

³⁴⁶ Flight Safety Foundation <<https://aviation-safety.net/database/country/>> accessed 21 July 2019

³⁴⁷ "India jumped up two places to rank 4th with 131 million departures in 2016 and, with stellar growth of 20.0 % year on year, continues to close in fast on Japan (ranked 3rd). Indonesia also moved up two positions this year to rank 6th, with 116 million passenger departures and a double-digit annual growth rate of 12.9%." IATA Economics 'Chart of the Week' (2017, March 3). Retrieved from <<http://www.iata.org/whatwedo/Documents/economics/chart-of-the-week-3-Mar-2017.pdf>> accessed 21 July 2019

³⁴⁸ "The Indian market which saw air traffic grow 20 percent last year... is struggling to find enough officials to ensure safety flights. That was one of the reasons why the U.S Federal Aviation Administration downgraded India's aviation safety rating in 2014. Anurag Kotoky 'Flying Getting Riskier in India as Safety Incidents Surge' Retrieved from <<https://www.bloomberg.com/news/articles/2016-08-15/flying-getting-riskier-in-india-as-safety-incidents-exceed-2015>> accessed August 16 2016

Category 2 in 2014. This signified that India's civil aviation safety oversight regime did not comply with the international safety standards³⁴⁹ set by ICAO.³⁵⁰ After corrective measures had been taken, the safety rating was upgraded by the FAA in April 2015.³⁵¹

Data from the Directorate General Civil Aviation of India³⁵² indicate that air safety incidents raise concerns and trigger regulatory actions. Among these incidents, problems with drunken pilots have attracted public attention.³⁵³ One of the main problems, which was also a cause of the FAA downgrading, was that there were insufficient officials to ensure the safety of flying in India.³⁵⁴

As a matter of principle, safety and security should be given the top priority in state regulation and the implementation of the regulations. Therefore, ensuring effective compliance with safety standards is crucial. However, state commitment to ensuring compliance with standards depends, in some cases, on the political dynamics of the national interests.³⁵⁵ For instance, it is essential to establish an independent accident investigation body to search for the real causes of accidents and incidents, and victims of accidents and their families have a right to know what happened and why.³⁵⁶ ICAO Annex 13 to the

³⁴⁹ See also CAPA (Centre for Aviation) 'FAA downgrade shows systemic flaws in India's aviation safety oversight. Jet Airways most affected' Retrieved from <<https://centreforaviation.com/insights/analysis/faa-downgrade-shows-systemic-flaws-in-indias-aviation-safety-oversight-jet-airways-most-affected-150822>> accessed 21 July 2019

³⁵⁰ FAA Press Release, 'FAA Announces Revised Safety Rating for India' (2014, January 31) Retrieved from <https://www.faa.gov/news/press_releases/news_story.cfm?newsId=15674> accessed 21 July 2019

³⁵¹ *ibid*

³⁵² Directorate General Civil Aviation of India Annual Safety Review (2016) Retrieved from <<http://dgca.nic.in/>> accessed 21 July 2019

³⁵³ 165 pilots reported drunk for duty in last five years , by Christin Mathew Philip <<http://timesofindia.indiatimes.com/india/165-pilots-reported-drunk-for-duty-in-last-five-years/articleshow/35613016.cms>>; India's drunk pilot problem is making flying riskier, <<https://www.thestar.com/business/2016/08/15/indias-drunk-pilot-problem-is-making-flying-riskier.html>> ; 'Unsafe' Indian aviation on the brink of crisis, Posted on 14th February 2017 by Nigel Tomkins <<https://aircargoeye.com/unsafe-indian-aviation-on-the-brink-crisis/>> ; Breathe for drunk pilots as DGCA dilutes norms, Saurabh Sinha, Jun 14, 2014, <<http://timesofindia.indiatimes.com/india/Breather-for-drunk-pilots-as-DGCA-dilutes-norms/articleshow/36518430.cms>> ; More than 40 pilots tested positive for alcohol on duty in India last year, <<https://qz.com/677267/more-than-40-pilots-were-drunk-on-duty-in-india-last-year-most-work-for-jet-airways-and-indigo/>>

³⁵⁴ Anurag Kotoky 'India's drunk pilot problem is making flying riskier' (2015, August 15). Retrieved from The Star <<https://www.thestar.com/business/2016/08/15/indias-drunk-pilot-problem-is-making-flying-riskier.html>> accessed 21 July 2019

³⁵⁵ John Saba, 'Aviation Safety in Crisis: The Option of the International Financial Facility Aviation Safety (IFFAS)' Vol. 30, Issue 1 (2002), Transportation Law Journal 1,3.

³⁵⁶ 'Strengthening rights of victims and their families' ETSC stresses that improving the quality and independence of accident investigation is of the utmost importance as independent investigations looking into underlying causes of accidents and incidents can also be of help for the victims and their families to come to terms with what has happened to them.' European Transport Safety Council , 'Position Paper of the European Transport Safety Council (ETSC) on the Proposal for a Regulation on investigation and prevention of accidents and incidents in civil aviation' (2010, March) Retrieved from

International Civil Aviation Convention contains international standards and recommended practices (SARPs) for the investigation of aircraft accidents and incidents. According to these provisions, the accident investigation authority ‘shall have independence in the conduct of the investigation and have unrestricted authority over its conduct’.³⁵⁷

However, the establishment of an independent accident investigation body is not common practice in less developed countries. Accident investigation bodies are generally established within the transport ministry of the country. For instance, Turkey has enacted a by-law to establish an Accident Investigation and Inspection Board in response to the requirements of Annex 13. However, the members of this board are appointed by the Minister of Transport. The Turkish Civil Aviation Authority has also been established and is a General Directorate subordinate to the Ministry of Transport. Therefore, if there is an air accident, a potential conflict of interest exists.

Generally, States, especially developing democracies, are not willing to give authority to independent bodies. In this way, the rights of individuals are weakened, as individuals have to be able to challenge the administrative decisions of an administrative body. Lack of public pressure on the accountable government branches could also allow accident search and rescue operations to be poorly organized.

Another important issue in aviation safety is that of knowledge gained through the analysis of reported accidents and incidents. In aviation, it is important to learn from mistakes, and therefore, it is essential to share reports of accidents and incidents and to produce data from them to prevent recurrences. An honest reporting system needs to be established, free from fear of persecution. This is called a ‘just culture’,³⁵⁸ and, in response to ICAO Assembly Resolution A35-17 ‘Protecting information from safety data collection and processing

<http://archive.etsc.eu/documents/copy_of_ETSC%20Position%20Paper%20on%20Aviation%20Accident%20Investigation.pdf> accessed 21 July 2019

³⁵⁷ Annex 13 to the Chicago Convention (1944), 5.4

³⁵⁸ See EUROCONTROL, ‘Just Culture; Finding Right Balance between the Aviation, Judicial and Political Authorities’ (2014, February) Retrieved from <<http://www.eurocontrol.int/articles/just-culture>> accessed 21 July 2019

systems in order to improve aviation safety’,³⁵⁹ ICAO developed legal guidance for the protection of safety data in 2006, contained in Attachment E to Annex 13.³⁶⁰

According to this guidance, states have to accomplish the necessary legislative work in their national legal order. The necessary reporting culture needs to be established so that aviation professionals can report incidents without fear of judicial consequences unless there is gross negligence or a willful violation. In this regard, states generally encounter a problem with reconciling judicial systems and legislators. However, this is more problematic in states that do not have an advanced democracy and where the rule of law is not fully applied. Aviation professionals should know that there is a reliable legislative framework and an advanced professional work culture so that they can report confidently.

The example of Turkey might show the problem more clearly. Turkish Airlines workers went on strike in May 2012 to protest against the government’s plan to ban strikes in the aviation sector. Turkish Airlines sacked these workers via text messages and emails.³⁶¹ Turkish Airlines, which is partly owned by the Turkish government, refused to come to an agreement with the unions and to reinstate the 305 workers.³⁶² Later on, the labour court ruled in favour of the workers, and the unions and the company finally came to a consensus and signed a collective agreement in December 2013.³⁶³ However, in a work environment where the management of an airline acts so arbitrarily against its workers, it is more difficult to establish an honest reporting system than in a state where aviation professionals are confident that their rights will have legal protection through the rule of law.

³⁵⁹ ICAO Assembly Resolution A35-17, ICAO Assembly Resolutions in Force (as of 8 October 2004) (Doc 9848) Retrieved from <http://www.icao.int/publications/Documents/9848_en.pdf> accessed 21 July 2019

³⁶⁰ Aircraft Accident and Investigation Annex 13 to the Convention on International Civil Aviation: Attachment E ‘Legal Guidance for the Protection of Information from Safety Data Collection and Processing Systems’ <[https://www.icao.int/Meetings/AMC/MA/Directors%20General%20of%20Civil%20Aviation%20Conference%20on%20a%20Global%20Strategy%20for%20Aviation%20Safety%20\(DGCA-06\)/Annex13attE_en.pdf](https://www.icao.int/Meetings/AMC/MA/Directors%20General%20of%20Civil%20Aviation%20Conference%20on%20a%20Global%20Strategy%20for%20Aviation%20Safety%20(DGCA-06)/Annex13attE_en.pdf)> accessed 24 July 2019

³⁶¹ International Transport Workers Federation (ITF) Media Release: ‘ITF urges Turkish Airlines chairman to step in over 305 sacked workers’ (2012, August 6) Retrieved from <<http://www.co-sea.dk/files/CO-S%C3%B8fart/Diverse/ITF/Pressemeddelelser/06-08-2012.pdf>> accessed 21 July 2019

³⁶² Turkish Airline Dispute Fact Sheet <[file:///C:/Users/Owner/AppData/Local/Packages/Microsoft.MicrosoftEdge_8wekyb3d8bbwe/TempState/Downloads/Turkish_Factsheet%20\(1\).pdf](file:///C:/Users/Owner/AppData/Local/Packages/Microsoft.MicrosoftEdge_8wekyb3d8bbwe/TempState/Downloads/Turkish_Factsheet%20(1).pdf)> accessed 24 July 2019

³⁶³ ‘On 8 July 2013, a labour court in Istanbul ruled in favour of Hava-Is claims that Turkish Airlines violated Articles 65 and 68 of The Unions and Collective Bargaining Agreement (Law No. 6356)’ Turkish Airline Dispute Fact Sheet <[file:///C:/Users/Owner/AppData/Local/Packages/Microsoft.MicrosoftEdge_8wekyb3d8bbwe/TempState/Downloads/Turkish_Factsheet%20\(1\).pdf](file:///C:/Users/Owner/AppData/Local/Packages/Microsoft.MicrosoftEdge_8wekyb3d8bbwe/TempState/Downloads/Turkish_Factsheet%20(1).pdf)> accessed 24 July 2019

Consumer profiles also have an important role. Consumers in advanced democracies are more aware of their rights, and therefore, they demand more attention to safety. Cultural differences affect aviation safety because of attitudes towards reporting incidents and accidents. For instance, David Learmount³⁶⁴ emphasises an aspect of Chinese culture: losing face in public and fear of punishment affect the implementation of a reporting culture.³⁶⁵

Another essential characteristic of emerging democracies is that they are susceptible to financial crises, which ultimately have an effect on the implementation of aviation safety policies.³⁶⁶ Under-developed democratic institutions and a lack of transparency in policy-making are issues that create political uncertainty in countries with emerging democracies, while governments' inability to handle and cooperate with the opposition in politics polarises societies and makes countries more politically unstable.

Consequently, international trade and investment, and eventually national income, decrease and the demand for air transport reduces.³⁶⁷

Aviation operations are costly. There are undeniable developments in the market that affect competition, and, in these circumstances, air carriers have to focus on profit-making. Decreasing profits encourage airline companies to reduce spending on safety and safety policies. Therefore, the safety oversight responsibility of the states is crucial. According to Saba the common reason why many developing states show deficiencies in satisfying safety obligations is lack of designated capital for the entities responsible for executing civil aviation safety.³⁶⁸

3.4.3 Aircraft accident analysis by region

In order to further illustrate relevance of the topic, it is worth to explore and compare air accidents by regions which demonstrate the link to one of the research questions; the impact of global air transport market developments on aviation safety.

³⁶⁴ David Learmount is the operations and safety editor of Flight International magazine and an expert on aviation issues.

³⁶⁵ Graham Earnshaw 'China Economic Review, China Business Guide 2006' (2005 China Economic Review Publishing) 141.

³⁶⁶ See John Saba, 'Aviation Safety in Crisis: The Option of the International Financial Facility Aviation Safety (IFFAS)' Vol. 30, Issue 1 (2002), Transportation Law Journal 1

³⁶⁷ *ibid*

³⁶⁸ *ibid* 11.

The year 2017 had a global fatality rate of 12.2 fatalities per billion passengers and is declared the safest year in the record of aviation.³⁶⁹ What is called fatalities in safety reports are the numbers that represent human lives. Therefore even with the numbers decreasing, and 2017 as the safest year, there was again a sharp rise in fatalities from air crashes in 2018.³⁷⁰ Even though the accident rates refer that 2018 was still the ninth safest year on the record, 556 people lost their lives as a result of air accidents in 2018³⁷¹. One of the worst air crashes occurred on 29 October 2018. The Air flight 610, a Boeing 737 MAX 8, crashed into the sea shortly after take-off from Jakarta-Soekarno-Hatta International Airport, Indonesia. One hundred eighty-nine passengers and crew lost their lives.³⁷²

In the following year on March 10, 2019, another Boeing 737 MAX 8, Ethiopian Airlines flight ET302, crashed shortly after take-off from Addis Ababa-Bole Airport, Ethiopia. One hundred fifty-seven passengers and crew on board lost their lives.³⁷³ After these two air crashes, Boeing made a statement on May 18, 2019, and acknowledged that there was a design flaw in software linked to the 737 MAX.³⁷⁴ One the day of the accident, Ethiopian Airlines decided to suspend the operation of B737-8MAX.³⁷⁵ Many countries and airlines have suspended Boeing 737 MAX 8 from operations.³⁷⁶ Also, the International Civil Aviation Organization (ICAO) recognised the right of states to suspend the operation of Boeing 737 MAX 8 liners after the plane crash in Ethiopia.³⁷⁷

³⁶⁹ ICAO Safety Report (2018 Edition) Retrieved from

<https://www.icao.int/safety/Documents/ICAO_SR_2018_30082018.pdf> accessed 25 July 2019

³⁷⁰ BBC 'Sharp rise in air crash deaths in 2018' < <https://www.bbc.com/news/world-46730478> > accessed 25 July 2019

³⁷¹ Aviation Safety Network, < <https://aviation-safety.net/database/dblist.php?Year=2018> > accessed 25 July 2019

³⁷² Aviation Safety Network, < <https://aviation-safety.net/database/record.php?id=20181029-0> > accessed 25 July 2019

³⁷³ Aviation Safety Network < <https://aviation-safety.net/database/record.php?id=20190310-0> > accessed 25 July 2019

³⁷⁴ Channel News Asia 'Boeing acknowledges defects in 737 MAX simulator software'

<https://www.channelnewsasia.com/news/world/boeing-737-max-simulator-software-acknowledges-defects-11546514>

³⁷⁵ 'On 14th March 2019, Ethiopian Civil Aviation Authority issued NOTAM regarding "The operation of Boeing B737-8 'MAX' and Boeing B737-9 'MAX' aircraft from, into or over the Ethiopian airspace, which is still active at the date of this report publication' Federal Democratic Republic of Ethiopia Ministry of Transport Aircraft Accident Investigation Bureau, 'Aircraft Accident Investigation Preliminary Report' <[http://www.ecaa.gov.et/documents/20435/0/Preliminary+Report+B737-800MAX+\(ET-AVJ\).pdf/4c65422d-5e4f-4689-9c58-d7af1ee17f3e](http://www.ecaa.gov.et/documents/20435/0/Preliminary+Report+B737-800MAX+(ET-AVJ).pdf/4c65422d-5e4f-4689-9c58-d7af1ee17f3e)> accessed 25 July 2019

³⁷⁶ Global News 'Boeing 737 MAX 8: A list of countries, airlines that have suspended the jet' <<https://globalnews.ca/news/5051149/boeing-737-max-8-countries-airlines-ban/>> accessed 25 July 2019

³⁷⁷ Central Asia Aero News 'ICAO recognizes the right of countries to suspend BOEING 737 MAX 8 flights (14.03.2019)' <http://caan.asia/en/2019/03/14/icao-recognizes-the-right-of-countries-to-suspend-boeing-737-max-8-flights/> > accessed 25 July 2019

In the line of this evidence, unfortunately even the safety record in 2017, is no proof that everything has been done in securing aviation safety worldwide. Even having a low rank of in air accident rates means the loss of hundreds of lives. Therefore, working on situations where aviation accidents can be better preventable will be continuing to be a focus in the field.

Looking ahead, ICAO forecast a grow of world-wide scheduled passenger traffic in terms of passenger-kilometres at an average annual rate of 4.6 per cent up to the year 2025. The international traffic is expected to continue to grow faster than total traffic, at 5.3 per cent per annum for passenger-kilometres. Furthermore, ICAO states that the airlines of the Middle East and Asia/Pacific regions are expected to show the highest growth in both passenger and freight traffic.³⁷⁸ The picture of global growing air traffic indicates that there is a need to coordination and collaboration among international, regional and national systems to deliver a harmonised, safe and efficient international civil aviation system as ICAO Global Aviation Safety Plan suggested.³⁷⁹

However, despite the improvements, the level of implementation of international civil aviation safety requirements instructed by the Chicago Convention (1944) and its Annexes is still not satisfying. One of the three main objectives of the ICAO Global Aviation Safety Plan (2017–2019 edition) was to ‘all States to reach an effective implementation (EI) score of 60 per cent for the eight critical elements (CEs)³⁸⁰ of a safety oversight system by the end of 2017’. However, ICAO Safety Report 2018 indicates that despite the marked trend of improvement, the objective was not met by the end of 2017.³⁸¹

³⁷⁸ ICAO News Release, ‘Growth in Air Traffic Projected to Continue to 2015’ (18 September 2007) <https://www.icao.int/Meetings/AMC/MA/Assembly%2036th%20Session/pio200708_e.pdf> accessed 25 July 2019

³⁷⁹ ICAO 2017-2019 Global Aviation Safety Plan, (Doc 10004 Second Edition, 2016) <<https://www.icao.int/Meetings/a39/Documents/GASP.pdf>> accessed 25 July 2019

³⁸⁰ See Appendix D

³⁸¹ ICAO Safety Report (2018 Edition) retrieved from <https://www.icao.int/safety/Documents/ICAO_SR_2018_30082018.pdf> accessed 25 July 2019

Annual IATA safety Reports give detailed in-depth aircraft accidents analysis. The data from IATA Safety Report 2016 (Issued April 2017)³⁸², IATA Safety Report 2017 (Issued April 2018)³⁸³, IATA Safety report 2018 (Issued April 2019)³⁸⁴ are explored.

One part of the report's analyses of aircraft accidents according to region. These regions are ;Asia/Pacific(ASPAC),³⁸⁵ the Commonwealth of Independent States (CIS),³⁸⁶ Europe (EUR),³⁸⁷ Latin America and the Caribbean (LATAM/CAR),³⁸⁸ the Middle East and North Africa (MENA),³⁸⁹ Africa (AFI),³⁹⁰ North America (NAM),³⁹¹ and North Asia (NASIA).³⁹²

The report indicates that the accident rate differed by region and that more advanced regions had a lower accident rate. Below, Figure 3.7 shows the accident rate by region and presents

³⁸² IATA Safety Report 2016 (53rd Edition , Issued April 2017) < <http://www.iata.org/publications/Pages/safety-report.aspx> > > accessed 25 July 2019

³⁸³ IATA Safety Report 2017 (54th Edition, Issued April 2018) <http://www.iata.org/publications/Pages/safety-report.aspx> > > accessed 25 July 2019

³⁸⁴ IATA Safety Report 2018 (55th Edition, Issued April 2019) <http://www.iata.org/publications/Pages/safety-report.aspx> > > accessed 25 July 2019

³⁸⁵ ASPAC Countries; Australia, Bangladesh, Bhutan Brunei, Darussalam, Cambodia, Fiji Islands, India, Indonesia, Japan, Kiribati, Korea, Republic of, Lao People's Democratic Republic, Malaysia, Maldives, Marshall Islands, Micronesia Federated States, of, Myanmar, Nauru, Nepal, New Zealand, Pakistan, Palau, Papua New Guinea, Philippines, Samoa, Singapore, Solomon Islands, Sri Lanka, Thailand, Timor –Leste, Tonga, Tuvalu, Vanuatu, Vietnam

³⁸⁶ CIS Countries; Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Republic of Russian Federation Tajikistan, Turkmenistan, Ukraine, Uzbekistan

³⁸⁷ EUR Countries; Albania, Andorra, Austria, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic Denmark, Estonia, Finland, France, Germany, Greece, Holy See (Vatican City State), Hungary, Iceland, Ireland, Italy, Israel, Kosovo, Latvia, Liechtenstein, Lithuania, Luxembourg, Macedonia, the former Yugoslav Republic of Malta, Monaco Montenegro, Netherlands, Norway, Poland, Portugal, Romania, San Marino, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, Turkey
United Kingdom

³⁸⁸ LATAM/CAR Countries; Antigua and Barbuda, Argentina, Bahamas, Barbados, Belize, Bolivia, Brazil, Chile, Colombia, Costa Rica, Cuba, Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru ,Saint Kitts and Nevis, Saint Lucia Region Country Saint Vincent and the Grenadines, Suriname, Trinidad and Tobago, Uruguay, Venezuela

³⁸⁹ MENA Countries; Afghanistan, Algeria, Bahrain, Egypt, Iran, Islamic Republic of Iraq, Jordan, Kuwait, Lebanon, Libya, Morocco, Oman, Palestinian Territories, Qatar, Saudi Arabia, Sudan, Syrian Arab Republic, Tunisia, United Arab, Emirates, Yemen

³⁹⁰ NAM Countries; Canada, United States of America

³⁹¹ AFI Countries; Angola, Benin, Botswana, Burkina, Faso, Burundi, Cameroon, Cape, Verde, Central African Republic, Chad, Comoros, Congo, Democratic Republic of Congo, Côte d'Ivoire, Djibouti, Equatorial Guinea, Eritrea, Ethiopia, Gabon, Gambia, Ghana, Guinea, Guinea Bissau, Kenya, Lesotho, Liberia, Madagascar, Malawi, Mali, Mauritania, Mauritius, Mozambique, Namibia, Niger, Nigeria, Rwanda, São Tomé and Príncipe, Senegal, Seychelles, Sierra Leone, Somalia, South Africa, South Sudan, Region Country, Swaziland, Tanzania, United Republic of Togo, Uganda, Zambia, Zimbabwe

³⁹² NASIA Countries; China, Mongolia, Korea, Democratic People's Republic of

an overview of occurrences.³⁹³ Implementation of SARPs, particularly in developing countries, remains poor.³⁹⁴

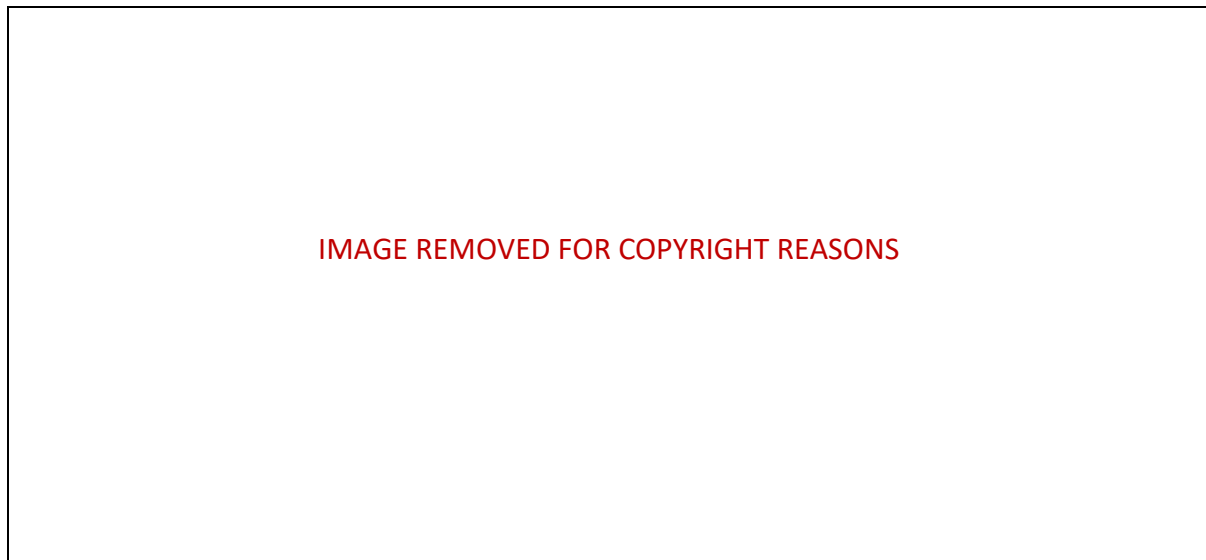


Figure 3.7 Accidents Rates by region 2012-2017/2017/2018 ³⁹⁵

In the reports, the top contributing factors for aircraft accidents are classified as latent conditions, threats, flight crew errors, undesired aircraft states, countermeasures and additional classifications. Among these, ‘latent conditions’ represent deficiencies in regulatory oversight, safety management, and flight operations training systems.³⁹⁶For the purposes of this research, the analysis regarding deficiencies in regulatory oversight is important.

³⁹³ The sources of data: IATA Safety Report 2016, 2017 and 2018, In-Depth Regional Accident Analysis (n. 377-378-379)

³⁹⁴ ‘Professor Paul Stephen Dempsey tells the story of his visit to the headquarters of the civil aviation authority of a central African State where he noticed a roomful of dusty unread manuals. Upon inquiry, he was told that the room was used to store “stuff that ICAO sends us” (As told to Prof. Brian F. Havel, in Montreal (Can) (April 15 2008)” at fn. 93, Brian F Havel, Gabriel Sanchez, *The Principles and Practice of International Aviation Law*’ (Kindle Edition, Cambridge University Press. June 2014) 212.

³⁹⁵ The sources of data; IATA Safety Report 2016, 2017 and 2018 (n. 377-378-379)

³⁹⁶ IATA Safety Reports 2016, 2017 and 2018 <<http://www.iata.org/publications/Pages/safety-report.aspx> > accessed 24 July 2019

The reports also reveal findings regarding what countermeasures by operators and the state could have been effective in reducing the number of accidents.³⁹⁷ Most significantly, the report suggests as a countermeasure for regulatory oversight deficiency that:

states must be responsible for establishing a safety program in order achieve an acceptable level of safety, encompassing the responsibilities of safety regulation, safety oversight, accident/incident investigation, mandatory/voluntary reporting systems, safety data analysis and exchange, safety assurance, safety promotion.³⁹⁸

The reports suggest that countermeasures could have been effective in 31% of the accidents time period of 2012 -2016, 33% of the accidents in 2013-2017, 31% of the accidents in 2014-2018 which regulatory deficiencies were a contributing factor.³⁹⁹

The graph in Figure 3.8 shows an analysis of deficiencies in regulatory oversight by region. It indicates that deficiencies in regulatory oversight were more likely to be a contributing factor in the regions with emerging markets.⁴⁰⁰

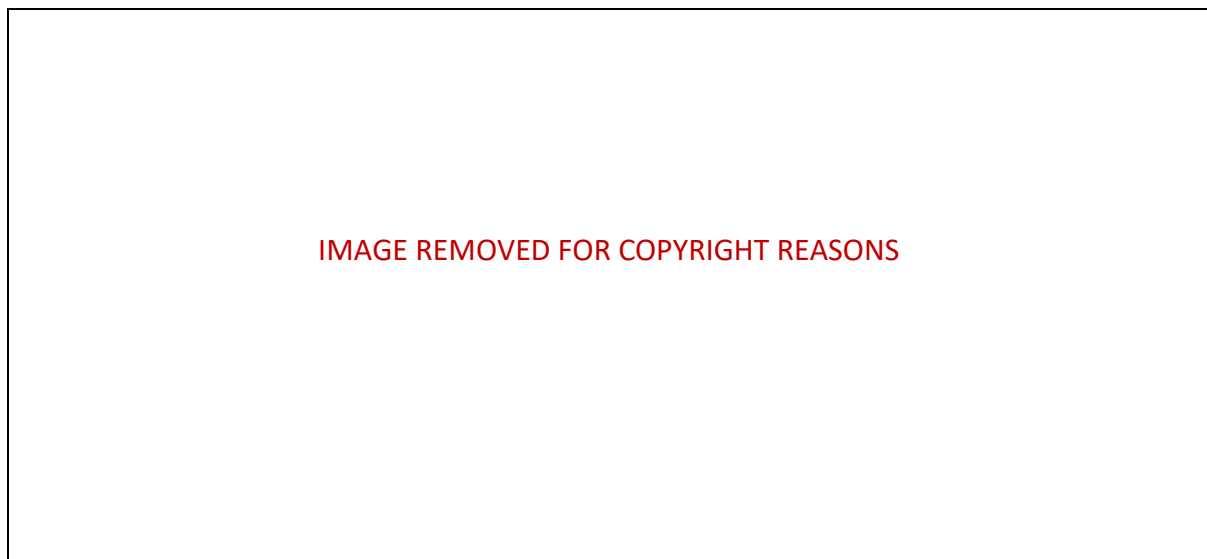


Figure 3.8 Deficiencies in Regulatory Oversight as a Contributing Factor to Accidents 2012-2017/2017/2018

³⁹⁷IATA Safety Report 2014. (Issued 2015, April) 72. <<http://asndata.aviation-safety.net/industry-reports/IATA-safety-report-2014.pdf> > accessed 25 July 2019

³⁹⁸ IATA Safety Report 2016. (Issued April 2017) 289. <<http://www.iata.org/docx/IATA-Safety-Report-2016.pdf> > accessed 25 July 2019

³⁹⁹ IATA Safety Report 2016. (Issued April 2017) 116. <<http://www.iata.org/docx/IATA-Safety-Report-2016.pdf> > accessed 25 July 2019

⁴⁰⁰ *ibid*, Section 5 In-Depth Regional Accident Analysis

The reports indicate that deficiencies in the regulatory oversight of states were one of the top factors in aircraft accidents. As figures represent there are significant differences in the implementation of regulatory oversight required by the Chicago Convention (1944) and its Annexes between the regions.



Figure 3.9 Fatality numbers by regions⁴⁰¹

On the other hand, IATA Report 2018 reveals that, in 2018, in 5 of 8 IATA regions (CIS, NASIA, MENA, LATAM/CAR, AFI), Fatality Risk increased compared to 2017.⁴⁰²

The conclusions of the above data analysis would allow having a view that there is an existing correlation between effective implementation of safety oversight obligations and actual accident rates. Hence, emerging markets have more deficiencies in complying with satisfactory regulatory oversight that leads to having a concerned view regarding aviation safety.

⁴⁰¹ IATA Safety Reports 2016, 2017 and 2018 <<http://www.iata.org/publications/Pages/safety-report.aspx> > accessed 24 July 2019

⁴⁰² IATA Safety Report 2018 (55th Edition, Issued April 2019) <http://www.iata.org/publications/Pages/safety-report.aspx> > > accessed 25 July 2019

3.5. Towards a global governance of aviation safety?

The liberalisation of air transport facilitates the entry by international aviation companies into foreign markets so that they can invest in and operate air transport, not only for their own benefit but also for the economic benefit of their host nations. These companies bring more connections and opportunities for business with their global potential. The question at this point is whether, given that liberalisation and deregulation in air transport, driven by globalisation and advanced technology, have been transforming aviation. Hence the governance of aviation needs to be reformed accordingly.⁴⁰³

Trade developments driven by globalisation have caused and will cause more demand for the movement of people and goods around the world. Increasing economic activity triggers interactions between domestic and international air transport. Domestic markets also receive an impact from globalisation. More economic activity also leads to more demand for domestic air transport services.

Even the fundamental principles of the Chicago Convention (1944) that govern international aviation are in question nowadays. For instance, Article 7 of the Chicago Convention (1944) lays down a nation's rights to reserve for its national aircraft. Cabotage rights⁴⁰⁴ have been defined as 'the carriage of passengers, cargo and mail between two points within the territory of the same State for compensation or hire.'⁴⁰⁵ The fundamental principle, the restriction on cabotage, has been controversial. The debate is mainly on whether or not cabotage restrictions are necessary. Advocates of cabotage restrictions still say that lifting restrictions will cause serious damage to the economy and security of a country.

On the other hand, many others claim that a competitive air transport market does not allow restrictions on the market if the benefits of economic and social development are to be enjoyed worldwide. For instance, Warner emphasizes the benefits for foreign air carriers of lifting cabotage restrictions and claims that granting cabotage rights to foreign air carriers

⁴⁰³Ruwantissa Abeyratne, *Convention on International Civil Aviation; A Commentary* (Springer International Publishing 2014) 95.

⁴⁰⁴ Brian F Havel, Gabriel Sanchez, *The Principles and Practice of International Aviation Law* (Kindle Edition, Cambridge University Press. June 2014) 6.

⁴⁰⁵ Brian Havel, *Beyond Open Skies; A New Regime for International Aviation* (Kluwer Law International 2009) 120.

would provide more benefits for the market and consumers ‘by making available more domestic air transport services.’⁴⁰⁶

The economic benefits that nations receive from competition from international companies give rise to policies and reduce the restrictions against foreign companies operating in domestic markets.⁴⁰⁷ Future expectations of the development of air transport indicate that travelling by air will be more seamless,⁴⁰⁸ which means that there will be fewer national restrictions and more passengers.

A passenger can now buy a combined ticket to travel across an air network provided by different operators that have network collaboration on shared routes. One can buy a ticket from New York to Ankara, using a United States airline to fly to Istanbul, and flying from there to Ankara with a Turkish airline that has an alliance with the United States carrier. This means that domestic flights are no longer carrying only domestic passengers; domestic flights can be part of international flight operations and therefore not all international flights are strictly international anymore. Ultimately, with newly employed forms of international flight operations and more Open Skies agreements in different regions, a citizen of a country with highly advanced aviation safety regulations might end up on a flight operated by an airline that applies poor safety standards. Saba refers to the study of the European Commission regarding the risk to EU passengers and rightly asserts that this assessment can apply to other developed countries elsewhere.⁴⁰⁹

EU airlines operate globally, and EU citizens travel widely all over the world and constitute an important percentage of passengers. The airports of the Community are also major destinations or stopovers for foreign carriers and aircrafts. The safety of their operations is thus a matter of direct and immediate concern to the EU,

⁴⁰⁶ Seth M. Warner, ‘Liberalize Open Skies: Foreign Investment and Cabotage Restrictions Keep Noncitizens in Second Class’, Vol.43, Issue 1, (1993) *American University Law*, 277, 317.

⁴⁰⁷ ‘Abeyratne explains the reason ‘why a nation provides a favourable home base for companies that compete internationally’ and emphasises the positive impact of competition that the international companies with their global strategies would bring into the nations’ economy.’ Ruwantissa Abeyratne, ‘Regulation of Air Transport the Slumbering Sentinels’ (Springer International Publishing 2014) 12.

‘Two good examples are Dubai and Singapore. Both these are small city States with small local populations. Both their airports see more than 30 million passengers pass through their gates every year. Both countries practice an Open Skies policy with no demand of reciprocity, which means that foreign airlines have free entry.’ 97.

⁴⁰⁸ IATA Vision 2050 Report (2011, February 12) Retrieved from http://www.iata.org/pressroom/facts_figures/documents/vision-2050.pdf accessed 26 July 2019

⁴⁰⁹ John Saba, ‘Aviation Safety in Crisis: The Option of the International Financial Facility Aviation Safety (IFFAS)’ Vol. 30, Issue 1 (2002), *Transportation Law Journal* 1, 5.

which is committed to ensure safety of citizens living near airports and travelling to non-EU destinations or travelling on non-EU airlines.⁴¹⁰

Some State's domestic aviation safety regulations might not provide the same level of protection as required and customers are not aware of this. However, aviation safety is a fundamental global issue that cannot be regulated separately either domestically or internationally.⁴¹¹

Aviation safety is a global issue and needs to be governed globally. There is no clear domestic and international definition of flight operations that applies to the current developments in the air transport market with regard to safety. Aviation safety is a consumer's top priority and is linked to a fundamental human right, the right to life. Therefore, safety is an issue whether at the domestic or the international level. It is global.

⁴¹⁰ Commission of the European Communities, A European Community Contribution to World Aviation Safety Improvement, July 16, 2001, referred by John Saba, 'Aviation Safety in Crisis: The Option of the International Financial Facility Aviation Safety (IFFAS)' Vol. 30, Issue 1 (2002), *Transportation Law Journal* 1,5.

⁴¹¹ See also Jiefeng Huang, *Aviation Safety through the Rule of Law; ICAO's Mechanisms and Practices*, (Kluwer law International 2009) 227.

CHAPTER IV – ADMINISTRATIVE LAW TYPE OF MECHANISMS FOR THE GLOBAL GOVERNANCE OF CIVIL AVIATION SAFETY

Introduction

This Chapter presents global governance of civil aviation safety and the administrative law type mechanisms for the governance of global aviation safety.

The purpose of this chapter also to demonstrate to what extent and how the ICAO system that governs international civil aviation safety partly complies an administrative structure suggested by global administrative law theory.

Before presenting and analysing global governance of aviation safety, it was necessary to explain historical conditions when the international civil aviation principles established. Therefore, in the second chapter, the evolution of public international aviation law was explored, with emphasis on the historical conditions that led to an international consensus with the Chicago Convention (1944) based on complete and exclusive state sovereignty.

The process of globalisation in terms of economics, policies and advanced technology has changed people's lives and has made cross-border dynamics and systems more effective than before. The global economy and the global air transport market have become increasingly interdependent.¹ From this perspective in the third Chapter, air transport market developments as driven by the impact of globalisation and shortcomings of customary international law that governs international civil aviation were explored. Particularly, the impact of globalisation on the air transport market and states' deregulation in response to it in the field of air transport was emphasised.

On the other hand, although global market integration in various sectors, and particularly in air transport, demands more liberal, free market, the legal framework of the regulations of this growing global sector remains national. States are, however, willingly abandoning some of their economic restrictions to enjoy the benefits of a global economy while still retaining the power to exercise 'the filter of state sovereignty'² in applying international regulations in

¹ See Chapter II

² Stefano Battini, 'International Organisations and Private Subjects: A Move Toward a Global Administrative Law', Institute for International Law and Justice, New York University School of Law (IILJ) Working Paper, Global Administrative Law Series (2005/03) 13. Retrieved from <<http://iilj.org/wp-content/uploads/2016/08/Battini-International-Organizations-and-Private-Subjects-2005-3.pdf>> accessed 15 August 2019

domestic law. This phenomenon has led to different levels of state compliance with aviation safety standards worldwide. Air transport is regarded as one of the transnational activities of 'global magnitude'.³

The nature of aviation safety is global therefore cannot be achieved by a single state.

Governing global aviation safety requires joint efforts of the world community of states and actors other than states that face the major common problems within the same sectorial field.⁴

Transnational governance is one of the emerging models of global governance that introduces the role of international actors and non-state organisations in exercising authority.⁵ Although this involves non-state actors in the formulation of regulations, states remain the main actors in implementing global regulations domestically.⁶

This research suggests that the current system of governing global aviation safety needs to be adjusted to address contemporary global developments. The current international regulatory system of civil aviation, which is based on the Chicago Convention (1944), is deemed to be "severely antiquated"⁷ in addressing global developments in the air transport market, which seeks more freedom from state restrictions in its operations.

³ Ulrich Sieber, 'Legal Order in a Global World -The Development of a Fragmented Systems of National, International, and Private Norms', A. von Bogdandy and R. Wolfrum, (eds.), Max Planck Yearbook of United Nations Law, Volume 14, 2010, 1, 5. Retrieved from Max Planck Yearbook of United Nations Law:<https://www.mpg.de/50696/hm01_LegalGlobal-basetext.pdf> accessed 15 August 2019

⁴ Sabino Cassese, Bruno Carotti, Lorenzo Casini, Eleonora Cavalieri, Euan MacDonald (eds) with collaboration of Marco Macchia, Mario Savino, 'Global Administrative Law: The Casebook' (3rd ed.) IRPA, Institute for International Law and Justice, NYU School of Law (2012) Forward XXIV< <https://images.irpa.eu/wp-content/uploads/2019/03/Foreword.pdf> > accessed 16 October 2019 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2140384&rec=1&srcabs=2089480&alg=1&pos=8 > accessed 15 August 2019

⁵ Michael Head, Scott Mann, Simon Kozlina, (eds.) 'Transnational Governance, Emerging Models of Global Legal Regulation' (Ashgate Publishing Limited 2012) 2.

⁶ ibid

⁷ "Global air transport in the jet age remains imprisoned within the most incongruous of legal and metaphorical borders, sovereignty over national air space" fn.9, Palacio, Vice President of the European Commission and Commissioner for Transport, Single European Sky and Passenger Protection, Speech to the Association of European Airlines, Brussels, Speech/00/179 (May 12, 2000) "It is always perplexing to see that the air transport industry, where the most sophisticated techniques of modern science have been concentrated and where humanity has witnessed one of the most advanced examples of industrial growth, is still governed by **severely antiquated regulations** which do not take into account the need for close, multinational co-operation among all the players. In other words, in the world of "globalisation", of the "global village" and of "real time", the air transport sector is still operating under economic rules that can at best be described as insufficient and antiquated, and at worst, obsolete." Brian Havel, 'Beyond Open Skies; A New Regime for International Aviation' (Kluwer Law International 2009) 520.

After a brief opening, in which the term ‘global governance’ is discussed in relation to international civil aviation, the complexity of increasing this type of administration is discussed. The consideration is addressed the problems of diminishing the states' power to control the governance of international regulations that affect their territory, the influence of globalisation on this process, and the following complexity of the legal order in international law.

In response to air transport market developments, states have deregulated their markets, and hence reduced barriers to attracting businesses.⁸ Also, other than states, private entities such as the International Air Transport Association (IATA) and the International Civil Aviation Organization (ICAO) are in power to design policies to regulate the global air transport market. However, at this point, a democracy deficit may arise for individuals, as these non-state decision-making procedures are not accessible to citizens who are directly affected by their decisions.⁹ Two critical issues need to be discussed. One is the legitimacy of the sources of global regulations within the state, and the other is state sovereignty.¹⁰ Moreover, the chapter goes further to discuss the GAL theory and its responsiveness to the democracy deficit through administrative law-type mechanisms for global regulatory regimes. Administrative law mechanisms allow the courts and individuals of states to be part of the global administrative system.

Exploring the principles of Global Administrative Law (GAL) theory contributes to addressing the contemporary legal issues in state compliance with international aviation safety standards that would otherwise not be covered by traditional international law.¹¹ In particular, the principles of GAL theory regarding global governance and the publicness character of global regulations, the role of individuals and states in global governance and state sovereignty are considered to be a valuable contribution to contemporary practical global aviation safety issues.

In this chapter, particular emphasis is placed on the global governance of civil aviation safety and the administrative structure of global administrative law in the governance of global

⁸ See Chapter III

⁹ Alfred C. Aman, Jr *The Democracy Deficit: Taming Globalization Through Law Reform* (Kindle ed. New York University Press.2004) 47.

¹⁰ See Francesco Giovanni Albissini, ‘The Rise of Global Standards, ICAO’s Standards and Recommended Practices’ (2016) Vol.8, Issue 1, *The Italian Journal of Public Law*

¹¹ Discussed in Chapter II

aviation safety. The administrative character of the global aviation safety regime and ICAO as a global regulatory body are underlined. The aim is to indicate the applicability of the principles of GAL theory to the current international aviation safety regime and establish the accountability of ICAO as a global regulatory body in domestic legal systems.

The Chapter discusses an International Civil Aviation Organisation (ICAO) acting as a global regulatory body and its administration through cooperation with national administrations and other actors in the international civil aviation field within the concept of ‘global administrative space’ that GAL theory suggests. Furthermore, it is demonstrated that the global governance of aviation safety is an example of the joint administrative action of international and national public powers through multiple actors, which is an executive structure that global administrative law theory offers. The ICAO, as global decision-making authority, largely satisfies administrative law principles, which include transparency, continuity, participation, as well as the right to review the fulfilment of worldwide governing authority on the national level.

4.1 The complexity of increasing global governance in the international legal order

As noted in Chapter III, international civil aviation has become global in a booming global air transport market. However, the Chicago Convention (1944) still provides a system that is based on traditional Westphalian state sovereignty.¹² Global regimes, as with global civil aviation, are working for all the actors in such a way as to establish regulatory harmonisation, standardisation of international and national regulations, continuing assistance and cooperation between states globally.¹³

Worldwide liberal economic developments such as privatisation and deregulation towards an integrated global economy have had an impact on the regulatory role of states generally. For instance, non-state actors such as the World Trade Organisation (WTO), the International

¹² Discussed in Chapter II

¹³ “the most recurrent functions in global regulatory systems are coordination, the promotion of cooperation, harmonization and standardization. But there are also additional functions, like the allocation of scarce resources (for instance, the allocation of radio frequencies by the International Telecommunication Union - 1865); assistance and the provision of services [for instance, the work of the International Organization for Migration (IOM – 1989)¹⁷, the WHO and the OIE]; protection [for instance, the United Nations High Commissioners for Refugees (UNHCR - 1950)] , Sabino Cassese, ‘Global Administrative Law: An Introduction’ (22 February 2005) 18.

Monetary Fund (IMF) and the World Bank establish international rules and play dominant roles in shaping and directing globalisation.¹⁴ The dominant role of states in international relations, according to the Westphalian order, has been changing.¹⁵ Particularly, shifting of responsibilities from the state to non-state actors by the impact of economic interdependence, deregulation and the dominance of the marketplace has been associated with globalisation.¹⁶ According to Cassese globalisation means the sharing of governance.¹⁷ New forms of rules, standards and administrative structures have been developing which are currently being set for a ‘global’ rather than an ‘international’ sphere.¹⁸

The research explores a global approach to the governance of global aviation safety that needs to be taken.¹⁹ It presents the need for each component of the global system, including international, domestic and global institutions, to function within an administrative harmonisation to establish a common public aim that addresses the concerns, not only of

¹⁴ U.N General Assembly, Preliminary report of the Secretary-General (A/55/342) ‘Globalization and its impact on the full enjoyment of all human rights’ 31 August 2000, Retrieved from <<http://www.un.org/documents/ga/docs/55/a55342.pdf>> accessed 15 August 2019

¹⁵ “Globalization is a short-hand term for complex social, economic, and political process that in effect denationalize and deterritorialize states” Alfred C, Aman Jr, ‘Globalization, Democracy, and the Need for a New Administrative Law’ (2002, August) Vol. 49, Issue 6, University of California Law Review, 1687, 1693. ; See also Saskia Sassen, ‘Losing Control? Sovereignty in an Age of Globalization’ (NY: Colombia University Press 1996) Retrieved from <https://www.researchgate.net/publication/30529999_Losing_Control_Sovereignty_in_an_Age_of_Globalization> accessed 15 August 2019; Jost Delbrück, ‘Globalization of Law, and Markets-Implications for Domestic law- A European Perspective’ (Fall 1993), Vol.1 Issue1, Indiana Journal of Global Legal Studies, 9

¹⁶ Dinah Shelton, ‘Protecting Human Rights in a Globalized World’, (2002) Vol. 25 Issue 2, Boston College International & Comparative Law Review, 273, 276. Retrieved from <<https://lawdigitalcommons.bc.edu/iclr/vol25/iss2/7/>> accessed 15 August 2019

¹⁷ Sabino Cassese, ‘Governing the World’ in Sabino Cassese (ed) ‘*Research Handbook on Global Administrative Law*’ (Edward Elgar Publishing 2017) 505.

¹⁸ Jost Delbrück, ‘Globalization of Law, and Markets-Implications for Domestic law- A European Perspective’ (Fall 1993), Vol.1 Issue1, Indiana Journal of Global Legal Studies, 9, 10.

¹⁹ ‘Intergovernmental organizations, global standards and global courts have developed at an extraordinary pace because global problems (such as terrorism, the environment, and trade) require global solutions. International organizations produce standards or guidelines addressed to national governments or directly to civil societies. They perform inspections and controls. They issue guidelines to ensure compliance. They oversee and coordinate the action of national governments. Moreover, alongside these global institutions, there are regional organizations, like the European Union, Mercosur and ASEAN, which cover Europe, South American and South-East Asia respectively.’ Sabino Cassese, Bruno Carotti, Lorenzo Casini, Eleonora Cavalieri, Euan MacDonald (eds) with collaboration of Marco Macchia, Mario Savino, ‘*Global Administrative Law: The Casebook*’ (3rd ed.) IRPA, Institute For International Law and Justice, NYU School of Law(2012) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2140384&rec=1&srcabs=2089480&alg=1&pos=8> forward

single states but also of the global public.²⁰ These developments have led to a rethinking of the way contemporary phenomena are moving from existing disciplines towards redefining concepts of the global society.

4.1.1 States' role in global governance

In order to address the state's role in global governance for the purpose of this dissertation the terms 'global' and 'globalisation' need to be explained. In the international legal order, the use of the term 'global' instead of 'international' has emerged in the process of the transformation of international law. The term global 'refers to the world as an interconnected whole',²¹ avoiding a distinction between national and international levels and it is especially used to emphasise the 'multi-level character of governance activities'.²²

Thus, the term 'global' does not refer to global law, to global law being hierarchically placed above the state, something which often triggers immediate objections. Quite the opposite, the GAL theory does not entail as demand for hierarchical authority over states' sovereignty. The theory is about global governance without having a world government; as Rosenau argued,²³ it is a given 'issue area'²⁴ which does not rely on enforcement measures to attain compliance, but which establishes a mechanism derived from shared goals. Achieving shared goals in an area requires working with harmony instead of coercive authority in the concept of global governance.

²⁰ Benedict Kingsbury, Nico Krisch & Richard B. Stewart, 'The Emergence of Global Administrative Law' (Summer 2005) Vol. 68, Law and Contemporary Problems, 44. Retrieved from <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1361&context=lcp> > accessed 27 August 2019

²¹ Sabino Cassese, Elisa D'Alterio, 'Introduction: the development of Global Administrative Law', in Sabino Cassese (ed) '*Research Handbook on Global Administrative Law*' (Edward Elgar Publishing 2017) 2.

²² Armin von Bogdandy, Phillip Dann and Matthias Goldman, 'Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities' (November 2008), Vol.9(11), 1378.
<https://www.researchgate.net/publication/47276725_Developing_the_Publicness_of_Public_International_Law_Towards_a_Legal_Framework_for_Global_Governance_Activities> accessed 15 August 2019, see also Jost Delbrück, 'Globalization of Law, and Markets-Implications for Domestic law- A European Perspective' (Fall 1993), Vol.1 Issue1, Indiana Journal of Global Legal Studies, 9.

²³ James N. Rosenau, Ernst- Otto Czempiel (ed) '*Governance without Government: Order and Change in World Politics*' (Cambridge University Press 1992) 7.

²⁴ James N. Rosenau, Ernst- Otto Czempiel (ed) '*Governance without Government: Order and Change in World Politics*' (Cambridge University Press 1992) 8.

Evidently, by the impact of globalisation, despite all the differences between people's lives around the world, the commonalities of people's needs, interests and expectations have increased.²⁵ This increasing sense of the common good and common risks has caused the process of denationalisation of 'markets, laws and politics in the sense of interlacing peoples and individuals'.²⁶ Therefore, governance involving global matters addresses issues in both public and private matters, from the setting of safety standards on food to laws governing the possession of weapons of mass destruction.²⁷ As per a 2000 UN report, people from different geographical areas can easily link and share information as a result of shrinking space and time, making the world a global society.²⁸ This transformation into a 'global civil society'²⁹ has accordingly triggered the emergence of legal regulatory structures.³⁰

The most obvious change has occurred in the traditional understanding of the state's role in public international law, which governs relations between states based on the Westphalian system. Although states remain powerful, they have started to lose their 'sole subject of international law' position and to share the influence with other actors.³¹ 'States' powers have been fragmented',³² and their monopoly on creating policies has been transformed into a new dynamic of cooperating and negotiating with other states and private entities to achieve their

²⁵ Rosalyn Higgins, 'International Law in a Changing International System' (March 1999), Vol. 58, No.1, The Cambridge Law Journal 78, 84.

²⁶ Jost Delbrück, 'Globalization of Law, and Markets-Implications for Domestic law- A European Perspective' (Fall 1993), Vol.1 Issue1, Indiana Journal of Global Legal Studies, 9, 11.

²⁷ Eyal Benvenisti, *The Law of Global Governance* (Hague Academy of International Law -All Pocket 2014)

²⁸ U.N General Assembly, Preliminary report of the Secretary-General (A/55/342) 'Globalization and its impact on the full enjoyment of all human rights' 31 August 2000, Retrieved from <<http://www.un.org/documents/ga/docs/55/a55342.pdf>> accessed 15 August 2019

²⁹ Steven Truxal, *Economic and Environmental Regulation of International Aviation: From Inter-national to Global Governance* (Kindle ed.) (Routledge. 2017) 131.

³⁰ Ulrich Sieber, 'Legal Order in a Global World -The Development of a Fragmented Systems of National, International, and Private Norms', A. von Bogdandy and R. Wolfrum, (eds.), Max Planck Yearbook of United Nations Law, Volume 14, 2010, 1, 4. Retrieved from Max Planck Yearbook of United Nations Law:<https://www.mpg.de/50696/hm01_LegalGlobal-basetext.pdf> accessed 15 August 2019

³¹ See the arguments regarding legitimacy, sovereignty and constitutionality of power of non-state actors in International legal order, Christopher Harding & C.L. LIM, (Eds.) *Renegotiating Westphalia* (Kluwer Law International 1999), Sabino Cassese, 'The Global Polity- Global Dimensions of Democracy and the Rule of Law' Global Law Press,(Editorial Derecho Global 2012) 29. Retrieved from <<http://es.globallawpress.org/wp-content/uploads/02-TheGlobalPolity.pdf>> accessed 27 August 2019

³² Alfred C, Aman Jr, 'Globalization, Democracy, and the Need for a New Administrative Law' (2002, August) Vol. 49, Issue 6, University of California Law Review, 1687,1697.

aims.³³ It must be underlined at this point that it is not being asserted that states are being demolished; rather, a reconceptualising of the role of states is being emphasised in response to growing interconnected global governance.³⁴ The nature of the world order and the concept of state sovereignty is being transformed, not demolished.³⁵ Globalised social and economic life makes states willing to share their previously sovereign rights within global governance and, rather than invoke sovereignty³⁶ to resist cooperation. The aim is to participate in global matters, which involves tolerating and accepting the regulations of global institutions.³⁷

Such collaborations among states have resulted in the decreased use of the traditional consent-based system and the increased adoption of the global common system.³⁸ This transformation confirms that the nature of governance of the international legal order has been changed by the impact of globalisation.³⁹ The applicability of Article 38 of the Statute of the International Court of Justice to contemporary international governance is subject to debate. Critics have said that the sources of international law in Article 38 are out-dated and need to be supplemented⁴⁰ due to increased diversity in law-making and standard-setting systems, which include the involvement of non-state actors in decision making in international systems. While global regulatory regimes are growing ever more diverse, a

³³ *ibid*, See also Robert O. Keohane, 'Global Governance and Democratic Accountability' (2002) Retrieved from <<http://unpan1.un.org/intradoc/groups/public/documents/apcity/unpan034133.pdf>> accessed 27 August 2019

³⁴ Steven Truxal, 'Economic and Environmental Regulation of International Aviation: From Inter-national to Global Governance' (Kindle ed. Routledge 2017) 134.

³⁵ See David Held, Anthony McGrew (Eds.) *'The Global Transformations Reader'* (Cambridge: Polity Press 2000)

³⁶ Abram Chayes, Antonia Handler Chayes, *'The New Sovereignty- Compliance with International Regulatory Agreements'* (Harvard University Press.1995)

³⁷ Karsten Nowrot, 'Global Governance and International law. Beiträge zum Transnationalen Wirtschaftsrecht, Heft 33 (2004, November) Retrieved from <<http://telc.jura.uni-halle.de/sites/default/files/altbestand/Heft33.pdf>> accessed 27 August 2019

³⁸ *ibid*, also see James N. Rosenau, 'Governance in the Twenty-first Century' (Winter 1995), Vol.1, No.1 *Global Governance* 13, 39. Retrieved from <<http://www.jstor.org/stable/27800099>> accessed 27 August 2019

³⁹ 'The process of globalisation and the emergence new transnational threats have fundamentally changed the nature of governance and the necessary purposes of international law in the past few years' William W. Burke-White, Anne-Marie Slaughter, 'The Future of International law is Domestic (or the European Way of Law)' (2006) Vol.47, No.2, *Harvard International Law Journal*, 327, 328.

⁴⁰ Karsten Nowrot, 'Global Governance and International law. Beiträge zum Transnationalen Wirtschaftsrecht, Heft 33 (2004, November) 16,17. Retrieved from <<http://telc.jura.uni-halle.de/sites/default/files/altbestand/Heft33.pdf>> accessed 27 August 2019

question can be raised about the efficiency of applying ‘state practice’ to establish international customary law over these many different state practices.

The effectiveness of peremptory norms of customary international law (*jus cogens*) and state obligation to comply with them (*erga omnes*) in the international legal system of the contemporary world are controversial subjects. Simma⁴¹ underlines Brownlie’s metaphor and says that ‘although the existence and relevance of *jus cogens* has by now been almost universally accepted, ‘the car has remained in the garage.’⁴² In response to this metaphor, Erika De Wet states her objection that ‘its excursion into the open has not yet resulted in a change of the rules of the road.’⁴³ However, as discussed in Chapter II of the thesis, the level of state compliance with SARPs within the consideration of state obligations as *erga omnes* obligation does not indicate the effectiveness that theoretically expected from them. Therefore in case of state compliance with aviation safety obligation Simma’s view explains the limited impact of *erga omnes* obligations in practice: ‘Viewed realistically, the world of obligations *erga omnes* is still the world of the “ought” rather than of the “is”’⁴⁴.

As a result of the ongoing processes of transformation from the international to the global in cultural, economic and social life, an increasing number of non-governmental organisations (NGOs), private organisations and non-state interest groups have become actors with effective roles in the international legal order.⁴⁵ Although states remain as the main actors, an increasing amount of global rulemaking in areas such as environment, economic regulations, security, labour standards, food safety standards and product standards is taking place in global institutions.⁴⁶ Cassese characterises the overall picture of the new world order that is the shared power in making rules as ‘marble cake’. By using ‘marble cake’ metaphor Cassese

⁴¹ Bruno Simma served as a judge on the International Court of Justice from 2003 until 2012.

⁴² Bruno Simma, ‘Universality of International Law from the Perspective of a Practitioner’ (2009) Vol.20, No.2, The European Journal of International Law, 265,273.

⁴³ Erika De Wet ‘Jus Cogens and Obligations Erga Omnes’ (January 15, 2013) in Dinah Shelton (Ed) ‘*The Oxford Handbook on Human Rights*’ (OUP 2013) Forthcoming. Available at SSRN: <<https://ssrn.com/abstract=2279563>> accessed 17 October 2019

⁴⁴ Bruno Simma, ‘Universality of International Law from the Perspective of a Practitioner’ (2009) Vol.20, No.2, The European Journal of International Law, 265,275.

⁴⁵ ‘Examples include certification of CDM projects by the Kyoto Protocol Clean Development Mechanism, UNCHR determinations of individuals’ refugee statutes, and certification of NGO’s by U.N. agencies as being specifically authorized to participate in their procedures.’ Benedict Kingsbury, Nico Krisch & Richard B.Stewart, ‘The Emergence of Global Administrative Law’ (Summer 2005) Vol. 68 , Law and Contemporary Problems, 24. Retrieved from <<http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1361&context=lcp>> accessed 27 August 2019

⁴⁶ Joshua Cohen & Charles F. Sabel, ‘*Global Democracy*’ (2004-2005) 37 N.Y.U. J. Int'l. L. & Pol. 763

emphasised blended global and national powers in a global space and clearly implied that global legal space is not above the national level.⁴⁷

4.1.2 The emerging complexity of the international aviation law

Public international issues that were traditionally worked out between states have started to fall within the province, not only of states but also of actors other than states in regulatory governance systems.⁴⁸ Therefore, certain lines between public and private, and domestic and international have become barely perceptible.⁴⁹ The ‘global space’ has emerged as a result of the erosion of boundaries between public and private and domestic and international.⁵⁰ However, this is explained not as an end of the state but as a ‘disaggregation of the State’.⁵¹ In some technical fields of international law, non-state actors are designated to enter legal procedures and have become important regulatory figures in international fields.⁵²

Concerns about the legitimacy and the control of legal order have risen, especially due to the way states’ roles have changed.⁵³ For instance, concern has erupted about whether previously

⁴⁷ Sabino Cassese, ‘Governing the World’ in Sabino Cassese (ed) ‘*Research Handbook on Global Administrative Law*’ (Edward Elgar Publishing 2017) 506.

⁴⁸ See Saskia Sassen, ‘Losing Control? Sovereignty in an Age of Globalization’ (1996) Columbia University Press.
<https://www.researchgate.net/publication/30529999_Losing_Control_Sovereignty_in_an_Age_of_Globalization> accessed 27 August 2019

⁴⁹ Andrew D. Mitchell and Elizabeth Sheargold, ‘Global Governance: The World Trade Organization’s Contribution’ (January 4, 2010) Vol.46, *Alta. Law Review*, 1061, (2008-2009) University of Melbourne Legal Studies Research Paper No. 426; Georgetown Law and Economics Research Paper No. 1477544. Available at SSRN: <<https://ssrn.com/abstract=1477544>> or <<http://dx.doi.org/10.2139/ssrn.1477544>> 1.

⁵⁰ Jiunn-rong Yeh, ‘Globalization, Government Reform and the Paradigm Shift of Administrative Law’ Vol. 5, Issue 2 (September 2010), *National Taiwan University Law Review*. 113; Andrew D. Mitchell and Elizabeth Sheargold, ‘Global Governance: The World Trade Organization’s Contribution’ (January 4, 2010) Vol.46, *Alta. Law Review*, 1061, (2008-2009) University of Melbourne Legal Studies Research Paper No. 426; Georgetown Law and Economics Research Paper No. 1477544. Available at SSRN: <<https://ssrn.com/abstract=1477544> or <http://dx.doi.org/10.2139/ssrn.1477544>> 1., Nico Krisch and Benedict Kingsbury ‘Introduction: Global Governance and Global Administrative Law in the International Legal Order’ (2006) *The European Journal of International Law* Vol. 17 no.1 p 11 <<http://ijl.org/wp-content/uploads/2016/08/Kingsbury-Krisch-Global-Governance-and-GAL-in-the-International-Legal-Order.pdf>> accessed 20 April 2019, Giuliana Ziccardi Capaldo, ‘*The Pillars of Global Law*’ (Ashgate 2008) 8.

⁵¹ “the state is not disappearing, it is disaggregating.” 185. Anne-Marie Slaughter, ‘The Real New Order’ (1997, September/October) Vol. 76, Issue 5, *Foreign Affairs*, 183

⁵² Rosalyn Higgins ‘International Law in a Changing International System’ (March 1999), Vol. 58, Issue 1, *Cambridge Law Journal*, 78, 85.

⁵³ Ulrich Sieber, ‘Legal Order in a Global World -The Development of a Fragmented Systems of National, International, and Private Norms’ *Max Planck Yearbook of United Nations Law*, 14, 1-49. Retrieved from Max

established international law principles are still effective even after the transformation that has led towards more global ways of dealing with common issues.

Battini argues that a ‘spatial revolution’ was produced by globalisation that has displaced states.⁵⁴ Accordingly, states’ principal regulatory role has changed domestically and internationally.⁵⁵ In particular, as was explored in Chapter III for the air transport market, the nature of the relationship between markets and the state has changed.⁵⁶ Aman, Jr. asserted that, due to globalisation, states and non-state entities have partnered, forming strong regulations that govern multiple states while compressing national interests in order to obtain economic goals. Aman, Jr. further stated that governmental units now operate like private firms as they work towards competing in a global marketplace.⁵⁷

However, the emerging power of non-state actors in global rulemaking has created concerns about a democratic deficit in legitimacy and accountability.⁵⁸ Generally, in domestic settings, the executive body is responsible and accountable to Parliament, which is constituted by elected representatives of the people, for its decisions. There is no such system in the global space that would provide for the people who are directly affected by the decisions of the global regulatory decision-makers.

Some examples that indicate the direct effect of the non-state institution’s decision domestically can be noteworthy for the purpose of this dissertation to address aviation safety in particular. For instance, a sale of private real estate was blocked in Berlin by the United Nations Security Council Al-Qaida and Taliban Sanctions Committee.⁵⁹ Also,

Planck Yearbook of United Nations Law. P.9 <https://www.mpg.de/50696/hm01_LegalGlobal-basetext.pdf > accessed 30 August 2019

⁵⁴ Stefano Battini, ‘The proliferation of global regulatory regimes’ in Sabino Cassese (ed) ‘*Research Handbook Global Administrative Law*’ (Edward Elgar Publishing 2017) 49.

⁵⁵ Alfred C. Aman, Jr. ‘The Limits of Globalization and the Future of Administrative Law: From Government to Governance’ (2000-2001) Vol.8 Ind. J. Global Legal Stud., 379.

⁵⁶ Alfred C, Aman Jr, ‘Globalization, Democracy, and the Need for a New Administrative Law’ (2002, August) Vol. 49, Issue 6, University of California Law Review, 1687, 1688.

⁵⁷ *ibid* p.1694

⁵⁸ Nico Krisch and Benedict Kingsbury ‘Introduction: Global Governance and Global Administrative Law in the International Legal Order’ (2006) The European Journal of International Law Vol. 17 no.1<<http://ijl.org/wp-content/uploads/2016/08/Kingsbury-Krisch-Global-Governance-and-GAL-in-the-International-Legal-Order.pdf> > accessed 20 April 2019 1-2

⁵⁹ ECJ, Case C-117/06, Möllendorf, 2007 ECR I-8361. On the Al-Qaida and Taliban Sanctions Committee see Clemens Feinäugle, in this volume; Armin von Bogdandy, Phillip Dann and Matthias Goldman, ‘Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities’(November 2008) , Vol.9(11), fn.1

due to OECD ranking, educational policies are regularly changed in order to comply with the globally set standards.⁶⁰ Another noteworthy example is the International Seabed Authority (ISA) which was established under Part XI of the UN Convention on the Law of the Sea, regulates, organises, and carries out mining for minerals in the deep seabed. Its exclusive jurisdictions extend to the seabed and subsoil beyond the limits of national jurisdiction, known as the “Area”.⁶¹ The Area and its mineral sources are the “common heritage” of mankind which the ISA manages on behalf of humankind as a whole.⁶² The legislative and executive decisions of ISA have a global impact on states, business and individuals.⁶³ The ISA is referred to as a ‘new model of the international organisation that can guide the development of other international regimes.’⁶⁴

In domestic systems, the need for the rule of law is vital for protecting individuals, citizens and enterprises against the arbitrary use of public power. Domestic administrative law, therefore, provides a checks-and-balances system for individuals. The challenge at this point is that, while the global sector-based regimes are developing, the decision centres have moved outside of the states.⁶⁵ Wheatly draws attention to a shift from a contractual model of inter-state relations to an international public law governance model which people are no longer part of decisions through political debates of those issues and the resulting loss of democracy.⁶⁶

https://www.researchgate.net/publication/47276725_Developing_the_Publicness_of_Public_International_Law_Towards_a_Legal_Framework_for_Global_Governance_Activities > accessed 15 August 2019

⁶⁰ *ibid* 1377. ; See also Eyal Benvenisti, ‘*The Law of Global Governance*’ (Hague Academy of International Law -All Pocket 2014) 69-72.

⁶¹ Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea. (1982, December 10). Retrieved from UN:

http://www.un.org/depts/los/convention_agreements/texts/unclos/closindxAgree.htm > accessed August 30 2019

⁶² Aline Jaeckel, ‘Developments at the International Seabed Authority’ (2016) Vol. 31, Issue 4. *International Journal of Marine and Coastal Law*, 706,706.

⁶³ Ulrich Sieber, ‘Legal Order in a Global World -The Development of a Fragmented Systems of National, International, and Private Norms’ *Max Planck Yearbook of United Nations Law*, 14, 1-49. Retrieved from Max Planck Yearbook of United Nations Law. 12. https://www.mpg.de/50696/hm01_LegalGlobal-basetext.pdf > accessed 30 August 2019

⁶⁴ Caitlyn Antrim, ‘The International Seabed Authority Turns Twenty’ (2015) Vol. 16 *GEO. J. OF INT’L. AFF.* 188,188.

⁶⁵ Marco Macchia, ‘The rule of law and transparency in the global space’ in Sabino Cassese (ed.) ‘*Research Handbook on Global Administrative Law*’ (Edward Elgar Publishing 2017) 261.

⁶⁶ Steven Wheatley, ‘A Democratic Rule of International Law’ (2011), V.22 No.2, *The European Journal of International Law*, 525, 526.

On the other hand, global law⁶⁷ introduces norms that apply to the world in international and domestic levels also individuals who directly affected from them.⁶⁸ Therefore as Macchia rightfully asserts that individual and states have become the subject of the same legal system.⁶⁹

Global regimes have assumed the power to impose legal rules upon individuals and national administrations as their members without requiring advance state authorisation. By intervening in internal state relations, this power of global regulation covers most aspects of human activity: the discipline of water sources and pharmaceutical products, intellectual property rights, forest preservation, environmental protection, fishing or arms control, food safety, accounting of financial institutions, the regulations governing the Internet, international terrorism, the protection of refugees, labour standards, and antitrust policies.⁷⁰

After determining global legal system that addresses individuals and states the issue arises that there is a need concentrate on the legal structures that promote the rule of law at the global level to hinder the emergence or spread of the arbitrary use of power.⁷¹

Among the sources of global regulation, a powerful one is the market. The citizens of ostensibly sovereign states take on the added identities of consumers, customers and clients in transnational transactions. At this point, the significant difference occurs in expectations regarding individual and collective responsibility for the provision of service.⁷² Aman raises the right question: ‘At what point does the convergence of market process, private decision-makers, and individuals as consumers, customers, or clients actually undercut our ability as citizens to engage in the broader kinds of participation necessary for a vibrant political process?’⁷³

⁶⁷ See Giuliana Ziccardi Capaldo, *The Pillars of Global Law* (Ashgate 2008); Rafael Domingo, *The New Global Law* (Cambridge University Press.2010); Emma Dunlop, ‘Globalization and sovereignty: global threats and international security’ in Sabino Cassese (ed.) *Research Handbook on Global Administrative Law* (Edward Elgar Publishing 2017) 468.

⁶⁸ Lorenzo Casini, ‘The Expansion of the Material Scope of Global Law’ in Sabino Cassese (ed.) *Research Handbook on Global Administrative Law* (Edward Elgar Publishing 2017) 27.

⁶⁹ Marco Macchia, ‘The rule of law and transparency in the global space’ in Sabino Cassese (ed.) *Research Handbook on Global Administrative Law* (Edward Elgar Publishing 2017)261.

⁷⁰ Marco Macchia, ‘The rule of law and transparency in the global space’ in Sabino Cassese (ed.) *Research Handbook on Global Administrative Law* (Edward Elgar Publishing 2017)261.

⁷¹ *ibid*

⁷² Alfred C, Aman Jr, ‘Globalization, Democracy, and the Need for a New Administrative Law’ (2002, August) Vol. 49, Issue 6, *University of California Law Review*, 1687, 1709-1710.

⁷³ *ibid*

Increasing global governance and developing complexities in the international legal order have spawned arguments regarding the concept of law that covers global governance. Kingsbury et al. have underlined the insufficiency of the international legal order and the necessity for a conceptualised law to govern globally.⁷⁴ This analysis applies, among other areas, also to developments in international air transport operations. Air transport regulations are not conceptualised in terms of international law, but rather are derived from the air transport practices that have taken shape amid the impact of globalisation and technical developments (see Chapter III).

For example, the Chicago Convention (1944) emphasises states' exclusive territorial sovereignty over their own airspace. However, in a liberalised air transport market by some of the operational practices, such as code-share, merger and acquisition agreements or possible development of aviation flags of convenience, state territorial power and some of its restrictions can be bypassed.⁷⁵ At this point, individual citizens are being affected directly without any awareness of the kind of jurisdictional imbroglio in which they are becoming involved.⁷⁶

Several examples illustrate the common practices developed by airlines to locate their different operations in separate countries so as to benefit from the presence of disparities in national regulations.⁷⁷ One of the concerns that has arisen is the use of 'flags of convenience' in civil aviation in addressing the potential risks that undermine accountability, transparency, and safety.⁷⁸ The regulations on working conditions such as standards of training requirements, minimum work hours, unregulated rest time of aviation workers have a direct link to flight safety.⁷⁹ If employers seek a situation that deprives employees of legal protection, that creates an aviation safety risk.

⁷⁴ Benedict Kingsbury, & Lorenzo Casini, 'Global Administrative Dimensions of International Organizations' IILJ Working Papers, Global Administrative Law Series(2009/ 9).. Retrieved from <<http://www.iilj.org/publications/documents/2009-9.Kingsbury-Casini.pdf> > 1. accessed 30 August 2019

⁷⁵ Alfred C, Aman Jr, 'Globalization, Democracy, and the Need for a New Administrative Law' (2002, August) Vol. 49, Issue 6, University of California Law Review, 1687, 1694.

⁷⁶ See Chapter III Section 3.3.4

⁷⁷ See Chapter III Section 3.3

⁷⁸ International Transport Workers Federation (ITF) warns against aviation 'flags of convenience'. (2013, March 15). Retrieved July 20, 2017, from ITF: <<http://www.itfglobal.org/en/news-events/news/2013/march/itf-warns-against-aviation-'flags-of-convenience/> > accessed 30 August 2019

⁷⁹Allan I. Mendelson, 'Flags of Convenience: Maritime and Aviation' (2014) Vol.79, J. Air L.& Com.,151.

Another problem is that flags of convenience can create many jurisdictional, choice-of-law and safety issues that individual passengers are not aware of it at all.⁸⁰

A concrete example can illustrate how chaotic the legal jurisdiction issues and choice-of-law can be. In 2012, Norwegian Air Shuttle, one of the fastest-growing airlines in the world, employed aviation flags of convenience leading to the involvement of many countries in its airline operations, including Ukraine, Latvia, Ireland, Thailand, the USA, Singapore, Spain and Portugal. As a result, its chaotic administrative and operational practices included: the location of an airline administrative office in Latvia; the location of the Information Technology department in Ukraine; the use of local staff with local cabin crew conditions to run Asian flights out of Bangkok; and the hiring of pilots to operate Asian flights through an employment agency based in Singapore called Air Crew Asia Limited.

Also, Air Shuttle named Bangkok as its secondary base; the pilots started becoming licensed in Europe under the European Aviation Safety Agency – EASA; its crew base was in the USA and JFK International Airport; and finally, it began training and recruiting cabin crews at its Fort Lauderdale base.⁸¹

There are many countries involved in one airlines' operation to avoid stricter regulations.⁸² This practice fearfully would lead a 'registry shopping'⁸³ in other terms for airlines to pick where the airlines trying to avoid certain countries to avoid stricter regulations.⁸⁴ The critical point of this practice that these strict regulations can be crucial to ensure civil aviation safety.

Air transport market practices as a result of air transport liberalisation such as code share agreements, aircraft leasing etc.⁸⁵ have been created in order to maximizing benefits from the market forces.⁸⁶ The liberalisation of air transport has created a more competitive market in which air carriers seek ways to lower costs and derive more economic benefit. As noted in Chapter III, a variety of air operations serve to further these goals. However, principles of liberal market are not adequate the principles of democracy for people. As Aman states, '[D]emocracy involves more than just market and outcomes... Legitimacy requires more than a process simply to "check-up" on those in positions of responsibility, to see if they are

⁸⁰ *ibid*

⁸¹ *ibid*

⁸² *ibid*

⁸³ Philip Donges Snodgrass, 'Aviation Flags of Convenience: Ireland and the Case of Norwegian Airlines International' (2015) 14 *Issues in Aviation Law & Policy* 245, 274.

⁸⁴ *ibid*

⁸⁵ See Chapter III Section 3.3

⁸⁶ *ibid*

doing their job. It also involves creating the kind of information necessary to understand the issues involved for a real debate to ensue and for new ideas to be suggested.’⁸⁷

Therefore, a democratic deficit emerges where the people are no longer able to determine issues subject to global regulations by exercising domestic political procedures.⁸⁸ Norms of global law are increasingly settling in the fields that previously constructed by the states’ sovereign will, which is not the core of international law anymore.⁸⁹

Hence the new theories concentrate on the relationship between state law systems and the system of global governance. Wheatley emphasises that the ‘idea of a democratic rule of international law is inherent in the idea of global governance through *law*.’⁹⁰ Furthermore, state legal systems are main guarantors of autonomy for individual citizens. Therefore, the legal institutions of states, including national courts, should be able to evaluate global law norms.⁹¹

Next, administrative law type mechanisms that embrace global developments and provides an administrative law structure to avoid democracy deficits in the global governance of aviation safety will be explored.⁹²

4.2 Administrative law for global governance in the aviation safety realm

The multi-dimensional concept of global governance is complex. The term global governance is used differently in different disciplines. Hence there is no certain way to define it.⁹³

Within the scope of this thesis, the global governance of aviation safety is addressed. The democratic deficit in the global governance of aviation safety is underlined as the remoteness of the public⁹⁴ in decision making in transnational governance mechanism which is the joint administrative action of international and national public powers.

⁸⁷ Alfred C, Aman Jr, ‘Globalization, Democracy, and the Need for a New Administrative Law’ (2002, August) Vol. 49, Issue 6, University of California Law Review, 1687, 1708-1709.

⁸⁸ Steven Wheatley, ‘A Democratic Rule of International Law’ (2011), V.22 No.2, The European Journal of International Law, 525, 527

⁸⁹ *ibid*

⁹⁰ *ibid* 548.

⁹¹ *ibid* 547

⁹² Alfred C, Aman Jr, ‘Globalization, Democracy, and the Need for a New Administrative Law’ (2002, August) Vol. 49, Issue 6, University of California Law Review, 1687, 1694.

⁹³ Jonathan Kuyper, ‘Global Governance and the Democratic Deficit’ (2010) 35 *Alternative LJ* 169

⁹⁴ David Held & Matthias Koenig-Archibugi (eds), ‘*Global Governance and Public Accountability*’ (Blackwell Publishing 2005) 4.

Establishing the legitimacy of global aviation safety standards within the state will allow national courts to be able to evaluate/invoke them. This way individuals will be able to be in checks and balance system of global governance of aviation safety.

To respond to the ‘democracy deficit’ in global governance in general, administrative law–type mechanisms, procedures, rules and principles have begun to emerge to form the foundation of global administrative law.⁹⁵ The focus of GAL theory is the use of such mechanisms within the regulatory institutions of global governance.⁹⁶

For instance, some of these mechanisms include the Inspection Panel that was created in 1993. Its creation aimed to provide transparency for projects conducted by the World Bank. The panel has the role of inspecting the concerns of those affected by World Bank policies.⁹⁷ The process that provides notice-and-comment adopted by the Basel Committee on Banking Supervision in developing international capital standards has resulted in improved transparency of the Committee.

Another example is the increasing inclusion of Non-Governmental Organizations (NGOs) in the regulatory progress of the Codex Alimentarius Commission, which deals with standards for international foods, and guidelines and codes of practice that contribute to the quality,

⁹⁵ Andrew D. Mitchell & John Farnik, ‘Global Administrative Law: Can it Bring Global Governance to Account?’ (2009, December 22) Vol.37, Federal Law Review 237.
<<http://classic.austlii.edu.au/au/journals/FedLawRw/2009/9.pdf>> accessed August 30 2019

also see Benedict Kingsbury & Richard B. Stewart, ‘Legitimacy and Accountability in Global Regulatory Governance: The Emerging Global Administrative Law and the Design and Operation of Administrative Tribunals of International Organisations’ (2008) Retrieved from Institute International Law and Justice, New York Law School, <<http://www.iilj.org/publications/legitimacy-and-accountability-in-global-regulatory-governance-the-emerging-global-administrative-law-and-the-design-and-operation-of-administrative-tribunals-of-international-organizations/>> accessed 30 August 2019

⁹⁶ ‘This project has resulted in the publication of over a hundred papers, journal symposia, and the Law and Global Governance book series published by Oxford University Press. The project has fostered collaborations across both developed and developing countries and has engaged a wide set of actors. Most recently, the World Bank has referenced global administrative law in the study of the Bank’s sanctions regime and its recent reforms.’ New York University Faculty of Law, Institute of International Law and Justice (IILJ) ; Global Administrative Law, <<https://www.iilj.org/gal/>> accessed 30 August 2019
For the further information regarding GAL scholarship and its developments see Lorenzo Casini, ‘Global Administrative Law Scholarship’ in Sabino Cassese (ed.) ‘*Research Handbook on Global Administrative Law*’ (Edward Elgar Publishing 2017) 549-567

⁹⁷ Enrique R. Carrasco & Alison K. Guernsey, ‘World Bank’s Inspection Panel: Promoting True Accountability through Arbitration’ (2008) Vol. 41, Cornell International Law Journal, 577,579.
<<https://scholarship.law.cornell.edu/cilj/vol41/iss3/1>> accessed 30 August 2019

safety, and fairness of the international food trade.⁹⁸ Since its establishment, the participation of NGOs has been growing.⁹⁹ The successful functioning of Codex Alimentarius in increasing compliance is explained by enhancing the participation in fair and open procedures of decision making.¹⁰⁰

One of the proponent scholars of GAL theory, Kingsbury pointed out that traditional rules of international law and their sources are not capable of governing the newly emerging global community and administrative structures due to the increasing involvement of many actors.¹⁰¹ It requires a move to a new governance system where the private regulators and hybrid bodies are also dominant actors, rather than only states and traditional international institutions and organisations.¹⁰²

Global regulatory governance is now characterised by diverse fields that include environment and labour, intellectual property, financial and economic regulation, trade and investment, human rights, international security, and the internal management of the involved organisations.¹⁰³ Global Administrative Law (GAL) scholars Kingsbury et al., have asserted that global regulatory governance ‘can now be understood as an administration’.¹⁰⁴

Furthermore, a field where the domestic and international orders are blurred, ‘in which administrative functions are performed in often complex interplays between officials and

⁹⁸ Codex Alimentarius, International Food Standards <<http://www.fao.org/fao-who-codexalimentarius/about-codex/en/>> accessed August 27 2017

⁹⁹ ‘Currently the Codex Alimentarius Commission has: 188 Codex Members - 187 Member Countries and 1 Member Organization (EU) 219 Codex Observers - 56 IGOs, 147 NGOs, 16 UN. Codex Alimentarius, International Food Standards ‘Codex Members and Observers’ Retrieved, from < <http://www.fao.org/fao-who-codexalimentarius/members-observers/en/> > August 26, 2017

¹⁰⁰ Michael A Livermore, 'Authority and Legitimacy in Global Governance: Deliberation, Institutional Differentiation, and the Codex Alimentarius' (2006) Vol.81 NYU Law Review 766,782.

¹⁰¹ Benedict Kingsbury, ‘Global Administrative Law: Implication for National Courts’ in C. Geiringer, & D. R. Knight (eds.) *Seeing the World Whole, Essays in Honor of Sir Kenneth Keith* Victoria University Press, New Zealand (2008) 104.

¹⁰² *ibid*

¹⁰³ Benedict Kingsbury & Richard B. Stewart, ‘Legitimacy and Accountability in Global Regulatory Governance: The Emerging Global Administrative Law and the Design and Operation of Administrative Tribunals of International Organisations’ (2008) Retrieved from Institute International Law and Justice, New York Law School, <<http://www.iilj.org/publications/legitimacy-and-accountability-in-global-regulatory-governance-the-emerging-global-administrative-law-and-the-design-and-operation-of-administrative-tribunals-of-international-organizations/>> accessed 30 August 2019

¹⁰⁴ *ibid* , Introduction

institutions on different levels, and in which regulation may be highly effective despite its predominantly non-binding forms',¹⁰⁵ is defined as a 'global administrative space'.¹⁰⁶

In response to raising issues in effective international law-making, the GAL theory introduces an administrative structure of regulatory decision making which according to Kingsbury et al., provides principles of transparency, legitimacy and accountability which are applicable

to administration by formal international organisations; to administration based on collective action by transnational networks of cooperative arrangements between national regulatory officials; to distributed administration conducted by national regulators under treaty, network, or other cooperative regimes; to administration by hybrid intergovernmental–private arrangements; and to administration by private institutions with regulatory functions.¹⁰⁷

Administrative law-type mechanisms for global regulatory governance¹⁰⁸ is deemed to be more responsive in dealing with the legal issues that derive from the increasing complexity of global governance and the issues between national and international administrative institutions.

4.2.1 Developments towards global governance of the international civil aviation regime

Taking into account the air transport market developments and contemporary technical and economic environment changes explored in the previous chapter, it is clear that the system of the Chicago Convention (1944) is in question. The issue is whether or not an international civil aviation system based on exclusive state sovereignty can be sustainable in contemporary global aviation, in which actors other than states have a significant role in global civil aviation. The answer to this challenge is generally expressed in terms of the need for

¹⁰⁵ Benedict Kingsbury, Nico Krisch, 'Introduction: Global Governance and Global Administrative Law in the International Legal Order' (2006) Vol. 17, Issue 1. *European Journal of International Law* 1, 2. Retrieved from <<http://www.ejil.org/pdfs/17/1/64.pdf>> accessed August 30 2019

¹⁰⁶ *ibid*

¹⁰⁷ Benedict Kingsbury, Nico Krisch & Richard B. Stewart, 'The Emergence of Global Administrative Law' (2005) Vol.68:15. *Law and Contemporary Problems*, 20. Retrieved from <<https://scholarship.law.duke.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1361&context=lcp>> accessed September 1 2019

¹⁰⁸ *ibid*

developing a global system to govern global civil aviation.¹⁰⁹ As Young stated ‘regimes are always created rather than discovered.’¹¹⁰

The international civil aviation regime that evolved from the Chicago Convention (1944) has been developing since 1944. Economic and technical developments since then have required constant adaptation of the standards and regulations, becoming more advanced and global than ever with unique issues that have never occurred before in civil aviation history. Therefore, there are grounds upon which to base a claim for the necessity of addressing a global regime to govern civil aviation around the world.

On the other hand, two significant issues have arisen that must be justified regarding the global governance of global civil aviation, particularly the international governance of civil aviation safety. These are state sovereignty and the legitimacy of global aviation safety standards (SARPs) produced by an external authority (ICAO) other than states.

4.2.1.1 The concept of state sovereignty in the global governance of aviation safety

The Chicago Convention (1944) was established based on a fundamental principle of international law, respect for national sovereignty.¹¹¹ States had absolute sovereignty over the airspace above their territory. Every air activity occurring over the airspace of the state was subject to state permission, and so aviation agreements were developed bilaterally between states. National ownership and control agreements were fundamental, cabotage rights were absolute¹¹², and there was no access for foreign air operators.

Much has changed since then, including the approach to state sovereignty as it applies to civil aviation (see Chapters II and III). Nowadays, state sovereignty is deemed by ICAO ‘an enabler, not a barrier, within the context of globally harmonised and seamless air navigation

¹⁰⁹ See Steven Truxal, *Economic and Environmental Regulation of International Aviation: From International to Global Governance* (Kindle ed. Routledge. 2017), Brian Havel, *Beyond Open Skies; A New Regime for International Aviation* (Kluwer Law International 2009)

¹¹⁰ Oran R. Young, ‘International Regimes, Problems of Concept Formation’ (April 1980) Vol. 32, Issue 3, World Politics Cambridge University, 331, 335.

¹¹¹ Convention On International Civil Aviation 1944 (Doc.7300) Article 1
<<https://www.icao.int/publications/pages/doc7300.aspx>> accessed 13 May 2019

¹¹² *ibid* Article 7

services'.¹¹³ For instance, state obligations imposed by Article 28 of the Chicago Convention (1944) are to 'provide, in its territory, airports, radio services, meteorological services and other air navigation facilities to facilitate international air navigation, in accordance with the standards and practices recommended or established from time to time'. These operations were considered a state monopoly. However, nowadays a state is not obliged to provide all these services and facilities itself but has full regulatory power and freedom to designate the national or foreign service providers.¹¹⁴ The use of state power to terminate the state monopoly in these areas is explained as the state does not delegate its sovereignty to the providers, but it delegates 'the responsibility of the performance of functional responsibilities'.¹¹⁵ This changed approach to state sovereignty emerged as a result of developments in the air transport market worldwide.

Roderick Van Dam emphasised that states are neither giving up nor renounce their sovereignty. The state exercises its sovereign power in cases that include international organisations such as the ICAO and the EU by allocating functions to these international organisations. These functions may include executive, legislative and judicial tasks. Accordingly, states have developed tendency to limit to exercise their sovereign power to achieve a common goal.¹¹⁶

Another indication of changes in the fundamental principles of the Chicago Convention (1944) is the impact of liberalisation and the deregulation of the air transport market. For instance, principles such as restrictions on air carriers' ownership and control have been relaxed in line with the liberalisation of the air transport market. Practices such as code-sharing agreements and aircraft leasing have been developed as a way to evade nationality requirements, and cabotage rules have been relaxed (see Chapter III).¹¹⁷

¹¹³ ICAO Worldwide Air Transport Conference (ATCONF) 6th Meeting (18 to 22 March 2013),, Working Paper Presented by Civil Air Navigation Services Organisation (CANSO) ATConf/6-WP/80 (04/03/2103) 'Airspace Sovereignty' <<https://www.icao.int/Meetings/atconf6/Documents/WorkingPapers/ATConf.6.WP.080.1.en.pdf>> accessed 2 September 2019

¹¹⁴ *ibid*

¹¹⁵ *ibid*

¹¹⁶ Roderick van Dam, 'The Long and Winding Road: Air Traffic Management Reform in Europe' (2015) Vol.40, Issue 1, *Air and Space Law*, 43,45.

¹¹⁷ Brian Havel, '*Beyond Open Skies; A New Regime for International Aviation*' (Kluwer Law International 2009)

The recent developments in air transport governance have led to the adjustment of the air transport market to a more global operation. States have relaxed control over air transport market developments and adjust to global economic developments to get their share of the economic benefits. However, the legal rules and regulations that govern air transport, particularly international civil aviation, remain the same – international, not global.

4.2.1.2 The question of legitimacy

Traditionally, administrative regulations are subject to each nation-state's sovereignty. The implementation in states of regulations which are the product of an external authority is a fundamental change. The state has sovereign power and exercises its power to regulate administration in its own territory, and whenever there is an international obligation derived from international agreements, the state transforms that regulation into national law at its own discretion.

However, this traditional dualist approach to international law has been challenged by global developments.¹¹⁸ The actors that are addressed by international regulations are no longer only states, but also private actors in global fields.¹¹⁹ Accordingly, as stated by Weis and Wilkinson, the concept of governance in international law has been transformed,

[t]he concept of governance from a simple association with international organization and law, multilateralism, and what states do in concert to one that looks at the kinds of world order in which their interactions take place, while also paying attention to a host of other actors, principles, norms, networks, and mechanisms.¹²⁰

The term global governance thus refers to collective efforts that aim towards identifying, understanding, or addressing common problems that affect different countries, as well as processes that go beyond the capacity of an individual state.¹²¹ Consistent with the 'new

¹¹⁸ Sabino Cassese, 'Global Standards for National Administrative Procedure' (2005) Vol.68 Law and Contemporary Problems, 109, 113. Retrieved from <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1363&context=lcp> > 2 September 2019

¹¹⁹ *ibid*

¹²⁰ Thomas G. Weiss, & Rorden Wilkinson, 'Introduction: Drivers and Change in Global Governance' (2015) Vol.29, No.4, Ethics & International Affairs, 391,395. Retrieved from https://www.cambridge.org/core/services/aop-cambridge-core/content/view/6ADD654318838258582826E660110C62/S0892679415000374a.pdf/introduction_drivers_and_change_in_global_governance.pdf accessed September 2 2019

¹²¹ *ibid*

sovereignty' theory that presented Chayes and Chayes¹²² participation and cooperation among the states has been described by Anne-Marie Slaughter as;

the capacity to participate in the international and trans-governmental regimes, networks, and institutions that are now necessary to allow governments to accomplish through cooperation with one another what they could once only hope to accomplish acting alone within defined territory.¹²³

Clearly, given the degree of risks that are involved, aviation safety cannot be solely established nationally. It requires – as it applies to the current system – the establishment of global regulatory authority and global regulations. It further requires cooperation among states and between states and global regulators.¹²⁴ Overall, the traditional power of national governments' regulatory space has been limited by global governance.¹²⁵

While the global governance of aviation safety is a reality, the concern is whether or not complete and exclusive sovereignty can still be claimed for legal arguments regarding those aviation safety standards that should be applied globally by nation-states. Although the role of states has not been challenged by GAL scholars,¹²⁶ instead of 'complete and exclusive' sovereignty, they now consider 'the erosion of state sovereignty' as a reality.¹²⁷ The necessity for cooperation and interaction among public and private, national and international actors in the global administrative space means that states are no longer able to control and regulate these global fields under the umbrella of 'sovereign rights' of individual states.

The rise of common global problems such as climate change, global terrorism and the expansion of global trade has led to the need for collective responses and actions. Civil aviation safety is clearly one of these global concerns as well which new challenges requires collective responses and actions. Cassese asserted that cooperation leads to the erosion of the traditional constitutional checks and balances that are found in many democratic nations

¹²² Abram Chayes, Antonia Handler Chayes, *The New Sovereignty- Compliance with International Regulatory Agreements* (Harvard University Press.1995) 26.

¹²³ Anne-Marie Slaughter, 'Sovereignty and Power in a Networked World Order' (2004, Summer) Vol.40, No.2, *Stanford Journal of International Law*, 283,285.

¹²⁴ Sabino Cassese, 'Governing the World' in Sabino Cassese (ed.) *Research Handbook on Global Administrative Law* (Edward Elgar Publishing 2017) 506.

¹²⁵ Eyal Benvenisti, 'The future of sovereignty: the nation state in the global governance space' in Sabino Cassese (ed.) *Research Handbook on Global Administrative Law* (Edward Elgar Publishing 2017) 484.

¹²⁶ *ibid*

¹²⁷ Sabino Cassese, 'Governing the World' in Sabino Cassese (ed.) *Research Handbook on Global Administrative Law* (Edward Elgar Publishing 2017) 502-511

because ‘the traditional premise that sovereignty as from freedom can guarantee its citizens the freedom to’ is shattered¹²⁸

GAL theory responds to the challenges that based on state sovereignty by promoting the rule of law at the global level.¹²⁹ The question arises here how the rule of law can continue be a fundamental principle in global setting. Rijpkema asserts that the principle of the rule of law needs to be adopted at the global level as a new reality.¹³⁰ The requirement to establish the rule of law for the global community should be ensuring all persons and institutions are accountable to exercise of power that is given to them.¹³¹ By accepting and implementing global regulations created by global authorities, states have become part of the global administrative space.¹³²

4.4 Global governance of aviation safety

The reason for addressing ‘global governance’ for global aviation safety is not to promote one ‘world government’ to govern the whole field. The world that we live in now is globalised and has developed in an unprecedented way: advanced technology and mobility of people and goods make boundaries between states less visible, and the international law that regulates relations between states based on state sovereignty has become unresponsive to some global issues. Therefore, globally developing and governing fields such as civil aviation and safety of civil aviation demand new forms of law that can respond to new ways of living.

¹²⁸ Sabino Cassese, Elisa D'Alterio, ‘Introduction:the development of Global Administrative Law’, in Sabino Cassese (ed) ‘*Research Handbook Global Administrative Law*’ (Edward Elgar Publishing 2017) 19. ; see also Eyal Benvenisti, ‘The future of sovereignty:the nation state in the global governance space’ in Sabino Cassese (ed.) ‘*Research Handbook on Global Administrative Law*’ (Edward Elgar Publishing 2017) 483

¹²⁹ Sabino Cassese, ‘Administrative Law without the State? The Challenge of Global Regulation’ Retrieved from 37 NYU Journal of International Law and Politics (2006, November 6) 659-660. < <http://ilj.org/wp-content/uploads/2016/08/Cassese-Administrative-Law-Without-the-State-2005.pdf> > 2 September 2019

¹³⁰ Peter Rijpkema, ‘ The Concept of a Global Rule of Law’ (2013) Vol.4 No.2, Transnational Legal Theory, 167,169.

¹³¹ *ibid* 196

¹³² Sabino Cassese, ‘Global Standards for National Administrative Procedure’ (2005) Vol.68 Law and Contemporary Problems, 109,111. Retrieved from <<http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1363&context=lcp> > 2 September 2019

The existing challenge in law for the twenty-first century is the creation of structures that bring about a new kind of democracy that is well-suited to the global changes.¹³³

Centuries ago, when the principles of traditional legal norms were established, many legal issues that nowadays are crucial were not foreseeable or even imaginable. All these laws came into being out of requirements of the dynamics of life. Life is changing, and the law is being amended to regulate these changes.

As a result of globalisation, people are now more able to connect. They can share values, concerns, cultural practices and beliefs, as well as address concerns even though they have different cultures and legal traditions. Rafael Domingo emphasised that global society has developed to address and solve global problems which could be threats to society, something he described as a ‘shared desire’.¹³⁴ With the changes in many aspects of life, the law that regulates life can hardly remain unchanged, and global developments are creating pressure for the reformation of global regulations. One of the shared common values of global society in a contemporary world is aviation safety.

Many regimes and institutions that are beyond the realm of states now regulate human activities.¹³⁵ Accordingly, an increasing number of international organisations, institutions and NGOs are in practice pursuing their goals in an organised manner around the world.¹³⁶ This is a complexity that was not foreseen by the drafters of the norms of public international

¹³³ Alfred C. Aman, Jr *The Democracy Deficit: Taming Globalization Through Law Reform* (Kindle ed. New York University Press.2004) 177.

¹³⁴ Rafael Domingo, *The New Global Law* (Cambridge University Press.2010) Preface

¹³⁵ Lorenzo Casini, ‘The Expansion of the Material Scope of Global Law’ in Sabino Cassese (ed.) *Research Handbook on Global Administrative Law* (Edward Elgar Publishing 2017) 25. “Fields as diverse as : forest preservation, the control of fishing, water regulation, environmental protection, standardization and food safety, financial and accounting standards, internet governance, pharmaceuticals regulation, intellectual property protection, refugee protection, coffee and cocoa standards, labor standards, antitrust regulation and finance of public works, trade standards, regulation of finance insurance, foreign investments, international terrorism, war and arms control, air and maritime navigation, postal services, telecommunications, nuclear energy and nuclear waste, money laundering, education, migration, law enforcement, sport, and health.” Quoted from Sabino Cassese, ‘The Global Polity? Global Dimensions of Democracy and the Rule of Law’ Global Law Press, (Editorial Derecho Global 2012) 20. Retrieved from <<http://es.globallawpress.org/wp-content/uploads/02-TheGlobalPolity.pdf>> accessed 27 August 2019

¹³⁶ See Benedict Kingsbury, & Lorenzo Casini, ‘Global Administrative Dimensions of International Organizations’ IILJ Working Papers, Global Administrative Law Series(2009/ 9).. Retrieved from <<http://www.iilj.org/publications/documents/2009-9.Kingsbury-Casini.pdf>> accessed 30 August 2019; Stefano Battini, ‘The proliferation of global regulatory regimes’ in Sabino Cassese (ed.) *Research Handbook Global Administrative Law* (Edward Elgar Publishing 2017) ; Sabino Cassese, ‘The Global Polity ? Global Dimensions of Democracy and the Rule of Law’ Global Law Press,(Editorial Derecho Global 2012) Retrieved from <<http://es.globallawpress.org/wp-content/uploads/02-TheGlobalPolity.pdf>> accessed 27 August 2019

law. According to Rosenau, this ‘ is because the world is host to ever greater numbers of organisations in walks of life and in every corner of every continent.’¹³⁷ Global developments indicate that the state’s role in international life is central; however, states are not the only type of actor on the global stage. Issues that are of global concern are not subjects for states alone to deal with. Global issues cannot be addressed at the state level only: these issues need to be addressed in such a way as to embrace all the actors in every corner of the world. Rosenau explains global governance as governance that involves the ruling of human activity, from the basic level, which is the family, to the most complex matters that affect the whole world. He went further to assert that the importance of international interdependence is the control of factors that affect the whole world in general.¹³⁸ General is also true for specific developments in air transport. According to the report of the UN Committee for Development Policy ‘international cooperation and the resulting governance mechanisms are not working well’¹³⁹ and need to be reformed.¹⁴⁰ Some of the reasons given emphasise the challenges of ineffective international cooperation and growing tension between decision-making processes at the national and global levels.¹⁴¹

As a result of the increasing number of issues that are global in nature and thus cannot be managed by national governments alone, global regulatory regimes are established.¹⁴² Battini asserts that ‘[t]he proliferation of global regulatory regimes is largely an institutional answer’¹⁴³ Accordingly, generation of global regulatory regimes has developed as a response to the ‘effectiveness and accountability’ issues of global regulations within the state.

¹³⁷ James N. Rosenau, ‘Governance in the Twenty-first Century’ (Winter 1995), Vol.1, No.1 *Global Governance* 13, 15-16. Retrieved from <<http://www.jstor.org/stable/27800099>> accessed 27 August 2019

¹³⁸ *ibid* 13.

¹³⁹ UN Committee for Development Policy, ‘Global governance and global rules for development in the post-2015 era’ (2014, June) vi. Retrieved from <http://www.un.org/en/development/desa/policy/cdp/cdp_publications/2014cdppolicynote.pdf> accessed 2 September 2019

¹⁴⁰ *ibid* 3. ‘While the importance of global governance has been acknowledged, we are witnessing the increasing need to manage global problems more effectively in the face of increased interdependence.’

¹⁴¹ *ibid* 3-4.

¹⁴² Sabino Cassese, ‘The Global Polity? Global Dimensions of Democracy and the Rule of Law’ *Global Law Press*, (Editorial *Derecho Global* 2012) 21. Retrieved from <<http://es.globallawpress.org/wp-content/uploads/02-TheGlobalPolity.pdf>> accessed 27 August 2019

¹⁴³ Stefano Battini, ‘The proliferation of global regulatory regimes’ in Sabino Cassese (ed) ‘*Research Handbook Global Administrative Law*’ (Edward Elgar Publishing 2017) 50.

Approximately 2,000 regulatory regimes¹⁴⁴ exist in so many areas that almost every human activity is now being subject to global regulation.¹⁴⁵

Within the increasing number of global regulatory regimes¹⁴⁶, Casesse observes, ‘national governments have increasingly been accompanied by other actors such as multinational corporations, international governmental organisations (IGOs) and non-governmental organizations (NGOs).’¹⁴⁷ The Yearbook of International Organisations indicates that non-governmental organisations show the most significant growth in recent years. They constitute the majority among the organisations involved in global issues. The report shows that, out of the 67,139 organisations surveyed in 2013, 59,383 are NGOs.¹⁴⁸

Article 71 of the UN Charter allows the Economic and Social Council to establish suitable arrangements and to consult with the non-governmental organisations that are concerned with issues within its competence. NGOs play a significant role in international law-making.¹⁴⁹ Instances of counselling and cooperating with NGOs, such as in identifying issues that need to be addressed or participating in treaty drafting processes within global regimes, are

¹⁴⁴ ‘Regulatory regimes are being sifted from domestic authorities to global agencies. International organizations now enjoy regulatory, adjudicatory and dispute resolution powers. Their number is increasing (there were 123 international governmental organizations in 1951;154 in 1960; 242 in1971;1039 in 1981;there are approximately 2000 now) Sabino Cassese, ‘The Global Polity ? Global Dimensions of Democracy and the Rule of Law’ Global Law Press, (Editorial Derecho Global 2012) 109. Retrieved from <<http://es.globallawpress.org/wp-content/uploads/02-TheGlobalPolity.pdf> > accessed 27 August 2019

¹⁴⁵ Stefano Battini, ‘The proliferation of global regulatory regimes’ in Sabino Cassese (ed) ‘*Research Handbook Global Administrative Law*’ (Edward Elgar Publishing 2017) 46.

¹⁴⁶ Mark Mazower, ‘*Governing the World: The History of an Idea, 1815 to the present*’ (Kindle ed. Penguin Books 2012) Locations 177-180-184 “Today there is more global policymaking, in more varied forms, than ever before, and the unwary student soon finds him- or herself stumbling through a landscape of obscure acronyms that stretch endlessly into the bureaucratic haze. There are military alliances, such as NATO and WEU; intergovernmental organizations in the classic mold, from the UN to specialist agencies such as the ILO, ICAO, ICC, WHO, and GATT; regional bodies, like the Council of Europe, the European Commission, and the Organizations of American and African states; post imperial clubs, like the Commonwealth and the Organisation internationale de la Francophonie; quasi-polities like the European Union; and regular summit conferences like the G-20. Nor should one ignore the vast number of NGOs of all kinds, many of which also now play a more or less formalized role in shaping global politics.”^{1E4} ;See also for figures Battini, ‘The proliferation of global regulatory regimes’ in Sabino Cassese (ed) ‘*Research Handbook Global Administrative Law*’ (Edward Elgar Publishing 2017) 46-49.

¹⁴⁷ Sabino Cassese, ‘The Global Polity? Global Dimensions of Democracy and the Rule of Law’ Global Law Press, (Editorial Derecho Global 2012) 16. Retrieved from <<http://es.globallawpress.org/wp-content/uploads/02-TheGlobalPolity.pdf> > accessed 27 August 2019

¹⁴⁸ Stefano Battini, ‘The proliferation of global regulatory regimes’ in Sabino Cassese (ed) ‘*Research Handbook Global Administrative Law*’ (Edward Elgar Publishing 2017) 46.

Union of International Association (UIA) Yearbook of International Organizations

¹⁴⁹ Barbara K Woodward, ‘The Role of International NGOs: An Introduction’ (2011) Vol. 19, Willamette J Int'l L & Dis. Res. 203

increasing.¹⁵⁰ One key area in which many international organisations are functioning, including numbers of NGOs in various speciality areas, is that of air transport. ICAO has compiled a list of them, as they may be invited to attend appropriate ICAO meetings.¹⁵¹

Global aviation safety is one of the global regulatory regimes generally discussed above. ICAO's 2014-2016 Global Aviation Safety Plan states that air transport has created 56.6 million job opportunities and has contributed over 2 trillion dollars to the global Gross Domestic Product (GDP). In addition, it carries over 2.5 billion passengers, as well as cargo worth 5.3 trillion dollars annually. Therefore, safety must be the first priority in each and every activity that is carried out.¹⁵²

IATA 2019 Annual Review of the International Air Transport Association (IATA)¹⁵³ reveals that:

¹⁵⁰ Sabino Cassese, 'The Global Polity? Global Dimensions of Democracy and the Rule of Law' Global Law Press, (Editorial Derecho Global 2012) 29. Retrieved from <<http://es.globallawpress.org/wp-content/uploads/02-TheGlobalPolity.pdf>> accessed 27 August 2019

¹⁵¹ 'Aeronautical Radio Inc. (ARINC) ,Aerospace Medical Association (AsMA) ,Air Crash Victims' Families' Federation International (ACVFFI) ,Airports Council International (ACI) ,Air Transport Research Society (ATRS) ,Aviation Working Group (AWG) ,Civil Air Navigation Services Organisation (CANSO) ,European Organisation for Civil Aviation Equipment (EUROCAE) ,Flight Safety Foundation (FSF) ,Global Express Association (GEA) ,Institute of International Law (IDI) ,Inter-American Statistical Institute (IASI) ,International Academy of Aviation and Space Medicine (IAASM) , International Aeronautical Federation (FAI) ,International Air Transport Association (IATA) ,International Association for the Physical Sciences of the Ocean (IAPSO) , International Association of Aircraft Brokers and Agents (IABA) ,International Association of Institutes of Navigation (IAIN) ,International Business Aviation Council (IBAC) ,International Chamber of Commerce (ICC) ,International Commission on Illumination (CIE) , International Committee for Airspace Standards and Calibration (ICASC) , International Coordinating Council of Aerospace Industries Associations (ICCAIA), International Council of Aircraft Owner and Pilot Associations (IAOPA) , International Federation of Aeronautical Information Management Associations (IFAIMA) , International Federation of Airline Dispatchers' Associations (IFALDA) ,International Federation of Air Line Pilots' Associations (IFALPA) International Federation of Air Traffic Controllers' Associations (IFATCA) ,International Federation of Air Traffic Safety Electronics Associations (IFATSEA) , International Federation of Helicopter Associations (IFHA) , International Geographic Union (IGU) ,International Law Association (ILA) , International Maritime Radio Committee (CIRM) , International Organization for Standardization (ISO), International Society of Air Safety Investigators (ISASI) , International Statistical Institute (ISI) , International Transport Workers' Federation (ITF) , International Union of Aerospace Insurers (IUAI) , International Union of Geodesy and Geophysics (IUGG),International Union of Railways (UIC) , Royal Aeronautical Society (RAeS) , RTCA, Inc. , Société internationale de télécommunications aéronautiques (SITA) , Society of Automotive Engineers (SAE) International , The International Air Cargo Association (TIACA) , World Wide Airport Coordinators Group (WWACG)' < <https://www.icao.int/about-icao/Pages/Invited-Organizations.aspx#idIONonGov> > accessed 17 October 2019

¹⁵² International Civil Aviation Organisation (ICAO) Global Aviation Safety Plan 2014-2016. (2013) Retrieved from <http://www.icao.int/publications/Documents/10004_cons_en.pdf> accessed 2 September 2019

¹⁵³ The International Air Transport Association (IATA) 'The International Air Transport Association (IATA) is the trade association for the world's airlines, representing some 290 airlines or 82% of total air traffic' <<https://www.iata.org/about/pages/index.aspx>> accessed 4 July 2019

‘[I]n 2018 the world’s airlines provided about 4 billion passengers the freedom to travel over a global network of some 22,000 routes. . . . , airlines also enabled the freedom to do business globally by transporting 64 million tonnes of cargo to markets around the world. This activity supported a third of global trade by value, generated 65 million jobs and underpinned \$2.7 trillion of GDP. In 2018 the world’s airlines earned a collective net profit of \$30 billion. Industry revenues topped \$812 billion and 8% return on invested capital was generated.’¹⁵⁴

Global air transport market integration has led to aviation safety being defined, not internationally, but globally. Uniformity in compliance with aviation safety regulations has been the subject of many studies, as they emphasise the application of aviation safety regulations by those who still adhere to the traditional legal norms¹⁵⁵ and define what should theoretically be established.¹⁵⁶ Moreover, uniformity in compliance with aviation safety standards is a concern of civil societies worldwide. Hence, in a rapidly developing civil aviation network, any deficiency in flight safety by one country would be a threat to the safety of other aviation networks around the world.

However, establishing uniformity in state compliance with aviation safety standards worldwide has been difficult to achieve. The ICAO as an international organisation has been developing global safety standards within the framework of legal structures as an international organisation and providing global safety oversight programmes to follow up on compliance levels among the contracting states. Despite all these efforts and improvements, uniformity of state compliance levels is still not satisfactory.¹⁵⁷

One of the reasons underlined regarding the failure to achieve a satisfactory level of compliance with international aviation safety standards is the lack of enforcement power of ICAO.¹⁵⁸ However, an argument favouring the enforcement power of the ICAO as an

¹⁵⁴ IATA Annual Review 2019 < <https://www.iata.org/publications/Documents/iata-annual-review-2019.pdf> > 8. accessed 4 July 2019

¹⁵⁵ Paul Stephen Dempsey, ‘Compliance and Enforcement in International Law: Achieving Global Uniformity in Aviation Safety’ (2004) Vol. 30, Issue 1, North Carolina Journal of International Law and Commercial Regulation 1 ; Jiefeng Huang, *Aviation Safety through the Rule of Law; ICAO’s Mechanisms and Practices*, (Kluwer law International 2009)

¹⁵⁶ *ibid*

¹⁵⁷ ICAO Safety Report 2014 < https://www.icao.int/safety/Documents/ICAO_2014%20Safety%20Report_final_02042014_web.pdf > accessed 25 October 2019

¹⁵⁸ See also Paul Stephen Dempsey, ‘Compliance and Enforcement in International Law: Achieving Global Uniformity in Aviation Safety’ (2004) Vol. 30, Issue 1, North Carolina Journal of International Law and

international organisation does not provide any feasible solution to the problem. Even if some tools can be considered to be enforcement powers, they can only be applied on a limited basis.¹⁵⁹ Hence, the principles of administrative law might be an appropriate tool to address the democratic deficit in the global governance of aviation safety.

Generally, addressing issues as ‘global’ gives people the impression that they only remotely affect their daily lives. On the contrary, the daily lives of people are being increasingly affected by global regulations. As Aman stated, ‘globalisation is not something “out there” which is foreign and distant; rather, it is embedded in our own domestic institutions, both “public” and “private”’¹⁶⁰

The evidence presented has shown that civil aviation safety is a global concern, with ‘a domestic face’.¹⁶¹ Indeed, the decisions of global regulators for air transport have an impact on people’s daily lives. Citizens of states need to have a voice, but, more than that, they need administrative-law types of mechanisms to enable them to challenge global policies, to invoke global aviation safety standards to be implemented through domestic institutions of government. Eventually, this would serve to establish a stronger democracy under the rule of law.¹⁶²

4.4.1 Administrative character of global aviation safety governance

In the international civil aviation regime, the Chicago Convention (1944) was the point of origin for the contracting states to agree on the international treaty. It is a point of origin, as GAL theory suggests, of ‘expecting and accepting’¹⁶³ the standards set by an international

Commercial Regulation 1; Jiefeng Huang, *Aviation Safety through the Rule of Law; ICAO’s Mechanisms and Practices*, (Kluwer law International 2009)

¹⁵⁹ Paul Stephen Dempsey, ‘Compliance and Enforcement in International Law: Achieving Global Uniformity in Aviation Safety’ (2004) Vol. 30, Issue 1, North Carolina Journal of International Law and Commercial Regulation 1,21.

¹⁶⁰ Alfred C. Aman, Jr ‘*The Democracy Deficit: Taming Globalization Through Law Reform*’ (Kindle ed. New York University Press.2004) 47.

¹⁶¹ *ibid* 131.

¹⁶² *ibid* 178.

¹⁶³ Sabino Cassese, ‘Global Standards for National Administrative Procedure’ (2005) Vol.68 Law and Contemporary Problems, 109,110. Retrieved from <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1363&context=lcp> > 2 September 2019

organisation. Thus, a national administration ought to respect global standards for the air activity above its territory. By signing the Chicago Convention (1944), the contracting states agreed that international civil aviation should be regulated by the Chicago Convention (1944) regime. The preamble of the Convention stated that signatory countries agreed on certain principles and arrangements in the international civil aviation field that can no longer be managed by individual states without interacting with other states.¹⁶⁴

The Chicago Convention (1944) has set up rules and obligations directed to states to establish a sustainable air transport network in the world. Therefore, under public international law, states became responsible for implementing internationally approved civil aviation rules and standards in their own territory.

The Convention (1944) also set up rules and obligations that directs states to establish a sustainable air transport network in the world. Therefore, under public international law, states became responsible for implementing internationally approved standards and civil aviation rules in their own territory. Currently, the ICAO is a specialised agency of the United Nations. Specialised agencies are those working in a particular field, such as civil aviation, which have a responsibility to control activities in that field. Agencies are described as international administrative bodies that perform administrative functions.¹⁶⁵

ICAO sets the rules and standards that govern international civil aviation safety and works closely with national civil aviation administrations to implement global aviation safety regulations. ICAO works with states and cooperates with them, but it does not act as an international institution that overrules them. Slaughter suggested the term ‘networked world order’, which can be applied to the system of the ICAO. She stated that the primary political authority remains at the national level even in the case of networked world order, except in cases in which the national government delegates its authority to supranational institutions. However, officials of the national government would be increasingly involved in networks for personal and institutional relations. Each of them would operate in both the domestic and international platforms, exercising their national power to implement trans-governmental and

¹⁶⁴ Convention On International Civil Aviation 1944 (Doc.7300)

<<https://www.icao.int/publications/pages/doc7300.aspx>> accessed 13 May 2019 Preamble ‘agreed on certain principles and arrangements in order that international civil aviation may be developed in a safe and orderly manner and that international air transport services may be established on the basis of equality of opportunity and operated soundly and economically.’

¹⁶⁵ Pitman B. Patter, ‘*An Introduction to the Study of International Organisation*’ (5th ed. New York: Appleton-Century Crofts. 1948) 273-274.

other international duties, and acting in the best interest of their states, while working with foreign and supranational partners to share and distil information. This would occur with the aim of obtaining harmonised national and international law, addressing common problems, as well as enforcing national and international laws.¹⁶⁶

The transforming perspective of the structure of international law due to the impact of globalisation and increasing global governance of global field has been addressed by GAL scholars in parallel with Slaughter. Kingsbury et al., emphasised the emergence of a ‘global administrative space,’ as ‘[a] space in which the strict dichotomy between domestic and international has largely broken down, where administrative functions are performed in often complex interplays between officials and institutions on different levels, and in which regulation may be highly effective despite its predominantly non-binding forms.’¹⁶⁷

ICAO works not only with national administrations, but also with sector representatives, private institutions, and NGOs in the civil aviation field. These stakeholders (a stakeholder is defined as ‘a person or group or organisation that has interest or concern in an organisation’¹⁶⁸) also participate in the decision-making and implementation processes coordinated by ICAO. Therefore, governing civil aviation safety is not limited to the domestic administrative space of a state; rather, it includes all the other actors, as well as the state. Because of this feature, the administration of civil aviation safety is addressed globally. There are no longer two different levels of hierarchical governance referred to as domestic and international. Rather, there is coordination and collaboration between all the actors in the civil aviation field.

The application of the principles of international administrative law in fields that are governed globally is now being challenged,¹⁶⁹ because the coverage of the activities of international organisations is becoming wider, and the effects of their regulations address not

¹⁶⁶ Anne-Marie Slaughter, ‘Sovereignty and Power in a Networked World Order’ (2004, Summer) Vol.40, No.2, *Stanford Journal of International Law*, 283

¹⁶⁷ Benedict Kingsbury, Nico Krisch, ‘Introduction: Global Governance and Global Administrative Law in the International Legal Order’ (2006) Vol. 17, Issue 1. *European Journal of International Law* 1,1. Retrieved from <<http://www.ejil.org/pdfs/17/1/64.pdf>> accessed August 30 2019

¹⁶⁸ Ruwantissa Abeyratne, *Regulation of Air Transport the Slumbering Sentinels* (Springer International Publishing, 2014) 14. ‘Stake holders can effect or be effected by the organisation’s actions, objectives and policies’fn.21

¹⁶⁹ Benedict Kingsbury, Nico Krisch, ‘Introduction: Global Governance and Global Administrative Law in the International Legal Order’ (2006) Vol. 17, Issue 1. *European Journal of International Law* 1,4. Retrieved from <<http://www.ejil.org/pdfs/17/1/64.pdf>> accessed August 30 2019

only states but also individuals and private parties. However, the legal order of international administrative law is limited to states, and its enforceability is based on reciprocity and obligations that derive from the reciprocal agreements of states.

Particularly, the regulations of international organisations are having an increasing effect on private parties and individuals around the globe; compliance with global regulations is still within the limits of implementation at the national administrations and state law level. Due to the ‘filter of state sovereignty,’ which gives states the discretionary power to apply international rules domestically, international administrative law has become more inefficient.¹⁷⁰

However, this has created the problem of the imbalance between global economic developments and their regulation, which was summarised by Battini. He stated that ‘[w]hile the economy becomes global; its legal regulation remains international. The state loses control over economic fluxes but maintains control over the legal ones.’ Battini also emphasised the ‘tendency to correct such imbalance’¹⁷¹ through the development of global governance.

Due to the impact of global economic developments, fields cannot be governed only by bilateral agreements and individual states; rather, as has occurred in the field of aviation safety, they become the subject of global administrative law. Although these regulations are called international, aviation safety has global character in nature. Global administrative law is demonstrated by scholars like Kingsbury et al., as broader than international administrative law.¹⁷² Therefore, the particular focus of GAL theory on the global administrative structure which includes transparency, participation in administrative progress, reasoned decision making and review mechanisms covers all the rules and procedures to ensure the

¹⁷⁰ Sabino Battini, ‘International Organisations and Private Subjects: A Move Toward a Global Administrative Law’ (2005) IILJ Working Paper, Global Administrative Law Series. 13. Retrieved from IILJ Working Paper: <<http://ssrn.com/abstract=723165>> accessed 2 September 2019

¹⁷¹ *ibid* 14.

¹⁷² Benedict Kingsbury, Nico Krisch & Richard B. Stewart, ‘The Emergence of Global Administrative Law’ (2005) Vol.68 Law and Contemporary Problems 15

accountability of global administration.¹⁷³ Applying the norms of administrative law helps to establish a global structure that responds to those who are affected by global decisions.¹⁷⁴

4.5. Global governance of aviation safety within the administrative structure of GAL theory

The thesis asserts that the global governance of aviation safety is an example of the joint administrative action of international and national public powers through multiple actors, i.e. an executive structure described by the GAL theory. ICAO, as global decision-making authority, mostly satisfies GAL's administrative law principles. Next, it will be illustrated that the ICAO's governance systems mostly comply with the GAL theory's definitions of global governance. The governance of global aviation safety, and the regulative and supervisory activities of the ICAO focus on the collaboration and cooperation of states¹⁷⁵. This practice is more in line with the global governance to which GAL refers.

4.5.1 International organisations as global regulatory bodies in the field of civil aviation

The number of international organisations engaging in different areas of international activities is increasing every year. According to the 2014–2015 *Yearbook of International Organisations*, the number is over 67,000.¹⁷⁶ For this reason, issues that were previously

¹⁷³ Benedict Kingsbury, Nico Krisch & Richard B. Stewart, 'The Emergence of Global Administrative Law' (2005) Vol.68 *Law and Contemporary Problems* 15, 28.

Retrieved from <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1361&context=lcp> > accessed September 1 2019 ; also see Benedict Kingsbury & Richard B. Stewart, 'Legitimacy and Accountability in Global Regulatory Governance: The Emerging Global Administrative Law and the Design and Operation of Administrative Tribunals of International Organizations' (2016) 3. <<http://iilj.org/wp-content/uploads/2016/08/Kingsbury-Stewart-Legitimacy-and-Accountability-in-Global-Regulatory-Governance-1.pdf>> September 2 2019

¹⁷⁴ Benedict Kingsbury & Richard B. Stewart, 'Legitimacy and Accountability in Global Regulatory Governance: The Emerging Global Administrative Law and the Design and Operation of Administrative Tribunals of International Organizations' (2016) 1. <<http://iilj.org/wp-content/uploads/2016/08/Kingsbury-Stewart-Legitimacy-and-Accountability-in-Global-Regulatory-Governance-1.pdf>> 2 September 2019

¹⁷⁵ ICAO Journal 'The Future of Safety' (2012) Vol.67 N.1., 6-7. Retrieved from http://www.icao.int/publications/journalsreports/2012/6701_en.pdf > accessed 7 September 2019

¹⁷⁶ 'The Yearbook of International Organisations includes detailed information on over 37,000 active and 30,000 dormant international organisations from 300 countries and territories - including intergovernmental (IGOs) and international non-governmental organisations (INGOs). Approximately 1,200 new organisations are added each

addressed on an international level are now being addressed on a global level. Global – or, in other words, supranational – policymaking is in practice worldwide. As Esty observed, ‘If every country were an island, or perhaps its own planet, there would be no need for supranational policymaking.’¹⁷⁷

With this in mind, developments in global economic integration resulting from the influence of capital market liberalisation require more regulations. Therefore, supranational policymaking and global regulations that manage the conduct of new connections among institutions, individuals and states have come into international law.¹⁷⁸ As Klabber observed:

[W]hen organisations start to administer territory or impose and monitor sanctions regimes, or regulate markets or set standards, discussion will start about how they do so, and whether they do so well enough to merit further support. They operate, so to speak, on the market of legitimacy, and legitimacy, however precisely conceptualized, is a scarce source. And when this happens, the organization loses its character as an organization and becomes something else—whatever the “something else” maybe.¹⁷⁹

The ‘something else’ to which Klabber referred to applies the ‘global regulatory authority’ structure described by GAL theory. GAL theory asserts that regulatory authority has shifted from domestic to global bodies. It has reconceptualised the decision-making system of regulations in certain fields such as aviation safety, at the global level.

Accordingly, the traditional role of national states in implementing international law through national parliaments has been changing. The cooperation between supranational and national administration has become not only more effective but also more important when the

year’ Union of International Associations, Retrieved from The Year book of International Organizations: <<http://www.uia.org/yearbook> > 2 September 2019

¹⁷⁷ Daniel C. Esty, ‘Good Governance at the Supranational Scale: Globalising Administrative Law’ Yale Law School, Faculty Scholarship Series (2006) 1490,1500. Retrieved from, <<https://pdfs.semanticscholar.org/442d/5fac19032422ec51c6ba9bb829175b7d72e7.pdf> > accessed 2 September 2019

¹⁷⁸ D. Davis & Huge Corder, ‘Globalisation, National Democratic Institutions and the Impact of Global Regulatory Governance and Developing Countries’. In J. Glazewski (ed.) ‘*Global Administrative Law, Acta Juridicata*’ (University of Cape Town 2009) 70.

¹⁷⁹ Jan Klabbers, ‘The Paradox of International Institutional Law’ (2008) 5 Int’l Org L Rev 151, 169-170.; see also Benedict Kingsbury, & Lorenzo Casini, ‘Global Administrative Dimensions of International Organizations’ 6. IILJ Working Papers, Global Administrative Law Series (2009/ 9).. Retrieved from < <http://www.iilj.org/publications/documents/2009-9.Kingsbury-Casini.pdf> > accessed 30 August 2019

implementation of supranational standards is involved.¹⁸⁰ The main distinction for global regulations is that global regulatory regimes operate in a global sphere rather than on different levels such as international and domestic. The practicality of the regulatory regimes is explained by the fragmentation of regulations in a global administrative space. As Kingsbury and Stewart explained, '[d]ifferent regimes are organised along sectorial lines in specific fields of regulation, often with more than one organisation in a given sector.'¹⁸¹ This means that states accept global institutions' authority to set up standards and regulations, as well as to create sector policy in a certain field to comply within their own territory.

Although states are main actors, many globally regulated systems are in practice and embrace many actors other than states within these governance mechanisms.¹⁸² The structure of the globally governed fields is different from that of the 'international' fields that are governed by the consent-based models of international law.¹⁸³ According to Cassese, the different characters of the rules that can be supported in GAL are mainly produced by international organisations. States allow international organisations to regulate certain sectors voluntarily so that they can benefit from being members of them. Therefore, on the global level, unlike on the national level, instead of one regime, many global regulatory regimes in different fields have emerged,¹⁸⁴ including the field of global aviation safety.

The subject sectors are regulated globally, and these regulations should be implemented through the states' collaboration with other states and organisations, not through force. The

¹⁸⁰ Francesco Giovanni Albissini, 'The Rise of Global Standards, ICAO's Standards and Recommended Practices' (2016) Vol.8, Issue 1. The Italian Journal of Public Law, 203

¹⁸¹ Benedict Kingsbury & Richard B. Stewart, 'Legitimacy and Accountability in Global Regulatory Governance: The Emerging Global Administrative Law and the Design and Operation of Administrative Tribunals of International Organizations' (2016) 5. <<http://iilj.org/wp-content/uploads/2016/08/Kingsbury-Stewart-Legitimacy-and-Accountability-in-Global-Regulatory-Governance-1.pdf>> September 2 2019

¹⁸² Sabino Cassese, 'Administrative Law without the State? The Challenge of Global Regulation' Retrieved from 37 NYU Journal of International Law and Politics (2006, November 6) 673. <<http://iilj.org/wp-content/uploads/2016/08/Cassese-Administrative-Law-Without-the-State-2005.pdf>> 2 September 2019

¹⁸³ Benedict Kingsbury, Nico Krisch, 'Introduction: Global Governance and Global Administrative Law in the International Legal Order' (2006) Vol. 17, Issue 1. European Journal of International Law' 1 Retrieved from <<http://www.ejil.org/pdfs/17/1/64.pdf>> accessed August 30 2019

¹⁸⁴ Sabino Cassese, Bruno Carotti, Lorenzo Casini, Eleonora Cavalieri & Euan MacDonald, (eds.) 'Global Administrative Law: The Case Book' (Third ed. Institute for International Law and Justice (2012) Forward Retrieved from <https://www.researchgate.net/publication/256032738_Global_Administrative_Law_The_Casebook> 2 September 2019

aim is to enable certain sectors' activities to be regulated globally and for nation-states to agree on the authority of the decision making of global institutions rather than to establish specific outcomes in these sectors.¹⁸⁵ No enforcement system forces states to comply when they compromise their absolute state sovereignty, and there is also no global government above all the states. Cassese and D'Alterio noted that 'it is not a layer of regulation that is superimposed upon state regulations and administrative law is not a multi-level system, because global regulation percolates into national legal orders and the result is a mixture of national and global measure.'¹⁸⁶

Collaboration between governmental and non-governmental organisations is increasingly practised in global governance. The ICAO sets a good example of the collaboration between non-governmental organisations in international civil aviation governance.¹⁸⁷ Non-governmental organisations that participate in ICAO's work¹⁸⁸ include the International Air Transport Association (IATA) which, as mentioned earlier, is the global trade association for the airline industry representing 290 member airlines comprising 82% of total air traffic.¹⁸⁹ The Airports Council International (ACI), the global trade representative of the world's airports, represents airports' interests.¹⁹⁰ The Civil Air Navigation Services Organisation (CANSO) has the mission to be the global voice of air traffic management (ATM) in the transformation of the aviation system and creating value for members and stakeholders.¹⁹¹ The International Federation of Air Line Pilots' Associations (IFALPA) 'represents over 100,000 pilots and flight engineers in almost 100 countries worldwide with the mission to be the global voice of professional pilots by providing representation, services and support to

¹⁸⁵ Daniel C. Esty, 'Good Governance at the Supranational Scale: Globalising Administrative Law' Yale Law School, Faculty Scholarship Series (2006) 1490,1500. Retrieved from, <<https://pdfs.semanticscholar.org/442d/5fac19032422ec51c6ba9bb829175b7d72e7.pdf>> accessed 2 September 2019

¹⁸⁶ Sabino Cassese, Elisa D'Alterio, 'Introduction: the development of Global Administrative Law', in Sabino Cassese (ed) '*Research Handbook Global Administrative Law*' (Edward Elgar Publishing 2017) 2.

¹⁸⁷ Sabino Cassese, 'Administrative Law without the State? The Challenge of Global Regulation' Retrieved from 37 NYU Journal of International Law and Politics (2006, November 6) 679. < <http://ijl.org/wp-content/uploads/2016/08/Cassese-Administrative-Law-Without-the-State-2005.pdf>> 2 September 2019

¹⁸⁸ International Civil Aviation Organisation (ICAO) <<https://www.icao.int/about-icao/Pages/Invited-Organizations.aspx#idIONonGov>> accessed 3 September 2019

¹⁸⁹ The International Air Transport Association (IATA) <<https://www.iata.org/about/Pages/index.aspx>> 3 September 2019

¹⁹⁰ Airports Council International (ACI) Retrieved from <<http://www.aci.aero/About-ACI>> accessed 3 September 2019

¹⁹¹ Civil Air Navigation Services Organisation (CANSO) < <https://www.canso.org/about-canso>> accessed 3 September 2019

promote the highest level of aviation safety worldwide'.¹⁹² The International Council of Aircraft Owner and Pilot Associations (IAOPA) is a non-profit federation of 73 autonomous, nongovernmental, national general aviation organisations. The combined total number of individual pilots who fly using general aviation aircraft for business and personal transportation and are represented by these constituent member groups of the IAOPA is over 470,000.¹⁹³

Although global regulations do not have a direct binding effect on states, globalisation has placed responsibility upon states to work within the framework of global legal principles and standards for the sectors that are regulated globally. Moreover, there is no absolute state sovereignty in relations between states. States have had to give up certain elements of sovereignty and accept restrictions as a result of developments in international relations, but this does not mean that the intention is to replace national governance with global government. According to Rosenau, 'some of their authority has relocated toward subnational collectives. Some of the functions of governance, in other words, are now being performed by activities that do not originate with governments.'¹⁹⁴

4.5.2 ICAO: Shifting from an international organisation to a global regulatory body

The worldwide activities of ICAO in civil aviation have been much more than what was originally envisaged. The complexity of the work of ICAO has increased since it was established. More significantly, nowadays, in addition to signatory states, ICAO works closely with private parties such as air companies, private institutions like IATA, other aviation stakeholders and other international organisations. The impact of globalisation and global market integration have introduced many contemporary issues that ICAO has needed to deal with including regulating and setting technical standards and recommendations. Many forms of these regulations are called 'soft law'¹⁹⁵ because of their non-binding nature.

¹⁹² The International Federation of Air Line Pilots' Associations (IFALPA) <<http://www.ifalpa.org/>> accessed 3 September 2019

¹⁹³ The International Council of Aircraft Owner and Pilot Associations (IOPA) Retrieved from <<http://www.iaopa.org/index.html>> accessed 3 September 2019

¹⁹⁴ James N. Rosenau & Ernst-Otto Czempiel, 'Governance without Government: Order and Change in World Politics' (Cambridge University Press.1992) 3.

¹⁹⁵ See Chapter II

Nevertheless, they have an effect on states, national administrations, public and private entities and private persons.¹⁹⁶

As was asserted in the second chapter, traditional international law and its approach to international organisations are not sufficient to address contemporary global issues. ICAO has even been called a ‘powerless organisation’¹⁹⁷ with reference to its lack of enforcement power on its member states. The ‘power’ in question could be that of enforcing or governing. In the contemporary world, where the issues are not limited by national borders and there is a global consensus for being governed by a supranational governing body in a coordinating and collaborating way, the term ‘power’ might better refer to ‘power to govern’.

As a matter of fact, the ICAO’s governance of international civil aviation is not based on its authority and enforcement power, but rather on cooperation. ICAO has created programmes to ensure that there is uniformity in safety standards worldwide in response to the requirements of the developing practices in international civil aviation. Originally, the contracting states intended to establish uniform technical standards for air transport worldwide. In line with global developments, ICAO’s authority to regulate matters such as aircraft licensing, registration of aircraft, international operating, airworthiness, certification of airways and communication controls has been extended. ICAO has become one of the most powerful international organisations in the world.

In June 2012, at the 8th meeting of the Council of the ICAO approved ICAO’s revised Vision and Mission Statements. The Mission Statement stated that ‘the International Civil Organisation is the global forum of States for International civil aviation. ICAO develops policies, standards, undertakes compliance audits, performs studies and analyses, provides assistance and builds aviation capacity through the cooperation of the Member States and stakeholders.’¹⁹⁸

In this respect, it is suggested that administrative cooperation between the ICAO, national administrations, and other actors in the international civil aviation field falls within the GAL

¹⁹⁶ Benedict Kingsbury, & Lorenzo Casini, ‘Global Administrative Dimensions of International Organizations’ IILJ Working Papers, Global Administrative Law Series(2009/ 9) 20. Retrieved from < <http://www.iilj.org/publications/documents/2009-9.Kingsbury-Casini.pdf> > accessed 30 August 2019

¹⁹⁷ Ruwantissa Abeyratne, *Regulation of Air Transport the Slumbering Sentinels* (Springer International Publishing, 2014) 2.

¹⁹⁸ *ibid* 2-3

theory's definition of the 'global administrative space', which emphasises 'the enmeshment of domestic and international regulation'.¹⁹⁹

However, in its Mission Statement, ICAO defines itself as a 'global forum'.²⁰⁰ It is arguable whether this is accurate according to the Chicago Convention (1944). Under Article 44 of the Chicago Convention (1944), the aim and objective of ICAO are defined as:

to develop the principles and techniques of international air navigation and to foster the planning and development of international air transport so as to:

a) Ensure the safe and orderly growth of international civil aviation throughout the world...

...

d) Meet the needs of the peoples of the world for safe, regular, efficient and economical air transport.

Defining ICAO as a 'global forum' does not fit the aims and objectives of ICAO as specified in the Chicago Convention (1944). ICAO can have a more leading regulatory authority role in global civil aviation governance. The necessity for a reform of the Chicago Convention (1944) system is already the subject of discussion amongst aviation scholars like Havel and Onidi.²⁰¹ In order to adjust to the contemporary challenges and pursue its objective to 'ensure the safe and orderly growth of international civil aviation throughout the world', ICAO needs to have a more active and strong institutional position than 'global forum' in order to be able to 'ensure' the safe and orderly growth of international civil aviation.²⁰²

In addition, ICAO could provide a global forum to discuss and welcome all stakeholders to participate in the decision-making process regarding global standards. However, there is a

¹⁹⁹ Benedict Kingsbury, Nico Krisch, 'Introduction: Global Governance and Global Administrative Law in the International Legal Order' (2006) Vol. 17, Issue 1. *European Journal of International Law* 1,5. Retrieved from <<http://www.ejil.org/pdfs/17/1/64.pdf>> accessed August 30 2019

²⁰⁰ International Civil Aviation Organisation (ICAO) Retrieved from <<http://www.icao.int/about/icao/Pages/vision-and-mission.aspx>> 3 September 2019 Vision: Achieve the sustainable growth of the global civil aviation system. Mission: To serve as the global forum of States for international civil aviation. ICAO develops policies and Standards, undertakes compliance audits, performs studies and analyses, provides assistance and builds aviation capacity through many other activities and the cooperation of its Member States and stakeholders.'

²⁰¹ Brian Havel, '*Beyond Open Skies; A New Regime for International Aviation*' (Kluwer Law International 2009) 5.; Oliver Onidi, 'A Critical Perspective on ICAO' (2008, February) Vol. 33, Issue 1. *Air & Space Law*, 38.

²⁰² Oliver Onidi, 'A Critical Perspective on ICAO' (2008, February) Vol. 33, Issue 1. *Air & Space Law*, 40.

need for a regulatory authority to make global decisions about the safety standards to pursue and to ensure uniformity in their worldwide implementation. Therefore, the ICAO should be addressed as a ‘global regulatory authority’ and a global agency, because both functions enable the organisation to pursue its objectives.²⁰³ Describing ICAO as a ‘global regulatory authority’ does not mean that it has hierarchical superiority over the states. The research reveals that the GAL theory’s definition of a ‘global regulatory authority’ more consistent with ICAO’s organisational structure in global aviation governance.

4.5.2.1 The global supervisory role of ICAO in the global governance of aviation safety

When a state fails to comply with the obligations that derive from an international treaty, international law does not provide a specific enforcement system, nor does the Chicago Convention (1944) system present a tool for the enforcement of state compliance. The legal obligations for state compliance, as well as many others, are defined by many legal theories which deny the necessity of enforcement measures in international law for state compliance. Basically, the contracting states are expected to comply with the standards set by the Chicago Convention (1944) system. Otherwise, the states have an obligation to notify the ICAO about differences between their own practice and those established by the international standards.²⁰⁴

Taking into account that states have different abilities to obtain certain levels of technical, economic, and personnel resources to establish substantial aviation operations, state compliance with SARPs is not uniform among the contracting states. Some of them have created serious concerns, especially for aviation safety, and as a result, they have failed to comply with these obligations.²⁰⁵

ICAO has hence taken action to urge the contracting states to comply with the safety standards by adopting amendments and Annexes that contain SARPs into their domestic law and consequently implementing them. ICAO, in its 29th General Assembly in 1992, adopted

²⁰³ *ibid* ‘ICAO should be worldwide technical rule making body, setting relevant international standards while ensuring their effective and uniform application. In time ICAO could effectively become the ‘world regulatory authority’., Onidi also emphasizes the modernisation of Chicago Convention (1944) and complete reorientation of ICAO’s role. 43.

²⁰⁴ See Chapter I, Chicago Convention (1944) Article 38

²⁰⁵ ‘ICAO has come to conclusion with great concern that compliance with safety standards is not even close to mention worldwide uniformity.’ Paul Stephen Dempsey, ‘Compliance and Enforcement in International Law: Achieving Global Uniformity in Aviation Safety’ (2004) Vol. 30, Issue 1, North Carolina Journal of International Law and Commercial Regulation 17,21.

the Assembly Resolution and reaffirmed states' responsibility for safety oversight as a 'tenet' of the Convention. It called upon all the contracting states to review their national legislation and to implement the obligations set, to reaffirm their safety oversight obligations, and to review their safety oversight procedures to ensure effective implementation.²⁰⁶ As an international organisation that has legislative power, ICAO has no effective enforcement power over contracting states to compel them to adopt and implement SARPs at the national level, or to sanction non-compliance.²⁰⁷ In reality, ICAO's great achievements have been obtained through the formation of consensus and negotiation, while its decisions have attained nearly universal acceptance, if not compliance.²⁰⁸

Global administration requires collaboration and cooperation in drafting and implementation stages of the global regulations. Precisely, to promote aviation safety, ICAO has adopted a collaborative approach for all states and non-state other actors.²⁰⁹ ICAO has initiated and managed worldwide projects addressing a wide range of safety issues. Some of the global projects of the ICAO are analysed below to illustrate this global cooperative approach that indicates the global governance of civil aviation.

4.5.2.1.1 Safety Oversight Programme (SOP)

Safety oversight programs of ICAO prove how the understanding of state sovereignty has developed since 1944. Safety Oversight Programme SOP (later USOAP) is an audit program that states allow the external authority (ICAO) to audit them in certain areas that crucial for international aviation safety.²¹⁰ This confirms Chayes and Chayes view regarding 'the new

²⁰⁶ Resolutions adopted by the Assembly and Index to Documentation (Doc 9600, A29-RES) (1992) 79. Retrieved <<https://www.icao.int/Meetings/AMC/ArchivedAssembly/en/A29/index.html>> 3 September 2019

²⁰⁷ Paul Stephen Dempsey, 'Compliance and Enforcement in International Law: Achieving Global Uniformity in Aviation Safety' (2004) Vol. 30, Issue 1, North Carolina Journal of International Law and Commercial Regulation 1, 21.

²⁰⁸ David Mackenzie, *'A History of the International Civil Aviation Organization'*. (2010 University of Toronto Press) 396.

²⁰⁹ International Civil Aviation Organisation (ICAO) State of Global Aviation Safety (2011) 16. Retrieved from <http://www.icao.int/safety/Documents/ICAO_State-of-Global-Safety_web_EN.pdf> 3 September 2019

²¹⁰ ICAO Contracting States, in their effort to establish and implement an effective safety oversight system, need to consider the critical elements for safety oversight (CE). Critical elements are essentially the safety/defence tools of a safety oversight system and are required for the effective implementation of safety-related policy and associated procedures. States are expected to implement safety oversight critical elements in a way that assumes the shared responsibility of the State and the aviation community. Critical Elements are : CE-1. Primary aviation legislation CE-2. Specific operating regulations CE-3. State civil aviation system and safety oversight functions CE-4. Technical personnel qualification and training CE-5. Technical guidance, tools and the provision of safety-critical information CE-6. Licensing, certification, authorization and approval obligations CE-7.

sovereignty'²¹¹. Accordingly, these audit programs are examples how states give up some part of their sovereign rights in order to be acknowledged by the international aviation community as a good standing member of international civil aviation regimes. Also confirms Havel et. al. view that air transport market developments had changed the meaning of national sovereignty since Chicago Convention (1944). Hence, state sovereignty is not only base to reject external interference but also the base for accepting external interference.²¹²

Moreover, such collaboration that ICAO programs establish supports increasing adoption of the global common system.²¹³ This transformation indicates that the nature of governance of the international civil aviation legal order has been changed by the impact of globalisation.²¹⁴

In 1994, growing concerns about worldwide air navigation safety systems led the ICAO Council to establish a Safety Oversight Programme.²¹⁵ The former ICAO secretary-general, Phillipe Rochat, stated that safety oversight is a 'global problem', not a regional or sub-regional one and that it should, therefore, be improved.²¹⁶ The programme aimed to investigate the level of state compliance among the contracting states with the requirements of the Chicago Convention (1944) and its Annexes.²¹⁷ ICAO also stated in the General Assembly's resolution that a state has the responsibility for safety oversight.²¹⁸ Thus, the Programme was still dependent on voluntary action by the contracting states, and hence, the

Surveillance obligations CE-8. Resolution of safety concerns. (Eight Critical Element of a safety oversight system) < <https://cfapp.icao.int/fsix/criticalelements.pdf> > accessed 17 October 2019

²¹¹ Abram Chayes and Antonia Handler Chayes, *The New Sovereignty, Compliance with International Regulatory Agreements* (Harvard University Press 1995) 27-28.

²¹² Brian F. Havel & Gabriel S. Sanchez, 'Restoring Global Aviation's "Cosmopolitan Mentalit'e', Vol.11, Issue 1 (2011) Boston University International Law Journal 1 28-29.

²¹³ James N. Rosenau, 'Governance in the Twenty-first Century' (Winter 1995), Vol.1, No.1 Global Governance' 13, 39. Retrieved from <<http://www.jstor.org/stable/27800099>> accessed 27 August 2109

²¹⁴ 'The process of globalisation and the emergence new transnational threats have fundamentally changed the nature of governance and the necessary purposes of international law in the past few years' William W. Burke-White, Anne-Marie Slaughter, 'The Future of International law is Domestic (or the European Way of Law)' (2006) Vol.47, No.2, Harvard International Law Journal, 327, 328.

²¹⁵ http://legacy.icao.int/icao/en/nr/1994/pio199411_e.pdf

²¹⁶ Phillipe Rochat, 'ICAO Moving to Address Compliance Concern' Aviation Daily, (November 1, 1994) 174. Quoted from Olga Baretto, 'Safety Oversight: Federal Aviation Administration, International Civil Aviation Organization, and Central America Aviation Safety Agency, (2002) Vol.67, Issue 3, Journal of Air Law and Commerce, 651, 665 fn.46

²¹⁷ Paul B. Larsen, Joseph Sweeney, & John Gillick, *Aviation Law: Cases and Related Sources* (2nd ed. Martinus Nijhoff Publishers, 2012) 1039.

²¹⁸ Resolutions adopted by the Assembly and Index to Documentation (Doc.9600, A29-13 Improvement of Safety Oversight) (1992) 79. Retrieved from ICAO: <<https://www.icao.int/Meetings/AMC/ArchivedAssembly/en/A29/index.html>> 3 September 2019

aim of the mission was not successfully completed.²¹⁹ The focus of the Resolution was criticised because, instead of focusing on important safety issues, it focussed on the financial aspects of the Programme. Ultimately, the safety compliance issues were again left to the states' discretion.²²⁰

The problem of compliance was again presented in the 31st Session of the ICAO's General Assembly²²¹ because it was acknowledged that the Programme had not quite served its original purpose. According to a pre-1994 report, only twenty-five per cent of the notifications of compliance responses had responded to the amendment of each of the eighteen Annexes.²²²

Safety is a key issue in air navigation transport worldwide. The results of the Safety Oversight Programme indicate that limited compliance with aviation safety standards was not satisfactory and needed to be improved. Instead of focussing on seeking enforcement measures against individual states, ICAO has focused on a global approach toward improving state compliance with safety regulations by working on collaborative ways to manage global safety compliance. The Council approved the establishment of the Universal Safety Oversight Audit Programme (USOAP) with the aim of enhancing the global capacity for safety oversight through an effective and assertive programme to conduct mandatory, systematic, harmonised and regular safety audits in all states.²²³

²¹⁹ 'Under the ICAO's Safety Oversight Programme, Oversight assessment would only be carried out at the petition of a member nation and both the initial and final reports on how and whether that country meets ICAO's safety standards would remain confidential. Safety would follow same voluntary procedure in sending team to review the ICAO and security of aviation practices in member nation" Paul B. Larsen, Joseph Sweeney, & John Gillick, *Aviation Law: Cases and Related Sources* (2nd ed. Martinus Nijhoff Publishers, 2012) 1039.

²²⁰ Michael Milde, 'The International Civil Aviation Organisation: After 50 Years and Beyond' (1996) *Australian International Law Journal* 60 ,66.

²²¹ 31. Session of General Assembly of International Civil Aviation Organisation (ICAO) Working paper A31-WP/56EX/19. (Implementation of ICAO Standards and Recommended Practices 01/08/95)
4.<<http://www.icao.int/Meetings/AMC/ArchivedAssembly/en/a31/wpno.htm> > 3 September 2019

²²²'Under the Safety Oversight Programme (SOP), ICAO began to review member states' aviation safety regulations and oversight systems. By 1997, SOP assessments had revealed that although 75% of member states had laws establishing a CAA (Civil Aviation Authority), only 51% had given it adequate legal status, 29% had adequate funding, 22% had adequate staffing and qualified inspectors, and 13% had adequate inspector training.' Paul Stephen Dempsey, 'Compliance and Enforcement in International Law: Achieving Global Uniformity in Aviation Safety' (2004) Vol. 30, Issue 1, *North Carolina Journal of International Law and Commercial Regulation* 1, 34.

²²³ International Civil Aviation Organisation (ICAO) Retrieved from
<<http://www.icao.int/safety/cmaforum/Pages/default.aspx> > 3 September 2019

4.5.2.1.2 Universal Safety Oversight Audit Programme (USOAP)

In 1998, Assembly Resolution A32-11 was adopted by the 32nd Session of the Assembly to establish the Universal Safety Oversight Audit Programme (USOAP)²²⁴ which became applicable to all states on 1 January 1999. The resolution referred to Assembly Resolution A29-13 concerning the improvement of safety oversight and the recommendations made by the Directors General of Civil Aviation Conference on a Global Strategy for Safety Oversight and established a universal safety oversight audit programme. The General Assembly decided that the USOAP should be carried out by ICAO by conducting regular, mandatory, systematic and harmonised safety audits to assess the implementation of safety standards and recommended practices in member states worldwide.

In 2002, the annual report of the Council revealed that the analyses of the initial audits, which were performed between January 1, 1999, and December 31, 2002, in 180 contracting states indicated that ‘safety oversight deficiencies and the prioritization of actions required to resolve safety concerns at a global, regional State or group of States level’.²²⁵

In 2005, the General Assembly adopted a ‘comprehensive system approach’ to restructure the Programme,²²⁶ by conducting safety oversight audits in all contracting states. The Programme was expanded to all safety-related Annexes to the Chicago Convention (1944). The core areas for audit were expanded to civil aviation regulations and primary aviation legislation, personnel licensing and training, air navigation services, civil aviation organisation, airworthiness of aircraft, aircraft accident and incident investigation, aircraft operations, and aerodrome and ground aids.²²⁷ The tasks were approached with increased disclosures and greater transparency. By 2004, the ICAO had performed 120 audit follow-up missions and had audited 181 States. The results of the Programme have hence been deemed to be satisfactory.

²²⁴ Resolutions Adopted at the 32nd session of the ICAO Assembly, (Provisional Edition, A32-11, 1998) Retrieved from <<https://www.icao.int/Meetings/AMC/MA/Assembly%2032nd%20Session/resolutions.pdf>> 3 September 2019

²²⁵ Annual Report of the ICAO Council 2002 (Doc. 9814) 11. Retrieved from <https://www.icao.int/Documents/annual-reports/rp02_en.pdf> 3 September 2019

²²⁶ Resolution 35-6 Doc 9848 Assembly Resolutions in Force (as of 8 October 2004) Resolution 35-6 Retrieved from ICAO: <http://www.icao.int/publications/Documents/9848_en.pdf>

²²⁷ Universal Safety Oversight Audit Programme (USOAP) Retrieved from << <https://www.icao.int/NACC/Documents/eDOCS/FS/FS--Flyer_US-Letter_ANB-USOAP_2013-08-30.pdf>

ICAO has collected a database with respect to the compliance levels and conformity of the contracting states, which has been deemed to be one of the significant effects of the Universal Safety Oversight Audit Programme.²²⁸ By providing a database regarding the compliance level of the contracting states, the USOAP has enabled ICAO to notify all the member states, instead of expecting to be notified by those involved in compliance. Also, the states were able to view other states' compliance levels with SARPs.²²⁹ Another effect of the USOAP is that it constitutes a collaborative function between ICAO and the member states. In addition, it has also helped the contracting states to identify difficulties in their implementation of safety obligations and has worked to resolve the problems by offering its assistance.²³⁰

4.5.2.1.3 Continuous Monitoring Approach (CMA)

Following the practical experiences of the safety oversight audit process, new approaches began to be discussed. Generally, the results of the audits showed that enhancing compliance with safety regulations and the uniformity of the ICAO should be the subject of an on-going effort. In September 2007, Resolution A36-4 on the USOAP's continuous monitoring approach (CMA) was adopted during the 36th Session of the Assembly. The aim was to use ICAO resources effectively and efficiently to reduce the burden of the repetitive audits on States.²³¹

In 2011, ICAO began its transition to a continuous monitoring approach (CMA). The CMA represents a long-term, flexible, cost-effective and sustainable method of identifying safety deficiencies, assessing associated risks, developing assistance strategies and prioritising improvements. The CMA aims to provide a continuous report of a state's effective implementation, as opposed to a snap-shot audit conducted once every six years under the

²²⁸ Paul Stephen Dempsey, 'Compliance and Enforcement in International Law: Achieving Global Uniformity in Aviation Safety' (2004) Vol. 30, Issue 1, North Carolina Journal of International Law and Commercial Regulation 1, 36.

²²⁹ Paul Stephen Dempsey, 'Compliance and Enforcement in International Law: Achieving Global Uniformity in Aviation Safety' (2004) Vol. 30, Issue 1, North Carolina Journal of International Law and Commercial Regulation 1, 37.

²³⁰ 33rd Session of the Assembly of International Civil Aviation Organisation (ICAO), Working Paper A33-WP/49EX/7 (Assisting States to Resolve Deficiencies Identified by the Safety Oversight Audits (09/07/01) - Revised 10/08/01)
Retrieved from <<http://www.icao.int/Meetings/AMC/ArchivedAssembly/en/A33/wpex.htm>> 3 September 2019

²³¹ Universal Safety Oversight Audit Programme (USOAP) Retrieved from <https://www.icao.int/NACC/Documents/eDOCS/FS/FS--Flyer_US-Letter_ANB-USOAP_2013-08-30.pdf>

comprehensive system approach.²³² Therefore, international civil aviation stakeholders can access the latest information.²³³ An interactive display of USOAP can be reached through ICAO's homepage. Also, the audit results of the state's last activity are compared with the global average.²³⁴ Although not all results are available to the public through this interactive page, it is still valuable, and it complies with the transparency principle of global governance.

The CMA is a clear indication of the way in which the ICAO policy manages state compliance. It strongly emphasises the value of collaboration with states and other stakeholders, as well as international organisations, to enhance uniformity in civil aviation safety.²³⁵

4.5.2.1.4 Global Aviation Safety Plan (GASP)

ICAO has initiated and managed worldwide projects addressing a wide range of safety issues. These activities 'are harmonised by the principles and objectives outlined in the Organisation's Global Aviation Safety Plan (GASP)'.²³⁶ The aim is to create a high-level policy document to guide states, industry partners and international organisations.²³⁷ ICAO's collaborative approach is strongly emphasised with key sectorial partners in GASP.²³⁸

Also, the GASP emphasises the coordination of activities to implement the strategies of the ICAO, and it addresses the entire international aviation community, not only the member states but also regional and international organisations and stakeholders, so as to improve

²³² International Civil Aviation Organisation. (ICAO) State of Global Aviation Safety 2011 , 6. Retrieved from <http://www.icao.int/safety/Documents/ICAO_State-of-Global-Safety_web_EN.pdf > accessed 3 September 2019

²³³ ICAO Journal Issue 5 (2010). Safety Audit Strategies <http://www.icao.int/safety/CMAForum/USOAP%20CMA%20SSP%20Rollout/ICAO%20Journal%2005_2010.pdf > accessed 3 September 2019

²³⁴ ICAO Safety Audit Information , Retrieved from < <http://www.icao.int/safety/pages/usoap-results.aspx> > accessed 3 September 2019

²³⁵ ICAO Journal 4 (2010) 'Evolving ICAO's Universal Safety Oversight Audit Programme: The Continuous Monitoring Approach'. Retrieved from <http://www.icao.int/safety/CMAForum/USOAP%20CMA%20SSP%20Rollout/ICAO%20Journal%2004_2010.pdf > 3 September 2019

²³⁶ International Civil Aviation Organisation. (ICAO) State of Global Aviation Safety 2011 Retrieved from <http://www.icao.int/safety/Documents/ICAO_State-of-Global-Safety_web_EN.pdf > 3 September 2019

²³⁷ *ibid* 2

²³⁸ *ibid* 2

safety.²³⁹The GASP 2014–2016 sets out a strategy for the next 15 years to establish a more advanced global aviation safety system. ICAO has initiated global programmes with the aim of enhancing global aviation safety while recognising the ‘value of collaboration’²⁴⁰ with states, the air industry, and international and regional aviation safety organisations. The latest version was published in 2016.²⁴¹ That 2017–2019 edition updates GASP while in addition including a global aviation safety roadmap which was developed to support an integrated approach to implementation.²⁴²

4.5.2.1.5 Safety Management Manual (SMM)

As an international organisation, the role of the ICAO is not limited to issuing the set standards and expecting states to comply with them. As another indication of its collaborative approach, ICAO has a guidance function for states’ safety management using the *Safety Management Manual*. In this regard, ICAO continuously collaborates with international organisations and member states.²⁴³

The Third Edition of ICAO’s *Safety Management Manual* (Doc 9859-AN/474) was published in 2013 with the aim of serving as a guide and a source of information on aviation safety management. Together with the SMM, the ICAO uses another guidance document known as the Accident Prevention Manual (Doc 9422). The stated objective of the manual is to provide states with a summary of the ICAO safety management SARPs that are contained in Annexes I, 6, 8, 11, 13, and 14. Secondly, it gives an overview of the fundamentals of safety management, provides guidance on how to develop (State Safety Programme) SSP in compliance with the ICAO’s SARPs that include a well harmonised regulatory framework for

²³⁹ *ibid* 2. “The GASP GSIs (Global Safety Initiatives) seek to enhance safety in aviation operations through the promotion of collaborative approaches, including the sharing of safety information as well as the prioritization of investments in the people, technologies and assistance projects necessary to achieve sustainable results. The GASP will continue to improve safety globally, with particular focus on improvements in regions facing more acute safety challenges.”

²⁴⁰ ICAO 2014-2016 Global Aviation Safety Plan (Doc.10004) 6. Retrieved from <http://www.icao.int/publications/Documents/10004_cons_en.pdf>

²⁴¹ ICAO 2017-2019 Global Aviation Safety Plan (Doc 10004) Second Edition. (2016) Retrieved from <<https://www.icao.int/Meetings/a39/Documents/GASP.pdf>> accessed 3 September 2019

²⁴² *ibid* 5.

²⁴³ International Civil Aviation Organisation (ICAO) State of Global Aviation Safety (2011) 2-3. Retrieved from <http://www.icao.int/safety/Documents/ICAO_State-of-Global-Safety_web_EN.pdf> 3 September 2019

the production of goods and the provision of services. Finally, it gives guidance for the implementation, development, and maintenance of the Safety Management System (SMS).²⁴⁴

Based on this objective, ICAO again intends to cooperate with service providers and states in complying with SARPs and a harmonised regulatory framework worldwide.

4.5.2.1.6 Global Aviation Safety Roadmap

ICAO continues to foster more efficient assistance and improved understanding in other areas of global aviation safety. The organisation has established programmes such as the Global Aviation Safety Roadmap,²⁴⁵ which provides a framework for all the stakeholders in the civil aviation safety field.

In May 2005, the Air Navigation Commission of ICAO held a consultation with the air industry on the improvement of aviation safety which resulted in the formation of the Industry Safety Strategy Group (ISSG).²⁴⁶ Under the coordination of the IATA, the ISSG works with other stakeholders.²⁴⁷ This new approach to working on aviation safety was described as ‘moving beyond the traditional government/industry model: a mostly adversarial relationship between the Regulatory Authority and the industry, regulating airlines and manufacturers.’²⁴⁸ The objectives of the Roadmap include providing a common framework that can be referenced by all the stakeholders, i.e. airport operators, aircraft manufacturers, states, state regulatory authorities, safety organisations, air traffic control service providers, and pilots’ associations.²⁴⁹

²⁴⁴ ICAO Safety Management Manual SMM (Doc.9859 AN/474 3rd ed. 2013) 1-1. Retrieved from <<http://www.icao.int/safety/SafetyManagement/Documents/Doc.9859.3rd%20Edition.alltext.en.pdf>> accessed 3 September 2019

²⁴⁵ Implementing the Global Aviation Safety Roadmap (2005) Retrieved from <<http://flightsafety.org/files/roadmap2.pdf>> accessed 3 September 2019

²⁴⁶ *ibid* ‘The ISSG members include: Airports Council International (ACI), Airbus, Boeing, the Civil Air Navigation Services Organization (CANSO), the Flight Safety Foundation, the International Air Transport Association (IATA), and the International Federation of Air Line Pilots Associations (IFALPA)’

²⁴⁷ Global Aviation Safety Roadmap, 2. Retrieved from <http://cfapp.icao.int/fsix/Library%5CGlobal_Aviation_Safety_Roadmap_Part_1.pdf> accessed 3 September 2019

²⁴⁸ Implementing the Global Aviation Safety Roadmap (2005) 1-2. Retrieved from <<http://flightsafety.org/files/roadmap2.pdf>> accessed 3 September 2019

²⁴⁹ *ibid* 1-2

Collaborative work has produced a different perspective among all the different stakeholders regarding a safer air transport industry. Together with ISSG, ICAO has worked to produce the Global Aviation Safety Roadmap Part 1 – A Strategic Action Plan for Future Aviation Safety. It was submitted to ICAO in December 2005 and presented to the Directors General of Civil Aviation (DGCA) Conference on a Global Strategy for Aviation Safety (DGCA/06) in March 2006. The conference welcomed the Global Aviation Safety Roadmap and recommended continuous collaboration between the ICAO, the states, and other stakeholders in order to achieve more integrated development of the safety initiatives that are based on the global framework called the Global Aviation Safety Roadmap so as to ensure their coordination on safety initiatives and policies.²⁵⁰ On 15 June 2016, the DGCA/06 recommendation was approved by the ICAO Council.

The Global Aviation Safety Roadmap is a product of the data collected by the USOAP's audit results, as well as the Operational Safety Audit (IOSA) by the IATA, which is an evaluation system that was designed to assess the control systems and operational management of all the IATA member airlines.²⁵¹ The audit results of both states and airlines and their compliance with aviation safety regulations are the basis for coordinative work to enhance compliance levels and uniformity at the global level.

Safety is a common concern of all stakeholders in civil aviation. These programmes are good examples of collaborative work in global governance.

4.5.2.1.7 Funding programmes to enhance aviation safety

The lack of compliance with aviation safety regulations by a particular state is not always a result of state discretion. States have different technical and financial abilities to establish a proper level of compliance. The ICAO's oversight audit programmes indicate that some states do not have suitable facilities or personnel and may even face other economic or technical challenges that hinder them from fully complying with the safety standards.

²⁵⁰ *ibid* 1-1

²⁵¹ IATA Operational Safety Audit, 'All IATA members are IOSA registered and must remain registered to maintain IATA membership' < <https://www.iata.org/whatwedo/safety/audit/iosa/Pages/index.aspx> > accessed 3 September 2019

In 1992, the ICAO's General Assembly recognised that there was a possibility that some contracting states may not have the financial or regulatory framework or the technical resources to meet the minimum requirements of the Chicago Convention (1944) and its Annexes.²⁵² The General Assembly of the ICAO underlined the importance of the global harmonisation of the national rules for the application of the ICAO's standards, stating:

Whereas the interdependence of international civil aviation makes aviation a prime candidate for benefits to be derived from the concept of globalization of which global harmonization of national rules for the application of ICAO standards is an important element.²⁵³

Different levels in the fulfilment of safety oversight responsibilities between the less developed and developed states have been indicated by the USOAP audits and follow-up procedures.

John Saba has emphasised four major reasons why such audited states may lack the will, means and/or ability to remedy their safety deficiencies: First, the institutional structures that supervise and regulate safety in aviation do not have the full authority to effectively and efficiently satisfy their duties for regulation. Second, the financial resources that are allocated to civil aviation safety are not sufficient, because many less developed and developing countries do not give aviation high priority compared to the priority given to sectors such as education, health, poverty and agriculture. Third, the human resources present in many states may lack appropriate expertise in the sector, mainly because of inadequate training or a lack of funds to receive adequate training. The most qualified personnel leave government jobs to seek better-paying jobs. Finally, the primary aviation regulations and legislation are inadequate or non-existent, probably due to a failure to provide sufficient enforcement powers.²⁵⁴

In 2001, the ICAO General Assembly adopted Resolution A33-10, endorsing the concept of the International Financial Facility for Aviation Safety (IFFAS) and requesting the Council to

²⁵² ICAO 37th Session Assembly Resolutions in Force (as of 8 October 2010) (Doc 9958 2011) I-87. Retrieved from <https://www.icao.int/publications/Documents/9958_en.pdf> accessed 4 September 2019

²⁵³ *ibid* I 81.

²⁵⁴ John Saba, 'Worldwide Safe Flight: will the international facility for aviation safety help it happen?' (2003) Vol. 68 *Journal of Air and Commerce* 537, 545 ; See also Paul Stephen Dempsey, 'Compliance and Enforcement in International Law: Achieving Global Uniformity in Aviation Safety' (2004) Vol. 30, Issue 1, *North Carolina Journal of International Law and Commercial Regulation* 1, 20-23.

pursue the establishment of an IFFAS early in the triennium (2002–2004).²⁵⁵ The primary purpose of the IFFAS was to address some states that have financial difficulties in applying corrective measures to remediate the aviation safety deficiencies that are addressed by the USOAP.²⁵⁶ One of the reasons underlying the efforts to find solutions for aviation safety deficiencies resulting from states' scarce financial resources is that aviation safety is a global concern, regardless of the citizenship of particular states. Accordingly, both the passengers and third parties on the ground who are involved in aircraft crashes and accidents have been subjected to global risk, regardless of their citizenship.²⁵⁷

The concept of establishing the IFFAS to create funding with the aim of securing global aviation safety fulfils the ICAO's responsibility 'to ensure the safe and orderly growth of international civil aviation throughout the world'. Also 'to meet the needs of the people of the world for safe, regular, efficient and economical air transport' as defined in Article 44 of the Chicago Convention(1944).²⁵⁸ The IFFAS became operational on 18 June 2003, and as of 30 June 2010, 22 grants and loans had been provided for projects, and 83 States had benefited from them.²⁵⁹

Moreover, the Safety Fund (SAFE) is another fund approved by the ICAO Council in 2010. The General Assembly of the ICAO adopted resolution 37-16, which addresses the difficulty created by the lack of financial resources in most developing states in funding their air navigation and airport service infrastructure, including the safety-related components of that structure. Based on Article 44 of the Chicago Convention (1944), the General Assembly supports the establishment of the SAFE and its aims and objectives.²⁶⁰ The Safety Fund

²⁵⁵ Resolutions adopted at the 33rd Session of the Assembly, Provisional Edition. (2001). Retrieved from <https://www.icao.int/Meetings/AMC/MA/Assembly%2033rd%20Session/plugin-resolutions_a33.pdf > July 26, 2017

²⁵⁶ John Saba, 'Worldwide Safe Flight: will the international facility for aviation safety help it happen?' (2003) Vol. 68 Journal of Air and Commerce 537, 539.

²⁵⁷ *ibid* 541.

²⁵⁸ Ruwantissa Abeyratne, 'Aviation and Climate Change; In search of a global market based measure' (2014 Springer) 143.

²⁵⁹From "IFFAS" to "SAFE", Maputo Symposium on Infrastructure Financing, Session 2 (2010, 29 November- 1 December). Retrieved from ICAO: <https://www.icao.int/Meetings/AMC/AfacIcao/Documentation/P_Session_2c_Iffas_Safe.pdf > accessed 4 September 2019

²⁶⁰ Resolutions Adopted by the ICAO Assembly 37th Session (2010, 28 September - 8 October) (Provisional ed. November 2010) 27. Retrieved from <https://www.icao.int/Meetings/AMC/Assembly37/Documents/ProvisionalEdition/a37_res_prov_en.pdf > accessed 4 September 2019

(SAFE) supports voluntary contributions from states²⁶¹ and other donors to support the ICAO's safety programmes in an efficient, transparent, consistent, timely, and responsible manner to improve the safety deficiencies in countries with limited or no financial ability to comply.²⁶²

4.5.2.1.8 Global Aviation Training (GAT)

In 2014, the ICAO's Global Aviation Training (GAT) was established with the mission of developing skilled and qualified human resources for aviation.²⁶³ Indeed, skilled, qualified aviation personnel have major importance for operating, managing and maintaining safety in flight. For instance, communication skills, especially the English fluency of pilots and air navigators and cultural background in the cockpit are important elements and are effective for flight safety. One unfortunate incident can illustrate the problems of not taking into account the different cultural backgrounds of personnel in the operation of aircraft safely.

On 6 August 1997, Korean Air Passenger Flight 801 was flying from Seoul to Guam. The plane, while attempting to land, went off the runway and crashed. Two hundred twenty-eight of the 254 passengers died on board. The probable cause was determined in the aircraft accident report of National Transportation Safety Board to be the '[c]aptain's failure to adequately brief and execute the non-precision approach and the first officers' and flight engineer's failure to effectively monitor and cross-check the captain's execution of the approach.'²⁶⁴

Another air crash was in 1999, when Korean Air Cargo Flight KE8509 (HL7451) crashed into Hatfield Forest near Great Hallingbury, England, shortly after taking off from London Stansted

²⁶¹For the list of SAFE fund voluntary contributions (2011-2017) see SAFE Fund Voluntary Contributions. (2011-2017). Retrieved from <<https://www.icao.int/safety/scan/Pages/Voluntary-Contributions.aspx>> accessed 4 September 2019

²⁶² Safety Fund (SAFE) Retrieved from < <https://www.icao.int/safety/Pages/Safety-Fund-SAFE.aspx> > accessed 3 September 2019

²⁶³ Global Aviation Training (GAT) Overview. Retrieved from ICAO <<https://www.icao.int/Training/Pages/default.aspx>> accessed 3 September 2019

²⁶⁴ National Transportation Safety Board. 2000. 'Controlled Flight Into Terrain, Korean Air Flight 801, Boeing 747-300, HL7468' Nimitz Hill, Guam, August 6, 1997. Aircraft Accident Report NTSB/AAR-00/01. Washington, DC. Retrieved from

<<https://www.ntsb.gov/investigations/AccidentReports/Reports/AAR0001.pdf>> accessed 3 September 2019

Airport to Malpensa Airport, Italy.²⁶⁵ After these crashes, the findings of the air accident reports indicated that ‘an “authoritarian” culture in the cockpit, inadequate English and pilot error were combining to compromising safety.’²⁶⁶ The allegations focused on the Korean²⁶⁷ crew, who were influenced by a cultural bias in which the first officers and flight engineers should not question the judgements of the captain.²⁶⁸

The findings of the aircraft accident report revealed that Korean Air had not fully complied with the intent of paragraph 3.9.3.1. of ICAO Annex 6.²⁶⁹ The report also identified deficiencies in KCABS–Korean Civil Aviation Bureau (South Korea) oversight of Korean Air.²⁷⁰

Such deficiencies led to the adoption of CRM (crew resource management), which is universally acceptable to all cultures.²⁷¹ In September 2006, ICAO and the Republic of Korea signed a memorandum of understanding on training programmes tailored for aviation personnel from developing countries.²⁷²

²⁶⁵ CVR transcript Korean Air 8509(1999, December 21) Retrieved from Aviation Safety Network:<
https://aviation-safety.net/investigation/cvr/transcripts/cvr_ke8509.php > accessed 4 September 2019

²⁶⁶ Jonathan Dehart, ‘Asia Asiana Airlines Crash: A Cockpit Culture Problem? A Tragic Plane Crash has reignited a debate about the Influence of national Culture inside Cockpit’ (July 126 2013) Retrieved from thediplomat.com: <<http://thediplomat.com/2013/07/asiana-airlines-crash-a-cockpit-culture-problem/> > ; Peter Brandl ‘*Crash Communication: Management Techniques from the Cockpit to Maximize Performance*’ (2016 Morgan James Publishing) 36. ; see also Jung Bongsoo, ‘Understanding Cultural Differences at Work Between Korea and the West’ (September 16, 2017) <<https://www.linkedin.com/pulse/understanding-cultural-differences-work-between-korea-bongsoo-jung/> > accessed 4 September 2019

²⁶⁷ Republic of Korea

²⁶⁸ Alex Halperin, ‘CNN asks if Korea's hierarchical culture caused crash; The network points out the importance of hierarchies in Korean culture’(July 10, 2013) <http://www.salon.com/2013/07/10/cnn_asks_if_koreas_hierarchical_culture_caused_crash/ > accessed 3 September 2019

²⁶⁹ Annex 6- Operation of Aircraft, 3.9.3 Flight crew member training programmes “The operator shall establish and maintain a training programme that is designed to ensure that a person who receives training acquires and maintains the competency to perform assigned duties, including skills related to human performance.”

²⁷⁰ National Transportation Safety Board. 2000. ‘Controlled Flight Into Terrain, Korean Air Flight 801, Boeing 747-300, HL7468’ Nimitz Hill, Guam, August 6, 1997. Aircraft Accident Report NTSB/AAR-00/01. Washington, DC. p168. Retrieved from <<https://www.nts.gov/investigations/AccidentReports/Reports/AAR0001.pdf>> accessed 3 September 2019

²⁷¹ Michael Engle, ‘Culture in the Cockpit-CRM in a Multicultural World’ (2000) Vol.5, No.1 Journal of Air Transportation World Wide, 107,108. <<https://ntrs.nasa.gov/archive/nasa/casi.ntrs.nasa.gov/20000044730.pdf> > accessed 4 September 2019

²⁷² Safety Management: Global Approach Unlocks Potential of SMS (2006) Vol. 61, No.6, ICAO Journal, 35. Retrieved from < https://www.icao.int/environmental-protection/Documents/Publications/6106_en.pdf > accessed 4 September 2019

Recently the General Assembly adopted Resolution A38-12 which defines the scope of ICAOs activities. First, the ICAO shall assist the member states in becoming competent and maintaining their position in employing the right personnel. This is to be achieved through ICAO's training programme. In addition, the organisation can step in to support the member states in cases in which the country(s) seems to need help in the implementation of the ICAO's SARPs, Procedures for Air Navigation Services (PANS), air transport policies and guidance, and the rectification of identified deficiencies or other ICAO activities.²⁷³ After that, the ICAO established the Global Aviation Training Office in January 2014 as the contact point for all training activities related to the programme. The GAT is responsible for management, coordination, and planning in line with ICAO training policy.²⁷⁴

4.5.2.1.9 No Country Left Behind (NCLB)

One of the key initiatives of ICAO to ensure global harmonisation in the implementation of SARPs is the No Country Left Behind (NCLB) campaign.²⁷⁵ The campaign was established in 2014 to assist states in effectively implementing SARPs. ICAO underlines that 'the effective implementation of ICAO standards represents the most basic foundation to be established before a State or Region can begin to realise true global connectivity for its citizens and businesses.'²⁷⁶ The safety oversight responsibility is referred to as 'state obligation' to ensure 'effective implementation of the safety-related SARPs and associated procedures contained in the Annexes of the Convention on International Civil Aviation and related ICAO documents'.²⁷⁷

²⁷³ ICAO Civil Aviation Training Policy. Retrieved from <<http://www.icao.int/Training/SiteAssets/20140701-TrainingPolicy.pdf>> accessed 4 September 2019

'The ICAO Civil Aviation Training Policy was approved by the Council of ICAO during its 202nd session and entered into force on 1 July 2014'

²⁷⁴ Global Aviation Training (GAT) Overview. Retrieved from ICAO <<https://www.icao.int/Training/Pages/default.aspx>> accessed 3 September 2019

²⁷⁵ No Country Left Behind (NCLB) Retrieved from <<https://www.icao.int/about-icao/NCLB/Pages/default.aspx>> accessed 4 September 2019

²⁷⁶ Leaving No Country Left Behind through the Effective Implementation of ICAO's Standards, Policies and Global Plans. Retrieved from <<https://www.icao.int/about-icao/DrAliu/Pages/Leaving-No-Country-Left-Behind-through-the-Effective-Implementation-of-ICAO-s-Standards-Policies-and-Global-Plans.aspx>> accessed 3 September 2019

²⁷⁷ ICAO Safety Oversight Manual (2nd ed. 2006) (Doc.9734/AN/959) 2-1. Retrieved from ICAO: <https://www.icao.int/WACAF/AFIRAN08_Doc/9734_parta_cons_en.pdf> accessed 6 September 2019

It is noteworthy that the focus of ICAO audits is the safety oversight capability of the designated governmental authority responsible for civil aviation, not the aviation industry and aviation service providers.²⁷⁸

USOAP audits state and identifies ‘Significant Safety Concern’ with respect to the ability of the audited state to properly oversee the airline operators, airports, aircraft and/or air navigation service providers under its jurisdiction. This indicates that the state is not providing sufficient safety oversight to ensure the effective implementation of all the standards set by the ICAO and does not necessarily indicate that there is a particular safety deficiency.²⁷⁹

The system established by ICAO to govern global aviation safety addresses state oversight responsibility within its jurisdiction to resolve safety deficiencies that are found during the audits.²⁸⁰ A red flag was placed on those states that were found to have SSC after the USOAP auditing by the ICAO. The list of states that was published on the ICAO website includes Malawi, Eritrea, Thailand, Haiti, Djibouti, and Kyrgyzstan.²⁸¹ Recently – in the year 2015, Thailand was given a red flag. This was an indication of a restriction on Thai flights by countries in the region, such as Korea, Japan, and China.²⁸²

The effort by the ICAO to provide necessary assistance to member states to enable them to enhance their compliance levels with global aviation safety regulations and standards might be deemed to be an indicator of the global governance of the ICAO system. As Truxal has suggested, ‘there is no room for “free riders” in global aviation.’²⁸³ Enhancing aviation safety is a common interest of all the stakeholders in global aviation. At this point, the question of

²⁷⁸ ICAO ‘Safety Compliance and Verification’ Retrieved from ICAO: <<https://www.icao.int/safety/CMAForum/Pages/FAQ.aspx> > accessed 6 September 2019

²⁷⁹ ICAO Safety Compliance and Verification. Retrieved from <<https://www.icao.int/safety/CMAForum/Pages/FAQ.aspx>> accessed 6 September 2019

²⁸⁰ ‘The NCLB effort also promotes ICAO’s efforts to resolve Significant Safety Concerns (SSCs) brought to light through ICAO’s safety oversight audits as well as other safety, security and emissions-related objectives.’ No Country Left Behind (NCLB) Retrieved from <<https://www.icao.int/about-icao/NCLB/Pages/default.aspx> > accessed 4 September 2019

²⁸¹ Safety Audit Results: USOAP interactive viewer. Retrieved from <<https://www.icao.int/safety/pages/usoap-results.aspx> > accessed 6 September 2019

²⁸² Karla Cripps, ‘Thailand ‘red-flagged’ for aviation safety concerns’ (2015, June 19) Retrieved from <<http://edition.cnn.com/2015/06/19/travel/thailand-aviation-safety/index.html> > 6 September 2019

²⁸³ Steven Truxal, ‘*Economic and Environmental Regulation of International Aviation: From Inter-national to Global Governance*’ (Kindle ed. Routledge. 2017) 193.

how States can collaborate can be answered according to international law because it is considered to be a non-binding element. The collaboration can only be obtained by changing the way of thinking from the ‘international law of coexistence’ to the ‘international law of collaboration.’²⁸⁴

In order to enhance global aviation safety, standardisation and harmonisation are essential in addressing global cooperation. Abeyratne rightfully drew attention to the importance of these two words in the practice of aviation safety. Accordingly, standardisation means compliance with the processes, practices and regulations that are set. Harmonisation, on the other hand, means that there is consistency in global processes, practices, and regulations. He went further to state that if these words are not put into practice, the achievement of aviation safety will be difficult. However, it will be easy to achieve them when they are placed into consideration.²⁸⁵

Eventually, taking into account the increase in air traffic worldwide, the ICAO adopted a new Annex, Annex 19, after almost 30 years. Annex 19 contains the Standards and Recommended Practices for safety management.²⁸⁶ The intention of the SARPs is to assist the states in managing aviation safety risks.²⁸⁷ Specifically, Annex 19 emphasises the safety management responsibility of the states through the compliance with and implementation of the SARPs, as well as coordination among the states to ensure the ‘global interoperability of safety measures’.²⁸⁸

Ensuring safety is the responsibility of states individually and collectively, as emphasised in Resolution A-38-5 General Assembly of ICAO.²⁸⁹ This collective responsibility of ensuring global aviation safety does not only refer to states but also entails collaboration with ICAO,

²⁸⁴ *ibid* 193 fn.175 citing J. Nijman, ‘Sovereignty and Personality: A process of Inclusion’ in Gerard Kreijen (ed.), *State Sovereignty and International Governance* (Oxford University press (2002) p.134 citing W.G. Friedman ‘*The Changing Structure of International law*’ (Columbia University press 1964)

²⁸⁵ Ruwantissa Abeyratne, *Aviation and International Cooperation: Human and Public Policy Issues* (Kindle ed. Springer International Publishing 2015) Locations 7551-7553

²⁸⁶ Annex 19 adopted by the ICAO Council on 25 February 2013 and becomes applicable on 14 November 2013. Annex 19- Safety Management (2013, July) Retrieved from <www.casa.gov.au/https://www.casa.gov.au/sites/g/files/net351/f/assets/main/sms/download/sms-annex19.pdf> accessed September 3 2017

²⁸⁷ *Ibid*, Foreword.

²⁸⁸ Ruwantissa Abeyratne, *Aviation and International Cooperation: Human and Public Policy Issues* (Kindle ed. Springer International Publishing 2015) Locations 7706-7710

²⁸⁹ Resolutions Adopted by the ICAO Assembly 38th Session. (2013, 24 September- 4 October). Retrieved from <https://www.icao.int/Meetings/a38/Documents/Resolutions/a38_res_prov_en.pdf> accessed 4 September 2019

industry and other stakeholders.²⁹⁰ In conclusion, collaborating with the programs of ICAO to secure and enhance global aviation safety is part of the states' responsibility.

Above ICAO programs mainly complies with the global regulatory governance definition that GAL theory defines as an administration.²⁹¹ Especially with the global aviation safety programs of ICAO such as Universal Safety Oversight (USOAP) Global Aviation Safety Plan, No Country Left Behind, Safety Management manual, Global Aviation Training and Funding Programmes to enhance safety indicates that aviation safety is a field that can be addressed as global administrative space²⁹² that GAL theory suggests which administrative functions of 'domestic and international orders are blurred'.²⁹³ The concept of GAL for this 'interwoven'²⁹⁴ global administrative space of aviation safety that combines domestic and international elements in the process of global aviation safety regulation is based on the idea of understanding global governance of aviation safety as an administration which can apply principles of administrative law to organize global governance global governance of aviation safety.

Globalised social and economic life makes states willing to share their previously sovereign rights within global governance of aviation safety and, instead of invoking sovereignty²⁹⁵ to resist cooperation, states participate in, tolerate and accept the regulations of ICAO.

4.6 Establishing legitimacy in the global governance of aviation safety

²⁹⁰ Ruwantissa Abeyratne, *Aviation and International Cooperation: Human and Public Policy Issues* (Kindle ed. Springer International Publishing 2015) Locations 7812-7819

²⁹¹ Benedict Kingsbury & Richard B. Stewart, 'Legitimacy and Accountability in Global Regulatory Governance: The Emerging Global Administrative Law and the Design and Operation of Administrative Tribunals of International Organizations' (2016) 1. <<http://iilj.org/wp-content/uploads/2016/08/Kingsbury-Stewart-Legitimacy-and-Accountability-in-Global-Regulatory-Governance-1.pdf>> September 2 2019

²⁹² Benedict Kingsbury, Nico Krisch, 'Introduction: Global Governance and Global Administrative Law in the International Legal Order' (2006) Vol. 17, Issue 1. *European Journal of International Law* 1-2. Retrieved from <<http://www.ejil.org/pdfs/17/1/64.pdf>> accessed August 30 2019

²⁹³ Benedict Kingsbury, Nico Krisch, 'Introduction: Global Governance and Global Administrative Law in the International Legal Order' (2006) Vol. 17, Issue 1. *European Journal of International Law* 1-2. Retrieved from <<http://www.ejil.org/pdfs/17/1/64.pdf>> accessed August 30 2019

²⁹⁴ Benedict Kingsbury, Nico Krisch, 'Introduction: Global Governance and Global Administrative Law in the International Legal Order' (2006) Vol. 17, Issue 1. *European Journal of International Law* 3. Retrieved from <<http://www.ejil.org/pdfs/17/1/64.pdf>> accessed August 30 2019

²⁹⁵ Abram Chayes, Antonia Handler Chayes, *The New Sovereignty- Compliance with International Regulatory Agreements* (Harvard University Press.1995) 27-28

The main focus of this research is to explore the contribution of the normative system of GAL theory and to establish global aviation safety standards and regulations as legal sources governing domestic administrations²⁹⁶ and eventually to make them invocable before national courts. Based on state consent, traditional international law addresses the legitimacy and legality issues in the international legal order within the domestic system. As explored in the previous chapter, the traditional international legal order does not sufficiently respond to the developments in global aviation safety governance. The proposed concept of the law of the GAL theory, which challenges ‘the orthodox ideas of international legal order’,²⁹⁷ is explored to seek answers to critical issues that have been raised regarding the legitimacy of global aviation safety standards that are issued by the ICAO within the states’ domestic legal order.

However, due to the complexity of the global regimes and the global administrative space discussed in this chapter, GAL norms do not prescribe a fixed way to establish a link to national legal orders for all global regimes. According to Chiti, ‘Global Administrative Law regulates substance and procedure of national administrative action through a plurality of legal patterns and its usual characterisation as a highly flexible legal matter, capable of adaptation to different contexts and circumstances’.²⁹⁸ However, the analysis in this research only focuses on global aviation safety governance.

Specifically, as the Chicago Convention (1944) strongly emphasises state sovereignty, the question that needs to be answered is: What definition of the concept of law can justify abandoning the state consent-based criteria and establish the legitimacy of global aviation safety standards in the domestic legal order?

The justification is explored in the concept of law proposed in GAL. Similar functions of administrative law, which are referred to as a modified form of administrative law in global decision-making in regulatory regimes, allow for participation, transparency, reasoned decision making and review to establish legitimacy and accountability within the domestic

²⁹⁶ Edoardo Chiti, ‘Bringing global law home’ in Sabino Cassese (ed.) *Research Handbook on Global Administrative Law* (Edward Elgar Publishing 2017) 440.

²⁹⁷ ‘Nevertheless, features of global regulatory governance and global administrative law now spur a rethinking of orthodox ideas of international legal order: the distinction between domestic and international law, the legitimacy basis of international law, the sovereign equality of states, and the doctrine of sources.’ Benedict Kingsbury, Nico Krisch, ‘Introduction: Global Governance and Global Administrative Law in the International Legal Order’ (2006) Vol. 17, Issue 1. *European Journal of International Law* 1,10. Retrieved from <<http://www.ejil.org/pdfs/17/1/64.pdf>> accessed August 30 2019

²⁹⁸ Edoardo Chiti, ‘Bringing global law home’ in Sabino Cassese (ed.) *Research Handbook on Global Administrative Law* (Edward Elgar Publishing 2017) 450.

legal order.²⁹⁹ Hence, GAL scholars like Kingsbury et al., underline that global governance can be demonstrated as an administration which constructed by principles of administrative law.³⁰⁰ In addition to principles of administrative law, GAL theory propose a normative element of ‘publicness’ to define the conception of law.³⁰¹

4.6.1 Applying administrative law principles in the global governance of aviation safety

Generally, regulatory norms and decisions of global regulatory regimes are implemented by national administrations and national courts.³⁰² It is called ‘distributed administration’. Accordingly, standards or decisions of global regulatory institutions have a practical effect within the nation-states through interpretation, implementation or enforcement of national institutions or non-territorial specialised companies.³⁰³

The concept of GAL for this ‘interwoven’³⁰⁴ global administrative space that combines domestic and international elements in the process of global regulation is based on the understanding global governance as an administration which applies principles of administrative law to organise global governance. The benefit of understanding global

²⁹⁹ Benedict Kingsbury & Richard B. Stewart, ‘Legitimacy and Accountability in Global Regulatory Governance: The Emerging Global Administrative Law and the Design and Operation of Administrative Tribunals of International Organisations’ (2008) Retrieved from Institute International Law and Justice, New York Law School, 6. <<http://www.iilj.org/publications/legitimacy-and-accountability-in-global-regulatory-governance-the-emerging-global-administrative-law-and-the-design-and-operation-of-administrative-tribunals-of-international-organizations/>> accessed 30 August 2019

³⁰⁰ Benedict Kingsbury, Nico Krisch, Richard B. Stewart & Jonathan B. Wiener, ‘Foreword: Global Governance as Administration- National and Transnational Approaches to Global Administrative Law’ (Summer/Autumn 2005) Vol.68, No.3-4, Law & Contemporary Problems, 1,2. Retrieved from <<http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1360&context=lcp>> accessed 6 September 2019

³⁰¹ Benedict Kingsbury, ‘The Concept of Law in Global Administrative Law’ (2009) Vol.20 No.1, The European Journal of International Law, Abstract <<http://www.ejil.org/pdfs/20/1/1784.pdf>> accessed 6 September 2019

³⁰² Richard B. Stewart, ‘Global Standards for national societies’ in Sabino Cassese (ed.) ‘*Research Handbook on Global Administrative Law*’ (Edward Elgar Publishing 2017) 175.

³⁰³ Benedict Kingsbury, ‘Three models of "distributed administration": Canopy, baobab, and symbiote’(2015) Vol.13 No.2 , I CON 478, 478. Retrieved from <http://www.iilj.org/wp-content/uploads/2016/08/Kingsbury_Three-models-of-distributed-administration.pdf> accessed 6 September 2019

³⁰⁴ Benedict Kingsbury, Nico Krisch, ‘Introduction: Global Governance and Global Administrative Law in the International Legal Order’ (2006) Vol. 17, Issue 1. European Journal of International Law’ 1,3. Retrieved from <<http://www.ejil.org/pdfs/17/1/64.pdf>> accessed August 30 2019

governance as an administration is that provides a way of thinking to reconstruct definitive structure to establish the legitimacy of international institutions within the state.³⁰⁵

Kingsbury and Stewart especially underline the ‘requirements of transparency, participation, reasoned decision, and decisional review with a view to ensuring greater accountability and responsiveness’³⁰⁶ to ensure that global regulatory authorities apply administrative law norms in the decision-making process to establish accountability.

The very distinguishing characteristic of the new structure of international organisations as global regulatory bodies is that there is no hierarchy, but rather, an interconnected administrative structure at both the international and domestic levels.³⁰⁷ Hence, the global regulatory bodies work together with national administrations.

However, because power has shifted to a non-state regulatory authority, legitimacy and accountability within the states need to be established through the application of administrative law norms. The global aviation safety standards placed in SARPs are designed to enhance the global normative system and to protect the common interests of the civil aviation system.³⁰⁸ The contracting states have an affirmative duty to harmonise their domestic laws with SARPs as per the Chicago Convention (1944). Furthermore, the Convention imposes a duty on the contracting states to ‘collaborate in securing the highest practicable degree of uniformity in regulations, standards, and procedures.’³⁰⁹

In this respect, the governance regime for global civil aviation safety that derives from the Chicago Convention (1944) is considered as a global administrative regime which brings about coordination between actors and different components, both international or

³⁰⁵ Benedict Kingsbury, Nico Krisch & Richard B. Stewart, ‘The Emergence of Global Administrative Law’ (Summer 2005) Vol. 68, Law and Contemporary Problems, 15, 27. Retrieved from <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1361&context=lcp> > accessed 27 August 2019

³⁰⁶ Benedict Kingsbury & Richard B. Stewart, ‘Legitimacy and Accountability in Global Regulatory Governance: The Emerging Global Administrative Law and the Design and Operation of Administrative Tribunals of International Organisations’ (2008) Retrieved from Institute International Law and Justice, New York Law School, 1. <<http://www.iilj.org/publications/legitimacy-and-accountability-in-global-regulatory-governance-the-emerging-global-administrative-law-and-the-design-and-operation-of-administrative-tribunals-of-international-organizations/>> accessed 30 August 2019

³⁰⁷ Sabino Cassese, Bruno Carotti, Lorenzo Casini, Eleonora Cavalieri, Euan MacDonald (eds) with collaboration of Marco Macchia, Mario Savino, ‘*Global Administrative Law: The Casebook*’ (3rd ed.) IRPA, Institute For International Law and Justice, NYU School of Law (2012) Forward <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2140384&rec=1&srcabs=2089480&alg=1&pos=8>

³⁰⁸ Convention On International Civil Aviation 1944 Article 37-38 (Doc.7300)<<https://www.icao.int/publications/pages/doc7300.aspx>> accessed 13 May 2019

³⁰⁹ ibid Art.37

transnational and national, to ensure that each of them performs their roles as assigned and in accordance with the norms of the regime.³¹⁰

In order to establish the legitimacy and accountability of the aviation safety regulations within the domestic order, transparency, consultation, participation, review mechanisms, and reasoned decision making should be put into practice. The aim is to ensure that the standard-setting and legitimate policymaking of the ICAO occur at a global level and applies administrative law principles. In the following will be shown that the theory does not create a new system for international management, but only evaluates international issues from a global perspective by applying existing administrative law principles.

4.6.1.1 Participation of stakeholders in the global governance of aviation safety

One of the principles of administrative law is participation. GAL theory suggests the establishment of global mechanisms that are shaped by administrative law principles will contribute to creating harmony in global administrative systems. Moreover, the theory suggests that harmony among the different levels of administration can be achieved by ensuring regulatory participation and accountability.³¹¹ Proponents cite ‘participation of states in global standard-setting procedures in global institutions and implementing global standards by their domestic capacity’ as an answer to questions about establishing accountability in global governance.³¹²

However, it is important to note that the GAL theory does not develop normative principles that are totally different from those of traditional international law. The sources employed in theory are not newly created but are international treaties, decisions of intergovernmental authorities and some customary intentional norms.³¹³

³¹⁰ Benedict Kingsbury, Nico Krisch & Richard B. Stewart, ‘The Emergence of Global Administrative Law’ (Summer 2005) Vol. 68, Law and Contemporary Problems, 15, 44. Retrieved from <<http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1361&context=lcp>> accessed 27 August 2019

³¹¹ Benedict Kingsbury, Nico Krisch, ‘Introduction: Global Governance and Global Administrative Law in the International Legal Order’ (2006) Vol. 17, Issue 1. European Journal of International Law’ 1, 4. Retrieved from <<http://www.ejil.org/pdfs/17/1/64.pdf>> accessed August 30 2019

³¹² *ibid* 11.

³¹³ Benedict Kingsbury, ‘The Administrative Law Frontier in Global Governance. Proceedings of the Annual Meeting, (March 30- April 2005) Vol. 99, American Society of International Law, 1, 4. Retrieved from <<http://www.jstor.org/stable/25659992>> accessed 6 September 2019

Nevertheless, the theory moves beyond or away from sources of traditional international law³¹⁴ by addressing the increasingly interconnected law-making process in different global sectors. GAL theory reconceptualises state behaviour in global governance, e.g. decision-making together with other actors and allowing monitoring by global institutions.³¹⁵

Air transport could provide an example of this. For instance, the International Air Transport Association (IATA), although it is a private association, has an influence on the decision-making process in drafting SARPs.

On the other hand, ICAO has also developed an auditing and monitoring³¹⁶ system which allows ICAO officials to visit state authorities and monitor the compliance of the states with SARPs. Therefore, although states still have authoritative powers, they do not exercise their sovereignty independently, but rather share it with other actors. Thus, the states have exclusive or ultimate authority which needs to be coordinated with other market-affected entities to establish the global policies for air transport.

State participation can be referred to as the first step, which involves the establishment of the legitimacy of the global regulations in the nation-state. Global governance necessitates state involvement to enhance participation in global regulatory decision-making. Therefore, establishing the participation of actors and joint action in global regulation will eventually promote fairness, transparency, and the rule of law in global regulatory regimes.³¹⁷

4.6.1.1.1 State participation and continuity in the decision-making process of international aviation safety standards

Under Article 90 of the Convention, the Council has the authority to adopt international standards and recommend practices that are incorporated into Annexes and to adopt an amendment of existing Annexes. The General Assembly is comprised of all the member

³¹⁴ *ibid* 6.

³¹⁵ Karsten Nowrot 'Global Governance and International law' (November 2004) Heft 33 <<http://telc.jura.uni-halle.de/sites/default/files/altbestand/Heft33.pdf> > accessed 28 March 2019

³¹⁶ See Chapter III

³¹⁷ Sabino Cassese, Bruno Carotti, Lorenzo Casini, Eleonora Cavalieri, Euan MacDonald (eds) with collaboration of Marco Macchia, Mario Savino, 'Global Administrative Law: The Casebook' (3rd ed.) IRPA, Institute For International Law and Justice, NYU School of Law (2012) XXV <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2140384&rec=1&srcabs=2089480&alg=1&pos=8 > accessed 3 September 2019

states of the ICAO, and the Council is composed of 36-member states which are elected for a three-year term by the Assembly.³¹⁸

The Council is a permanent body of the organisation that is responsible to the Assembly and functions as the organisation's executive committee.³¹⁹ In the election of the Council members, three different groups of states are chosen to represent the others in order to bring about adequate representation.³²⁰ The states are chosen based on their contribution to the provision of facilities for international civil air navigation. In addition, the representatives should ensure that all the geographic areas of the world are represented on the Council.³²¹ The original number of contracting states on the Council membership, 21, was changed to 36 due to the growing number of member states to provide a wider representation of the member states.³²²

Although the number of members on the Council has changed, the criteria for membership on the Council as stated in Article 50 of the Convention have not been altered. On the one hand, it might be debatable whether 36-member states out of 191 can establish adequate participation in the executive body of the ICAO. In response to this, Abeyratne drew attention to the obligation of the Council members to act to the best of their knowledge for the constituents they represent. He asserted that the representation provided by the member states

³¹⁸ Convention On International Civil Aviation 1944

(Doc.7300) <<https://www.icao.int/publications/pages/doc7300.aspx>> accessed 13 May 2019

Article 50 a) The Council shall be a permanent body responsible to the Assembly. It shall be composed of thirty-six contracting States elected by the Assembly. An election shall be held at the first meeting of the Assembly and thereafter every three years, and the members of the Council so elected shall hold office until the next following election.

³¹⁹ Discussed in Chapter II

³²⁰ Convention On International Civil Aviation 1944 (Doc.7300) Article 50(b)

<<https://www.icao.int/publications/pages/doc7300.aspx>> accessed 13 May 2019

³²¹ Convention On International Civil Aviation 1944 (Doc.7300) Article 50

<<https://www.icao.int/publications/pages/doc7300.aspx>> accessed 13 May 2019

'The following States were elected from among ICAO's 191 Member States to the Organization's 36 Member Governing Council during the 2016 ICAO Assembly. States of chief importance in air transport- Australia, Brazil, Canada, China, France, Germany, Italy, Japan, Russian Federation, United Kingdom and the United States; States which make the largest contribution to the provision of facilities for international civil air navigation- Argentina, Colombia*, Egypt, India, Ireland*, Mexico, Nigeria, Saudi Arabia, Singapore, South Africa, Spain and Sweden*. States ensuring geographic representation- Algeria*, Cabo Verde*, Congo*, Cuba*, Ecuador*, Kenya, Malaysia, Panama*, Republic of Korea, Turkey*, United Arab Emirates, United Republic of Tanzania, and Uruguay*.(*States which were newly-included in 2016)' ICAO- Council States 2016-2019. Retrieved from <<https://www.icao.int/about-icao/Council/Pages/council-states-2016-2019.aspx>> accessed 6 September 2019

³²²Michael Milde, *'International Air Law and ICAO'* (Eleven International Publishing, 2008) 139.

of the Council was ‘morally reprehensible.’ This can be indicated as the best way of working for the adoption of Annexes, particularly those including safety and security regulations.³²³

However, the composition of the Council as an executive body was criticised by Sochor (1990) regarding the possible influence of politics by powerful countries in the process of decision-making.³²⁴ The criticism, which focuses on the composition of the Council, pointed out the inadequate representation of the member states and the role of politics³²⁵ in the decision making of the ICAO.

In fact, there is no provision in the Convention to define what represents ‘adequate representation’. Milde emphasised the original idea of the Convention which involves structuring the Council to establish a balance in the composition of the member states on an economic, technical and geographical basis.³²⁶ He drew attention to the possibility that a state must secure a position within the election system of the Council as required by the Convention. A secret ballot in the Assembly determines whether a particular state candidate meets certain set criteria because there are no guidelines or benchmarks that can be used to measure their performance. For instance, a small state can be a candidate if elected by a sufficient number of votes, because the Assembly’s decision is respected.³²⁷

In addition, the legislative action of the ICAO Council on security and safety issues in ‘low politics areas’ suggests that the states have achieved a broad consensus.

Furthermore, the ICAO system gives all the contracting states an opportunity to participate in decision making before the adoption of standards. Under Article 90 (a) of the Convention, two-thirds of the Council votes at a meeting are required to adopt an Annex and a submission by the Council to each contracting state. The Article also provides that the entry into force of these Annexes is also regulated. Accordingly, the Annexes or amendments of the Annexes become effective within three months after their submission to the contracting states.

³²³ Ruwantissa Abeyratne, *Convention on International Civil Aviation: A Commentary* (Springer International Publishing, 2014) 576.

³²⁴ Eugene Sochor, *The Politics of International Aviation* (MacMillan Press Ltd.1990) 222.

³²⁵ *ibid*

³²⁶ Michael Milde, *International Air Law and ICAO* (Eleven International Publishing, 2008) 141.

³²⁷ *ibid*

Buergenthal referred to the adoption of an Annex or its amendment by the ICAO Council as ‘the first stage of the legislative process leading to its formal enactment.’³²⁸ As far as these regulatory acts are concerned, the legislative power of the Council is subject to a veto by the member states. Article 90 (a) of the Convention provides that after its adoption by the Council, any amendment or Annex shall become effective within the first three months of its submission by the state on contract, or after a long period prescribed by the Council unless the state decides to register its disapproval with the Council.³²⁹

The Article also states that after three months, if there has been no veto of the majority by the contracting states, the Annexes, or amendment of Annexes ‘shall become effective.’ Article 90 (b) states that an ‘immediate notification’ by the Council to the contracting states is necessary for such regulation. After their adoption by the Council, the recommended practices and international standards become an Annex of the Convention.

Article 37 regulates the adoption of international procedures and standards and obliges the contracting states to undertake collaboration to secure uniformity of the highest practicable degree in regulatory standards. Article 38, on the other hand, regulates ‘departures’ from international procedures and standards by stating that any state that finds it impracticable to comply with SARPs or that adopts regulations that are different from the set standards ‘shall give immediate notification’ to the ICAO of the differences between its own practices and those established by the international standard. The Council shall then provide immediate notification to all the other states.

The contracting states have the obligation to notify the ICAO about the differences between their own practices and those established in the international standard to enable the organisation to notify other states about the differences between what those states adopted and the set standards. This action is ‘an absolute obligation’³³⁰ of the contracting states. If a contracting state fails to notify the ICAO, then it is assumed that the state is in compliance with the standards.³³¹

³²⁸ Thomas Buergenthal, *Law-Making in the International Civil Aviation Organisation* (1st ed.) University of Virginia Press. 1969) 66.

³²⁹ *ibid*

³³⁰ Tim Unmack, *Aviation Practical Guides, Civil Aviation Standards and Liabilities (Aviation Practical Guides)* (LLP Professional Publishing 1999) 24.

³³¹ Michael Milde, ‘The International Civil Aviation Organisation: After 50 Years and Beyond’ (1996) *Australian International Law Journal* 60, 64.

Therefore, from the proposal stage to the adoption of the standards, the ICAO system provides the contracting states with the opportunity to provide their objections and opinions. The contracting states even have an option to depart from the standards when they feel they are impracticable or for other reasons; in such a case, they should submit a notification to the Council.

Another key principle of the GAL theory that applies to global aviation safety regulations is that of the ‘continuity’ of the regulations. GAL scholars, Krisch and Kingsbury, emphasised ‘the enmeshment of domestic and international regulation’³³² in the global regulation system. Regulations in global fields demand continuity from the global level to the national level. Cassese stressed that there should be no boundary dividing the national and the global levels. This means that there should be continuity in the activities that involve both levels. According to Cassese, national civil society, national executives, and national bureaucracies are important in global activities. They have given up some of their sovereignty in order to gain a larger area than the state.³³³

The ICAO’s system for the adoption of Annexes which contain safety standards and the obligations of the contracting states to implement them complies with the ‘continuity’ criteria suggested by GAL theory.

The ICAO Council does not act as an executive committee that issues an order without consulting with the members. Before the adoption of the standards, the debating process can contribute transparency and provide reasons to establish the legitimacy of the standards within the domestic order.

4.6.1.1.2 Participation of all other stakeholders in the decision-making process of aviation safety standards

³³² Benedict Kingsbury, Nico Krisch, ‘Introduction: Global Governance and Global Administrative Law in the International Legal Order’ (2006) Vol. 17, Issue 1. *European Journal of International Law* 1,5. Retrieved from <<http://www.ejil.org/pdfs/17/1/64.pdf>> accessed August 30 2019

³³³ Sabino Cassese, Stefano Battini, Elisa D’Alterio, Giulio Napolitano, Maurizia De Bellis, Hilde Caroli Casavola, Elisabetta Morlino, Lorenzo Casini, Edoardo Chiti, and Mario Savino ‘Global Administrative Law: An Italian Perspective’ RSCAS Policy Papers (RSCAS PP 2012/04), Robert Schuman Centre for Advanced Studies Global Governance Program. 2. <http://cadmus.eui.eu/bitstream/handle/1814/22374/RSCAS_PP_2012_04.pdf?sequence=1> accessed 6 September 2019

As per the GAL theory, one of the indicators of accountability for global regulations is the participation of not only states but all of the other actors in the decision-making process. Cassese argued that global governance encourages states, private institutions, and civil society to participate democratically in the decision-making process for global standards. The theory supports the idea of the participation of all the actors in the field and their influence in every step of the decision-making process in order to achieve deliberative democracy in the system as desired.³³⁴

ICAO states that aviation safety is at the core of the fundamental objective of the organisation and emphasises collaboration with the entire air transport community to achieve its objectives.³³⁵ Furthermore, ICAO strongly accentuates that ‘aviation safety requires the participation of all relevant stakeholders. ICAO also fosters collaboration among States and other stakeholders, and facilitates a coordinated, transparent and proactive approach to safety.’³³⁶

The ICAO’s standard-making process embraces not only states but also the participation of various stakeholders³³⁷ in the aviation industry by allowing them to formulate amendments or proposals for new SARPs.³³⁸ An example of a private organisation’s participation in the field of civil aviation is the collaboration between ICAO and IATA in the standard making process. IATA has a particular role to play in the ICAO system among the many private international organisations in civil aviation;³³⁹ also, it provides a good example of cooperation between government and industry with the aim of shaping collaborative and universal standards.³⁴⁰ One important indication of the collaboration between IATA and

³³⁴ *ibid* 3.

³³⁵ International Civil Aviation Organisation. Retrieved from ICAO Vision & Mission: <<http://www.icao.int/about-icao/Pages/vision-and-mission.aspx>> accessed 6 September 2019

³³⁶ ICAO 2017-2019 Global Aviation Safety Plan (Doc 10004) Second Edition. (2016) Retrieved from <<https://www.icao.int/Meetings/a39/Documents/GASP.pdf>> accessed 3 September 2019

³³⁷ *ibid* “Key aviation stakeholders are referred as “ include but are not limited to : ICAO, States, international organizations, regional organizations, RASGs (regional aviation safety groups) RSOOs (regional safety oversight organization) RAIOS (regional accident and incident investigation organization) industry representatives, air navigation service providers, operators, aerodromes, manufacturers, and maintenance organizations. p.4-4

³³⁸ T. Fidalgo de Freitas, ‘From participation towards compliance: The role of private actors in the making of SARPs by ICAO’ (2011) 9. Retrieved from IRPA< <http://irpa-c02.kxcdn.com/wp-content/uploads/2011/06/2.pdf> >

³³⁹ The International Air Transport Association (IATA) Retrieved from <<http://www.iata.org/about/pages/index.aspx>> accessed 6 September 2019

³⁴⁰ *ibid*

ICAO is that IATA is authorised to attend the ICAO's Assembly, which comprises all the member states. However, it is only authorised as an observer and has no right to vote.³⁴¹ Nevertheless, because it represents airline companies worldwide, the coordination between the two organisations in making standard decisions means that it is more than just an observer, and this is a good indication of the collaborative administration of global civil aviation.

ICAO declares that effective SARPs can be achieved through 'cooperation in the formulation of SARPs, the consensus in their approval, compliance in their application, and commitment of adherence to this on-going process.'³⁴² Tiago Fidalgo de Freitas applied administrative law features to the role of IATA in the SARP-making procedure. He asserted that the mechanism contains two features of administrative law. First, it embraces the institutional perspective by recognising the IATA as an advisory or consultative body. On the other hand, it assumes a functional standpoint. The mechanism also imposes a duty to provide a reason to the ICAO through the analysis of the obtained remarks and simultaneously forcing the ICAO to justify its policy choices in a formal manner.³⁴³

Although the ICAO's standards are contained in the Annexes, after adopting the standards, the states have the responsibility for oversight over the airlines' activities. The IATA, as a representative of the airline industry, has an active contributory role in the process of standard setting. As an actor in global civil aviation, it participates in the decision making regarding the standards that will regulate the global aviation sector. In this respect, the IATA's participation can be deemed to comply with the administrative structure as proposed by GAL theory.

Kingsbury and Stewart drew attention to the increasing practice toward the creation of a system to enable the civil society actors and the social and economic parties affected by the regulatory activities of transnational and intergovernmental administrative bodies to

³⁴¹ The International Air Transport Association (IATA) Retrieved from <<http://www.iata.org/about/pages/index.aspx>> accessed 6 September 2019 ; see also Standing Rules of Procedure of the Assembly of the International Civil Aviation Organization (Doc 7600/8th Edition 2014) 5, 25, 43. Retrieved from < http://www.icao.int/publications/Documents/7600_8ed.pdf> accessed 6 September 2019

³⁴² SARPs - Standards and Recommended Practices. Retrieved from <<https://www.icao.int/safety/SafetyManagement/Pages/SARPs.aspx> > accessed 6 September 2019

³⁴³ Fidalgo de Freitas, 'From participation towards compliance: The role of private actors in the making of SARPs by ICAO' (2011) 14. Retrieved from IRPA < <http://irpa-c02.kxcdn.com/wp-content/uploads/2011/06/2.pdf> >

participate in the standard-making process. Among them is the ICAO, which provides a good example to other organisations dealing with aviation management by allowing states and other independent bodies to participate in the process of the standard-setting through the IATA, which represents the air industry interests of different countries.³⁴⁴

4.6.1.2 Transparency

Transparency and participation are two complementary administrative tools that establish good governance and provide acceptance and recognition. Freitas drew attention to the fact that broader participation also provides more transparency in the mechanism. He stressed that transparency allows for more effective participation. Such participation leads to the presentation of the arguments and evidence that the decision-makers must provide in following the set norms and the consideration of the reasons they give. Through transparency, the reasons given to support the decisions and the benefits obtained are effectively evaluated from the information obtained during the discussions of the participants.³⁴⁵

In the global decision-making process, transparency is one of the core elements in establishing the legitimacy of the nation-state. Kingsbury et al. have emphasised that transparency is one of the important elements in establishing the legitimacy of global administrative decision making in governance.³⁴⁶ For regulatory power to be visible and controllable, transparency is needed as a regulator of the visibility of governance.³⁴⁷

One of the best ways to establish transparency is to provide access to information to all interested parties, including associations and private individuals. Documents regarding the policy-making procedure should be accessible by the interested parties. Kingsbury and Kirsch

³⁴⁴ Benedict Kingsbury & Richard B. Stewart, 'Legitimacy and Accountability in Global Regulatory Governance: The Emerging Global Administrative Law and the Design and Operation of Administrative Tribunals of International Organisations' (2008) 7. Retrieved from Institute International Law and Justice, New York Law School, <<http://www.iilj.org/publications/legitimacy-and-accountability-in-global-regulatory-governance-the-emerging-global-administrative-law-and-the-design-and-operation-of-administrative-tribunals-of-international-organizations/>> accessed 30 August 2019 ;See also paragraph 3.2 of this Chapter

³⁴⁵ Fidalgo de Freitas, 'From participation towards compliance: The role of private actors in the making of SARPs by ICAO' (2011) 17. Retrieved from IRPA < <http://irpa-c02.kxcdn.com/wp-content/uploads/2011/06/2.pdf> >

³⁴⁶ Benedict Kingsbury, Nico Krisch & Richard B. Stewart, 'The Emergence of Global Administrative Law' (Summer 2005) Vol. 68 , Law and Contemporary Problems, Retrieved from <<http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1361&context=lcp> > accessed 27 August 2019

³⁴⁷ Ida Koivisto, 'The IMF and the Transparency Turn' (2016) 25 Minnesota Journal of International Law, 381, 383-388.

strongly emphasised the importance of transparency and access to information for substantial participation and review to establish accountability.³⁴⁸

According to Chayes and Chayes (1995), another aspect of transparency is that it is an ‘almost universal element of management strategy.’³⁴⁹ With respect to compliance with the set standards, the establishment of transparency in regulatory regimes is a better strategy than coercive enforcement. Chayes and Chayes asserted that transparency also contributes to compliance management in regulatory regimes because all the parties have access to information. According to them, transparency also creates pressure among the parties in compliance with international treaties.³⁵⁰

In different regulatory regimes, the importance of transparency has been a subject in global governance.³⁵¹ Among them is the IMF (International Monetary Fund), which has made transparency a policy value with the expectation of increasing the legitimacy, effectiveness, and quality of its surveillance and programmes, as well as its contribution to the public debate.³⁵² It is crucial for the member countries to be open with each other because this leads to more extensive examinations of policies and more public discussion. In addition, it enhances the credibility of its policies and policymakers and facilitates the order, efficiency, and functioning of the financial markets.³⁵³

The World Trade Organization (WTO) has focused on increasing public access to information, and hence, on promoting transparency. On July 18, 1996, members of the WTO Council agreed on guidelines to improve its transparency and to further contacts between the WTO and the public, including the representatives of NGO’s that are concerned with matters

³⁴⁸ Benedict Kingsbury & Richard B. Stewart, ‘Legitimacy and Accountability in Global Regulatory Governance: The Emerging Global Administrative Law and the Design and Operation of Administrative Tribunals of International Organisations’ (2008) 7. Retrieved from Institute International Law and Justice, New York Law School, <<http://www.iilj.org/publications/legitimacy-and-accountability-in-global-regulatory-governance-the-emerging-global-administrative-law-and-the-design-and-operation-of-administrative-tribunals-of-international-organizations/>> accessed 30 August 2019

³⁴⁹ Abram Chayes, Antonia Handler Chayes, ‘*The New Sovereignty- Compliance with International Regulatory Agreements*’ (Harvard University Press.1995) 22.

³⁵⁰ *ibid* 22-24. see also 135.

³⁵¹ Ida Koivisto, ‘The IMF and the Transparency Turn’ (2016) 25 *Minnesota Journal of International Law*, 381,387.

³⁵² *ibid* 384

³⁵³ Transparency at the IMF. (Fact Sheet as of March 2019) Retrieved from IMF: <<http://www.imf.org/About/Factsheets/Sheets/2016/07/27/15/35/Transparency-at-the-IMF?pdf=1>> accessed 7 September 2019

related to those of the WTO.³⁵⁴ In 2002, the WTO Council, emphasising the importance of greater transparency, decided that all its official documents shall be unrestricted to members of the public.³⁵⁵

The Aarhus Convention (1998) is another example of a significant international agreement that emphasises transparency. The Convention was adopted on 25 June 1998 with the aim ‘to improve the public’s right, as well as to make and implement environmental policy.’³⁵⁶ The importance of the Convention as an example of transparency in global governance is that the Convention introduces the obligations on contracting parties and also public authorities to provide access to information and encourage public participation. For this reason, the Aarhus Convention designed ‘new process’ about public participation of international agreements.³⁵⁷

The incorporation of the transparency principle in the decision making of the ICAO and its implementation of the global aviation safety regulations can be traced back to 1997. One of the results of the Directors General of Civil Aviation Conference in November 1997 was the recommendation of ‘greater transparency and increased closure to be implemented in the release of audit results.’³⁵⁸ The following year, a resolution was adopted in the 32nd session of the ICAO General Assembly requiring that ‘greater transparency and increased closure be implemented in the release of audit results’.³⁵⁹ At the same time, the Assembly adopted a resolution to establish the Universal Safety Oversight Audit programme (USOAP) and to transform the previous Safety Oversight Audit Programme (SOAP), which was voluntary and

³⁵⁴ WTO Press release, ‘General Council takes steps to increase public access to WTO information’ (1996). Retrieved August 26, 2017, from WTO: <https://www.wto.org/english/news_e/pres96_e/ngo.htm> accessed 7 September 2019

³⁵⁵ Procedures for the circulation and derestriction of WTO documents. (Decision of 14 May 2002, WT/L/452 02-2719) Retrieved August 26, 2017, from WTO: <https://docs.wto.org/gtd/WTODerestriction_documents/L452.pdf> accessed 7 September 2019

³⁵⁶ Pavla Bejckova, ‘Aarhus Convention and the Right to Know’ (2010) Vol. 11 Common Law Review, 44,44.

³⁵⁷ The United Nations Economic Commission for Europe (UNECE) Retrieved from UNECE: <<https://www.unece.org/env/pp/introduction.html>> accessed 7 September 2019

³⁵⁸ Resolutions Adopted at the 32nd session of the ICAO Assembly, (Provisional Edition, A32-11 1998) Retrieved from <<https://www.icao.int/Meetings/AMC/MA/Assembly%2032nd%20Session/resolutions.pdf>> 3 September 2019

Agenda item 17: Safety Oversight, Transition to the ICAO Universal Safety Oversight Audit Programme

³⁵⁹ Resolutions Adopted at the 32nd session of the ICAO Assembly, (Provisional Edition, A32-11 1998) Retrieved from <<https://www.icao.int/Meetings/AMC/MA/Assembly%2032nd%20Session/resolutions.pdf>> 3 September 2019

confidential, into a transparent and mandatory safety audit programme.³⁶⁰ Huang emphasised this drastic change in the ICAO's perspective regarding the sharing of information and transparency to the public. He addressed the significant shift from the previously held view that 'confidentiality is a cornerstone of the previous safety oversight assessment programme.'³⁶¹

ICAO monitors its member states on a regular basis through its Universal Safety Oversight Audit Programme (USOAP).³⁶² The aims include monitoring the level of the aviation activity of a certain state and the level of implementation of SARPs of each of the eight audited areas by states, regions or globally. Also, the types of difficulties experienced by the Member States in establishing safety systems for each of the audited areas are evaluated.³⁶³ In addition, the ICAO, during its 35th Session in 2004, recognised that sharing safety information and being transparent is one of the most fundamental tenets in the air transport field.³⁶⁴ The session aimed at improving safety through transparency and the sharing of information, as well as by drawing attention to the specific issues that are of great importance.³⁶⁵ To the ICAO, transparency is the basis of safety in aviation. The concerned stakeholders and contracting states need to access information that relates to safety. Also, the travelling public needs to have access to information that is necessary for making decisions regarding their use of air transportation. More improvements in aviation safety are required; this can only be achieved through increased sharing of information regarding safety among the contracting states, civil aviation stakeholders and the ICAO. In addition, the data should be adequately protected to prevent inappropriate use.³⁶⁶

³⁶⁰ *ibid*

³⁶¹ Jiefang Huang, 'Aviation Safety and ICAO' (Dphil thesis, Leiden University, Netherland 2009) 78. <<https://openaccess.leidenuniv.nl/bitstream/handle/1887/13688/000-huang-diss-28-01-09.pdf?sequence=1>> accessed 7 September 2019

³⁶² International Civil Aviation Organisation (ICAO) 'State of Global Aviation Safety' (2011) Section 2.5. Retrieved from <http://www.icao.int/safety/Documents/ICAO_State-of-Global-Safety_web_EN.pdf> 3 September 2019

³⁶³ *ibid*

³⁶⁴ ICAO 35th Session Assembly Resolutions in Force (as of 8 October 2004) (Doc 9848) Retrieved from <http://www.icao.int/publications/Documents/9848_en.pdf> accessed 4 September 2019

³⁶⁵ International Civil Aviation Organisation (ICAO) State of Global Aviation Safety (2011) Section 2.7 Retrieved from <http://www.icao.int/safety/Documents/ICAO_State-of-Global-Safety_web_EN.pdf> 3 September 2019

³⁶⁶ 'At the end of conference 66-member States indicated their willingness to authorize ICAO to release information from their safety oversight audits.' Jiefang Huang, 'Aviation Safety and ICAO' (Dphil thesis, Leiden University, Netherland 2009) 78. <<https://openaccess.leidenuniv.nl/bitstream/handle/1887/13688/000-huang-diss-28-01-09.pdf?sequence=1>> accessed 7 September 2019

In 2006, the Directors General of Civil Aviation Conference was held in Montreal on a Global Strategy for Aviation Safety. At this conference, it was agreed that states, stakeholders, and the travelling public should have access to the safety audit results and that they should be made publicly available through the ICAO's secure website.³⁶⁷ On July 16, 2008, the ICAO issued a news release declaring that all audited information on safety concerning air transportation should be posted on its public website. Since 2008, the safety oversight audit results have been posted on a secure website for review by the public.³⁶⁸ The creation of websites for the public to view detailed information on the internal procedures of decisions has become a common practice among international regulatory institutions.³⁶⁹ The ICAO prioritises the value of public trust in oversight authorities. Therefore, it provides public access to the information necessary to make relevant decisions regarding the use of air transportation.³⁷⁰

The application of transparency is not the only core element in the decision-making process. In order to establish accountability, transparency should also be applied to regulations and the implementation or compliance with regulations. Therefore, the whole process, from the decision making to the compliance with the set standards and their implementation should be available for review by the public. The ICAO's audit programmes have generally produced a considerable improvement in compliance with the set standard levels of aviation safety

³⁶⁷ Directors General of Civil Aviation Conference on a Global Strategy for Aviation Safety (2006) 'Transparency and Sharing of Safety Information (DGCA/06-WP/5) Presented by the Secretariat, b. Retrieved from <[http://www.icao.int/Meetings/AMC/MA/Directors%20General%20of%20Civil%20Aviation%20Conference%20on%20a%20Global%20Strategy%20for%20Aviation%20Safety%20\(DGCA-06\)/dgca_06_wp_05_rev_e.pdf](http://www.icao.int/Meetings/AMC/MA/Directors%20General%20of%20Civil%20Aviation%20Conference%20on%20a%20Global%20Strategy%20for%20Aviation%20Safety%20(DGCA-06)/dgca_06_wp_05_rev_e.pdf)> accessed 8 September 2019

³⁶⁸ Safety Audit Results: USOAP interactive viewer. Retrieved from <<https://www.icao.int/safety/pages/usoap-results.aspx>> accessed 6 September 2019

³⁶⁹ 'including the Basel Committee, the IOSCO, and the hybrid networks dealing with certification of sustainable forestry practices...' Benedict Kingsbury & Richard B. Stewart, 'Legitimacy and Accountability in Global Regulatory Governance: The Emerging Global Administrative Law and the Design and Operation of Administrative Tribunals of International Organisations' (2008) 7. Retrieved from Institute International Law and Justice, New York Law School, <<http://www.iilj.org/publications/legitimacy-and-accountability-in-global-regulatory-governance-the-emerging-global-administrative-law-and-the-design-and-operation-of-administrative-tribunals-of-international-organizations/>> accessed 30 August 2019

³⁷⁰ High Level Safety Conference (HLSC 2010) (WP/12 17/12/09) Presented by the ICAO Secretariat 'Improving ICAO Transparency: Sharing and Using Information in a Transparent, Consistent and Fair Manner'. Retrieved from <<https://www.icao.int/Meetings/AMC/HLSC/Working%20Papers/HLSC.2010.WP.012.en.pdf>> accessed 6 September 2019

regulations.³⁷¹ The transparency of the USOAP is defined as a ‘quasi-enforcement’ power³⁷² of the ICAO that enhances the level of compliance among the contracting states.

4.6.1.2.1 Sharing information among the parties

Another strategy for contemporary regulatory regimes in monitoring compliance levels among the parties is ‘reassurance transparency.’ Such monitoring is useful in providing information about the parties’ behaviour.³⁷³

In the international civil aviation system, it is important to have mutual trust between states. Their compliance and commitment to their international safety obligations are crucial, as it allows states to accept the operation of other states’ aircraft in their airspace or vice versa. When states work together, this helps them to maintain trust among themselves to the extent that they can act individually and collectively in a transparent and consistent manner when their practice complies with the set policies.³⁷⁴

The sharing of safety information occurs not only between states but also among the stakeholders of the civil aviation community that are working towards improving safety in aviation. Accordingly, the industry has also developed an audit programme which ensures that detailed results are made available based on the agreement of the audited entity.³⁷⁵

4.6.1.2.2 Limited transparency of security audits

It is noteworthy to emphasise the approach of transparency in security. Although transparency and information sharing in aviation safety management among the stakeholders of civil aviation and states have been improving, the transparency of security audits and the

³⁷¹ Safety Audit Results: USOAP interactive viewer. Retrieved from <<https://www.icao.int/safety/pages/usoap-results.aspx>> accessed 6 September 2019

³⁷² Jimena Blumenkron, ‘Implications of Transparency in the International Civil Aviation Organization’s Universal Safety Oversight Audit Programme’ 20. (2011) Retrieved from Institute for Research on Public Administration < <https://images.irpa.eu/wp-content/uploads/2019/03/42.pdf> > accessed 7 September 2019

³⁷³ Abram Chayes, Antonia Handler Chayes, ‘*The New Sovereignty- Compliance with International Regulatory Agreements*’ (Harvard University Press.1995) 150.

³⁷⁴ High Level Safety Conference (HLSC 2010) (WP/12 17/12/09) Presented by the ICAO Secretariat ‘Improving ICAO Transparency: Sharing and Using Information in a Transparent, Consistent and Fair Manner’. Retrieved from <<https://www.icao.int/Meetings/AMC/HLSC/Working%20Papers/HLSC.2010.WP.012.en.pdf> > accessed 6 September 2019

³⁷⁵ *ibid* ‘including the IATA operation Safety Audit (IOSA) programme, the IATA Safety Audit for Ground Operations (ISAGO) and the IBAC International Standards for Business Aircraft Operations (IS-BAO)

Universal Security Audit Programme (USAP) has not received the same level of focus and development. Aviation is very vulnerable to terrorist attacks and other harmful activities; therefore, there is a need to prevent the sharing of certain crucial information regarding deficiencies in the security systems that could be used by terrorists and other potentially harmful people.³⁷⁶

During the General Assembly at the 36th Session, which addressed the value of continuing bilateral exchanges of security information between states, the Assembly directed the Council to limit the level of transparency of the results of the ICAO's aviation security audits. This would be done by balancing the needs of the states and unresolved security concerns with the aim of keeping sensitive information secure and out of the public realm.³⁷⁷

Following the ICAO Assembly's request in the 36th Session, the Council approved the limited level of transparency. This applies to all audits under the Universal Security Audit Programme, Continuous Monitoring Approach (USAP_CMA).³⁷⁸

4.6.1.3 The right to review

A domestic administrative body's decision which affects the rights of an individual is subject to review by a court or tribunal that is independently structured according to the domestic order. This process is called the 'bedrock' of domestic administrative law.³⁷⁹ The increasing impact of global administrative decisions on individuals (as discussed above) has led to the emergence of a principle of administrative law called the 'right to review' in global

³⁷⁶ Jiefang Huang, 'Aviation Safety and ICAO' (D.Phil. thesis, Leiden University, Netherland 2009) 77. <<https://openaccess.leidenuniv.nl/bitstream/handle/1887/13688/000-huang-diss-28-01-09.pdf?sequence=1>> accessed 7 September 2019

³⁷⁷ ICAO Assembly – 36th Session (2007) 'Report of the Executive Committee on Agenda Item 16' (A36-WP/336 p/46 25/9/07) Retrieved from <https://www.icao.int/Meetings/AMC/MA/Assembly%2036th%20Session/wp336_en.pdf> accessed 7 September 2019

³⁷⁸ ICAO 'Limited Transparency and Significant Security Concerns' Retrieved from ICAO: <<https://www.icao.int/Security/USAP/Pages/Limited-Transparency-and-Significant-Security-Concerns.aspx>> accessed 6 September 2019

³⁷⁹ Benedict Kingsbury & Richard B. Stewart, 'Legitimacy and Accountability in Global Regulatory Governance: The Emerging Global Administrative Law and the Design and Operation of Administrative Tribunals of International Organisations' (2008) 8. Retrieved from Institute International Law and Justice, New York Law School, <<http://www.iilj.org/publications/legitimacy-and-accountability-in-global-regulatory-governance-the-emerging-global-administrative-law-and-the-design-and-operation-of-administrative-tribunals-of-international-organizations/>> accessed 30 August 2019

administration.³⁸⁰ As a matter of fact, the review mechanisms of some global regulatory regimes have developed into inspection panels, tribunals, or even compliance committees.³⁸¹

Among them, the World Bank Inspection Panel, which was established in 1993, functions as an independent complaint mechanism. The inspection panel is a non-judicial body that acts independently³⁸² and aims at providing a ‘citizen-led or bottom-up accountability’ system for people who may be adversely affected by the World Bank’s projects to be heard and to find solutions for their concerns.³⁸³ The process applies especially when the World Bank’s projects do not efficiently apply its own environmental and social safeguard policies. For instance, the inspection panel worked on the dam project that was financed by the World Bank on the Narmada River in India. The Morse Commission found that ‘there were serious violations of World Bank safeguard policies and devastating human and environmental consequences of those violations.’³⁸⁴ Since 1994, when the first inspection was requested, until June 2015, more than 100 requests have been made to the Inspection Panel.³⁸⁵

Another global regulatory body whose regulatory norms and decisions are implemented by national administrations and become part of domestic law and policy is the World Anti-Doping Agency (WADA),³⁸⁶ which has been referred to as a ‘a model’ for global

³⁸⁰ Benedict Kingsbury, Nico Krisch & Richard B. Stewart, ‘The Emergence of Global Administrative Law’ (2005) Vol.68. *Law and Contemporary Problems* 15, 39 Retrieved from <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1361&context=lcp> > accessed 1 September 2019

³⁸¹ Sabino Cassese, Elisa D’Alterio, ‘Introduction: the development of Global Administrative Law’, in Sabino Cassese (ed) ‘*Research Handbook Global Administrative Law*’ (Edward Elgar Publishing 2017) 9.

³⁸² World bank , ‘How to File a Request for Inspection’ Retrieved from World bank: <http://ewebapps.worldbank.org/apps/ip/Pages/FileaRequest.aspx> > accessed 6 September 2019

³⁸³ Peter L. Lallas, ‘Citizen driven Accountability: The Inspection Panel and other Independent Accountability Mechanisms’ (2013) Vol. 107, *American Society of International Law*, 308, 308. <https://www.cambridge.org/core/journals/proceedings-of-the-asil-annual-meeting/article/div-classtitlecitizen-driven-accountability-the-inspection-panel-and-other-independent-accountability-mechanismsdiv/4CADE152ECCCC453FF73A6C36DCBD43F> > accessed 6 September 2019

³⁸⁴ *ibid* 309.

³⁸⁵ Detailed information of the Inspection Panel cases can be found on the Panel’s website, http://ewebapps.worldbank.org/apps/ip/Pages/Panel_Cases.aspx > accessed 6 September 2019

³⁸⁶ Richard B. Stewart, ‘Global Standards for national societies’ in Sabino Cassese (ed.) ‘*Research Handbook on Global Administrative Law*’ (Edward Elgar Publishing 2017) 181.

lawmaking.³⁸⁷ The agency works on harmonisation of rules and regulation of sports organisations and public authorities on anti-doping policies worldwide.³⁸⁸

However, the Court of Arbitration for Sport (CAS), which was created in 1984 under the financial and administrative authority of the International Council of Arbitration for Sport (ICAS),³⁸⁹ is referred to as the ‘final checkpoint in the preventative process for doping in sport’.³⁹⁰ Any legal or individual entity can submit their sport-related dispute to the CAS, including the decisions of the WADA,³⁹¹ which has the right of appeal to CAS in doping cases that are under the jurisdiction of organisations that have implemented the Code.³⁹²

In the international civil aviation field, the Convention gives ‘mandatory power’³⁹³ to the ICAO Council. Accordingly, the Council has the jurisdiction to settle disputes between the contracting parties. When a conflict arises regarding the application or interpretation of the Convention and its Annexes, it cannot be settled by negotiation between them. Instead, upon the application of any concerned contracting state, the Council of the ICAO is the only body authorised by the Convention to decide on such disagreements.³⁹⁴ The Council may investigate situations that present avoidable obstacles to the development of international air

³⁸⁷“International sports antidoping rules, especially the World Anti-Doping Code (WADA Code), provide a paradigm for rapidly creating and implementing globally accepted legal norms and an example of an international legal system. Second, the process by which “*lex sportiva*,” a developing body of international sports law based largely on private agreements and dispute resolution processes, is being created by the Court of Arbitration for Sport and becoming globally accepted has wide-ranging implications for global dispute resolution and the establishment of international legal norm. Third, the emerging propensity of private agreements between international sports governing federations, a form of global legal pluralism, to displace national laws raises important issues regarding national sovereignty.” Matthew J. Mitten & Hayden Opie, ‘Sports Law’: Implications for the Development of International, Comparative, and National Law and Global Dispute Resolution’ (2010) Vol. 85 Tulane Law Review, 269, 274.<

<http://scholarship.law.marquette.edu/facpub/519/> > accessed 5 September 2019

³⁸⁸ WADA, ‘The Code’ Retrieved from WADA <<https://www.wada-ama.org/en/what-we-do/the-code>> accessed 6 September 2019

³⁸⁹ The Court of Arbitration for Sport (CAS) Retrieved from www.tas-cas.org < <http://www.tas-cas.org/en/general-information/frequently-asked-questions.html> > accessed 6 September 2019

³⁹⁰ Richard H. McHarlen, ‘The Court of Arbitration for Sport: An Independent Arena for the World’s Sport Disputes’ (2001) Vol.35. No.2 Valparaiso Law Review 379,380.

³⁹¹ CAS 2016/A/4707, *Alex Schwazer v. IAAF, NADO Italia, FIDAL & WADA*

³⁹² CAS 2015/A/4233, *World Anti-Doping Agency (WADA) v. Martin Johnsrud Sundby & Fédération Internationale de Ski (FIS)*, <http://www.tascas.org/fileadmin/user_upload/Award_FINAL_.pdf >

³⁹³ Michael Milde, ‘*International Air Law and ICAO*’ (3rd ed. Eleven International 2016) 199.

³⁹⁴ Article 84 Convention On International Civil Aviation 1944 (Doc.7300)<<https://www.icao.int/publications/pages/doc7300.aspx>> accessed 13 May 2019

navigation and then take the necessary steps to maintain the regularity and safety of international air transport.³⁹⁵

However, the settlement of disputes by the Council has been criticised, with the main criticism focusing on the structure of the Council. Michael Milde, the Principal Legal Officer of the ICAO,³⁹⁶ addressed the influence of politics on the Council's structure. Since the Council is a political body and is not run by judges but rather by states (a majority of the representatives of the states are diplomats and aviation experts rather than lawyers),³⁹⁷ the decisions of the Council will not be totally objective on legal grounds and the basis of international law.³⁹⁸

Milde identified the International Court of Justice (ICJ) as the means for the neutral and legal settlement of legal disputes, stating that legal disputes can be settled through a judicial body which provides good judicial detachment in its procedures, expertise, and independence.³⁹⁹

Furthermore, Havel and Sanchez stated that the ICJ experience and resources should be used to adjudicate state-to-state legal entanglements.⁴⁰⁰ However, Abeyratne asserted that the ICAO Council is more suitable than the ICJ to address international civil aviation issues. He noted that the ICAO's unsuitability is counterbalanced by the fact that the Council members are presumed to be well-versed in matters of international civil aviation and would, therefore, be deemed to be better equipped to comprehend the

³⁹⁵ ICAO 'Making a ICAO Standard' Retrieved from <http://www.icao.int/safety/airnavigation/Pages/standard.aspx#1> > Accessed 6 September 2019

³⁹⁶ Paul Stephen Dempsey, *Law & Foreign Policy in International Aviation* (Transnational Pub Inc. 1987) 300. ; Michael Milde, 'Dispute Settlement in the Framework of the International Civil Aviation Organisation (ICAO) in Karl-Heinz Böckstiegel, ed, Settlement of Space Law Disputes: the Present State of the Law and Perspectives of further Development: Proceedings of an International Colloquium, Munich, 13 & 14 September 1979 (Cologne: Heymann, 1980) 87 -88.

³⁹⁷ Michael Milde, *International Air Law and ICAO* (3rd ed. Eleven International 2016) 204.

³⁹⁸ Michael Milde, 'Dispute Settlement in the Framework of the International Civil Aviation Organisation (ICAO) in Karl-Heinz Böckstiegel, ed, Settlement of Space Law Disputes: the Present State of the Law and Perspectives of further Development: Proceedings of an International Colloquium, Munich, 13 & 14 September 1979 (Cologne: Heymann, 1980) 93-95; see also "A convincing illustration that representative on the Council meeting held on 29 July 1971, where several Representatives requested a postponement of a vote (*re Pakistan v. India*) to Consult with their respective administrations to obtain instructions. It would be unthinkable for a judge to request "instructions" from a national administration or anybody else." Michael Milde, *International Air Law and ICAO* (3rd ed. Eleven International 2016) 204.

³⁹⁹ Michael Milde, *International Air Law and ICAO* (3rd ed. Eleven International 2016) 201. ; Paul Stephen Dempsey, *Law & Foreign Policy in International Aviation* (Transnational Pub Inc. 1987) 300.

⁴⁰⁰ Brian F. Havel, Gabriel Sanchez, *The Principles and Practice of International Aviation Law* (Kindle Edition, Cambridge University Press. June 2014) 64. see fn. 131

issues placed before them than the distinguished members of the ICJ, some of whom may not be experts in international law.⁴⁰¹

Dempsey stressed that after the Council decides on disputes, a neutral appeal body should be available. He asserted that the member states should apply to the ICAO Council for dispute settlement, especially for issues regarding economic regulation and concluded that if the losing party is not satisfied with the decision of the Council, it can appeal to a neutral body (the ICJ or an *ad hoc* arbitration board) under Article 86 of the Convention.⁴⁰²

Article 84 regulates the appeal of Council decisions. Hence, the party in a dispute can appeal to the International Court of Justice (ICJ), and the ICAO Council makes a decision. This means that any contracting state can appeal against a Council decision to an *ad hoc* arbitral tribunal that is agreed upon with the other parties or even to the Permanent Court of International Justice. Such appeal is notified to the Council within sixty days after the notification of the decisions of the Council.⁴⁰³

Only five cases have been brought to the Council during the history of dispute settlement at the ICAO under Article 84 of the Chicago Convention (1944). They are the following:⁴⁰⁴

India v. Pakistan (1952) involved a dispute about the interpretation and application of the Chicago Convention (1944) and originated ‘from the tense political relations.’ Eventually, the parties settled by an agreement and negotiations were concluded in 1953.

U.K. v. Spain (1967) was the second dispute brought to the Council. The base of the conflict was a political problem regarding the legal status of Gibraltar. The Council decided to adjourn the debate *sine die* in 1969 at the request of the parties.⁴⁰⁵ Milde asserted that because

⁴⁰¹ Ruwantissa Abeyratne, ‘Law Making and Decision-Making Powers of the ICAO Council- A Critical Analysis. *Zeitschrift fur Luft- und Weltraumrecht*’ Vol. 41 issue 4 (1992) *German Journal of Air and Space Law* 387, 394.

⁴⁰² Paul Stephen Dempsey, ‘*Law & Foreign Policy in International Aviation*’ (Transnational Pub Inc. 1987) 302.

⁴⁰³ Article 84 Convention On International Civil Aviation 1944 (Doc.7300) <<https://www.icao.int/publications/pages/doc7300.aspx>> accessed 13 May 2019

⁴⁰⁴For details regarding cases see Michael Milde, ‘*International Air Law and ICAO*’ (3rd ed. Eleven International 2016) 204-208, for detailed case document see Ludwig Weber, ‘*International Civil Aviation Organization (ICAO)*, (Kluwer Law International 2007) 41-42

⁴⁰⁵ Annual Report of the Council to the Assembly for 1969, (Doc.8869 A18-P2 June 1970) Retrieved from <<https://www.icao.int/assembly-archive/Session18/A.18.REP.2.P.EN.pdf>> accessed 6 September 2019

of this ‘inconclusive conclusion,’ the case is technically pending. Especially after ‘BREXIT,’ the relations between the parties in dispute are more complicated.⁴⁰⁶

Pakistan v. India (1971) was the first case where a Council decision was appealed and reached ICJ. ICJ affirmed the Council’s decision. The dispute was settled by a joint statement of parties announcing the discontinuance of the proceedings in 1976.

Cuba v. the United States (1998) conflict was based on the fact that a Cuban aircraft was barred by the United States from flying over its territory to Canada. In mid-1998, the parties reached an agreement.

The most recent case, *United States v. Fifteen States of the European Union* (2000). It addressed a directive of the EU on the noise of aircraft engines. The case was settled after the EU adopted a directive that satisfied both parties and the parties agreed on the discontinuation of the proceeding.

On the other hand, the Convention regulates sanctions to ensure compliance in cases of non-conformity with the Council’s dispute settlement decisions. These sanctions separately address states and airlines that have not confirmed with a decision. Article 87 provides for sanctions on airlines, and Article 88 provides for state sanctions.

Article 87 states that ‘[e]ach contracting State should not allow the operation of *an airline of a Contracting State* through the airspace above its territory if the Council has decided that the airline concerned is not conforming to the final decision rendered in accordance with the previous article.’

However, taking into account the number of contracting states and the complexity of air traffic today compared to the time during which the Convention was written, it would be difficult for 191 states to coordinate the monitoring and barring of an air carrier, even if the states agree to comply with barring the air carrier.⁴⁰⁷

⁴⁰⁶ Michael Milde, ‘*International Air Law and ICAO*’ (3rd ed. Eleven International 2016) 206

⁴⁰⁷ Brian F. Havel, Gabriel Sanchez, ‘*The Principles and Practice of International Aviation Law*’ (Kindle Edition, Cambridge University Press. June 2014) 67.

Under Article 88, ‘the Assembly shall suspend the voting power in the Assembly and in the Council of any Contracting State that is found in default’. However, the sanctions provided in these two articles have never been applied.⁴⁰⁸

The history of the ICAO Council’s dispute settlement cases indicates that many of the cases presented, apart from the last one, which was related to the environment, are ‘political in nature.’⁴⁰⁹ Hence, the political concerns of the ICAO Council do not appeal to a proper adjudicatory function.⁴¹⁰ Furthermore, a legal decision on the merits has not been produced by the Council; rather, the settlement of disputes between the parties has occurred through diplomacy. The sanctions due to non-compliance with the law are not actually applicable.⁴¹¹ In addition, individuals are not provided *locus standi* for the review mechanism of the Chicago Convention (1944). Nonetheless, the policies in international civil aviation directly affect individuals’ lives regarding security, the environment, and safety, among other things need a stronger global infrastructure.

Individuals who are affected by aviation are too remote to the policy-making and control of those policies. Abeyratne rightfully draws attention to the lack of focus on persons in the current Chicago System. He stated that the Chicago Convention (1944) is not about airline passengers or people; it is also not about passenger’s rights. Rather, it is about regulating airports, airlines, states, and other service providers. He also underlines as a ‘disturbing fact’ that no major organisations that represent passengers as there are for airports, airlines, and service providers.⁴¹²

⁴⁰⁸ Michael Milde, *International Air Law and ICAO* (Eleven International Publishing, 2008) 187.

⁴⁰⁹ Michael Milde, *International Air Law and ICAO* (3rd ed. Eleven International 2016) 207.; Richard N. Garipey & Davis L. Botsford, ‘The Effectiveness of the International Civil Aviation Organization’s Adjudicatory Machinery’(1976) Vol.42, Issue 1, *Journal of Air Law and Commerce* 351,360.; Gabriel S. Sanchez, ‘The Impotence of the Chicago Convention’s Dispute Settlement Provisions’ (2010) Vol.10, *Issues in Aviation Law and Policy* 27,32.

⁴¹⁰ Richard N. Garipey & Davis L. Botsford, ‘The Effectiveness of the International Civil Aviation Organization’s Adjudicatory Machinery’ (1976) Vol.42, Issue 1, *Journal of Air Law and Commerce* 351, 361.

⁴¹¹ Gabriel S. Sanchez, ‘The Impotence of the Chicago Convention’s Dispute Settlement Provisions’ (2010) Vol.10, *Issues in Aviation Law and Policy* 27,37.

⁴¹² Ruwantissa Abeyratne, *Aviation and International Cooperation: Human and Public Policy Issues* (Kindle ed. Springer International Publishing 2015) Locations 36-39.

The procedures for the review of global governance entities vary from one state to another.⁴¹³ The GAL approach includes one important missing actor in global governance, ‘individuals’. The GAL approach includes individuals in the global administrative structure and addresses the remoteness of individuals in the global governance of aviation safety. Accordingly, global rulemaking addresses states, individuals, and states’ administration, unlike the international administrative law, which only addresses states and states’ administrations.⁴¹⁴ The problem for individuals based on the dualist international law approach is that they cannot invoke global regulations before the national courts; rather, they can only seek accountability and challenge state administrations within the limits of the national law. This research addresses the benefits of the GAL approach, in which individuals can apply global regulations directly based on the principle of the rule of law; further, they are also among the addressees of global regulations.⁴¹⁵ The increasing effect of international legal norms on individuals is not a new subject; the roles and rights of individuals in international law have been the subject of many academic works.⁴¹⁶ As Casini observed ‘[t]he fact is that GAL is based on reality. It is international organisations that adopt GAL principles, and they do so regardless of the scholarship.’⁴¹⁷ This assertion applies to the governance of global aviation safety and international civil aviation.

4.6.2 The notion of publicness for aviation safety

The theories that respond to global developments in public international law are diverse and are the subject of many works from different perspectives. Global regulatory developments that are addressed as multi-level international governance in different sectors have caused traditional interpretation of international law to become controversial among scholars. In addition, international law no longer regulates issues between states in a connected world but rather addresses the common interests of the international community, including those of

⁴¹³ Benedict Kingsbury, ‘The Concept of Law in Global Administrative Law’ (2009) Vol.20 No.1, The European Journal of International Law, 41-47. <<http://www.ejil.org/pdfs/20/1/1784.pdf>> accessed 6 September 2019

⁴¹⁴ Benedict Kingsbury, Nico Krisch & Richard B. Stewart, ‘The Emergence of Global Administrative Law’ (Summer 2005) Vol. 68, Law and Contemporary Problems, Retrieved from <<http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1361&context=lcp>> accessed 27 August 2019

⁴¹⁵ *ibid*

⁴¹⁶ Lorenzo Casini, ‘Global Administrative Law Scholarship’ in Sabino Cassese (ed.) *Research Handbook on Global Administrative Law* (Edward Elgar Publishing 2017) 564.

⁴¹⁷ *ibid*

individuals.⁴¹⁸ Therefore the focus of the controversial discussions among the scholars is on two main issues: fragmentation of international law and common interests of the international community.

Some commentators, like Benvenisti and Downs, have emphasised the danger of fragmentation, which leads to the dominance of powerful states: 'It operates to sabotage the evolution of a more democratic and egalitarian international regulatory system and to undermine the normative integrity of international law.'⁴¹⁹

The fragmentation of international law has been the subject of many studies. According to a UN International Law Commission Report (ILC), the impact of globalisation and the emergence of new self-contained regimes have arisen from the necessity to respond to contemporary functional and technical developments in the law.⁴²⁰ The report stated that the general international law has become a platform in which specialised systems such as the environment, the sea, trade, European, human rights, investment, and international refugee law possess their own institutions and principles.⁴²¹

On the other hand, the ILC report highlighted the coherence problems created by the new rules of such regimes, and it observed the risk of conflict with general international law. As a result of these developments, the report asserted that 'the unity of the law suffers.'⁴²² Therefore, although the report emphasises that public international law does not respond to all of the developing global society's problems, it concludes that international law is still the normative basis on which to deal with emerging specialist systems in a global society: the

⁴¹⁸ Bruno Simma, 'Universality of International Law from the Perspective of a Practitioner' (2009) Vol.20, No.2, *The European Journal of International Law*, 265,268.

⁴¹⁹ Eyal Benvenisti, George W. Downs, 'The Empire's New Clothes: Political Economy and The Fragmentation of International Law' (2007) Vol.60, *Stanford Law Review* 597.< <http://ssrn.com/abstract=976930> > accessed 6 September 2019

⁴²⁰ Report of the Study Group of the International Law Commission Finalized by Martti Koskenniemi , 'Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law' UN General Assembly, International Law Commission Report. Fifty-eighth session (2006, April). Paragraph 15. Retrieved from United Nations Office of Legal Affairs <http://legal.un.org/documentation/english/a_cn4_l682.pdf > accessed 6 September 2019
Paragraph 15

⁴²¹ *ibid* Paragraph 8

⁴²² *ibid* Paragraph 15

‘Vienna Convention on the Law of Treaties (1969)⁴²³ provides the normative basis – the “toolbox” – for dealing with fragmentation.’⁴²⁴

Simma opined that there is no need to fragment international law and pointed out the importance of unity in international law.⁴²⁵ According to Simma the principle of ‘universality’ in international law has the capacity to engage the contemporary legal issues that arise in a heterogeneous world.⁴²⁶

The international civil aviation regime is one of those specialist regimes that are regulated globally. In particular, aviation safety is a topic that has shifted from international to global. ICAO addresses aviation safety as a global issue. The global accessibility of air transport in the contemporary world has shifted aviation safety concerns from national to global.⁴²⁷

The question at this point of the discussion is whether defining aviation safety as ‘common interest’ would address contemporary legal issues.

In order to analyse the common interest, or rather, the public interest in the nature of aviation safety, some procedures must be defined. Aviation safety is defined by the Air Navigation Commission of ICAO, as ‘the state of freedom from unacceptable risk of injury to persons, aircraft and property’.⁴²⁸ At first, the means of establishing a certain acceptable level of safety in aviation may be considered technical. However, as Huang pointed out aviation safety is not merely a technical concept, but also a dynamic concept which requires a multidisciplinary approach. A specific technical safety standard can be very attractive, but it may not be effective or efficient, and it may be economically prohibitive to implement. To maintain such standards, there is a need for careful policy judgements in determining the best standards to

⁴²³ See Chapter II

⁴²⁴ Report of the Study Group of the International Law Commission Finalized by Martti Koskenniemi, ‘Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law’ UN General Assembly, International Law Commission Report. Fifty-eighth session (2006, April) 248-250. Retrieved from United Nations Office of Legal Affairs <http://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf> accessed 6 September 2019

⁴²⁵ Bruno Simma, ‘Universality of International Law from the Perspective of a Practitioner’ (2009) Vol.20, No.2, The European Journal of International Law, 265,268.

⁴²⁶ Bruno Simma, ‘Universality of International Law from the Perspective of a Practitioner’ (2009) Vol.20, No.2, The European Journal of International Law, 265,266.

⁴²⁷ Jiefang Huang, ‘Aviation Safety and ICAO’ (D.Phil. thesis, Leiden University, Netherland 2009) 15. <<https://openaccess.leidenuniv.nl/bitstream/handle/1887/13688/000-huang-diss-28-01-09.pdf?sequence=1>> accessed 7 September 2019

⁴²⁸ ICAO Working paper AN-WP/7699, ‘Determination of a Definition of Aviation Safety’ 11 December 2001 at para.2.2. quoted from Jiefang Huang, ‘Aviation Safety and ICAO’ (D.Phil. thesis, Leiden University, Netherland 2009) 4. <<https://openaccess.leidenuniv.nl/bitstream/handle/1887/13688/000-huang-diss-28-01-09.pdf?sequence=1>> accessed 7 September 2019

impose. Aviation safety requires an approach that is economical, managerial, technical, and legal.

Moreover, as Abeyratne stated, managing aviation safety globally includes a ‘law-making process for determining and managing acceptable risks.’⁴²⁹ A proposal was raised that common interests must be managed using the bilateral model provided by public international law. However, there is still ambiguity regarding what constitutes a global definition of common or public interest.

In his analysis, Huang emphasised that aviation safety directly concerns the fundamental human right - the right to life.⁴³⁰ However, this is only the first step on the way to the effective protection of individuals. Today, it continues to be problematic in practice for an individual to be subjected to public international law although it is commonly accepted⁴³¹ because the role of individuals in public international law still depends on the will of the states.

Clearly, aviation safety can be considered as a common interest. But being a common interest of the international community does not provide a practical answer, especially for individuals, in the case of state non-compliance with aviation safety standards.

However, the GAL theory offers a new approach. It starts with the question of ‘how a community interest of all individuals can be articulated through, and against, a structure of international law designed to accommodate the interest of states’.⁴³² Kingsbury and Donaldson challenged Simma’s theory of the international community, which is connected to the interest of the community that is shared by everyone at least to some degree.⁴³³

According to the GAL theory, the commonality of interest is ‘a fragile foundation for an international community.’⁴³⁴ However, considering global sectorial regulatory developments, Kingsbury and Donaldson emphasised the diversity of obligations and rights by addressing the beneficiaries of different institutions and norms in contemporary and future international

⁴²⁹ *ibid* 20.

⁴³⁰ *ibid* 168.

⁴³¹ Albrecht Randelzhofer and Christian Tomuschat (eds) ‘*State Responsibility and the Individual. Reparation in Instances of Grave Violations of Human Rights*’, (1999, Martinus Nijhoff Publishers) 232.

⁴³² Benedict Kingsbury, Megan Donaldson, ‘From Bilateralism to Publicness in International Law’ in Ulrich Fastenrath, Rudolf Geiger, Daniel-Erasmus Khan, Andreas Paulus, Sabine von Schorlemer, and Christoph Vedder (eds) ‘*From Bilateralism to Community Interest. Essays in Honour of Bruno Simma*’ (2011 Oxford University Press) 79.

⁴³³ *ibid* 244.

⁴³⁴ *ibid* 79.

social life. A ‘single set of common interests or with one unified community’⁴³⁵ is too complex. Cassese called politics ‘the empire of ad-hoc-crazy.’ The global regulatory regimes are not uniform, and they do not follow a common pattern because they must balance global standards, area by area, and national diversity.⁴³⁶

As pointed out in the first chapter that the current norms of public international law in aviation safety, such as *erga omnes* and *jus cogens* rules, are not producing practical responses on a global scale. In order to overcome these shortcomings, the ‘publicness’ criterion as introduced by the GAL theory shall be applied. This criterion allows to go beyond the common interest definition.

In the place of the bilateral model, the publicness approach proposes that international law be conceptualized as a law between ‘public entities’ (primarily, but not limited to, States), these public entities being subject to public law and thus to basic public law principles, including legality, rationality, proportionality, rule of law, and fundamental rights, as well as to an additional quality of ‘publicness’ inherent in law, one that is difficult to define but nevertheless crucial.⁴³⁷

The general definition of the ‘publicness’ criterion was stated by Kingsbury as ‘the claim made for law that it has been wrought by the whole society, the public, and the connected claim that law addresses matters of concern to the society’.⁴³⁸ The publicness criterion is satisfied by the fact that the legal aspect of aviation safety is claimed by the whole of society. In order to justify the use of the term ‘law’ for this emerging field of law,⁴³⁹ Kingsbury suggested the ‘publicness’ criterion as an addition to the principles of public law, such as legality, rationality, proportionality, the rule of law, and the respect for human rights.⁴⁴⁰

⁴³⁵ *ibid* 83.

⁴³⁶ Sabino Cassese, ‘The Global Polity- Global Dimensions of Democracy and the Rule of Law’ Global Law Press, (Editorial Derecho Global 2012) 23. Retrieved from <<http://es.globallawpress.org/wp-content/uploads/02-TheGlobalPolity.pdf>> accessed 27 August 2019

⁴³⁷ Benedict Kingsbury, Megan Donaldson, ‘From Bilateralism to Publicness in International Law’ in Ulrich Fastenrath, Rudolf Geiger, Daniel-Erasmus Khan, Andreas Paulus, Sabine von Schorlemer, and Christoph Vedder (eds) ‘*From Bilateralism to Community Interest. Essays in Honour of Bruno Simma*’ (2011 Oxford University Press) 83.

⁴³⁸ Benedict Kingsbury, ‘The Concept of Law in Global Administrative Law’ (2009) Vol.20 No.1, The European Journal of International Law, 31. <<http://www.ejil.org/pdfs/20/1/1784.pdf>> accessed 6 September 2019

⁴³⁹ Benedict Kingsbury, Megan Donaldson, ‘From Bilateralism to Publicness in International Law’ in Ulrich Fastenrath, Rudolf Geiger, Daniel-Erasmus Khan, Andreas Paulus, Sabine von Schorlemer, and Christoph Vedder (eds) ‘*From Bilateralism to Community Interest. Essays in Honour of Bruno Simma*’ (2011 Oxford University Press) 83.

⁴⁴⁰ Benedict Kingsbury, ‘The Concept of Law in Global Administrative Law’ (2009) Vol.20 No.1, The European Journal of International Law, 23. <<http://www.ejil.org/pdfs/20/1/1784.pdf>> accessed 6 September 2019

Therefore, the public character of law may be established by conceptualising as law what in the public interest.

The most striking idea is that the ‘publicness’ characteristic is deemed to be a definition that starts from the process of decision-making of global institutions and not as an assumption. Hence, the criterion in global governance starts from an open process of decision-making in global entities.⁴⁴¹

One example referred to as ‘a prime example of a source of norms’ that is formally private, but shows a high degree of “publicness” is the World Anti-Doping Code (WADC).⁴⁴² This is a formally private regulation that has achieved a high level of compliance by States. Governments participate in the norm-making process due to the presence of public elements. Also, the domestic orders contribute in forming legislation as per the global norms.⁴⁴³ However, whether meeting the definition of the term publicness is sufficient for something to be identified as a law is controversial.

One of the principles of the publicness criterion, legality, has been challenged by scholars like Kuo. According to traditional international law theory, the legality and legitimacy of traditional international law rest on the consent of the state. Kuo asked, ‘without the formal foundation of legitimacy rooted in state consent, where does GAL ground its legitimacy?’⁴⁴⁴ Furthermore, Kuo applied Fuller’s ‘inner morality of law’ to explain the notion of ‘publicness’ by providing an alternative baseline concept of legitimacy other than the consent of the state. ‘The notion cannot be dictated by regulator... rather, it must result from the values that the members, or rather interested parties, of a particular regulatory regime, i.e., the regulatory public hold in common.’⁴⁴⁵

⁴⁴¹ *ibid* 41; see also Rene Fernando Uruena Hernández, ‘Global Administrative Law and Global’ in Sabino Cassese (ed.) ‘*Global Administrative Law Research Handbook on Global Administrative Law*’ (Edward Elgar Publishing 2017) 408.

⁴⁴² Lorenzo Casini, ‘The Expansion of the Material Scope of Global Law’ in Sabino Cassese (ed.) ‘*Research Handbook on Global Administrative Law*’ (Edward Elgar Publishing 2017) 31-32.

⁴⁴³ *ibid*

⁴⁴⁴ Ming-Sung Kuo, ‘The Concept of ‘Law’ in Global Administrative Law: A Reply to Benedict Kingsbury’ (2009) Vol.20, No.4, *European Journal of International Law*, 997, 998. Available at SSRN: <<https://ssrn.com/abstract=1493739>> accessed 7 September 2019

⁴⁴⁵ Ming-Sung Kuo, ‘Inter-Public Legality or post-Public Legitimacy? Global Governance and the Curious Case of Global Administrative Law as a New Paradigm of Law’ (2012) Vol.10, Issue 4, *International Journal of Constitutional Law*, 1050, 1063. Retrieved from <<https://academic.oup.com/icon/article/10/4/1050/646205>> accessed 7 September 2019

Kingsbury, asserted that the term publicness should be distinguished from the generality rule as a requirement for a rule to be the rule of law⁴⁴⁶ and that ‘generality is not a requirement for a general concept of law in global governance’.⁴⁴⁷

Another challenge was raised by Hernández , who asserted that ‘the notion of the criterion begs the question of the public’s identity – who the public is’.⁴⁴⁸ Kuo also challenged Kingsbury’s notion with respect to the application of the criterion to public entities, while leaving the public unaddressed. He asserted that democratic control over the entities’ creation is weak and ‘their regulatory decisions remain on the margins of public contestation’.⁴⁴⁹

Kingsbury acknowledged that developing a concept of law that responds to concrete realities at the global level is a challenge and responded legitimacy and legality challenges by referring to the ‘publicness’ notion rather than to the notion of generality⁴⁵⁰. Kuo challenged the notion by asserting that it should be established from common values and cannot be dictated by regulators.⁴⁵¹ Kingsbury, in contrast, believed that ‘publicness’⁴⁵² exists wherever there is a democratic law.⁴⁵³ However, Hernandez drew attention to global regulatory bodies by arguing that they may fail to respond to the concerns and interests of the public even if

⁴⁴⁶ Benedict Kingsbury, ‘The Concept of Law in Global Administrative Law’ (2009) Vol.20 No.1, *The European Journal of International Law* , 31. <<http://www.ejil.org/pdfs/20/1/1784.pdf> > accessed 6 September 2019

⁴⁴⁷ *ibid* 52.

⁴⁴⁸ Rene Fernando Uruena Hernández, ‘Global Administrative Law and Global’ in Sabino Cassese (ed.) ‘*Global Administrative Law Research Handbook on Global Administrative Law*’ (Edward Elgar Publishing 2017) 409.

⁴⁴⁹ Ming-Sung Kuo, ‘The Concept of ‘Law’ in Global Administrative Law: A Reply to Benedict Kingsbury’ (2009) Vol.20, No.4, *European Journal of International Law*, 997, 1002. Available at SSRN: <<https://ssrn.com/abstract=1493739> > accessed 7 September 2019

⁴⁵⁰ Benedict Kingsbury, ‘The Concept of Law in Global Administrative Law’ (2009) Vol.20 No.1, *The European Journal of International Law* , 31. <<http://www.ejil.org/pdfs/20/1/1784.pdf> > accessed 6 September 2019

⁴⁵¹ Ming-Sung Kuo, ‘The Concept of ‘Law’ in Global Administrative Law: A Reply to Benedict Kingsbury’ (2009) Vol.20, No.4, *European Journal of International Law*, 997, 1000. Available at SSRN: <<https://ssrn.com/abstract=1493739> > accessed 7 September 2019

⁴⁵² ‘publicness’ is immanent in public law in national democratic jurisprudence, and increasingly in global governance, where it applies to public entities rather than to identifiable global publics. Principles relevant to publicness include the entity’s adherence to legality, rationality, proportionality, rule of law, and some human rights.’ Benedict Kingsbury, ‘The Concept of Law in Global Administrative Law’ (2009) Vol.20 No.1, *The European Journal of International Law*, abstract. <<http://www.ejil.org/pdfs/20/1/1784.pdf> > accessed 6 September 2019

⁴⁵³ Benedict Kingsbury, ‘Weighing Global Regulatory Rules and Decisions in National Courts’ (2009) *Acta Juridica* 90, 114.

they fulfil the criterion's requirement. It is because of this fact that it does not respond to the physical public or because it responds to a public that is different than that affected.⁴⁵⁴

At this point, there is a need to explore the link between 'publicness' and democracies. Generally, as rules dictated to the nation-states by an external authority, there would be a propensity to interpret global regulations, but 'publicness' has been described as a 'necessary element in the concept of law under modern democratic conditions'.⁴⁵⁵ Kingsbury also stressed the parallels between administrative law and the 'publicness' notion. He emphasised the parallels between the notion of publicness and administrative law as follows:

[T]he idea of law being wrought by, and for, the whole society overlaps with an approach to administrative law in many national systems that emphasizes public service and an objective of the public good, an approach projected also into administration beyond the state.⁴⁵⁶

One of the distinctive features of global law discussed by Casini is that it is sector-based.⁴⁵⁷ Global regimes are sectorial, and there are many different types of regulatory regimes which have a specific public aim and cannot be achieved solely by a state's actions.⁴⁵⁸

In order to set norms with implications for actors in particular sectors, international organisations have been operating as global regulators. Common interests within specific fields need to be addressed by administrations at the global level. The traditional mechanism provided by international law does not cover legal issues that have developed as a result of globalisation.⁴⁵⁹ Therefore, one could assert that regulations established by global bodies

⁴⁵⁴ Rene Fernando Uruena Hernández, 'Global Administrative Law and Global' in Sabino Cassese (ed.) *Global Administrative Law Research Handbook on Global Administrative Law* (Edward Elgar Publishing 2017) 409.

⁴⁵⁵ Benedict Kingsbury, 'The Concept of Law in Global Administrative Law' (2009) Vol.20 No.1, *The European Journal of International Law*, 31. <<http://www.ejil.org/pdfs/20/1/1784.pdf>> accessed 6 September 2019

⁴⁵⁶ *ibid* 32.

⁴⁵⁷ Lorenzo Casini, 'Global Administrative Law Scholarship' in Sabino Cassese (ed.) *Research Handbook on Global Administrative Law* (Edward Elgar Publishing 2017) 42.

⁴⁵⁸ Sabino Cassese, Bruno Carotti, Lorenzo Casini, Eleonora Cavalieri & Euan MacDonald, (eds.) *Global Administrative Law: The Case Book* (Third ed. Institute for International Law and Justice (2012) forward Retrieved from <https://www.researchgate.net/publication/256032738_Global_Administrative_Law_The_Casebook> forward September 2019 ; also see Karsten Nowrot, 'Global Governance and International law. Beiträge zum Transnationalen Wirtschaftsrecht, Heft 33 (2004, November) Retrieved from <<http://telc.jura.uni-halle.de/sites/default/files/altbestand/Heft33.pdf>> accessed 27 August 2019, Referenced to Chayes on p.19 fn.109 'It is that for all but a few self-isolated nations, sovereignty no longer consist in the freedom of states to act independently in their perceived self-interest, but in membership in reasonably good standing in the regimes that make up the substance of international life'

⁴⁵⁹ Lorenzo Casini, 'The Expansion of the Material Scope of Global Law' in Sabino Cassese (ed.) *Research Handbook on Global Administrative Law* (Edward Elgar Publishing 2017) 40.

represent the interests and global values of a specific field. Each field represents different interests and values in its own subject globally.⁴⁶⁰ Moreover, each sector has developed legal tools such as recommendations, standards, and guidelines or procedural, administrative principles. Casini asserted that ‘these norms are generally labelled “soft law” but they also display a certain degree of “publicness”’.⁴⁶¹

The notion of publicness proposed by GAL theory for global governance goes beyond public international law’s definition of global interest. The establishment of the ‘publicness’ criterion for global aviation safety standards could be essential for aviation safety standards to be eventually invoked before national courts.⁴⁶²

⁴⁶⁰ Benedict Kingsbury, & Lorenzo Casini, ‘Global Administrative Dimensions of International Organizations’ IILJ Working Papers, Global Administrative Law Series (2009/ 9) 20. Retrieved from < <http://www.iilj.org/publications/documents/2009-9.Kingsbury-Casini.pdf> > accessed 30 August 2019

⁴⁶¹ Lorenzo Casini, ‘ The Expansion of the Material Scope of Global Law’ in Sabino Cassese (ed.) ‘*Research Handbook on Global Administrative Law*’ (Edward Elgar Publishing 2017) ‘For example, although the WTO Codes of ‘Good Practice’ are not binding, all international standards setters comply with them, so that they may fall within the scope of TBT agreement. In communications, the International Telecommunication Union (ITU) adopts hundreds of recommendations every year which, although not mandatory, are observed by a States’ 34.

⁴⁶² This issue is discussed in Chapter V

CHAPTER V- THE APPLICATION OF GLOBAL AVIATION SAFETY STANDARDS IN NATIONAL COURTS

Introduction

Previous chapters have explored the implications of changes in the global air transport market and air operations that are reducing fundamental restrictions, such as nationality clauses and cabotage, on international flight operations and serving people globally. However, the people who are affected by global aviation safety policies are too remote from having any control over policymaking or enforcement of these policies in states. The contention of this thesis, however, is that traditional international norms do not provide an effective way of dealing with the legal issues that are increasingly affecting people worldwide. Particularly, the impact of globalisation on aviation safety was analysed in the third chapter. Globalisation also has an impact on individuals' right to contribute to policy on global aviation safety standards and the implementation of such standards in their own countries and thus it is creating a democratic deficit.

This chapter explores the possibility of using national courts to invoke global aviation safety standards by applying Global Administrative Law (GAL) principles on the grounds that GAL theory recognises individuals as the real addressees of global regulatory regimes.¹ The benefit of this perspective is that individuals, as part of global governance, can be able to question a state's implementation of global aviation safety regulations and compliance with them in national courts. In other words, global aviation safety standards should be applicable in national courts and citizens should not have to rely only on safety standards that have been incorporated into national legislation. As Sohn suggests, people around the world should not be 'mere objects, mere pawns in the hands of [the] state'² when it comes to state compliance with aviation safety standards.

¹ Benedict Kingsbury, Nico Krisch & Richard B. Stewart, 'The Emergence of Global Administrative Law' (2005) Vol.68, *Law and Contemporary Problems*, 15,23. Retrieved from <<https://scholarship.law.duke.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1361&context=lcp> > accessed 1 September 2019

² Louis B. Sohn, 'The New International Law: Protection of the Rights of Individuals Rather than States' (1982) Vol.32 *The American University Law Review*, 1,1.

Therefore, the chapter starts by analysing the role of national courts in the current international legal system. In particular, the application of SARPs that contain global aviation safety standards in national courts is analysed. The aim is to demonstrate that as global aviation safety standards are intended to apply globally, limiting national courts in applying global safety standards within the limit of domestic legislation means that global standards do not serve their intended purpose.

To support this claim, the changing role of national courts in contemporary global governance is explored. GAL theory's approach to the relationship between the rule of law and global regulations in global governance is invoked, which introduces the topic of different approaches to domestic implementation of transnational regulations. Civil aviation safety regulations became transnational. No state government can function on its own way and each states' regulatory functions concern the others. The research suggests that setting global aviation safety standards is a global administrative act and has a direct effect on individuals. Therefore, the issue of individuals rights accompanied the principle of rule of law in global governance induced the need for global administrative law.³

However, GAL theory does not rule out traditional international law norms but asserts that these norms are not sufficient to enable national courts to apply global regulations. Also, the theory introduces the 'publicness' criterion, which refers to the public-facing character of norms. Therefore, the public character of civil aviation safety is explored. Moreover, GAL theory asserts that global regulations deal with matters of concern to international society as a whole and emphasises the global interest therein. Publicness is deemed as an essential feature of global regulations.

The ultimate purpose of this approach is to make individuals part of a global governance system and establish proper control, monitoring and enforcement of a global aviation safety regime. In this way, state compliance with global aviation safety standards could be controlled and provide uniformity in compliance by national courts all over the world. Furthermore, the chapter also explores theories that refer to judicial globalisation and its relevance in this context.

³ Benedict Kingsbury, Nico Krisch & Richard B. Stewart, 'The Emergence of Global Administrative Law' (2005) Vol.68, Law and Contemporary Problems, 15,46. Retrieved from <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1361&context=lcp> > accessed 1 September 2019

5.1. The role of national courts in global space

Globalisation, the interconnection of people and increased international migration are changing the concepts of nation-state and sovereignty. Legal theories have been emerging as an answer to the legal challenges globalisation poses for the relationship between citizen and nation-state. Social, political and cultural life, which used to be under the regulatory scrutiny of nation-states, is changing in a way that prevents individual states from sustaining the regulatory performance as they once did.

Questioning the traditional concept of national sovereignty has been the subject of scholarly works in various fields. In 1990, historian Eric Hobsbawm emphasised changing life around the world which cannot be sustained within the limits of 'old nation-states' anymore.⁴ A French diplomat who is an expert in global governance, Jean-Marie Guéhenno addressed the ineffectiveness of national sovereignty in the face of global problems. Global issues that affect people's lives every day creates pressure on states to administer. However, states are too distant and conventional sovereignty restricts nations to adopt this increasing unification of the world.⁵

In 1997 the UNDP Human Development Report addressed the reasons for '*The Shrinking World*'. The report highlighted the increase in contact between people around the world that has been brought about by the immense drop in the costs of communication and transportation, which has caused natural and artificial barriers between people to fall around the world.⁶ In this 'shrinking world' national policies are diluting and borders are demolishing by the impact of global integration. The report emphasised that the global policies and system need to be established to regulate markets to serve people instead of people to serve for markets.⁷

⁴ Eric J. Hobsbawm, '*Nations and Nationalism since 1780: Programme, Myth, Reality*' (Cambridge University Press, 1990) 191.

⁵ Jean-Marie Guéhenno, '*The End of the Nation-State*' (Translated by Victoria Elliott) (University of Minnesota Press, 1995) 12.

⁶ United Nations Development Programme (UNDP) 'Human Development Report' (New York: Oxford University Press, 1997) 87. Retrieved from http://hdr.undp.org/sites/default/files/reports/258/hdr_1997_en_complete_nostats.pdf accessed 16 September 2019

⁷ United Nations Development Programme (UNDP) 'Human Development Report' (New York: Oxford University Press, 1997) 87. Retrieved from http://hdr.undp.org/sites/default/files/reports/258/hdr_1997_en_complete_nostats.pdf accessed 16 September 2019

This erosion of national borders has had a huge impact on the daily life of people and the rules and regulations governing their lives. However, as Guéhenno pointed out, people are ‘too remote’⁸ to play an effective role in policy-making and control of state compliance with global regulations that affect daily life. Individuals bear all the consequences of global decisions, but they do not really have a way to get their voices heard or to challenge the global regulations, whether in global institutions or their home state. As Simma describes with a metaphor;

In the end, it is the individuals addressed by international measures who may get caught up in its wheels.⁹

The current international legal system does not provide an effective way for individuals to apply to national courts to enforce international law. This is particularly the case when it comes to the focus of this research, which is the shortcomings in the application of global aviation safety regulations in national courts.

International treaties as recognised by the Vienna Convention on the Law of Treaties¹⁰ are one of the sources of international law. Article 2(1a) of the Vienna Convention (1969) defines a treaty as an intentional agreement governed by international law, by which it means an ‘intention to create obligations under the international law’;¹¹ this distinguishes a treaty from other agreements governed by domestic legal systems.¹² State compliance with obligations derived from international treaties is secured by the principle of *pacta sunt servanda*. According to Article 26 of the Vienna Convention (1969):

Every treaty in force is binding upon the parties to it and must be performed by them in good faith.

Therefore, States are under an obligation to apply international treaties and give them effect in domestic law. Traditionally the way in which treaty obligations are translated into

⁸ Jean-Marie Guéhenno, ‘*The End of the Nation-State*’ (Translated by Victoria Elliott) (University of Minnesota Press, 1995) 12.

⁹ Bruno Simma, ‘Universality of International Law from the Perspective of a Practitioner’ (2009) Vol.20, No.2, *European Journal of International Law*, 265,295. Retrieved from <http://www.ejil.org/pdfs/20/2/1801.pdf>

¹⁰ Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, 8 I.L.M. 679, *entered into force* Jan. 27, 1980

¹¹ Anthony Aust, ‘*Modern Treaty Law and Practice*’ (3rd ed. Cambridge University Press,2013) 30.

¹² Jan Klabbers, ‘*The Concept of Treaty in International Law*’ (Martinus Nijhoff Publishers. 1996) 55-57.

domestic law depends on the constitutional structure of the state, but the dualist and monist methods are commonly used.¹³

Under the dualist method, the rights and obligations of states that are derived from international treaties become binding on the state only when incorporated into domestic law. The United Kingdom, Denmark, the Nordic states and Israel follow the dualist approach.¹⁴ Under the monist system, international treaties may become part of national law without a legislative act provided that the treaty is concluded in accordance with the requirements of the state's constitution.¹⁵ National executives of monist states have an obligation to ensure that international law is applied in the state by the government's executive branches and courts.¹⁶ France, Germany, the Netherlands and Poland follow the monist approach. However, the monist approach is not as straightforward as it sounds. Interpretation of international treaties by domestic courts, national legal requirements for international treaties to have direct effect and the different approaches of different legal systems such as the common or civil law systems can all cause variations in the way in which international law is applied.¹⁷

Therefore, the concept of these two approaches regarding integrating international regulations into domestic law is in question. Arguably, there are two certain different approaches in practice now in different legal systems.¹⁸

5.1.1 The changing role of national courts in global governance

Developments in global social and economic life as a result of globalisation are posing a challenge to traditional approaches in many domains, particularly the relationship between international law and the applicability of international law in domestic courts. Self-evidently, the impact of global regulations on people's daily life makes interpretation and enforcement

¹³ See also Ruwantissa Abeyratne, 'The Law and Practice Relating to Aeronautical Treaties and Agreements' (2012) Vol. XXXVII *Annals of Air and Space Law*, 169,178-179.

¹⁴ Anthony Aust, *Modern Treaty Law and Practice* (3rd ed. Cambridge University Press,2013) 173.

¹⁵ *ibid* 163

¹⁶ George Slyz, 'International Law in National Courts' (Fall 1995/Winter 1996) Vol. 28, Issues 1 & 2, *New York University Journal of International Law and Politics*, 65,67.

¹⁷ See also Julian Hermida, 'A New Model of Application of International Law in National Courts: A Transjudicial Vision' (2003) Vol.11 *Waikato Law Review*, 37,40.

¹⁸ See Chapter II, Paragraph 2.4

of these regulations by national courts more important. National courts are the first institutions to which individuals turn when the issue at stake relates to international regulations. In general, the mission of national courts is to apply the rule of law to serve justice; however, each state has its own established justice system, with a strong legal tradition that is influenced by its history and culture.

Although domestic courts' interpretation of international law contributes to the development of international law, generally domestic courts tend to give more weight to their national interest and the political policies of their government than to international regulations.¹⁹ However, this general approach by domestic courts to the application of international law is changing. Benvenisti observed in 2009 that the general attitude of national courts was changing such that they were taking a more aggressive approach to interpreting and applying international law.²⁰

For instance, the responsibility of the state to implement obligations derived from an international treaty by applying relevant customary international law varies from state to state.²¹ *Baker v. Canada (Minister of Citizenship and Immigration)* [1999] 2 S.C.R 817²² is a landmark case in Canadian Administrative Law.

Mavis Baker, a Jamaican National, who stayed almost 11 years illegally and had four children during her stay in Canada, was ordered to be deported in 1992. The appeal of an immigration officials' decision based on humanitarian grounds reached the Canadian Supreme Court.

¹⁹ Benedetto Conforti, *International Law and Role of Domestic Legal Systems* (Springer 1993 ed.) 161.

²⁰ Eyal Benvenisti & George W. Downs, 'National Courts, Domestic Democracy, and the Evolution of International Law' (2009) Vol.20, Issue 1 *European Journal of International Law*, 59,59-60. ; Eyal Benvenisti, 'Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts' (April 2008) Vol.102, Issue 2, *American Journal of International Law*, 241.

²¹ 'Germany, for example, which is highly receptive to international law, is strictly speaking not a monist state because it incorporates customary international law through Article 25 of its Basic Law.....Similarly, countries which express an essentially dualist outlook, such as the United States no longer do so in its pure form. They have assented to numerous international treaties and recognise the existence of customary international law' George Slyz, 'International Law in National Courts' (Fall 1995/Winter 1996) Vol. 28, Issues 1 & 2, *New York University Journal of International Law and Politics*, 65,71.

²² *Baker v Canada (Minister of Citizenship & Immigration)* [1999] 2 SCR 817, 858; (1999) 174 DLR (4th) 193, 228. Retrieved from <<https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1717/index.do>> accessed 16 September 2019

The Court examined whether the requirement in the Canadian Immigration Act (1976) complied with Canada's international obligations as derived from the International Convention on the Rights of the Child (1989)²³, which had been ratified but not incorporated into domestic law. As the Convention had not been incorporated into domestic law, it was not binding under the dualist system. The Supreme Court reasoned its judgement on the application of the principle that Baker should be treated in line with the values of the Canadian constitution.²⁴ Accordingly, fundamental common values prevailed over the traditional approaches to the applicability of international treaties in domestic courts.

Baker case illustrates how national courts' interpretations of international law can extend beyond a strictly dualist approach and shows how a domestic court recognised the fundamental human rights values in its interpretation of international law rather than focusing on whether the international treaty was binding.

Moreover, the way in which international law was applied in the Baker case demonstrates that a domestic court can apply shared humanitarian values rather than arguing technicalities in state's domestic legal order. In Baker, the Court applied common human values rather than technical arguments on the binding effect of an international treaty.²⁵ Knop emphasised the application of international law in Baker Case as a disruption of traditional perceptive of international law in national courts.²⁶

For the purpose of this thesis, Baker case set up a good example regarding application of common human values in national courts. The Canadian national court's decision supports the idea that national courts might consider aviation safety as a common human value with the direct link to fundamental human right 'right to life' in their application of international law.

²³ UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, (The Convention on the Rights of the Child was adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989. It entered into force on 2 September 1990, in accordance with article 49)

²⁴ David Dyzenhaus, 'Constituting the Rule of Law: Fundamental Values in Administrative Law' (Spring 2002) Vol. 27, No.2. Queen's Law Journal, 445,503.

²⁵ 'Canada's participation in international law is a testimony to its social values and, at the same time, makes Canada part of a wider society of values. The fact that Canada ratified the Convention on the Rights of the Child indicates the importance that Canada places on children's interests and thus reflects what the Canadian community already sees as central humanitarian and compassionate values' Karen Knop, 'Here and There: International Law in Domestic Courts' (Winter 2000) Vol.32 No.2, New York University Journal of International Law and Politics, 501,511.fn.30

²⁶ *ibid* 510.

Besides, in the contemporary world, international treaties are no longer the only source of obligation for the contracting states. Boyle asserted that modern world international treaties ‘have become law-making instruments codifying existing law, creating new law, establishing widely accepted norms and principles applicable to all or the large majority of states.’²⁷ The Chicago Convention on International Civil Aviation (1944)²⁸ illustrates the truth of this assertion. The ICAO, with its quasi-legislative power, sets standards and places them in Annexes. Furthermore, although they are called “soft law”²⁹, generally accepted international rules and standards based on treaty regimes might have binding character and pose a challenge to traditional notions about the applicability of international treaties in domestic courts around the world.³⁰ Common values such as human rights and protection of the environment have become more influential than the traditional sovereignty concept in shaping legal systems around the world. Civil aviation safety is also one of these common values.

Traditionally, international law with a state-centred focus defines the states’ legal obligation to comply with international obligations based on the state’s consent to that international order. With regard to the application of international law in national courts, Knop described this approach as a ‘*here and there*’³¹ situation. However, states can no longer ignore obligations derived from common global values. Hence the changing structure of global life could transform the ‘*here and there*’ approach to the application of global regulations into an ‘*everywhere*’ approach.

Moreover, by increasing awareness of global policy and economic developments, the perspective of national interest that national courts are protecting by applying or not applying international law is changing. Benvenisti and Downs drew attention to national courts’

²⁷ Alan Boyle, ‘Reflections on the Treaty as a Law-making Instrument. In Alexander Orakhelashvili, & Sarah Williams (eds.) ‘*40 years of the Vienna Convention on the Law of Treaties*’ (British Institute of International and Comparative Law 2010) 1.

²⁸ Convention on Civil Aviation (“Chicago Convention”), 7 December 1944, (1994) 15 U.N.T.S. 295, entered into force: 4 April 1947

²⁹ Paul Stephen Dempsey, ‘Compliance and Enforcement in International Law: Achieving Global Uniformity in Aviation Safety’ Vol. 30 Issue 1 (2004). North Carolina Journal of International Law and Commercial Regulation, 1,13-14.

³⁰ Alan Boyle, ‘Reflections on the Treaty as a Law-making Instrument. In Alexander Orakhelashvili, & Sarah Williams (eds.) ‘*40 years of the Vienna Convention on the Law of Treaties*’ (British Institute of International and Comparative Law 2010) 1, 12 and 27

³¹ Karen Knop, ‘Here and There: International Law in Domestic Courts’ (Winter 2000) Vol.32 No.2, New York University Journal of International Law and Politics, 501

increasing awareness that complementing rather than conflicting with other national courts and interest groups would serve their governments' better.³²

Furthermore, Slaughter emphasised the role of national courts as the mechanism that can integrate the international agreements and customary law that have not yet merged into domestic law and legal systems.³³

The decision of the Constitutional Court of South Africa on *Huge Glenister v. President of the Republic of South Africa and Others*³⁴ is relevant to the above discussions. The Glenister case is a good example of a national court invoking international law directly, although it had not been incorporated into national law.

In 2008, the South African Cabinet approved draft legislation³⁵ to replace a government institution, the Directorate of Special Operations (DSO), with a specialised crime-fighting unit, the Directorate for Priority Crime Investigation (DPCI). The issue raised about relocating anti-corruption policing capacity of DSO within the National Prosecuting Authority to the DPCI within the South African Police Service. The reason was that the draft legislation gave the Ministerial Committee the authority to determine the functions of the DPCI and the national priority offences. This meant that the newly established unit, the DPCI, was the subject of concerns about political interference and an absence of adequate safeguards to ensure its independence.³⁶

³² Eyal Benvenisti & George W. Downs, 'National Courts, Domestic Democracy, and the Evolution of International Law' (2009) Vol.20, Issue 1, *European Journal of International Law* 59,61.

³³ Anne-Marie Slaughter, 'Judicial Globalisation' (Summer 2000) Vol.40 Issue.4, *Virginia Journal of International Law* 1103,1103.

³⁴ *Glenister v. President of the Republic of South Africa and Others* (CCT 48/10) [2011] ZACC 6; 2011 (3) SA 347 (CC); 2011 (7) BCLR 651(CC) (17 March 2011) Helen Suzman Foundation was amicus curiae. Retrieved from < <http://www.saflii.org/za/cases/ZACC/2011/6.html> > accessed 19 September 2019

³⁵ The National Prosecuting Authority Amendment Bill of 2008 (NPAA Bill) (B23-2008) and the General Law Amendment Bill of 2008, which has been renamed the South African Police Service Amendment Bill of 2008 (SAPSA Bill) (B30-2008). < <http://www.saflii.org/za/cases/ZACC/2008/19.pdf> > accessed 19 September 2019

³⁶ South African Legal Information Institute, <<http://www.saflii.org/za/cases/ZACC/2008/19.pdf>> accessed 19 September 2019

In fact, corruption is one of the main problems that South Africans have been facing.³⁷ Corruption has been defined as ‘the abuse of entrusted power for private gain’³⁸ and hence there is a link to the violation of human rights.³⁹ In this regard, abuse of power can cause to defeat investigations and prosecutions of corruption by government officers who have the entrusted power.⁴⁰

South Africa has ratified various international treaties which impose obligations to create independent institutions to investigate and fight corruption.⁴¹ The constitution of the Republic of South Africa lays out how international law should be given effect in domestic law, thus taking both the dualist and the monist approach to applying International law.⁴² Article 232 of the constitution relies on the monist approach to customary international law, whereas Article 231 applies the dualist approach to international treaties.⁴³

Huge Glenister, a businessman, standing granted based on Article 38 of the constitution⁴⁴, challenged the legislation in court, claiming that he was threatened by crime and thus by

³⁷ ‘South Africa scored 45 points out of 100 on the 2016 Corruption Perceptions Index reported by Transparency International. Corruption Index in South Africa averaged 46.97 Points from 1996 until 2016, reaching an all-time high of 56.80 Points in 1996 and a record low of 41 Points in 2011’ Trading Economics, ‘South African Corruption Index’ Retrieved from <<https://tradingeconomics.com/south-africa/corruption-index>> accessed 19 September 2019

³⁸ Transparency International, < <https://www.transparency.org/what-is-corruption> > accessed 19 September 2019

³⁹ Julio Bacio -Terracino, ‘Corruption as a Violation of Human Rights’ (2008, January) Retrieved from < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1107918 > accessed 19 September 2019

⁴⁰ James Thuo Gathii, ‘Defining the Relationship Between Human Rights and Corruption’ (2009) Vol. 31 Issue 1, University of Pennsylvania Journal of International Law, 125
<Available at: <https://scholarship.law.upenn.edu/jil/vol31/iss1/3> > accessed 19 September 2019

⁴¹ The United Nations Corruption Convention, the African Union Convention, the OECD Convention, the United Nations Organized Crime Convention, two Southern African Development Community protocols Edwin Cameron, ‘Constitutionalism, Rights, and International Law: The Glenister Decision’ (2013) Vol.23, No. 2, Duke Journal of Comparative and International Law, 389,399.

⁴² Constitution of Republic of South Africa. (1996, October 18). Retrieved from <<https://www.gov.za/documents/constitution-republic-south-africa-1996-chapter-14-general-provisions#231>> accessed 19 September 2019 ‘While Art. 231 (2) determines that international agreement binds the Republic only after it has been approved by approved by resolution in both the National Assembly and the National Council provinces , next paragraph of article 231 (3) determines that some international agreement, such as those of a technical, administrative or executive nature , or those which do not require either ratification or accession , entered into by the national executive binds Republic without approval by the National Assembly and the National Council of Provinces. Article 232 determines customary international law is law in the republic unless it is inconsistent with the Constitution or an Act of Parliament’

⁴³ *ibid*

⁴⁴ Article 36 ‘The person who may approach a court are – anyone acting in his or her own interest..’ Constitution of Republic of South Africa. (1996, October 18). Retrieved from <<https://www.gov.za/documents/constitution-republic-south-africa-1996-chapter-14-general-provisions#231>> accessed 19 September 2019

legislation that would result in the disbanding of an effective crime-fighting unit (such as the DSO). He also submitted applications on behalf of interested groups and classes of persons affected by the legislation to support his claim that he was acting in the public interest.⁴⁵

The Constitutional court reached its decision⁴⁶ on 17 March 2011, one that a commentator called ‘A monumental judgment in defence of the poor.’⁴⁷The court found that corruption is a threat to society and undermines the democratic ethos, institutions of democracy and the rule of law.⁴⁸ This remarkable judgment by the Court determined the state’s obligations with regard to international law and the application of international law in domestic courts. Article (7)2 of the constitution provides that the state must respect rights in the Bill of Rights. The majority of the Constitutional court stated that the courts must consider international law when interpreting the state’s obligation under Article 7(2).⁴⁹

...the fact that section 231(2) provides that an international agreement that Parliament ratifies “binds the Republic” is of prime significance. It makes it unreasonable for the state, in fulfilling its obligations under section 7(2), to create an anti-corruption entity that lacks sufficient independence.”⁵⁰

The Constitutional court found that the state had an obligation to establish and maintain an independent body to combat corruption and organised crime.⁵¹ The Court emphasised that the

⁴⁵ *Glenister v President of the Republic of South Africa and Others* (CCT 41/08) [2008] ZACC 19; 2009 (1) SA 287 (CC); 2009 (2) BCLR 136 (CC) (22 October 2008) “The applicant has obtained, by way of an online petition, a number of “signatures” in support of his opposition to the proposed legislation, which he has submitted to demonstrate he acts on behalf of a group of persons which opposes the disestablishment of the DSO. He has also submitted a number of public opinion polls to demonstrate support for the DSO and opposition to the proposed legislation. To support his claim that he acts in the public interest, the applicant refers to the “massive amount” of public interest in the matter, as evidenced by the public opinion polls and media reports.’ 4. < <http://www.saflii.org/za/cases/ZACC/2008/19.pdf>> accessed 19 September 2019

⁴⁶ *Glenister v. President of the Republic of South Africa and Others* (CCT 48/10) [2011] ZACC 6; 2011 (3) SA 347 (CC); 2011 (7) BCLR 651(CC) (17 March 2011)< <http://www.saflii.org/za/cases/ZACC/2011/6.pdf> > accessed 19 September 2019

⁴⁷ Constitutionally Speaking , ‘A Monumental Judgement in Defence of the Poor’ (2011, March 18) Retrieved from <<https://constitutionallyspeaking.co.za/glenister-a-monumental-judgment-in-defence-of-the-poor/>> accessed 19 September 2019

⁴⁸ *Glenister v. President of the Republic of South Africa and Others* (CCT 48/10) [2011] ZACC 6; 2011 (3) SA 347 (CC); 2011 (7) BCLR 651(CC) (17 March 2011) Paragraph 166 .<<http://www.saflii.org/za/cases/ZACC/2011/6.pdf> > accessed 19 September 2019

⁴⁹ *ibid* Paragraph 192.

⁵⁰ *ibid* Paragraph 194.

⁵¹ *ibid* Paragraph 56-155. (minority) and Paragraph 96-101. (majority)

role of international law in domestic law as to ensure maximum protection provided to individuals by international law.⁵²

The Glenister decision of the South African Constitutional court set an example regarding the applicability of international law within the domestic legal system that was outside the limits of the debate over monist and dualist approach.⁵³ Justice Cameron emphasised that the real significance of the Constitutional court's judgement was that it recognised the impact of global law on domestic law.⁵⁴ He concluded that:

...in a globalized world there should be no cover from properly undertaken international law obligations in the thicket of domestic law.⁵⁵

The Glenister case illustrates two principles of GAL theory. The first is that an individual who is directly affected by international regulations can ask national courts to apply internationally agreed standards. In this case, Mr Glenister, as an individual citizen of the state of South Africa, applied to a national court requesting that the state complies with international treaties. The second is that the publicness character of international standards applies in national courts. In the Glenister case, it was determined that the independence of the anti-corruption entity was a standard with which international treaties obliged the state to comply.

In fact, traditional domestic or national functions of courts within states have been changing. National courts are increasingly dealing with legal issues that involve global or foreign law, such as foreign investments, global standards produced by global regulatory regimes for trade, environmental issues and human rights.⁵⁶ This global judicial legal context has developed mainly as a result of the impact of globalisation and human rights law, which is also related to developments in global aviation safety standards and the application of global aviation safety standards in national courts.

⁵² G. Ferreira & A. Ferreira-Snyman, 'The Incorporation of Public International Law into Municipal Law and Regional Law Against the Background of the Dichotomy between Monism and Dualism' (2014) Vol.17, No.4, Potchefstroom Electronic Law Journal, 1470,1490.

⁵³ Edwin Cameron, 'Constitutionalism, Rights, and International Law: The Glenister Decision' (2013) Vol.23, No. 2, Duke Journal of Comparative and International Law, 389,404-405.

⁵⁴ *ibid* 407.

⁵⁵ *ibid* 409.

⁵⁶ Marta Cartabia & Sabino Cassese, 'How Judges Think in a Globalised World? European and American Perspective' (Issue 2013/07, December 2013) European University Institute: Robert Schuman Center for Advanced Studies. Retrieved from <http://cadmus.eui.eu/bitstream/handle/1814/30057/2013_07-Policy%20Brief_RSCAS_GGP-WEB.pdf?sequence=1> accessed 19 September 2019

5.1.1.1 The impact of globalisation on the application of international law by national courts

Globalisation has altered prospect of daily life around the world. The law that regulates life cannot resist this reality too.⁵⁷In fact, the law is responding to the changes in social, economic and cultural life brought about by globalisation. Global regulatory regimes and their standards have an impact on legislative work in states worldwide. In addition, there is a dialogue between judges in states that take monist and dualist approaches to international law. This means that national courts have to deal with disputes - regardless of whether the state takes a monist or dualist approach - involving global or supranational issues in fields such as foreign investment, sport, trade, health, environment, terrorism, intellectual property etc. ⁵⁸

Globalisation has affected various aspects of social life, but its most significant effect has been on awareness of what is going on other parts of the world. The advantage of advanced communication technology is that it enables judges to access information on interpretations of international issues in domestic courts in other jurisdictions quickly and easily.⁵⁹ Thus judges' interpretation of international laws and the obligation they impose is influenced by judgements in other jurisdictions.

A global judicial network has been developing that allows dialogue between judges from different jurisdictions. This network includes organisation such as the International Association of Supreme Administrative Jurisdictions (IASAJ),⁶⁰ Eurojust⁶¹ and the

⁵⁷ Rafael Domingo, *The New Global Law*, (Cambridge University Press 2010) 100.

⁵⁸ Marta Cartabia & Sabino Cassese, 'How Judges Think in a Globalised World? European and American Perspective' (Issue 2013/07, December 2013) European University Institute: Robert Schuman Center for Advanced Studies. 3. Retrieved from <http://cadmus.eui.eu/bitstream/handle/1814/30057/2013_07-Policy%20Brief_RSCAS_GGP-WEB.pdf?sequence=1> accessed 19 September 2019 ; See also Justice Kathryn Neilson, 'Judicial Globalisation' - What impact in Canada?' (2009, October 21)Retrieved from <https://www.brandeis.edu/ethics/pdfs/internationaljustice/Judicial_Globalization_Neilson_Oct_2009.pdf > accessed 19 September 2019

⁵⁹ See also Anne -Marie Slaughter, 'A Typology of Transjudicial Communication'(1994, December) Vol.29, Issue 1, University of Richmond Law Review 99 ; Karen Knop, 'Here and There: International Law in Domestic Courts' (Winter 2000) Vol.32 No.2 , New York University Journal of International Law and Politics, 501,520.

⁶⁰ International Association of Supreme Administrative Jurisdictions (IASAJ), <<https://africanlii.org/catalog/292> > accessed 19 September 2019

⁶¹ The European Union's Judicial Cooperation Unit (EUROJUST) <<http://www.eurojust.europa.eu/pages/home.aspx> > accessed 19 September 2019

Association of the Councils of the States and Supreme Administrative Jurisdiction of the European Union.⁶² These organisations hold meetings and seminars that allow judges from different jurisdictions to have a judicial dialogue on global matters.⁶³

This does not mean that judges around the world are applying global standards just because they can access them via advanced technology. The impact of globalisation is rather than the judgments of one court on an issue which is regulated globally can easily be accessed by judges from other states.⁶⁴ Ability to communicate with other judges from other jurisdictions and their decisions that respond to the pressure of globalisation can cause judges to act away from the limit of the domestic legal system and build up a common approach. This common approach of judges by recognising the global perspective of the issues eventually become source for ‘a global community of law’.⁶⁵

A comparative analysis by Mak⁶⁶ of how judges engage with international and comparative law in the highest courts of both common law and civil law legal systems such as the United Kingdom, Canada, the United States, France and the Netherlands revealed that the role of the highest national courts has changed. In addition to their traditional functions as guardian and developer of the law, their role has also been widened beyond national borders with a transnational aspect. Thus, foreign legal norms can be binding on the highest courts or influence their decisions. Furthermore, judges have developed international relationships with

⁶² Association of the Councils of the States and Supreme Administrative Jurisdiction of European Union (ACA EUROPE) < <http://www.aca-europe.eu/index.php/en/> > accessed 19 September 2019

⁶³ ECHR ‘ Dialog Between Judges 2016; International and national courts confronting large-scale violations of human rights’ < http://www.echr.coe.int/Documents/Dialogue_2016_ENG.pdf > accessed 19 September 2019 ; Justice Michel Kirby, ‘Transnational Judicial Dialogue, Internationalisation of law and Australian Judges’ (2008) Vol.9, Issue 1, Melbourne Journal of International Law, 171 Retrieved from <http://law.unimelb.edu.au/data/assets/pdf_file/0006/1683186/Kirby.pdf > accessed 19 September 2019

⁶⁴ Anne-Marie Slaughter, ‘A New World Order’ (Princeton University Press, 2004) 1.; See also Ruwantissa Abeyratne, ‘The Role of International Civil Aviation Organisation (ICAO) in the Twenty First Century’ (2009) Vol. XXXIV, Annals of Air and Space Law 529,542.

⁶⁵ Anne-Marie Slaughter, ‘Judicial Globalisation’ (Summer 2000) Vol.40 Issue.4, Virginia Journal of International Law 1103, 1103.

⁶⁶ Elaine Mak, ‘*Judicial Decision-Making in a Globalised World: A Comparative Analysis of the Changing Practices of Western Highest Courts*’ (Kindle ed. Hart Publishing 2013); also see Elaine Mak, ‘Globalisation of the National Judiciary and the Dutch Constitution’ (2013, March) Vol.9, Issue 2, Utrecht Law Review 36 , Retrieved from < <https://www.utrechtlawreview.org> > accessed 19 September 2019 ‘In the analysis it is noted that the analysis did not consider the role of binding international treaties in decision making of the Dutch courts, instead the analysis is based on the role of non-binding foreign legal sources, such as a foreign legislation and the case law of national courts in foreign jurisdictions, in judicial decision -making’

judges from other jurisdictions, which enables collaboration on the development of shared legal norms and exchange of judicial practices relevant to domestic cases.⁶⁷

Thus, when it comes to aviation safety with a direct link to human rights, global standards and state oversight responsibility, the responsibilities of national courts with regard to compliance with global aviation safety standards are in line with contemporary legal developments.

5.1.1.2 The impact of human rights standards on the role of national courts

A paradox arises when states cede part of their executive authority to set standards in fields such as civil aviation to international organisations whilst restricting domestic courts to applying these regulations only within the framework of domestic legislation. While global regimes are emerging with the ability of lawmaking within their subject field, the implementation of global regulations in national courts is based on traditional international law norms which give states sole power to implement these regulations. However, the approach of national courts to universal values is changing.

One of the most significant factors in the new era is the development of fundamental human rights as a global standard. International law also has been developing accordingly. Falk emphasised the law of humanity as a future domain: ‘we should associate the period of the interstate with “the modern” and the law of humanity with “post-modern”.’⁶⁸

International awareness of fundamental values was raised by the experience of World War II to protect humanity as a common value, and the Charter of the United Nations was followed in 1948 by the Universal Declaration of Human Rights.

Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.⁶⁹

Since then international human rights laws have been developed, and human rights standards have shaped legislation throughout the world. The most significant effect of developing

⁶⁷ *ibid* 36-38.

⁶⁸ Richard A. Falk, *Law in Emerging Global Village : A Post- Westphalian Perspective* (Transnational publishers 1998) 33.

⁶⁹ U.N., ‘Universal Declaration of Human Rights’. Retrieved from < <http://www.un.org/en/universal-declaration-human-rights/> > accessed 20 September 2019

human rights law is that the rights and obligations of governments, international organisations and individuals are dealt with under the same legal framework. This is a strong indication of how the concept of state sovereignty has changed and states' political power limited on a global basis.⁷⁰

As Henkin has said, before 1945 and the end of World War II:

How a state treated its own inhabitants was nobody else's business... Since 1945, how a state treats its own citizens, how it behaves even in its own territory, has no longer been its own business; it has become a matter of international concern, of international politics, and of international law.⁷¹

The implementation of international human rights law has been assisted by organised civil society.⁷² Many NGOs, human rights associations and monitoring groups around the world have become a public voice for enforcement of human rights.⁷³

Under the legal system of the European Union, the European Court of Justice functions as a supranational court and the European Court of Human Rights (ECtHR), which has jurisdiction over member states of the EU and non-member states that have accepted its jurisdiction is also an important institution. Not only are ECtHR judgements on human rights are binding on national courts in states that have accepted the Court's jurisdiction by signing the European Convention on Human Rights (1953), but the national courts of other states also cite decisions of the ECtHR. Slaughter noted that the South African Supreme Court cited an ECtHR decision as a landmark decision in its judgment holding that the death penalty is unconstitutional.⁷⁴ The Supreme Court of Zimbabwe invoked an ECtHR decision to support its determination that corporal punishment of an adult constitutes "cruel and unusual punishment" and that corporal punishment of juveniles is unconstitutional.⁷⁵ Sassen

⁷⁰ David Held & Anthony McGrew (Eds.) *The Global Transformations Reader* (2nd ed. Polity Press 2000) 169.

⁷¹ Louis Henkin, 'That S Word: Sovereignty, and Globalization, and Human Rights, Et Cetera [comments]' (1999) Vol. 68 Issue 1, *Fordham Law Review*, 1,4.

⁷² Richard A. Falk, *Law in Emerging Global Village: A Post-Westphalian Perspective* (Transnational Publishers 1998) 33.

⁷³ Jerome J. Shestack, 'Globalization of Human Rights Law' (1997, December) Vol.21, Issue 2, *Fordham International Law Journal*, 558,561.

⁷⁴ Anne-Marie Slaughter, 'Judicial Globalisation' (Summer 2000) Vol.40 Issue.4, *Virginia Journal of International Law* 1103,1110. fn. 25 *State v. Makwanyane, 1995*

⁷⁵ Anne-Marie Slaughter, 'Judicial Globalisation' (Summer 2000) Vol.40 Issue.4, *Virginia Journal of International Law* 1103,1110. fn. 26 *Ncube v. State, 1988*; See also for Further discussion Anne-Marie

convincingly argued that the increasingly institutionalised framework of the international human rights regime allows state sovereignty to be bypassed.⁷⁶ At this point, the changing approach of traditional monist and dualist legal systems to human rights laws needs to be emphasised. Generally, countries that have a civil law tradition take a monist approach. Accordingly, human rights treaties are given higher normative status than domestic legislation.⁷⁷

The best example of the role of the national courts is the legal system of the European Union.⁷⁸ Directly effective EU law empowers individuals to invoke national courts and question their government's compliance with its international commitments.⁷⁹ The judgment of the European Court of Justice on such cases has served to establish the legal order of the EU Community.⁸⁰

In states that take a dualist approach, mainly those with common law systems, international treaties become enforceable in domestic law after legislative approval, but this strict dualist approach is changing as common-law judges take account of human rights treaties in their judgements.⁸¹

Slaughter, 'A Typology of Transjudicial Communication'(1994, December) Vol.29, Issue 1, University of Richmond Law Review 99

⁷⁶ Saskia Sassen, 'The Participation of States and Citizens in Global Governance' (2003, Winter) Vol.10, Issue 1, Indiana Journal of Global Legal Studies, 5,23.

⁷⁷ George Slyz, 'International Law in National Courts' (Fall 1995/Winter 1996) Vol. 28, Issues 1 & 2, New York University Journal of International Law and Politics, 65

⁷⁸ See William W. Burke-White and Anne-Marie Slaughter, 'The Future of International Law is Domestic (or, The European Way of Law)' (2006) Vol. 47 Issue 2, Harvard International Law Journal, 327

⁷⁹ Anne-Marie Slaughter, 'Judicial Globalisation' (Summer 2000) Vol.40 Issue.4, Virginia Journal of International Law 1103,1105.

⁸⁰ 'A fundamental judgment of the Court in respect of principles, the Costa v Enel (Flaminio Costa v ENEL, European Court of Justice, Case 6/64, 1964), judgment shows that the EEC Treaty has created its own legal system which has become an integral part of the legal systems of the Member States, and that Community law takes precedence over national law.' Digital Research in European Studies(CVCE)<https://www.cvce.eu/en/obj/judgment_of_the_court_of_justice_costa_v_enel_case_6_64_15_july_1964-en-cb4154a0-23c6-4eb5-8b7e-7518e8a2a995.html>accessed 20 September 2019, , Case 26/62 Van Gend en Loos [1963] ECR 1, The Van Gend en Loos judgment is one of the most important judgments in the development of the Community legal order. The European Court of Justice specifies that the Community constitutes a new legal order of international law for the benefit of which the States have limited their sovereign rights and the subjects of which comprise not only Member States but also their nationals. The Court concludes from this a fundamental principle: that of the direct effect of Community law. Digital Research in European Studies(CVCE)<https://www.cvce.eu/en/obj/judgment_of_the_court_van_gend_loos_case_26_62_5_february_1963-en-4b81dcab-c67e-44fa-b0c9-18c48848faf3.html>

⁸¹ Melissa A. Waters, 'Creeping Monism: The Judicial Trend toward Interpretive Incorporation of Human Rights Treaties' (2007, April). Vol.107, Issue 3, Columbia Law Review, 628,635-636.

Moreover, in common law jurisdiction judges are increasingly abandoning their traditional dualist approach to treaties and are beginning to use human rights treaties despite the absence of domestic legislation giving effect to them.⁸²

Waters calls this ‘creeping monism’⁸³. She has argued that traditional common law dualism faces challenges in a global era of human rights internationalism.⁸⁴ Judges in common law jurisdiction are engaged in global judicial dialogue and even referring to the decisions of foreign courts in their interpretation of human rights issues.⁸⁵

For instance, the United States has a common law legal system. The United States Supreme Court in *Lawrence v. Texas* 539 U.S 558 (2003)⁸⁶ had to resolve the issue of the validity of a Texas statute criminalising intimate sexual contact between two persons of the same sex.⁸⁷ The Supreme Court referred to the ECtHR judgement in *Dudgeon v. United Kingdom*⁸⁸ in which the ECtHR found that Northern Ireland legislation that prohibits homosexual conduct is a breach of the right to a private life, which is protected by Article 8 of the ECHR.

Another example is *Roper v. Simmons*, 125 S. Ct. 1183 (Mar.1, 2005).⁸⁹ The issue was whether the death penalty could be imposed on an individual who was 17 years old when the relevant crime was committed. The Supreme Court used international law and referred to relevant international treaties, including the United Nations Convention on the Rights of the Child (1989) and the International Covenant on Civil and Political Rights. The point to be underlined here is that these treaties have not been incorporated into U.S. law. Nonetheless, the majority of the Court referred to the overwhelming weight of international opinion

⁸² See Melissa A. Waters, ‘Creeping Monism: The Judicial Trend toward Interpretive Incorporation of Human Rights Treaties’ (2007, April). Vol.107, Issue 3, Columbia Law Review, 628; Melissa A. Waters, ‘Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law’ (2005, January). Vol. 93, Issue 2, Georgetown Law Journal, 487; Elaine Mak, ‘Judicial Decision-Making in a Globalised World: A Comparative Analysis of the Changing Practices of Western Highest Courts’ (Kindle ed. Hart Publishing 2013)

⁸³ Melissa A. Waters, ‘Creeping Monism: The Judicial Trend toward Interpretive Incorporation of Human Rights Treaties’ (2007, April). Vol.107, Issue 3, Columbia Law Review, 628

⁸⁴ *ibid* 635-636

⁸⁵ *ibid* 635-636

⁸⁶ *Lawrence v. Texas*, 539 U.S 558 (2003) JUSTIA , US Supreme Court
<<https://supreme.justia.com/cases/federal/us/539/558/case.html>> accessed 19 September 2019

⁸⁷ *ibid*

⁸⁸ *Dudgeon v. United Kingdom*, Appl. No. 7525/76, Council of Europe: European Court of Human Rights, 22 October 1981, available at < http://www.refworld.org/cases/ECHR_47dfaf7d.html > accessed 27 October 2017

⁸⁹ *Roper v. Simmons*, 125 S.Ct. 1183 (2005); 543 U. S. ____ (2005), United States Supreme Court, 1 March 2005, available at: <http://www.refworld.org/cases/USSCT_42d7a1f34.html> accessed 27 October 2017

against the juvenile death penalty and struck down state laws that permit the death penalty for juvenile offenders.⁹⁰

Tavita v Minister of Immigration [1994] 2 NZLR 257 (CA) dealt with a Samoan citizen married to a New Zealand citizen and with a child from that marriage who faced deportation because s/he had overstayed in the country. The New Zealand Court of Appeal adopted a “rights-conscious”⁹¹ approach to statutory interpretation, rejecting the government’s dualist argument as an “unattractive argument”.⁹² Furthermore, the Court emphasised in its decision that “administrative decision-makers have an obligation to give consideration to human rights treaty obligations regardless of the formal domestic legal status of the treaties in question”.⁹³ The *Tavita* decision and its rights-conscious approach are cited by courts in many common law jurisdictions such as Australia, Canada, Australia and the United Kingdom.⁹⁴

In light of some the above examples and many others, it is asserted that common law courts are abandoning their traditional approach and applying human rights treaties regardless of whether they have been formally incorporated into domestic law.⁹⁵

Although national courts focus on promoting the domestic rule of law rather than global justice, their interpretation of universal values in decisions which have a global dimension is enhancing democratic outcomes.⁹⁶ Evidently, judges do not have executive power, and they are not policymakers, but they are fact-finders, and their interpretation of common values is based on facts.⁹⁷ Hence national courts’ decisions contribute to the monitoring of state administrative bodies and efforts to ensure that their decision-making is in line with the law.⁹⁸

⁹⁰ *Roper v. Simmons*, 125 S.Ct. 1183 (2005); 543 U. S. ____ (2005), United States Supreme Court, 1 March 2005, available at: < <http://www.refworld.org/cases,USSCT,42d7a1f34.html> > [accessed 27 October 2017] See also Melissa A. Waters, ‘Creeping Monism: The Judicial Trend toward Interpretive Incorporation of Human Rights Treaties’ (2007, April). Vol.107, Issue 3, Columbia Law Review, 628; Melissa A. Waters, ‘Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law’ (2005, January). Vol. 93, Issue 2, Georgetown Law Journal, 487; Elaine Mak, ‘*Judicial Decision-Making in a Globalised World: A Comparative Analysis of the Changing Practices of Western Highest Courts*’ (Kindle ed. Hart Publishing 2013)

⁹¹ *Tavita v Minister of Immigration* [1994] 2 NZLR 257 (CA) ,266.

⁹² *ibid*

⁹³ *ibid*

⁹⁴ Melissa A. Waters, ‘Creeping Monism: The Judicial Trend toward Interpretive Incorporation of Human Rights Treaties’(2007, April). Vol.107, Issue 3, Columbia Law Review, 628,666. fn.177-179; “*Baker v. Canada*, [1994] 2 S.C.R. 817-861, *Minister for Immigration & Ethnic Affairs v. Teoh* (1995) 183 A.L.R 353,372-73(Australia), *The Queen v. Dir. Of Public Prosecutions ex parte Kabilene*, [2000] 2 A.C 326,353 (H.L. 1999)

⁹⁵ *ibid*

⁹⁶ Eyal Benvenisti & George W. Downs, ‘Democratizing Courts: How National Courts Promote Democracy in Era of Global Governance’ (2014) Vol.46 N.Y.U.J International Law & Policy 741,770-771.

⁹⁷ *ibid* 772.

⁹⁸ *ibid* 772.

In particular, internationally recognised human rights are global values and recognition is not at the discretion of states. Respecting human rights is “a duty” of states⁹⁹ and this duty includes publicly recognising the violation of human rights as a wrong.¹⁰⁰

Aviation safety is a global issue and is directly linked to fundamental human rights, including the right to life.¹⁰¹ Moreover, states are responsible for oversight of compliance with standards set up in SARPs by ICAO for safe and orderly flight operations.¹⁰² Thus the state is responsible, within the limits of the power delegated to it by the people, for compliance with safety standards.

This section has emphasised the role of national courts in global space; the next section explores the handling of aviation safety in national courts. First, the approach of national courts to international aviation safety standards under the current international aviation legal system is explored. Then the application of aviation safety standards as a global issue in national courts within the global governance of aviation safety is explored.

5.2 International Aviation Safety Regulations (SARPs) in domestic courts

This section aims to point out shortcomings of the current international legal order, which gives national courts discretion over application of aviation safety standards as Annexes of Chicago Convention (1944). The binding effects of SARPs were discussed in Chapter II. The Annexes that contain SARPs do not constitute a treaty, but these regulations are treated as quasi-law¹⁰³ and developed by ICAO under an international treaty, the Chicago Convention (1944). The SARPs that regulate aviation safety standards are enforceable by national courts if the provisions of the Annexes have been incorporated into domestic law.¹⁰⁴ In signing the Chicago Convention (1944), contracting states accept the law-making authority of ICAO, but regulations, including aviation safety standards set up by ICAO in SARPs, still need to be transformed into national law.

⁹⁹ Eyal Benvenisti & Alon Harel, ‘Embracing the tension between national and international human rights law; The case for discordant parity’ (2017, January 1) Vol.15 Issue 1, *International Journal of Constitutional Law*, 36,42. Retrieved from <<https://doi.org/10.1093/icon/mox002>> accessed 20 September 2019

¹⁰⁰ *ibid* 47.

¹⁰¹ See Chapter II Section 2.4.2.3

¹⁰² See Chapter II Section 2.4.2.4

¹⁰³ Jiefang Huang, ‘*Aviation Safety through the Rule of Law; ICAO's Mechanisms and Practices*’ (Kluwer Law International 2009) 192-197.

¹⁰⁴ *ibid* 205-206.

The principle of post-war territorial “absolute and exclusive” state sovereignty adopted by the Chicago Convention (1944) is being transformed in the face of the reality of emerging global governance of civil aviation.¹⁰⁵ However, under current international law emerging global regimes are constrained by monist and dualist approaches that applicability of standards in Annexes is based on state incorporation of these standards into domestic law. The concern is that if a state does not incorporate aviation safety standards into national law they will not be justiciable in national courts.

The effective implementation of SARPs is of major importance to economic and social development around the world in an industry that supports global employment and will increasingly have an effect on global economic and social life.¹⁰⁶

5.2.1 The shortcomings of the traditional approach of domestic courts in applying SARPs

In general, the difficulty of establishing common international aviation safety standards is due to differences in the levels of the transformation of safety regulations into domestic law and reliance on this process for implementation.¹⁰⁷

The universal safety oversight audit indicates that the current process has not been working effectively. The latest report, “*Universal Safety Oversight Audit Programme -Continuous Monitoring Approach Results*” covering January 1, 2013, to December 2015,¹⁰⁸ in Chapter 4, addresses concerns in the legislative area. It states that “More than 70 per cent of the States have not established comprehensive procedures for the timely amendment of their civil aviation regulations in order to keep pace with amendments to the Annexes to the Chicago Convention (1944).”¹⁰⁹ Moreover, “[m]ore than 75 per cent of the States have not established an effective system for the identification and notification of the differences between the SARPs and their national regulations and practices to ICAO.”¹¹⁰ The results indicate that

¹⁰⁵ Sovereignty discussions Chapter II

¹⁰⁶ ICAO ‘Global Aviation Safety Plan 2014-2016’ (Doc 10004) Retrieved from <www.icao.int/publications/Documents/10004_cons_en.pdf> accessed 20 September 2019 , See Chapter II Section 2.5

¹⁰⁷ See Chapter II, Section 2.4.2.4

¹⁰⁸ ICAO Universal Safety Oversight Audit Programme Continuous Monitoring Approach Results (1 January 2013 to 31 December 2015) <https://www.icao.int/safety/CMAForum/Documents/USOAP_REPORT_2013-2016.pdf> accessed 24 July 2019

¹⁰⁹ *ibid* 25. Section 4.1.1.1

¹¹⁰ *ibid* 25. Section 4.1.2.1

states' uncooperative attitude to compliance with the Annexes acts as an obstacle to the establishment of a unified global aviation safety regime.

Under the current legal system, two issues pose an obstacle to the application of global aviation safety standards by national courts. One is the lack of precedents for the national courts; precedents that can be established by other states' domestic courts for legal issues which are globally regulated. The other is the impact of political interests that can shape a state's implementation of aviation safety standards.

5.2.1.1 Lack of precedent in application of SARPs in domestic courts

As mentioned earlier, the importance of SARPs is that they set down global aviation safety standards and these standards are designated Annexes of the Chicago Convention (1944).¹¹¹The current problem is that the Annexes containing SARPs do not become part of domestic law unless there is a state act incorporating them.

Conforti argued that this requirement for domestic legislation showed that states had a 'negative attitude'¹¹² to binding resolutions of international organisations that 'must be rejected'. Conforti pointed out that judicial decisions in Germany and France¹¹³ have held the Annexes of the Chicago Convention (1944) are self-executing.

In two French cases the courts, including the Cour de Cassation, had no misgivings concerning the application of Annex 9 to the Chicago Convention, although this Annex had been neither incorporated into French Law nor even published locally. In a similar way the Oberlandesgericht Frankfurt Main applied provisions of Annexes 11 and 15 to the Chicago Convention without any reference to German implementing measures.¹¹⁴

¹¹¹ See Chapter II

¹¹² Benedetto Conforti, *International Law and Role of Domestic Legal Systems* (Springer 1993 ed.) 35. Cases cited in fn.79.

¹¹³ *ibid* Cases Cited in fn.80; see also Christoph H. Schreuer, *Decisions of International Institutions Before Domestic Courts* (Oceana Publications INC. 1981) fn.114 'Public Prosecutor and Customs Administration v. Schreiber and Air France, Court of Appeal Dakar, 15 May 1957, 24 ILR 54(1957), confirmed by the French Cour de cassation, 8 Nov.1963, quoted from Ruzie, *Le Jugefrançais*, p.107; Oberlandesgericht Frankfurt/Main, 25 Feb.1965, 16 *Zeitschrift f.Luftrecht u.Weltraumrechts-fragen* 185,188(1967) *Re Males*, Cour de cassation (Fr.), 29 June 1972, 101 *Clunet* 142(1974), 19 *AFDI* 979 (1973).

¹¹⁴ Christoph H. Schreuer, *Decisions of International Institutions Before Domestic Courts* (Oceana Publications INC. 1981) 189. Although the author underlines that the courts most probably were not aware that the Annexes did not have the same effect as treaties.

However, SARPs are not generally recognised as binding in the same way as the treaty obligations themselves, and their direct application by the national courts is rejected.¹¹⁵ In 1981 Schreuer¹¹⁶ reviewed cases where courts had applied and accepted the regulations of international institutions, but the court decision had created a precedent. The main reason for national courts refusing even to discuss the direct application of aviation safety standards is that SARPs have no binding effect and the ICAO is an external authority.¹¹⁷ As a result, there has been no development of judicial precedents regarding the application of SARPs around the world. The lack of precedents on SARPs in domestic courts is a big loophole in the international civil aviation safety regime.

Evidently, the need to improve implementation and uniformity of aviation safety standards is becoming more pressing as a result of the impact of global developments in the air transport market and there is also a need to change the way of domestic courts review and apply global aviation safety standards in order to overcome shortcomings of the traditional approaches.

5.2.1.2 The impact of the state's political interest on domestic courts

Generally, the role of domestic courts in interpreting international treaties when they are dealing with international legal issues is limited. In particular, the drawback of domestic courts interpreting international law is that they are influenced by the national perspective and the political interest of their own state's executive. In most cases, domestic courts assess international law from the perspective of domestic values and the political interest of the state's executive.¹¹⁸

¹¹⁵ *ibid* fn.113 '*Belgium v. Marquise de Croix de Maillie de la Tour Landry et. Al., Cour de cassation (Belg.), 3 Oct. 1957, 24 ILR 9 (1957); Regie des voies aeriennes et Etat belge c. Verhoeven et commune de Steenokkerzeel, Cour d'appel, Brussels, 15 June 1965, 5 RBDI 385 (1969)*

¹¹⁶ *ibid* fn.114 '*Public Prosecutor and Customs Administration v. Schreiber and Air France, Court of Appeal Dakar, 15 May 1957, 24 ILR 54(1957), confirmed by the French Cour de Cassation, 8 Nov.1963, quoted from Ruzie, Le Jugefrançais, p.107; Oberlandesgericht Frankfurt/Main, 25 Feb.1965, 16 Zeitschrift f.Luftrecht u.Weltraumrechts-fragen 185,188(1967) Re Males, Cour de cassation (Fr.), 29 June 1972, 101 Clunet 142(1974), 19 AFDI 979 (1973).*

¹¹⁷ *ibid* Cited case n.117 '*Hurwits v. State of the Netherlands, Dist. Ct. of The Hague, 12 June 1958, 6 NTIR 195 (1959) In a decision of 12 July 1974, 1 EuGRZ 14 (1974), the Swiss Federal Court held that there was no need to answer the question whether a decision by the OECD council, which had been invoked by a party, was binding under international law and valid under domestic law, since it was not sufficiently specific to be directly applicable.*

¹¹⁸ See also, Julian Hermida, 'A Proposal Toward Defining the Model of Application of International Law in Domestic Arena' (2003) Vol.7 Issue.2, Singapore Journal of International & Comparative Law, 489, 489-510,496. ; Karen Knop, 'Here and There: International Law in Domestic Courts' (Winter 2000) Vol.32 No.2 , New York University Journal of International Law and Politics, 501,516.

An example relating to the implementation of Annex 13 of the Chicago Convention (1944), which regulates aircraft accidents and incidents as well as subsequent investigations, will be used to illustrate the negative impact of a state's political interest on domestic courts.

In the case of an air accident in civil aviation, there are two important aspects of the accident investigation. First, the prevention of future accidents and the development of better safety standards. Second, an independent accident investigation is crucial for the victims and their families. Therefore, the independence of accident investigations is of the utmost importance.

Article 26 of the Chicago Convention regulates the general framework of the rights and obligations of the contracting states as follows:

In the event of an accident to an aircraft of a contracting State occurring in the territory of another contracting State, and involving death or serious injury, or indicating serious technical defect in the aircraft or air navigation facilities, the State in which the accident occurs will institute an inquiry into the circumstances of the accident, in accordance, so far **as its laws permit**, with the procedure which may be recommended by the International Civil Aviation Organization. The State in which the aircraft is registered shall be given the opportunity to appoint observers to be present at the inquiry and the State holding the inquiry shall communicate the report and findings in the matter to that State'. [emphasis added]

The ICAO Council adopted SARPs for Aircraft Accident Inquiries on 11 April 1951 pursuant to Article 37 of the Convention on International Civil Aviation (Chicago, 1944) and they were designated Annex 13 to the Convention.¹¹⁹ Amongst other standards and recommendations Annex 13 prescribes as a standard the independence of the state aviation accident investigation authority under the section entitled "Responsibility of the State Conducting the Investigation":

5.4 The accident investigation authority shall have **independence in the conduct of the investigation and have unrestricted authority over its conduct**, consistent with the provisions of this Annex. The investigation shall include:

- a) the gathering, recording and analysis of all available information on that accident or incident:
- b) if appropriate, the issuance of safety recommendations:
- c) if possible, the determination of the causes; and
- d) the completion of the final report.

¹¹⁹ Annex 13 to the Convention on International Civil Aviation, 'Aircraft Accident and Incident Investigation' Foreword < https://www.emsa.europa.eu/retro/Docs/marine_casualties/annex_13.pdf > accessed 20 September 2019

When possible, the scene of the accident shall be visited, the wreckage examined, and statements taken from witnesses.¹²⁰

The standard regulated by Article 3.1 of Annex 13 state that the objective of the investigation of an accident or incident ‘shall be the prevention of accidents and incidents. It is not the purpose of this activity to apportion blame or liability.’ However, there is no national legislative standard restricting the use of information from accident investigation reports. The ICAO was reluctant to regulate national legislation on the use of the information and only made recommendations.¹²¹ Milde highlighted the conflict of interest as the interests of judicial investigation to seek the cause of accidents and the person guilty or liable for punishment and the interest to prevent future accidents and concluded that the balance between the two had not yet been achieved.

However, one clear point was set as a standard, namely the independence of the aviation accident authority:¹²²

The accident investigation authority **shall have independence** in the conduct of the investigation and have unrestricted authority over its conduct, consistent with the provisions of this Annex.¹²³

Thus, a contracting state shall establish an ‘independent’ accident investigation authority, but the way the information it generates is used remain a matter for state legislation. However, the latest USOAP results indicate that compliance with Annex 13, which regulates accident investigation among contracting states, is significantly lower than the global average, at 54.79 %.¹²⁴

Putting aside the conflict of interest regarding the use of information from the accident investigation, the most crucial prerequisite for a proper investigation is the establishment of an independent investigation authority. Its independence helps to assure the reliability of accident reports and prevents higher authorities from influencing investigations.

The general practice is to establish the air accident investigation authority within the Ministry of Transport, but this may weaken its independence as the possible conflict of interest

¹²⁰ (emphasis added)

¹²¹ Michael Milde, ‘Aircraft Accident Investigation in International Law’ (1984) Vol.9 Issue 1. Air Law, 61,65.

¹²² Annex 13 to the Convention on International Civil Aviation, ‘Aircraft Accident and Incident Investigation’ Article 5.4

< https://www.emsa.europa.eu/retro/Docs/marine_casualties/annex_13.pdf > accessed 20 September 2019

¹²³ (emphasis added)

¹²⁴ USOAP interactive viewer <<http://www.icao.int/safety/pages/usoap-results.aspx>> accessed 21 July 2019

between the roles of regulator and investigator could result in the obstruction of an independent accident investigation.¹²⁵ The European Transport Safety Council (ETSC) stresses that “improving the quality and independence of accident investigation is of the utmost importance as independent investigations looking into underlying causes of accidents and incidents can also be of help for the victims and their families to come to terms with what has happened to them.”¹²⁶

Having inspectors within a ministry makes it difficult for accident investigations to be independent. In fact, Government involvement in securing accident investigations is inevitable. However, the way to conduct and establish an independent investigation authority as set as a standard in Annex 13 differs from state by state. Even within the government departments safety can be sectional and approached differently. As Pieter van Vollenhoven asserts ‘independent investigations may be completely accepted in one sector and a taboo subject in another’.¹²⁷ The difference is more significant with states that culturally allow more transparency. In countries with greater transparency and freedom of the press, the government’s view of aviation safety is changing to address safety as a responsibility towards society.¹²⁸ Therefore, implementing the standards in SARPs regarding securing a reliable accident investigation that emphasises the importance of the independence of investigation authority is secured in national legislation.

For instance, Council Directive 94/56/EC on transportation addresses the rules for which there are standards in Annexes.¹²⁹ Article 6 (Investigating body or entity) of the Directive underlines that it is compulsory for EU member states to make arrangements for air accidents investigations that are independent of the state regulatory body for aviation.¹³⁰

¹²⁵ European Transport Safety Council (ETSC) Retrieved from <http://archive.etsc.eu/documents/copy_of_ETSC%20Position%20Paper%20on%20Aviation%20Accident%20Investigation.pdf> accessed 20 September 2019

¹²⁶ *ibid*

¹²⁷ Pieter van Vollenhoven, ‘Independent Accident Investigation- The right of Each Citizen and Society’s Duty’ (2002) No.33, Japan Railway & Transport Review, 14,17.

¹²⁸ *ibid*

¹²⁹ Eur-Lex Access to EU legislation ‘Council Directive 94/56/EC’ Retrieved from <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A31994L0056>> accessed 20 September 2019

¹³⁰ *ibid* Article 6 (Investigation Entity or Body) Each Member State shall ensure that technical investigations are conducted or supervised by a permanent civil aviation body or entity. The body or entity concerned shall be functionally independent in particular of the national aviation authorities responsible for airworthiness, certification, flight operation, maintenance, licensing, air traffic control or airport operation and, in general, of any other party whose interests could conflict with the task entrusted to the investigating body or entity.

In the UK, for instance, the investigation of civil air accidents and incidents is regulated under the Civil Aviation (Investigation of Air Accidents and Incidents) Regulations 1996.¹³¹ Article 8-1 of the legislation authorises the Secretary of State to appoint a Chief Inspector and inspectors of Air Accidents, but Article 17, which regulates obstruction of investigations, is intended to guarantee the independence of the investigation and protect it from obstruction by other state authorities:

Obstruction of Investigation

17.—(1) No person shall obstruct or impede an Inspector or any person acting under the authority of the Secretary of State in the exercise of any powers or duties under these Regulations.

(2) **No person** shall without reasonable excuse fail, after having had the expenses (if any) to which he is entitled under these Regulations tendered to him, to comply with any summons of an Inspector holding an investigation.¹³²

In the USA, the National Transportation Safety Board (NTSB) was established in 1967 as an independent agency to investigate all transport accidents, but it sits within the Department of Transportation (DoT) for administrative purposes. In 1974 Congress re-affirmed that the NTSB is a separate entity out with DoT control:

...No federal agency can properly perform such (investigatory) functions **unless it is totally separate and independent from any other... agency of the United States.**’ Because the DOT has broad operational and regulatory responsibilities that affect the safety, adequacy, and efficiency of the transportation system, and transportation accidents may suggest deficiencies in that system, the NTSB's independence was deemed necessary for proper oversight. The NTSB, which has no authority to regulate, fund, or be directly involved in the operation of any mode of transportation, conducts investigations and makes recommendations from an objective.¹³³

In Turkey, civil aviation is governed by the Turkish Civil Aviation Code No. 2920.¹³⁴ The conduct of civil aviation accident investigations is regulated under Article 10-17 of the Code.

¹³¹ The Civil Aviation (Investigation of Air Accidents and Incidents) Regulations 1996 No.2798. Retrieved from www.legislation.gov.uk: <<http://www.legislation.gov.uk/ukxi/1996/2798/contents/made> > accessed 20 September 2019

¹³² (emphasis added)

¹³³ National Transportation Safety Board (NTSB) (An Independent United States Federal Government Agency) Retrieved from [www.nts.gov](https://www.nts.gov/about/history/Pages/default.aspx): <<https://www.nts.gov/about/history/Pages/default.aspx> > accessed 20 September 2019 (emphasis added)

¹³⁴ Turkish Civil Aviation Code (Türk Sivil Havacılık Kanunu) (1983). Retrieved from <<http://www.mevzuat.gov.tr/MevzuatMetin/1.5.2920.pdf> > accessed 20 September 2019

The detailed conduct of a civil aviation accident investigation is regulated by bylaw (SHY 13)¹³⁵ issued by the Director-General of the Civil Aviation Authority.

Under Article 14 of the bylaw, the Ministry of Transport and Infrastructure appoints¹³⁶ the accident investigation board from experts in the aviation field. Article 17 regulates the framework of the authority of the investigation board and asserts its independence: ‘The board of investigators shall be independent in its conduct of the investigation, and the authority of the board that is regulated by the law cannot be restricted’.¹³⁷

The language of the bylaw is very general. Unlike the UK regulation, there is no separate article regulating obstruction of an investigation. Although ‘independence’ is referred to in the bylaw, it does not state how that independence shall be protected.

In 2013 an Accident Investigation Board was established to deal with accidents and incidents that occur during transportation.¹³⁸ According to the bylaw¹³⁹ that regulates the framework of the Board, the board is independent in its decisions.¹⁴⁰ However, the Board performs its duty in the name of the Minister. Furthermore, Article 17(3) states that no-one, other than the Minister, can give an order to the Board.¹⁴¹ In comparison with UK legislation on obstruction of investigation that use of language “no one shall obstruct ...” Turkish legislation appears a rather fragile way of protecting the independence of the Accident Investigation Board as it remains legitimate for the Minister to give orders to the Board.

Nonetheless, the aim of the standard set up by Annex 13 was to establish and secure the independence of accident and incident investigations. States might prefer an investigation

¹³⁵ By Law on the Accident Investigation Board of the Ministry of Transport, Maritime Affairs and Communications (1985) Retrieved from www.mevzuat.gov.tr: <http://www.mevzuat.gov.tr/Metin.Aspix?MevzuatKod=7.5.10108&MevzuatIliski=0&sourceXmlSearch=hava%20-%20ara%C3%A7%20kazalar%C4%B1> > accessed 20 September 2019

¹³⁶ The title of Ministry of Transport, Maritime Affairs and Communications has been amended by decree act number 703 July 9, 2018 < accessed <<http://www.ubak.gov.tr/> > accessed 20 September 2019

¹³⁷ By Law on the Accident Investigation Board of the Ministry of Transport, Maritime Affairs and Communications (1985) Article 17. Retrieved from www.mevzuat.gov.tr: <http://www.mevzuat.gov.tr/Metin.Aspix?MevzuatKod=7.5.10108&MevzuatIliski=0&sourceXmlSearch=hava%20-%20ara%C3%A7%20kazalar%C4%B1> > accessed 20 September 2019

¹³⁸ Accident Investigation Board (2013) ‘By Law of Accident Investigation and Board was published in the Official Gazette of 06 May 2013 and number 28639 and the Board is established on this basis and started their activities’ Retrieved from <<http://www.kaik.gov.tr/> > accessed 20 September 2019

¹³⁹ By Law on the Accident Investigation Board of the Ministry of Transport, Maritime Affairs and Communications (2013) Retrieved from < <http://www.resmigazete.gov.tr/eskiler/2013/05/20130506.pdf> > accessed 20 September 2019

¹⁴⁰ *ibid* Article 17

¹⁴¹ *ibid* Article 17(3)

structure that is within their own administrative establishment, but the standard that provides for the independence of investigations leaves no room for question in this regard.

Of course, many other established standards are essential to the safety of civil aviation. Many political issues can influence whether and how governments incorporate these standards into domestic law.

However, national courts are limited in how they can apply global standards within the framework of domestic legislation. The example above is intended to illustrate that if an issue regarding the independence of accident investigation board comes before the national courts of the UK or Turkey, national courts will have to decide on different interpretation of the standards by their legislative authority whereas the real purpose of the standards is to ensure that fair investigations are provided for everyone, throughout the world.

The evidence presented above indicates that interpretation of state legislation regarding the implementation of aviation safety standards would not serve unifying aviation safety standards as intended by the global standard.

In particular, independent air accident investigations play a crucial role in establishing causes and liability in cases where civil passenger planes are shot down by missiles. These incidents are the most complicated when it comes to instituting a proper accident investigation. They are also the most controversial. In these cases, finalising the investigation report and the subsequent litigation can take years, and the results are not always satisfactory.¹⁴²

Ustica Massacre (*'Strage di Ustica'*) illustrates the importance of independent air accident investigation in an accident that involves state military authorities. In a case in 1980, an Italian commercial flight en route from Bologna to Palermo crashed into the Tyrrhenian Sea between Ponza and Ustica. All passengers and crew on board, 81 people, were killed. This

¹⁴² Unfortunately in the history of civil aviation, the list of aircraft that shot down by missiles is long .Among them, Cathay Pacific Airways C-54, July 1954, killing 10 people; Libyan Arab Airlines Flight 114, Feb 1973, killing 108 people; Air Rhodesia Flights 825 and 827, Sept 1978 and Feb 1979, killing 97 people; Korean Airlines Flight 007, Sept 1983, killing 269 people; Iran Air Flight 655, July 1988, killing 290 people; Three Transair Georgia planes, Sep 1993, killing 136 people; Siberian Airlines Flight 1812, Oct 2001 killing 78 people; Aerolinee Itavia Flight 870 killing 81 people; Balad aircraft crash, January 9, 2007, killing 35 people; TransAVIA export Airlines Il-76, March 23, 2007, killing 11 people; and Malaysia Airlines flight 17 July 17, 2014 killing 298 people. <<http://www.scmp.com/news/world/article/1556036/timeline-tragic-history-civilian-airliner-shootdown-incidents>> accessed 20 September 2019

incident is known in Italian media as the Ustica Massacre (*'Strage di Ustica'*).¹⁴³ Because of there was intense military activity in the area in which the civil aircraft was flying there were allegations that a missile fired by American or French fighter jets had contributed to the crash, but this was denied by Washington and the French Defence Ministry refused to comment.¹⁴⁴ In 1999, in his 5,488-page report Italian court, Judge Rosario Priore concluded that:

the plane had probably been caught in a dogfight between NATO jet fighters and Libyan MiGs. He said that his investigation and previous investigations into the tragedy had been deliberately obstructed by the Italian military and members of the Secret Service, who had complied with requests from NATO to cover up the tragedy.¹⁴⁵

Twenty-two years later, in November 2003, a Tribunal awarded Aerolinee ITAVIA in one of the cases against the Ministry of Defence, Ministry of Transport and Ministry of Interior brought by ITAVIA.¹⁴⁶

This is one of the air disasters¹⁴⁷ about which there is much speculation regarding obstruction of the investigation by state and military authorities, and reliable independent investigation is crucial.

The next section explores how traditional international legal order is changing in relation to the application of global aviation safety standards in national courts. The aim is to indicate the crucial role that national courts have in applying global aviation safety standards.

¹⁴³ Aerolinee-Itavia-Flight-870 (Ustica Massacre) Retrieved from <<https://www.tailstrike.com/270680.htm> > accessed 20 September 2019

¹⁴⁴ The Mystery of Flight 870 (2006) Retrieved from <<http://www.theguardian.com/world/2006/jul/21/worlddispatch.italy> > accessed 20 September 2019

¹⁴⁵ *ibid*

¹⁴⁶ Giuseppe Guerrieri, 'Hasty Justice' (December 2004) Vol.29, Issue 6 Air & Space Law, 452,453. '*ITAVIA SPA v. Ministry of Defence, Ministry of Transport and Ministry of Interior*, In 26 November 2003, Tribunal Awarded ITAVIA to cover the damages in one of the cases after the crash brought by ITAVIA against Ministry of Defence, Ministry of Transport and Ministry of Interior in the amount of 108,071,773.64 Euro'

¹⁴⁷ See James A. Beckman, 'Nation-State Culpability and Liability for Catastrophic Air Disasters: Reforming Public International Law to Allow for Liability of Nation-states and the Application of Punitive Damages' (Spring 2015) Vol.10, No.2, FIU Law Review, 585

5.3 Global aviation safety standards in national courts

Globalisation means that changes are inevitable in many areas, including global civil aviation and in particular the global governance system of civil aviation safety. Legal doctrines on state sovereignty in the context of international civil aviation are shifting under the influence of increasing globalisation.¹⁴⁸

The definition of state sovereignty that recognises the exclusive power of a state within its territory has been transforming. Held asserts that ‘liberal international sovereignty’ arises when effective state power is challenged ‘by the principles of self-determination, democracy, and human rights as the proper basis of sovereignty’.¹⁴⁹

The increasing use of common standards in many areas, in particular in civil aviation, has eroded boundaries between states. Thus, as Held states, global and regional developments about mechanisms and formation of regulations have redefined the traditional rule of sovereignty.¹⁵⁰

The concept of sovereignty in international law has been a subject of scholarly discussions. Henkin strongly addressed that the concept of sovereignty in international law has been wrong. According to Henkin, the concept of sovereignty is relevant to autonomy within a state and should not be used as ‘*iron curtains*’ to excuse the state from international collaboration. Instead of state ‘universal human values’ should be the heart of international law.¹⁵¹

Furthermore, many developments in globally governed regimes have an impact on territoriality and the concept of state sovereignty. Thus, territoriality and state sovereignty

¹⁴⁸ See Chapter II

¹⁴⁹ David Held & Anthony McGrew (Eds.) *The Global Transformations Reader* (2nd ed. Polity Press 2000) 164.

¹⁵⁰ *ibid* 172

¹⁵¹ Louis Henkin, *The Mythology of Sovereignty*, Am. Soc’y Int’l L. Newsl., Mar. 1993, at 1. Quoted from Paul Schiff Berman, ‘From International Law to Law of Globalisation’ (2005) Vol.43, No.2, Columbia Journal of Transnational Law 485,525.

have become ‘unbundled’¹⁵² and sovereignty is becoming non-territorial.¹⁵³ The EU is a good example of the transformation of territorial sovereignty into functional sovereignty.¹⁵⁴

In particular, many actors other than states, such as NGOs, are involving in global regulatory regimes are increasing. Buxbaum stated that the involvement of these non-state actors is another indication that the role of territory in jurisdictional law is lessening.¹⁵⁵

Therefore, in global civil aviation, which is one of the most interconnected fields in the contemporary world, the law of jurisdiction based on the principle of territoriality has become questionable and brings the risk of as Truxal defined ‘thin justice’¹⁵⁶

In practice, globalised civil aviation has been putting pressure on traditional international legal theories based on exclusive territorial sovereignty. Although not denying the importance of territory, as Berman underlines, it is impractical to suppose territorial legal conducts are still satisfying in regulatory regimes with global effects.¹⁵⁷ Buxbaum has emphasised the borderless nature of some activities and suggested that ‘jurisdictional law need to be reshaped and regulatory solutions freed from territorial underpinnings’.¹⁵⁸

In line with the above arguments this thesis asserts that when it comes to applying global aviation safety standards that were set up under the SARPs framework in national courts, state sovereignty as emphasised in Article 1 of the Chicago Convention does not necessarily determine the jurisdiction of the national court.

¹⁵² John Gerard Ruggie, ‘Territoriality and Beyond: Problematizing Modernity in International Relations. International Organization’ (Winter 1993) Vol.47, No.1, International Organization 139,165. Retrieved from

<http://links.jstor.org/sici?sici=00208183%28199324%2947%3A1%3C139%3ATABPMI%3E2.0.CO%3B2-P>
> accessed 20 September 2019

¹⁵³ Steven Truxal, ‘*Economic and Environmental Regulation of International Aviation: From Inter-national to Global Governance*’ (Kindle ed.) (Routledge. 2017) 54.

¹⁵⁴ *ibid* 55. fn.135

¹⁵⁵ Hannah L.Buxbaum, ‘Territory, Territoriality and the resolution of Jurisdictional Conflict’ (2009) Vol.57, Issue 3, American Journal of Comparative Law 631,673.

¹⁵⁶ Steven Truxal, ‘*Economic and Environmental Regulation of International Aviation: From Inter-national to Global Governance*’ (Kindle ed.) (Routledge. 2017) 46. cited from Ryangaert and Steven Ratner fn.83and 84

¹⁵⁷ Paul Schiff Berman, ‘Global Legal Pluralism’ (2007) Vol.80 Issue 6, Southern California Law Review 1155,1182.

¹⁵⁸ Hannah L.Buxbaum, ‘Territory, Territoriality and the resolution of Jurisdictional Conflict’ (2009) Vol.57, Issue 3, American Journal of Comparative Law 631,668.

5.3.1 Securing the rule of law in the global governance of aviation safety

In global governance, the rule of law has to be secured on two different aspects: one aspect of securing the rule of law is global decision-making in global institutions and the other one is implementation of global regulations in states.

Accordingly, global decision-making in global institutions, the rule of law requires the existence of a legal structure that prevents the executive from exercising its power in an abusive or arbitrary way. The lack of control mechanisms and the possibility of undue influence by politically or economically powerful states on the decision-making about global regulations means that securing the rule of law is deemed a challenge in global governance.¹⁵⁹

Therefore, mechanisms for securing the rule of law need to be established so that people are protected from abuses or arbitrary use of executive powers and executive power is restrained with a legal structure to which rule of law norms apply. However, defining executive power in globally governed fields is a subject of scholarly discussions. In fact, there is no global government that can impose a legal structure, apply the rule of law and offer legal protection.¹⁶⁰ Waldron defined executive power in global regulations by reference to ‘international entities’ that were established by international law and act in the name of international law as well as being designed in accordance with and constrained by the rule of law norms.

In contrast, Nowrot emphasised states’ function in global governance which no authority exist as a world government. According to Nowrot, states should ‘contribute to, tolerate and actively participate’ in global governance.¹⁶¹

Armin von Bogdandy et al. propose an ‘international public authority’ that uses delegated authority for the common good and controls ‘any governance activity which directly affects

¹⁵⁹ Richard B. Stewart, ‘Remedying Disregard in Global regulatory Governance: Accountability, Participation, and Responsiveness’ (April 2014) Vol. 108, Issue 2, American Journal of International Law 211,211.

¹⁶⁰ Jeremy Waldron, ‘Are Sovereigns Entitled to the Benefit of International Rule of Law?’ (2011) Vol.22, Issue 2 European Journal of International Law, 315; see also Anne-Marie Slaughter, ‘Disaggregated Sovereignty: Towards the Public Accountability of Global Government Networks’ (2004) Vol.39, Issue 2, Government and Opposition 159 doi:10.1111/j.1477-7053.2004.00119.x ; Anne-Marie Slaughter, ‘A New World Order’ (Princeton University Press, 2004); Karsten Nowrot, ‘Global Governance and International law. Beiträge zum Transnationalen Wirtschaftsrecht, Heft 33 (2004, November) Retrieved from <<http://telc.jura.uni-halle.de/sites/default/files/altbestand/Heft33.pdf>> accessed 27 August 2019

¹⁶¹ Karsten Nowrot, ‘Global Governance and International law. Beiträge zum Transnationalen Wirtschaftsrecht, Heft 33 (2004, November) Retrieved from <<http://telc.jura.uni-halle.de/sites/default/files/altbestand/Heft33.pdf>> accessed 27 August 2019

public goods, by which global infrastructures are managed, or which unfolds in a situation where collision of fundamental interest of different social groups has to be dealt with'.¹⁶²

Obviously, there are challenges affecting the decision-making process in international organisations, because states are not economically and politically equal in global institutions. Although all states participate in the decision-making process, the influence of powerful states is a concern¹⁶³, and so the executive power of global regulatory institutions needs to be constrained by the rule of law principles.

Another challenge at the global institutional level is that of establishing the accountability of global administrative decision-makers for their global regulations. According to GAL scholars like Stewart, the first factor in the accountability of decision-making on global regulations is the securing of the rule of law. They assert that GAL responds to this challenge better than domestic systems and traditional 'state-centred' international law theories.¹⁶⁴ GAL theory suggests that accountability can be established by promoting the rule of law in the global decision-making process.¹⁶⁵ 'In particular by focusing on the administrative structure, on transparency in participatory elements of the administrative procedure, on principles of reasoned decision-making and mechanisms of review.'¹⁶⁶

Another aspect of securing the rule of law is the implementation of global regulations in the states. The rule of law, in general, demands that the government should use its executive power according to a legal framework of public norms rather than its own preferences. Rules have to be laid down in advance to make clear the requirements and the legal consequences of people's actions. The right of access to impartial courts, enduring due process and equality before the courts should apply to everyone.¹⁶⁷ Generally, these are the principles that legal systems of states have to comply with in order to secure the rule of law in regulating public

¹⁶² Armin von Bogdandy, Phillip Dann and Matthias Goldman, 'Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities' (November 2008), Vol.9(11), 1384.

<https://www.researchgate.net/publication/47276725_Developing_the_Publicness_of_Public_International_Law_Towards_a_Legal_Framework_for_Global_Governance_Activities> accessed 15 August 2019

¹⁶³ Michael Milde, 'International Air Law and ICAO' (2nd Edition ed. Eleven International Publishing 2102)

¹⁶⁴ Richard B. Stewart, 'Remedying Disregard in Global regulatory Governance: Accountability, Participation, and Responsiveness' (April 2014) Vol. 108, Issue 2, American Journal of International Law 211.

¹⁶⁵ Benedict Kingsbury, Nico Krisch & Richard B. Stewart, 'The Emergence of Global Administrative Law' (2005) Vol.68. Law and Contemporary Problems, 15, 61. Retrieved from

<<https://scholarship.law.duke.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1361&context=lcp>> accessed September 1 2019

¹⁶⁶ *ibid* 28.

¹⁶⁷ Jeremy Waldron, 'Are Sovereigns Entitled to the Benefit of International Rule of Law?' (2011) Vol.22, Issue 2 European Journal of International Law, 315, 316-317.

life in the state. In states, individuals are subject to law, and the government has to secure the rule of law when it exercises its executive power.

However, the concept of the rule of law has been controversial in international law. The traditional approach to the rule of law in international law is state-centred¹⁶⁸ and suggests that states are subject to international law as individuals are subject to domestic law. Chesterman asserts that ‘the historic challenge for the rule of law has been its relationship to the sovereign. In a domestic legal order, the sovereign exists in a vertical hierarchy with other subjects of law; at the international level, sovereignty tends to be conceived of as remaining with States, at least nominally existing in a horizontal plane of sovereign equality.’¹⁶⁹

Waldron states that although states are subject to international law, he refers the role of states as officials or officers of international law.¹⁷⁰ Furthermore, he states that ‘[the] national state is a source of international law in the sense that it participates in treaty-making and in the emergence of customary ordering’.¹⁷¹ This clearly supports the GAL position that state participation in decision-making on global regulations is an important prerequisite for establishing the legitimacy of global regulations in nation-states. States are part of the decision-making process for global regulations and contribute to global regulatory bodies. Global regulations are implemented or enforced by domestic administrative authorities in states. GAL scholars like Kingsbury, Krisch and Stewart call these authorities ‘distributed administration conducted by national regulators under treaty, network or other cooperative regimes.’¹⁷²

On the other hand, in the context of relations between international law and nation-states securing the rule of law requires that the legal consequences of the rules be clear and

¹⁶⁸ Mattias Kumm, 'International Law in National Courts: The International Rule of Law and the Limits of the Internationalist Model' (2003) Vol.44 No.1 Virginia Journal of International Law 19,22.

¹⁶⁹ Simon Chesterman, ‘Globalisation and Public Law; A Global Administrative Law?’ In Jeremy Farral, & Kim Rubenstein (Eds.) *Sanctions, Accountability and Governance in a Globalised World* (Cambridge University Press. 2014) 34.

¹⁷⁰ Jeremy Waldron, ‘Are Sovereigns Entitled to the Benefit of International Rule of Law?’ (2011) Vol.22, Issue 2 European Journal of International Law, 315,316,317,329.; Jeremy Waldron, ‘The Rule of International Law’ (Fall 2006) Vol.30, Issue 1, Harvard Journal of Law & Public Policy 15,23-24.

¹⁷¹ Jeremy Waldron, ‘Are Sovereigns Entitled to the Benefit of International Rule of Law?’ (2011) Vol.22, Issue 2 European Journal of International Law, 315,316,317,329.

¹⁷² Benedict Kingsbury, Nico Krisch & Richard B. Stewart, ‘The Emergence of Global Administrative Law’ (2005) Vol.68. Law and Contemporary Problems, 15, 20. Retrieved from <<https://scholarship.law.duke.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1361&context=lcp> > accessed September 1 2019 ; see also Richard B. Stewart, ‘Remedying Disregard in Global regulatory Governance: Accountability, Participation, and Responsiveness’ , (April 2014) Vol. 108, Issue 2, American Journal of International Law 211

predictable.¹⁷³ Waldron argued that clarity should not be assessed mechanically. He explained that unlike individuals, who can act freely when there is no clear regulation on a subject, states should not be entitled to the benefit of the uncertainty.¹⁷⁴ Therefore, even in the absence of regulations states should not be free to act or not to act, and are still responsible for acting to secure individuals' wellbeing.¹⁷⁵

Governmental freedom is not the *raison d'être* of the rule of law. The rule of law does not favour freedom or unregulated discretion for the government. Quite the opposite is true; the government is required to go out of its way to ensure that legality and the rule of law are honoured in its administration of society.¹⁷⁶

Another requirement for securing the rule of law is predictability. The rule of law requires states to act in a predictable way and to safeguard individuals' wellbeing. States should not depart arbitrarily from general norms. Waldron emphasised that 'generality of the norms is not enough; the norms must be promulgated to the public – to those whose conduct will be assessed by them and to those whose interests their application is supposed to affect.'¹⁷⁷

The ICAO is a specialised agency of the United Nations. The rule of law was defined as the UN's mission in the Report of the Secretary-General:

The rule of law is a concept at the very heart of the Organization's mission. It refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.¹⁷⁸

Aviation safety is global and concerns everyone. Promotion of aviation safety is directly linked to fundamental human rights, specifically the right to life.¹⁷⁹

¹⁷³ Jeremy Waldron, 'Are Sovereigns Entitled to the Benefit of International Rule of Law?' (2011) Vol.22, Issue 2 *European Journal of International Law*, 315,335.

¹⁷⁴ *ibid* 338.

¹⁷⁵ *ibid* 316-317.

¹⁷⁶ Jeremy Waldron, 'Are Sovereigns Entitled to the Benefit of International Rule of Law?' (2011) Vol.22, Issue 2 *European Journal of International Law*, 315,316,317,339.

¹⁷⁷ Jeremy Waldron, 'The Concept of the Rule of Law' (Fall 2008) Vol.43, No.1 *Georgia Law Review*, 1,25.

¹⁷⁸ The UN Security Council, Report of the Secretary General, (S/2004/616) 'The rule of law and transnational justice in conflict and post-conflict societies' (2004, August 23) 4. Retrieved from <<http://archive.ipu.org/splz-e/unga07/law.pdf>> accessed 20 September 2019

¹⁷⁹ See Jiefang Huang, 'Aviation Safety through the Rule of Law; ICAO's Mechanisms and Practice' (Kluwer Law International 2009)

The ICAO system confirms Waldron's theory that states are a source of international law and also officers of international law who are responsible for implementing international regulations. ICAO's aviation safety regulations are global in nature. Contracting states of the Chicago convention are part of the ICAO decision-making system and responsible for incorporating aviation safety regulations into their domestic legal system. The ICAO is well-equipped for complying with the rule of law.

5.3.2 Universal values v. territoriality

The consequences of increasing worldwide economic integration and cross-border population movements – globalisation – have changed values. Especially by the impact of developments of human rights in international law, the focus moved beyond state values towards universal human values.¹⁸⁰ Hence, it is simply not possible for states to isolate themselves from the rest of the world. Benvenisti uses the metaphor of 'small apartments in one densely packed high-rise in which two hundred families live' as a metaphor for today's world, in which a 'solipsistic vision of sovereignty' is no longer sustainable.¹⁸¹ Applying to this metaphor, states must take into consideration not only their own citizens' interests but the interests of 'all effected stakeholders.'¹⁸²

Global aviation safety is the field to which this perspective is most relevant. IATA Annual Review 2019 reveals continuing growth in air transport. According to IATA report the air transport connected more cities at a lowered cost in 2018 and worldwide air passenger number continued to increase and reached 4.3 billion in 2018.¹⁸³ Taken into considerations of the volume of use of air transport by passengers globally, states cannot avoid being audited by authorities other than their own so that their statute in the air transport market can be

¹⁸⁰ See Louis Henkin, 'Human Rights and State Sovereignty' (1995-1996) Vol.25, Issue 1&2 Georgia Journal of International and Comparative Law, 31,32-33.

¹⁸¹ Eyal Benvenisti & Olga Frishman, 'National Courts and Interpretative Approaches to International Law: The Case Against Convergence' 17. (August 14, 2014) Interpretation of International Law by Domestic Courts, Helmut Philip Aust and Georg Nolte (eds) Oxford University Press. Available at SSRN: <<https://ssrn.com/abstract=2504988> > accessed 17 October 2019

¹⁸² Eyal Benvenisti & George W. Downs, 'Democratizing Courts: How National Courts Promote Democracy in Era of Global Governance' (2014) Vol.46 N.Y.U.J International Law & Policy 741, 769-770.

¹⁸³ IATA Annual Review 2019, < <https://www.iata.org/publications/Documents/iata-annual-review-2019.pdf> > accessed 24 July 2019

confirmed positively. To illustrate this assertion significant examples from the practice of aviation safety are given below.

The first example concerns the U.S. Federal Aviation Administration (FAA) which established the International Aviation Safety Assessment (IASA) programme¹⁸⁴ in August 1992. By this programme, FAA assesses the country's – not airlines' – commitments to SARPs. Therefore, state permits other State's authority to audit its commitments. The programme aims to ensure that all foreign air carriers that operate into or out of the U.S. are properly licensed and operate under the supervision (including safety oversight) of a competent Civil Aviation Authority (CAA) in accordance with SARPs. In 1994, the FAA decided to make IASA audits public.¹⁸⁵

Another example is the European Civil Aviation Conference (ECAC)¹⁸⁶ Safety Assessment of Foreign Aircraft) SAFA program which was active from 1996 to 2006. In 2004, EU Directive 2004/36/EC on 30 April 2004¹⁸⁷ came into force and as of 1 January 2007 the SAFA Programme was transferred to the authority of the European Community (EC) and responsibility for the management and further development of the EU SAFA Programme now falls on the European Commission, assisted by the European Aviation Safety Agency (EASA).¹⁸⁸

The scope and objective of the Directive were explained as follows:

Within the framework of the Community's overall strategy to establish and maintain a high uniform level of civil aviation safety in Europe, this Directive introduces a harmonised approach to the effective enforcement of international safety standards within the Community by harmonising the rules and procedures for ramp inspections of third-country aircraft landing at airports located in the Member States.¹⁸⁹

¹⁸⁴ U.S. Federal Aviation Administration, International Aviation Safety Assessments (IASA) Programme. Retrieved from <<http://www.faa.gov/about/initiatives/iasa/>> accessed 21 September 2019

¹⁸⁵ *ibid*

¹⁸⁶ European Civil Aviation Conference (ECAC) The ECAC SAFA (Safety Assessment of Foreign Aircraft) Programme <<https://www.ecac-ceac.org/safa-programme>> accessed 21 September 2019

¹⁸⁷ Council Directive 2004/36/CE of the European Parliament and of the Council of 21 April 2004 on the safety of third-country aircraft using Community airports, [2004] OJ, L 143/76 [Directive 2004/36/CE]

¹⁸⁸ European Civil Aviation Conference (ECAC) The ECAC SAFA (Safety Assessment of Foreign Aircraft) Programme <<https://www.ecac-ceac.org/safa-programme>> accessed 21 September 2019

¹⁸⁹ Official Journal of the European Union, Directive 2004/36/CE (2004) the European Parliament and of the Council of 21 April 2004 on the safety of third-country aircraft using Community airports. Retrieved from <<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32004L0036&from=EN>> accessed 21 September 2019

Accordingly, international safety standards are enforced within the Community by means of ramp inspection of third-country aircraft landing at airports located in EU member states. Directive 2004/36/EC on the safety of third-country aircraft using Community airports (the *SAFA Directive*) was published on 30 April 2004. EU member states are also obliged to take appropriate corrective measures as well as disseminating the results of these inspections to the other participants in the EC SAFA Programme.¹⁹⁰

These two programmes, IASA and SAFA, are examples of how nation-states allow external authorities oversight of their implementation of safety and security regulations, which is within the state sovereignty, to remain active in the global air transport market.

The Universal Safety Oversight Audit Programme (USOAP) (see Chapter IV) also allows the ICAO to assess and collect a database about the compliance level of states with safety standards. The ICAO, as an international organisation, has been granted power over contracting states to inspect and assess states' implementation of global aviation safety regulations. Milde explains why the ICAO holds this exceptional power:

There is no precedent in international practice that an international organisation would be granted the power of inspecting and assessing a State's implementation of certain obligations, instruct on the remedial action to be taken with the implied threat that non-implementation of the corrective action would lead to damaging public disclosure of the shortcomings.¹⁹¹

This indicates that domestic legal systems permit an external authority to determine whether the state is complying with safety measures. Thus, as Benvenisti asserted, 'with the permeability of the domestic legal system to external regulatory efforts, the assumption that international politics is unrelated to the domestic system has lost its force over the years'.¹⁹²

In fact, global markets and human rights developments have eroded the strict concept of sovereignty based on state territory. Accordingly, the concept of sovereignty has been transformed in such a way that globally common values prevail over traditional territorial sovereignty in global life.

¹⁹⁰ Md. Tanveer Ahmad, 'Achieving Global Safety in Civil Aviation- A Critical Analysis of Contemporary Safety Oversight Mechanisms' (2012) Volume XXXVII, *Annals of Air and Space Law*, 81, 94.

¹⁹¹ Michael Milde, 'International Air Law and ICAO' (2nd Edition ed. Eleven International Publishing 2102) ; Michael Milde, *International Air Law and ICAO* (Eleven International Publishing, 2008) 203.

¹⁹² Eyal Benvenisti, 'Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts' (April 2008) Vol.102, Issue 2, *American Journal of International Law*, 241,245.

Many scholars argue that the current state of human values does not follow states anymore. Among them, Waldron has argued that people's wellbeing, rather than state sovereignty should be governments' first concern. Waldron explains that 'the government is a trustee for its people's interests; ultimately international law is oriented to the wellbeing of human individuals rather than the freedom of states'¹⁹³ and that these people expect the state to act, not in the interests of national sovereignty, but for the sake of the people.¹⁹⁴ This is a version of the classic argument that in democratic regimes the state exists for the sake of its citizens. Waldron places individual citizens in the international realm and asserts that 'the same [the state exist for the sake of its citizens] is true in the international arena, where states are recognised by international law as trustees for the people committed to their care'.¹⁹⁵ This perspective changes the states' role in international law. States are not the only addressee of international law, but they are also addressees of international law as trustees for the people committed to their care.

Furthermore, in an interdependent world states have an obligation to take foreign stakeholders' interests, as well as the interests of their own citizens, into account in creating and implementing policies that might affect foreign interests.¹⁹⁶ Benvenisti asserts that states are trustees of humanity and that they also have certain duties towards non-citizens.¹⁹⁷ He explains that he uses 'trusteeship' as it is defined in Administrative Law, as something that 'determines the ends and modes to and in which the sovereign power shall be exercised.'¹⁹⁸

In the governance of global aviation safety states are responsible towards the citizen of other states as well as their own citizens. In other words, passengers from Canada have an interest in Turkey's compliance with safety standards when they travel from Toronto to Canada to Ankara. Hence Turkey has an obligation to comply with safety standards for Canadian citizens' interest as well.

¹⁹³ Jeremy Waldron, 'The Rule of International Law' (2006) Vol.30 No.1 Harvard Journal of Law & Public Policy 15

¹⁹⁴ 'These millions are the ones who are likely to suffer if the international order disrupted; they are the ones whose property is secure when international order is secure' *ibid* 24

¹⁹⁵ *ibid* 24

¹⁹⁶ Eyal Benvenisti & Olga Frishman, 'National Courts and Interpretative Approaches to International Law: The Case Against Convergence' (August 14, 2014) Interpretation of International Law by Domestic Courts, Helmut Philip Aust and Georg Nolte, eds, Oxford University Press. Available at SSRN: <<https://ssrn.com/abstract=2504988>> 17.

¹⁹⁷ Eyal Benvenisti, 'Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders' (2013) Vol. 7, Issue 2 American Journal of International Law, 295,314.

¹⁹⁸ Eyal Benvenisti, 'The Paradoxes of Sovereigns as Trustees of Humanity: Concluding Remarks' (2015) Vol.16, No.2 Theoretical Inquiries in Law, 535,544.

As the FAA and SAFA programmes demonstrate, states allow other states to audit their compliance with SARPs. States that share common global values and comply with them thus strengthen their standing in a global community.¹⁹⁹

These practices raise the question of whether national courts should limit their assessments of aviation safety in accordance with the scope of national legislation despite changes to the way in which state sovereignty is interpreted by national courts to restrict the application of international law to protect the national interest.

Frishman and Benvenisti adopt an approach of ‘sovereignty as a trusteeship of humanity’ for national courts which refers that national courts in their interpretation of international law need to take global interest into account.²⁰⁰

Generally, national courts are not motivated by the idea of globalism.²⁰¹ However, there are positive examples of national courts “giving weight to the trusteeship conception of sovereignty”²⁰² in their decisions.

The landmark decision of the Indian Supreme Court in *Novartis AG v. Union of India*²⁰³ provides an example of a national court standing up for “social and economic welfare for the masses”.²⁰⁴

The case dealt with the recognition of Swiss pharmaceutical company Novartis’s patent for Gleevec, a cancer drug, based on a new form of the molecule. The Supreme Court rejected the Novartis claim and stated that it

... strove to balance its obligations under the international [TRIPS Agreement] and its commitment to protect and promote public health considerations, not only of its

¹⁹⁹ Abram Chayes, Antonia Handler Chayes, *The New Sovereignty- Compliance with International Regulatory Agreements* (Harvard University Press.1995) 27.

²⁰⁰ Eyal Benvenisti & Olga Frishman, ‘National Courts and Interpretative Approaches to International Law: The Case Against Convergence’ (August 14, 2014) Interpretation of International Law by Domestic Courts, Helmut Philip Aust and Georg Nolte, eds, Oxford University Press. Available at SSRN: <<https://ssrn.com/abstract=2504988>> 17.

²⁰¹ Eyal Benvenisti & George W. Downs, ‘Democratizing Courts: How National Courts Promote Democracy in Era of Global Governance’ (2014) Vol.46 N.Y.U.J International Law & Policy 741,791.

²⁰² Paul Mertenskotter, ‘National Courts as Trustees of Humanity’ (2013) Vol.46 No.1 46 New York University Journal of International Law and Politics 291,331.

331

²⁰³ *Novartis AG v. Union of India* (2013) 6 SCC 1, Civil Appeal Nos. 2706-16 of 2013, with 2728 of 2013 and 2717-2727 of 2013 (Apr. 1, 2013).

²⁰⁴ Saby Ghosray, ‘3(d) View of India’s Patent Law: Social Justice Aspiration Meets Property Rights in *Novartis v. Union of India & Others*’ (2014) Vol.13 J. Marshall Rev. Intell. Prop. L. 719,738.

own people but in many other parts of the world (particularly in the Developing Countries and the Least Developed Countries).²⁰⁵

The Indian Supreme court judgement was welcomed by many of those who would be affected by medicines becoming more affordable in developing countries.²⁰⁶

Indeed, growing interaction in many areas creates complicated legal issues that territorial jurisdiction is losing its impact on the application of the law that national courts have to deal with. Berman states that 'local communities might feel the need to apply their norms to extraterritorial activities based simply on the local harms such activities cause, assertions of jurisdiction on this basis will almost inevitably tend toward a system of universal jurisdiction because so many activities will have effects far beyond their immediate geographical boundaries.'²⁰⁷

For instance, in the Emsland case²⁰⁸ from Germany, the German Federal Administrative Court (Bundesverwaltungsgericht [BverwG]) had to deal with an application by a Dutch citizen who was resident in the Netherlands for judicial review of the German authority's granting of permission for operation of a nuclear power plant in accordance with the German Atomic Energy Act.²⁰⁹ The judgement of the German Federal Administrative Court was delivered on December 17th, 1986²¹⁰ and stated that:

the principle of territoriality did not prohibit national courts from granting legal standing to foreigners. Moreover, the Court argued that the provisions of the Atomgesetz on the protection against the harmful effects of ionising radiation were

²⁰⁵ Paul Mertenskotter, 'National Courts as Trustees of Humanity' (2013) Vol.46 No.1 46 New York University Journal of International Law and Politics 291,332.

²⁰⁶ Access Campaign, Press Release (31 March 2013) 'Indian Supreme Court Delivers Verdict in Novartis Case' Dr Unni Karunakara, MSF International President. "This is a huge relief for the millions of patients and doctors in developing countries who depend on affordable medicines from India, and for treatment providers like MSF," <<https://www.msfaccess.org/about-us/media-room/press-releases/indian-supreme-court-delivers-verdict-novartis-case>> accessed 21 September 2019

²⁰⁷ Paul Schiff Berman, 'From International Law to Law of Globalisation' (2005) Vol.43, No.2, Columbia Journal of Transnational Law 485,530-531.

²⁰⁸ Erika de Wet, Holger Hestermeyer & Rüdiger Wolfrum, 'The Implementation of International Law in Germany, and South Africa' (Pretoria University Law Press 2015) 270-271.

²⁰⁹ 'The Atomic Energy Act includes the general national regulations for protective and preventive measures, radiation protection and the disposal of radioactive waste and irradiated fuel elements in Germany and is the basis for the associated ordinances.' Federal Ministry for the Environment, Nature Conservation and Nuclear Safety of Germany, 'Nuclear Safety/ Constitution and Laws' Retrieved from <<http://www.bmub.bund.de/en/topics/nuclear-safety-radiological-protection/nuclear-safety/legal-provisions-technical-rules/constitution-and-laws/>> accessed 21 September 2019

²¹⁰ Bundesverwaltungsgericht [BverwG] [Federal Administrative Court] Dec. 17, 1986, 75 Entscheidungen Des Bundesverwaltunggerichts [BVERwGE] 285, Neue Juristische Wochenschrift 1154, 1987 ("Klagebefugnis eines Ausländers gegen atomrechtliche Genehmigung")

not limited to the protection of the environment in Germany but also intended to implement Germany's "international obligations" not to cause harm to another state's environment.²¹¹

5.3.3 Global regulatory body v. external authority

The challenge arises for national courts in establishing the legitimacy of the international organisation as an external authority in the state's legal order. Generally, global aviation safety standards are adopted in national systems as 'regulations of external authority'. From a state perspective, the ICAO is an external authority. The 'external authority' definition of the ICAO might be challenged by invoking GAL theory and its approach to international organisations as global regulatory bodies.

It must be noted that the intention is not to weaken the position of states in globally governed fields such as civil aviation safety. Firstly, global governance is not just regulatory actions of global bodies with power over states, and it is not asserted that there is any world government of states. Secondly, state participation in the decision-making process means that the regulations emerging from the process might not be regarded as strictly external. GAL theory emphasises the involvement of nations in decision-making on global regulations.

In fact, states that participate in the decision-making process for global regulations also accept the obligations that derive from global regulations. States have an obligation to incorporate these regulations into their legal system. GAL theory addresses the obligations on national regulatory officials at both international level and domestic level. These obligations include decision-making at the international level and implementing global decisions in their home nation. Incorporation of transnational administrative legal norms into national legal systems is essential and requires more structural effort from nation-states. GAL theory emphasises that states have an obligation to reshape their national administrative structures to allow transnational implementation of global regulations. Sassen underlines the importance of the participation of states' institutions and citizens in global governance.²¹² This participation involves active negotiation and steering of discussions. Where states negotiate

²¹¹ Erika de Wet, Holger Hestermeyer & Rüdiger Wolfrum, *The Implementation of International Law in Germany, and South Africa* (Pretoria University Law Press 2015) 271.

²¹² Saskia Sassen, 'The Participation of States and Citizens in Global Governance' (2003, Winter) Vol.10, Issue 1, *Indiana Journal of Global Legal Studies*, 5

and are part of the decision-making process, they have an obligation to incorporate global regulations into their legal system.²¹³

Furthermore, GAL theory defines a so-called 'enmeshed' area where no distinction is made between domestic and global level in the decision-making process. It is asserted that the decision-making process starts at the global level and is concluded at the national level, with a decision or implementation of a global decision.²¹⁴ In the ICAO system decisions on aviation safety standards are adopted by subsidiary administrative bodies rather than by agreement between contracting states. Therefore, the obligations for the national regulatory officials are both on the international and domestic level. These obligations include decision-making at the international level and implementation of international decisions in their state.

In other words, states participate in decision making and accept the transfer of some of their sovereign power in certain fields to the global body. Thus, states willingly enable external authorities to exercise regulatory powers in those fields. In response to concerns about the legitimacy of global - and therefore external - regulatory authorities Sassen argued that 'by doing this [enabling external authorities to exercise regulatory powers], states leave more effectiveness and legitimacy to the global regulatory bodies'.²¹⁵ Furthermore, Sassen describes as 'denationalisation of particular state functions' that enhance the power of international organisation.²¹⁶ This perspective also applies to the global governance of civil aviation safety and emasculates arguments against applying global aviation safety standards in national courts that are based on the traditional concept of state sovereignty as 'exclusive sovereignty over the space above state territory'.²¹⁷

The ICAO is the only specialised UN organisation in the civil aviation field and its legislative function addresses not only international issues but also domestic civil aviation; it is global

²¹³ *ibid* 11 'negotiation entails the development of inside national states through legislative acts, court ruling, executive orders and policy. Therefore, the national system will transform its system in order to globalisation.

²¹⁴ Benedict Kingsbury, 'Introduction; Global Governance and Global Administrative Law in the International Legal Order' (2006) Vol.17, No.1 *The European Journal of International Law (EJIL)* 1,11.

²¹⁵ Saskia Sassen, 'The Participation of States and Citizens in Global Governance' (2003, Winter) Vol.10, Issue 1, *Indiana Journal of Global Legal Studies*, 5,13-15.

²¹⁶ *ibid* 15 'state feed the power of international organisations by denationalisation of particular state functions.'

²¹⁷ Convention On International Civil Aviation 1944 (Doc.7300) Article 1
<<https://www.icao.int/publications/pages/doc7300.aspx>> accessed 13 May 2019

and inter-governmental in nature.²¹⁸ Civil aviation safety standards issued by the ICAO no longer apply solely to international civil aviation, as the ICAO's responsibility is global.

'[T]his has vested ICAO with prima facie legitimacy to coordinate safety issues at the **global level for civil aviation**'²¹⁹

On the other hand, scholars in the civil aviation field like Havel argues that reform of the Chicago Convention (1944) system is needed to strengthen the ICAO and increase its responsibilities in relation to safety and orderly civil aviation globally.²²⁰ They include Wassenberg, who addressed the issue when commercial aviation started booming and suggested that the ICAO should be given more power to implement and enforce the SARP safety standards.²²¹ Onidi emphasised the developments that have taken place in aviation and clearly suggested that the ICAO's role needed to change.²²² He suggested that 'one of the key factors for the future of ICAO to become a world regulatory authority is focusing on its core business which are the technical and regulatory aspects of aviation in the areas of safety, security, ATM (Air Traffic Management) and the environment'.²²³

In fact, aviation safety is now addressed as a global rather than international issue, as the term "global" includes both the domestic and the international.²²⁴ Developments in the global air transport market and the variety of current air operations generated in response confirm that there is a need for a strong regulator to ensure safe civil aviation worldwide. The ICAO should be deemed to a global regulatory body rather than an external authority for the contracting states of the Chicago Convention (1944).

²¹⁸ Jiefang Huang, '*Aviation Safety through the Rule of Law; ICAO's Mechanisms and Practices*' (Kluwer Law International 2009) 227 ; See also Chapter III

²¹⁹ Jiefang Huang, '*Aviation Safety through the Rule of Law; ICAO's Mechanisms and Practices*' (Kluwer Law International 2009) 227. (emphasis added)

²²⁰ Brian Havel, '*Beyond Open Skies; A New Regime for International Aviation*' (Kluwer Law International 2009) Preface 5.

²²¹ Henri Wassenberg, 'Safety in Air Transportation and Market Entry' (1998) Vol.23, Issue 2, Air and Space Law, 75,81.

²²² Oliver Onidi, 'A Critical Perspective on ICAO' (2008, February) Vol. 33, Issue 1. Air & Space Law, 40,42.

²²³ *ibid*

²²⁴ 'ICAO is a specialised agency of the United Nations and is the only organization in the world in the field of civil aviation which is global and inter-governmental in nature.' Jiefang Huang, '*Aviation Safety through the Rule of Law; ICAO's Mechanisms and Practices*' (Kluwer Law International 2009) 227.

5.3.4 The publicness character of civil aviation safety

Fields that subject of global governance have an effect on states, private actors, institutions and individuals. One of the significant consequences of that we face today that, as a result of effects of global governance, national courts are engaging global issues that traditional path to apply international law in national courts not exactly responsive to contemporary legal issues.²²⁵

Traditionally, under the international legal order external authorities' regulations only acquire legitimacy through the consent of individual states and can only be invoked in national courts with the consent of the state, but this regime is no longer responsive to global activities.²²⁶ One of these global activities is global governance of aviation safety.

GAL theory attempts to depart from state consent-based international legal order and provides the notion of publicness as “an alternative baseline concept of legitimacy” that is embedded in the practice of law.²²⁷ In particular, the notion of publicness reflects the values that rooted but not imposed in global sectoral governance.²²⁸

In fact, in the contemporary world, national courts increasingly have to deal with issues that occur or originate in another jurisdiction, but traditional state consent-based international law does not provide effective guidance for national courts.²²⁹ One of the global issues with which national courts engage is safety standards set out in the SARPs of the ICAO.

Kingsbury addressed the role of national courts in global regulatory governance, reviewing both the acts of national bodies and international and transnational bodies that administer global governance.²³⁰ The focus of this study is on how national courts could appraise global aviation safety standards adopted by external institutions such as the ICAO and safety standards set out in SARPs.

²²⁵ Benedict Kingsbury, 'Weighing Global Regulatory Rules and Decisions in National Courts' (2009) Vol.2009 No.1 Acta Juridica 90,90.

²²⁶ Lorenzo Casini, 'Beyond drip-painting? Ten years of GAL and the emergence of global administration' (2015 April) Vol.13, Issue 2 International Journal of Constitutional Law 473,477.

²²⁷ Ming-Sung Kuo, 'Inter-Public Legality or post-Public Legitimacy? Global Governance and the Curious Case of Global Administrative Law as a New Paradigm of Law' (2012) Vol.10, Issue 4, International Journal of Constitutional Law, 1050,1062-1065. Retrieved from <<https://academic.oup.com/icon/article/10/4/1050/646205>> accessed 7 September 2019

²²⁸ *ibid* 1062

²²⁹ Benedict Kingsbury, 'Weighing Global Regulatory Rules and Decisions in National Courts' (2009) Vol.2009 No.1 Acta Juridica 90,92.

²³⁰ *ibid* 91

One of the approaches proposed by Kingsbury is that national courts should evaluate standards, rules or decision of global institutions whether or not they satisfy the publicness criteria.²³¹

In fact, the Chicago Convention regime, as an intergovernmental regime, is operationalised through national government agencies.²³² However, the ICAO's SARPs do not follow a uniform system, as Kingsbury asserts, 'their formal legal status varies depending on the topic and phrasing of the particular Standard and Recommended Practice'.²³³ However, aviation safety and standards that serve to establish and enhance aviation safety are an issue of global interest. The recipient of safety compliance 'is humanity as a whole'.²³⁴

Accordingly, each state has responsibility for oversight and enforcement of safety-related standards. This responsibility is owed towards all people potentially affected, not just the state's own citizens.

This approach to state oversight responsibility was underlined in the ICAO General Assembly. The resolution adopted at the 32nd Session of General Assembly in September 1998. Resolution A32-19 states that

Each State preserves its authority and responsibility to control operations of aircraft and to enforce safety and other regulations within its sovereign airspace.²³⁵

Furthermore, the "Safety Oversight Manual" clearly states that states are responsible for oversight of safety and control and supervision of all their aviation activities.²³⁶

State oversight responsibility is emphasised strongly in the Safety Management Annex, Annex 19. In today's global, liberalised air transport market in which an increasing number of air carriers operate in a competitive environment, the need to ensure the safety of civil aviation entails global coordination of states' efforts to establish safety management systems. Moreover, the standards that are contained in Annex 19 Safety Management to the Chicago

²³¹ *ibid* 90

²³² *ibid* 93

²³³ *ibid* 94

²³⁴ Md. Tanveer Ahmad, 'Achieving Global Safety in Civil Aviation- A Critical Analysis of Contemporary Safety Oversight Mechanisms' (2012) Volume XXXVII, *Annals of Air and Space Law*, 81,83-85. See fn.11

²³⁵ ICAO Resolutions Adopted at the 32nd Session of the Assembly (22 September – 2 October 1998) Provisional Edition < <https://www.icao.int/Meetings/AMC/MA/Assembly%2032nd%20Session/resolutions.pdf> > accessed 21 September 2019

²³⁶ ICAO Safety Oversight Manual (Doc 9734 AN/959) Second Edition 2006, <https://www.icao.int/WACAF/AFIRAN08_Doc/9734_parta_cons_en.pdf> accessed 21 September

Convention could demonstrate the application of the notion of publicness of SARPs in applying national courts.

The Safety Management Annex, Annex 19 is the first new ICAO Annex to be adopted in over 30 years, and it came into force on 14 November 2013.²³⁷

A particularly important aspect of Annex 19 is that it contains standards relating to the establishment of the State Safety Programme (SSP).²³⁸ According to the standard,

...each state shall establish an SSP for the management of safety in the State, in order to achieve an acceptable level of safety performance in civil aviation. The SSP include the components; State safety policy and objectives, State safety risk management; States safety assurance and State safety promotion.²³⁹

Moreover, under SSP each state is required, by the standard, to implement Safety Management Systems (SMS).²⁴⁰ In particular, Annex 19 emphasises the implementation of an SMS contained in the Safety Management Manual.²⁴¹ Three components of safety management are distinguished: coordination, performance and accountability.²⁴²

Coordination and performance are required to ensure global interoperability in global air transport, whereas ‘accountability ensures the implementation of the state management system worldwide’.²⁴³

Thus, safety oversight is a state responsibility. In the case of an air accident which could have been prevented by proper oversight of safety procedures, the state is accountable for the failure to provide proper oversight.

Two accidents illustrate how the notion of publicness can establish the legitimacy of state oversight responsibility before national courts. These accidents are referred to only to illustrate that it is possible to invoke the publicness criteria if a state has failed to exercise proper oversight of safety.

²³⁷ ICAO Annex 19 ‘ Safety Management’

<https://www.icao.int/safety/SafetyManagement/WebsiteDesignJuly2016/Flyer_US-Letter_ANB-ANNEX19-SM_2016-10-03.AP.pdf> accessed 21 September 2109

²³⁸ Captain John Illson , ‘Annex 19 SSP Coordination Meeting – Lima, Peru (23 April 2014) ICAO Air Navigation Bureau <https://www.icao.int/SAM/Documents/2014-SSPFLTDATA/5_lima%20Annex%2019%20rev%201.pdf> accessed 21 September 2019

²³⁹ Annex 19, Chapter 3, 3.1

²⁴⁰ *ibid* Chapter 3, 3.1.3

²⁴¹ *ibid* Chapter 4, (ICAO Safety Management Manual, Doc. 9859)

²⁴² Ruwantissa Abeyratne, ‘*Aviation and International Cooperation: Human and Public Policy Issues*’ (Kindle ed. Springer International Publishing 2015) Locations 7706 of 8499

²⁴³ *ibid* locations 7706 of 8499

The first air accident was on November 30th, 2007. An MD-83 aircraft belonging to Atlasjet (Flight # KK4203) was on route from Istanbul to Isparta and crashed 12 km from Isparta Airport, shortly before it was due to land. All the people on board (50 passengers and 7 crew members) were killed. After the air crash, the families of victims started legal action in the criminal court. On January 6th, 2015, after almost eight years of litigation, judgment was given by the 1st Assize Court of Isparta. Amongst others, the Court convicted high-ranking officials in the state civil aviation administration (DGCA, Director General Civil Aviation) on criminal charges of “misconduct in office” and sentenced them to one year and eight months in prison in accordance with the Turkish criminal code.²⁴⁴ The basis for the criminal charges was that the DGCA had given the aircraft permission to operate although it was not in an airworthy condition, a fact which was testified to by several formal investigations by DGCA technicians that had taken place before the accident.

The decision was appealed, and the Court of Appeal partly upheld the High Criminal Court’s decision. The Court of Appeals for the 12th Circuit upheld the conviction of high-ranking officials in the state civil aviation administration on the charge of “misconduct in office”.²⁴⁵

The importance of this tragic accident is that if the state civil aviation administration had not failed in its responsibility to oversee safety procedures the aircraft would not have been allowed to fly and those 57 lives would have been spared.

Another tragic air accident was that involving Air Asia flight QZ 8501. This was an international flight. On Sunday 28th December 2014 Air Asia flight QZ 8501 crashed into the Javan sea during a flight from Surabaya to Singapore. All 162 passengers and crew on board were killed.

Later it was revealed by the Indonesian Transport Ministry that the airline did not have authority to operate that route on Sundays.²⁴⁶ Basically, Air Asia flight QZ 8501 was unauthorised when the tragic accident occurred.

²⁴⁴Public Prosecution v. Aydın Kızıltan and others, File number 2009/117, Decision number 2015/1 (The 1st Assize Court of Isparta January 6, 2015)

²⁴⁵ Decision of Court of Appeal 12th Criminal Chamber, Decision Number 2016/3470 (Court of Appeal 12th Criminal Chamber March 7, 2016)

²⁴⁶ The Guardian, Jonathan Kaiman (Sun 28 Dec 2014) ‘AirAsia flight QZ8501: no distress call, no red flags and no sign of wreckage’ <https://www.theguardian.com/world/2014/dec/28/airasia-flight-qz8501-disappearance-chronology> ‘Flight QZ8501 took off from Juanda International Airport in Surabaya a little after 5:30 a.m. last Sunday. Just after 6:12 a.m., one of the pilots radioed air traffic control requesting permission to climb from

Once again, the accident could have been prevented if the aircraft had been prevented from taking off from Surabaya Airport and thus avoided the severe weather conditions that Sunday.²⁴⁷

It is noteworthy that air carrier liability issues, which are not within the scope of this study, are dealt with under the liability regime for private air carriers.²⁴⁸ However, under the safety management system, states are responsible for safety oversight. Therefore, it is the state which was responsible for oversight of flight QZ 8501.

In his analysis of state oversight responsibility of Air Asia flight QZ 8501 Abeyratne states that:

The ICAO Safety Oversight Manual states that accountability and responsibility is the state of being responsible for an undertaking, person, thing or action and for which an organization or individual or both are liable to be called to account. An ICAO Contracting State and its respective civil aviation authority are ultimately responsible for the implementation of ICAO SARPs within their State.²⁴⁹

When national courts deal with the kind of situation exemplified by these two air accidents the issue raises that how standards contained in Annexes to the Chicago Convention (1944) can be appraised by national courts. These are challenging issues for judges because of the

32,000 to 38,000 feet and turn left to avoid bad weather. Permission was given to turn but not to increase altitude. That was the last communication with the plane. At 6:18 a.m. it disappeared from radar.'

²⁴⁷ Ruwantissa Abeyratne, *Aviation and International Cooperation: Human and Public Policy Issues* (Kindle ed. Springer International Publishing 2015) Locations 7571 of 8489

²⁴⁸ *The Warsaw Convention (1929) Convention for the Unification of Certain Rules Relating to International Carriage by Air* Warsaw Convention was signed on 12 October 1929, came into force on 13 February 1933 ; *The Montreal Convention (1999) Convention for the Unification of Certain Rules for International Carriage by Air*, was signed on 28 May 1999, came into force on November 4th.

'The Warsaw Convention and later Montreal Convention have established unique system that as private legal regime effective directly on individuals and corporate persons. However, these Conventions did not establish supranational judicial body which contracting states of the conventions shall comply with liability regulations of the Convention within their territorial jurisdictions. Instead "private legal regime" was established through a "public international law treaty". And "enforcement" of the private legal regime was left to the legal systems of the contracting states' Havel, Brian F.; Sanchez, Gabriel S.. *The Principles and Practice of International Aviation Law* (p.257-258). Cambridge University Press. Kindle Edition.

²⁴⁹ Ruwantissa Abeyratne, *Aviation and International Cooperation: Human and Public Policy Issues* (Kindle ed. Springer International Publishing 2015) Location 7780 of 8499

lack of a clear path to follow. It is suggested that the GAL concept of publicness²⁵⁰ may help national courts with their evaluation.

Kingsbury stated that ‘publicness thus exists as a desideratum where there is democratic law.’²⁵¹ Accordingly, components of publicness are, in general, principles of public law, such as legality, rationality, proportionality, the rule of law and human rights.²⁵²

When national courts face the issue of accountability in cases such as the two described above, rather than focusing on the controlling law of that makes standards that address states oversight responsibility, courts could consider the legality of the standards within the concept of ICAO and the state’s participation to these standards.

This study asserts that safety standards meet the criteria for publicness. Even if a state fails to incorporate safety standards into domestic legislation, national courts can invoke the notion of publicness in order to take such standards into consideration. Thus, national courts that have to deal with such a situation might appraise the safety standards that address state responsibility regardless of their adoption into domestic legislation. States have a responsibility to implement and oversee standards for flight safety. The two accidents discussed above would have been prevented by proper state oversight of compliance with safety-related standards.

5.4 Looking ahead; Global judicial cooperation in global aviation safety

One of the challenges raised by the impact of globalisation is ‘the world’s legal culture’.²⁵³ The influence of the judgments of other national courts or supranational courts on national courts is increasing. Slaughter claims that ‘courts are talking to one another all over the world’.²⁵⁴

²⁵⁰ ‘By publicness is meant the claim made for law that it has been wrought by the whole society, by the public, and the connected claim that law addresses matters of concern to the society as such’ Benedict Kingsbury, ‘Weighing Global Regulatory Rules and Decisions in National Courts’ (2009) Vol.2009 No.1 Acta Juridica 90,114.

²⁵¹ *ibid* 114

²⁵² *ibid* 115

²⁵³ Charles H. Jr. Koch, ‘Judicial Dialogue or Legal Multiculturalism’ (2004) Vol.25 No.4 Michigan Journal of International Law 879,879.

²⁵⁴ Anne -Marie Slaughter, ‘A Typology of Transjudicial Communication’ (1994, December) Vol.29, Issue 1, University of Richmond Law Review 99,99.

This has been referred to as ‘transnational judicial globalisation’ by scholars like Waters.²⁵⁵ Cross-border issues that involve globally common values such as health, intellectual property, trade, finance, terrorism environment etc. have increasingly become the subject of legal conflicts before national courts. As a result of growing common values on these subjects, the judicial exchange has become inevitable.²⁵⁶ As Baudenbacher asserted ‘globalisation has led to a homogenization of legal problems and legal responses to those problems.’²⁵⁷

Waters has spoken of an ‘increasingly globalised legal world’ that challenges the traditional concepts of sovereignty and jurisdiction.²⁵⁸

It should be noted, however, that Slaughter’s arguments for judicial globalisation mostly refer to judicial communication rather than a “World Court”; they advocate a ‘dialogue between the adjudicative bodies of the world community’.²⁵⁹

Slaughter also asserts that this dialogue between adjudicative bodies is causing the emergence of a ‘vision of [a] global community of law’ rather than a global legal system.²⁶⁰ Although there are many structural differences between national courts a judicial dialogue²⁶¹ between courts ‘suggests the possibility of a relationship of collective deliberation on common legal problems’.²⁶²

Generally, two kinds of dialogue are referred to as “judicial dialogue”.²⁶³ One is meetings of a trans-judicial network, such as Global Judicial Institute for the Environment and the Judicial Reference Group (JRG)²⁶⁴ established by the UN High Commissioner, at which there

²⁵⁵ Melissa A. Waters, ‘Creeping Monism: The Judicial Trend toward Interpretive Incorporation of Human Rights Treaties’ (2007, April). Vol.107, Issue 3, Columbia Law Review, 628,643.

²⁵⁶ Justice Kathryn Neilson, ‘Judicial Globalisation’ - What impact in Canada?’ (2009, October 21) 8. Retrieved from <https://www.brandeis.edu/ethics/pdfs/internationaljustice/Judicial_Globalization_Neilson_Oct_2009.pdf> accessed 19 September 2019

²⁵⁷ Carl Baudenbacher, ‘Judicial Globalization: New Development or Old Wine in New Bottles’ (2003)Vol. 38, No.3 Texas International Law Journal 505,505.

²⁵⁸ Melissa A. Waters, ‘Creeping Monism: The Judicial Trend toward Interpretive Incorporation of Human Rights Treaties’(2007, April). Vol.107, Issue 3, Columbia Law Review, 628,697.

²⁵⁹ Anne-Marie Slaughter, ‘Judicial Globalisation’ (Summer 2000) Vol.40 Issue.4 , Virginia Journal of International Law 1103, 1113. ‘Judge Calabresi of the Second Circuit, *fn.41 In the matter of the Application of Euromopa, S.A., 51 F3d 1095 *2d Cir1995*’

²⁶⁰ *ibid* 1114

²⁶¹ Anne -Marie Slaughter, ‘A Typology of Transjudicial Communication’(1994, December) Vol.29, Issue 1, University of Richmond Law Review 99,100.

²⁶² *ibid* 101.

²⁶³ Melissa A. Waters, ‘Creeping Monism: The Judicial Trend toward Interpretive Incorporation of Human Rights Treaties’ (2007, April). Vol.107, Issue 3, Columbia Law Review, 628,643.

²⁶⁴ ‘The judicial members of the JRG were judges or former judges from courts of high authority in Argentina, Canada, Egypt, France, India, Israel, the Philippines, the Russian Federation, Samoa, South Africa, Switzerland, the United Kingdom, the United States and from Australia.’ Justice Michel Kirby, ‘Transnational Judicial

is an exchange of legal perspectives on global legal issues.²⁶⁵ The first meeting of the JRG was held in November 2007, with the aim of bringing judges from all regions together to discuss the engagement of national judiciaries on human right issues.²⁶⁶

Another form of judicial dialogue is the citation and discussion of case law, in particular by common law judges.²⁶⁷ The availability of comparative and international sources has increased dramatically with the rise of the Internet. Lexis Nexis and Westlaw and the World Legal Information Institute²⁶⁸ databases provide many records of case law and statutes.²⁶⁹

The motivation for developing judicial connections also derives from the demand for intergovernmental coordination of global governance. States need to act in line with global trends in certain fields in order to be part of the global harmony. Therefore, the necessity for 'inter-judicial coordination' arise for national courts to execute their common judicial review.²⁷⁰

Dialogue, Internationalisation of law and Australian Judges' (2008) Vol.9, Issue 1, Melbourne Journal of International Law, 177. Retrieved from <http://law.unimelb.edu.au/_data/assets/pdf_file/0006/1683186/Kirby.pdf> accessed 19 September 2019

²⁶⁵ 'judges from 15 different countries gathered in Brazil in April 2016 for the inauguration of the Global Judicial Institute for the Environment (GJIE) " with the mission of supporting the role of courts and tribunals in applying and enforcing environmental laws and in promoting the environmental rule of law and the fair distribution of environmental benefits and burdens.' Recognizing that judges play a critical role in responding to the pressing environmental crises Earth faces - such as biodiversity loss, climate change, and water security - the GJIE, as various national and international organizations, seeks to develop and enhance the capacity of judges to exercise their role in environmental matters through the effective implementation, compliance and enforcement of the law"

International Union for Conservation of Nature (IUCN) 'Judges Establish the Global Judicial Institute for the Environment' (08 Jul 2016) retrieved from <<https://www.iucn.org/news/world-commission-environmental-law/201607/judges-establish-global-judicial-institute-environment>> accessed 21 September 2019

²⁶⁶ UN Report of the United Nations High Commissioner for Human Rights General Assembly Official Records Sixty-third Session Supplement No. 36 (A63/36 2008) 12. <https://www.ohchr.org/jahia/webdav/shared/shared/mainsite/policy_and_research/un/63/A_63_36.pdf> accessed 24 September 2019

²⁶⁷ Melissa A. Waters, 'Creeping Monism: The Judicial Trend toward Interpretive Incorporation of Human Rights Treaties' (2007, April). Vol.107, Issue 3, Columbia Law Review, 628,643.

²⁶⁸ The World Legal Information Institute <<http://worldlii.org/>> accessed 21 September 2019

²⁶⁹ Justice Kathryn Neilson, 'Judicial Globalisation' - What impact in Canada?' (2009, October 21) 15-16. Retrieved from <https://www.brandeis.edu/ethics/pdfs/internationaljustice/Judicial_Globalization_Neilson_Oct_2009.pdf> accessed 19 September 2019

²⁷⁰ Eyal Benvenisti & George Downs, 2009. "Toward global checks and balances," (September 2009) Vol.20 Issue 3, Constitutional Political Economy, DOI: 10.1007/s10602-008-9071-3 , Page1. Retrieved from <https://www.researchgate.net/publication/225331224_Toward_global_checks_and_balances> accessed 24 September 2019

In civil aviation, for instance, many different domains, such as airports, immigration, air navigation service providers and counterterrorism measures, need to be regulated on the basis of intergovernmental cooperation²⁷¹ and intergovernmental cooperation requires global standards.

For instance, an emerging judicial dialogue has occurred in relation to counterterrorism measures. Benvenisti stated that:

includes courts from several other jurisdictions including France, Germany, Hong Kong, India, Israel and New Zealand. These courts explore the international obligations of their respective states, making references to the text of treaties on human rights and the laws of armed conflict, and to customary international law.²⁷²

Furthermore, he suggested that these court decisions have brought a new radical interpretation to ‘speak in one voice’ by pursuing one voice as well from their political bodies.²⁷³

However, because the concept of law to implement global regulations is still strictly national, global regulations do not yet contribute much to global justice.²⁷⁴

The issue is whether or not national courts will interpret global standards without reference to national government policies. Benvenisti argues that the motivation for national courts to apply global standards is that they:

seek to expand the space for domestic deliberation, strengthen the ability of national governments to withstand the pressure brought to bear by interest groups and powerful foreign governments, and insulate the national courts from intergovernmental pressures.²⁷⁵

On issues such as counterterrorism measures, environmental protection and immigration state cooperation with global standards could provide to state respectable statutes in the world

²⁷¹Ruwantissa Abeyratne, ‘The Role of International Civil Aviation Organisation (ICAO) in the Twenty First Century’ (2009) Vol. XXXIV, *Annals of Air and Space Law* 529,543.

²⁷² Eyal Benvenisti & George Downs, 2009. "Toward global checks and balances," (September 2009) Vol.20 Issue 3, *Constitutional Political Economy*, DOI: 10.1007/s10602-008-9071-3 , Page5 fn.44. Retrieved from <https://www.researchgate.net/publication/225331224_Toward_global_checks_and_balances > accessed 24 September 2019

²⁷³ Eyal Benvenisti, ‘Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts’ (April 2008) Vol.102, Issue 2, *American Journal of International Law*, 241,269.

²⁷⁴ Anne-Marie Slaughter, ‘Judicial Globalisation’ (Summer 2000) Vol.40 Issue.4 , *Virginia Journal of International Law* 1103,1103.

²⁷⁵ Eyal Benvenisti, ‘Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts’ (April 2008) Vol.102, Issue 2, *American Journal of International Law*, 241,242.

community. Therefore, in applying global standards, national courts are ultimately serving the national interest. Judge Sabharwal of the Supreme Court of India explained that the law needs to developed according to the need of changing life of society:

The Supreme Court must depart from traditional common law doctrines of tort law to address contemporary environmental hazards. Law has to grow in order to satisfy the needs of the fast-changing society and keep abreast with the economic developments taking place in the country. Law cannot afford to remain static. The Court cannot allow judicial thinking to be constricted by reference to the law as it prevails in England or in any other foreign country. Though the Court should be [open to enlightenment] from whatever source...it has to build up its own jurisprudence. It has to evolve new principles and lay down new norms which would adequately deal with the new problems which arise in a highly industrialized economy.²⁷⁶

Global organisations with their own law-making capacity are a new element in international life and fragmentation of international law is a subject of scholarly discussions. No global government sits above nation-states, and so an effective alternative system of checks and balances is needed.²⁷⁷ National courts are becoming more involved in global issues and relying more on global standards to achieve conformity with domestic law in their decisions. National courts need to take a “global approach” to global issues.²⁷⁸

This study asserts that national differences in the implementation of aviation safety standards could be reduced by establishing a “vision of a global aviation safety community of law” through judicial dialogue.

These developments in the global judicial dialogue are just a beginning. Clearly it is too early to conclude that judicial dialogue and the role of national courts as trustees for humanity constitute a common approach to global issues such as aviation safety. However, as GAL theory refers, national courts as part of global governance can develop an increasing common approach to the global issues in particular to global aviation safety. There is, therefore, enough reason to look ahead and hope for a common global judicial approach to aviation safety.

²⁷⁶ *ibid* 259 fn.80

²⁷⁷ *ibid* 271

²⁷⁸ Carl Baudenbacher, ‘Judicial Globalization: New Development or Old Wine in New Bottles’ (2003)Vol. 38, No.3 Texas International Law Journal 505,523.

CONCLUSION

Every day, millions of travellers use air transport as the fastest and safest way to travel. International civil aviation is a market now with global nature. Aviation safety is a concern of the whole world including states, governments air transport industry and individuals. Safety for civil aviation is the priority for all stakeholders in air transport; from states to airlines and passengers. Hence, aviation safety requires collaboration between states, air companies and international public and private organisations to provide safety standards globally. As a result of the global air transport market and also global regulatory environment developments for international civil aviation the concept of jurisdiction and sovereignty have changed from the concept that originally defined in Chicago Convention (1944).

The global aim of the ICAO is to enhance the uniformity of compliance with SARPs. However, the problem of the lack of state compliance with SARPs is clearly indicated in the ICAO's state oversight audit reports. The current international legal system and the customary international legal norms are not effective in practice to ensure state compliance with global aviation safety standards.

The idea behind this research is to critically question how individuals rely on the checks and balance system for the application of international aviation safety standards (SARPs) in states. The main motivation for the researcher to undertake this PhD dissertation was the observation of the weak position of individuals in legal proceedings after air accidents in which state compliance with international aviation safety standards was in question. Equally, another main motivation was the consideration of the effectiveness of these proceedings in national courts.

In terms of the methodological approach, the thesis has developed from the idea of GAL theory which challenges the traditional view according to which the subjects of international law are only states. From the perspective of the GAL theory, an administrative law-type mechanism for global governance could be more suited to govern the global aviation safety regime hence increasing its responsiveness. The research aimed to answer the question whether the administrative legal mechanisms suggested by GAL theory allow individuals to rely on global aviation safety standards set by the ICAO and established through SARPs before national courts.

To support this assertion, as a first step, in Chapter II, the current international legal system was analysed to indicate the shortcomings of the system on this particular subject. The examination of the historical background to public international aviation law demonstrated that the Convention on International Civil Aviation (Chicago Convention, 1944) emphasises states' exclusive sovereignty. It was established that the reason for the international community reaching such a strong consensus on the principle of exclusive state sovereignty originated in the impact of two world wars, World War I and World War II. However, the growth of connections and interdependence amongst nation-states has been transforming political, social, and economic life since 1944. Therefore, the literature on the changing concept of sovereignty has been reviewed from the perspective of globalisation. The two main findings relating to the current international legal system particularly emphasised that firstly, the concept of sovereignty in public international law is changing, and secondly the binding effect of standards and recommended practices (SARPs) on the contracting states of the Convention on International Civil Aviation - Chicago Convention (1944), that refers to customary international legal norms, has not been adequately applied. The shortcomings in compliance with aviation safety standards (SARPs) by states showed the diminishing effectiveness of traditional international legal norms. The reviewed literature supports the two main findings.

In light of the two findings, the research has concluded that the current international legal system for aviation safety does not sufficiently respond to contemporary realities. After this conclusion, the next step was to identify global developments in international civil aviation caused by air transport liberalisation, globalisation and advanced technology.

Air transport market developments, such as liberalisation, deregulation and their impacts on aviation safety, were explored in Chapter III. Driven by globalisation, rapid market developments in air transport led the air industry to find ways to build freer markets by innovation in civil aviation systems. However, developments in the aviation industry face, on the one hand, states' willingness to take their economic share and to respond to the demand in the air transport market, but, on the other hand, states' resistance to giving up control over their air transport activities and the bilateral agreements that are still common. Generally, the liberalisation of air markets and the contributions of Open Skies agreements to economic growth have changed governments' former restrictive policies to more liberal policies that encourage competition.

In line with one of the main aims, Chapter III of the dissertation has demonstrated that significant changes have occurred in the governance of international civil aviation since the 1944 governing treaty of International Civil Aviation–Chicago Convention entered into force, April 4, 1947.

However, the dissertation has underlined that air transport market developments have not been the creation of a strategic plan. The arguments suggested that developments in air transport driven by globalisation have not been strategically planned and cannot respond to all the issues that could possibly occur. One of the reasons why ways to do business in foreign markets were needed was that nationality restriction placed on air carriers needed to be avoided. Issues such as regard for individuals' right to demand safe flight operations and legal right to seek accountability have been missed in the development of the air transport market.

The regulatory involvement of various states in a single flight operation causes safety concerns. This is supported by the findings of the research indicated in Chapter III, showing that although the growth of emerging markets is faster than those of established markets, their compliance level with aviation safety standards is lower than the global average.

Furthermore, the analysis of the IATA and ICAO Safety Reports has clearly established a link between accident rate and regions and suggests that air accidents are more frequent in regions with developing countries and emerging markets. Chapter III of the dissertation concluded that aviation safety is a global concern and should be governed by equivalent standards worldwide. In line with global air transport market developments, aviation safety governance cannot only be applied domestically and internationally but globally. Global issues need global solutions. Safety in civil aviation is a global concern of all nations and their citizens. Therefore, demanding safety is an issue, regardless of whether it is at domestic or international level, of global concern.

Liberalisation and deregulation in air transport around the world have mainly focused on the policies and interests of the industry and of states. The research indicates that global air transport market developments are driven by restrictive or unrestrictive state policies towards the market and the respond of the industry to those state policies. However, one important aspect of air transport that has been neglected so far is the rights of consumers, especially passengers. The rights of air transport passengers should also be the focus of global

developments. Many issues can be considered as consumers' rights, but this study focuses on the right of passengers to demand safe air transport.

The issue is that although states' regulations and the air transport industry underline safety and security as a first priority, consumers' rights to demand and check state compliance with safety regulations have not been developed globally.

While the air transport market is being liberalised, the governing Convention, the Chicago Convention (1944), is still based on a state's exclusive sovereignty. The underlying issue is at this point that compliance with aviation safety has to be ensured globally, but it remains for individual states to implement safety standards.

Around the world, liberalisation will create more regional Open Skies agreements, which will allow countries to open their skies to foreign air carriers regardless of nationality rules. The air transport market domains such as IATA aims to have a market free from all restrictions.

This approach might be controversial from the consumer's perspective concerning state compliance with safety regulations. Taking into account the growth of air transport around the world, the air transport market has grown most in emerging and developing markets. In most developing countries, the application of basic human rights and democratic principles is still poor. States are opening their skies, by entering into multilateral or bilateral agreements to allow foreign airlines to operate, but passengers who use the air transport services are left with regulatory uncertainty in individual states if there is an incident or accident. In this regard, passengers do care about who owns the airline and which regulations apply regarding who is responsible and liable.

The question is whether or not the current system for the governance of global air transport safety responds to global developments with regard to passengers' rights. Moreover, whether the current system is sustainable, given the trend of lifting national restrictions and creating a freer global air transport market but confining passengers within the domestic legislation.

Global developments in civil aviation show that aviation safety is a concern all over the world. Leaving compliance with aviation safety standards as the responsibility of individual states is no longer working effectively for individuals. Individuals' rights should be developing in a way that is responsive to global developments in the air transport market. Discussions regarding liberalisation, privatisation and deregulation in air transport always underline safety as a paramount priority, and compromising safety and security is a risk to the

competitive air transport market created by liberalisation. However, individuals should also be granted legal rights to give them a strong position in relation to these risks and the right to demand safety and accountability in the national courts.

Although ICAO describes its mission as a ‘global forum’ of States for international civil aviation, ICAO should be more than a global forum for member states. ICAO needs to be restructured as a global regulatory body for civil aviation, setting aviation safety standards and governing civil aviation globally. Individuals should also gain a greater legal standing with respect to global regulations that have an immediate effect on them.

After identifying air industry market developments and the impact of these developments on civil aviation safety, the research explored administrative law- type mechanisms proposed by Global Administrative Law theory for globally governed fields such as civil aviation safety in Chapter IV. Chapter IV illustrated that global governance of aviation safety could serve as an example for the joint administrative action of international and national public power through multiple actors. It complies with the executive structure outlined in GAL theory.

It is clear that single states cannot regulate global aviation safety on their own or solely through state-to-state agreements anymore. Therefore, global governance needs to be characterised by legal terms that address global, rather than international, aviation safety issues. The current international regulatory system of civil aviation, which is based on the Chicago Convention (1944), has become outdated in addressing global developments in the air transport market. The current system of global aviation safety needs to be adjusted to address contemporary global developments.

One important finding of the research is that ICAO as an international organisation already mostly complies with global governance structure with its worldwide programmes. Especially of interest are the ICAO’s global aviation safety and universal safety oversight audit programmes to establish uniformity in global aviation safety regulations, which support the arguments regarding the global governance of global civil aviation safety.

The Chicago Convention (1944) was designed to regulate international civil aviation activities. However, since its formation, worldwide developments have led to the creation of universal aviation safety policies because single states cannot regulate global aviation safety on their own or solely through state-to-state agreements. The focus is to enhance uniformity among states in their compliance with global aviation safety regulations. Although the Chicago Convention (1944) is an international treaty that governs international civil aviation,

the contemporary activities of the ICAO have not been well defined in traditional international institutional law. Such activities of the ICAO which include universal audit programmes and aviation safety regulations have failed to be conceptualised in legal terms.

To this end, the research suggested that GAL theory might provide more practical legal theories for the current international aviation safety system. The governance of aviation safety is no longer limited by traditional international law approaches. Global governance needs to be characterised by legal terms that address global rather than international issues. In the daily practice of international institutions such as the ICAO, arguments over whether or not international institutions should use enforcement measures are no longer practical. The GAL theory promotes global regulatory systems that coordinate and manage compliance as opposed to the use of enforcement measures.

Chapter IV of the dissertation has illustrated that the governance of global aviation safety and the supervisory and regulatory activities of the ICAO mostly comply in practice with the administrative structure that GAL theory proposes. ICAO has been developing global projects which apply global collaboration among states. The governance of global aviation safety and the regulative and supervisory activities of the ICAO focus on the collaboration and cooperation of states rather than on traditional enforcement activities; this practice is more in line with the global governance to which GAL refers rather than with international administrative law. ICAO complies in practice with the administrative structure referred to by GAL theory for establishing legitimacy in national legal systems. Additionally, the ICAO's safety oversight and global aviation safety programmes, which aim to establish uniformity in global aviation safety regulations, support the global governance of global civil aviation safety.

Chapter IV concluded that ICAO, as global decision-making, largely satisfies administrative law principles, which include transparency, continuity, participation, as well as the right to review the fulfilment of worldwide governing authority on the national level. The research shows that ICAO has been developing in line with the administrative structure of GAL, but it has to develop further to serve the needs of those concerned by civil aviation safety.

After identifying the current international legal system regarding ensuring state compliance with Standards and Recommended Practices (SARPs) and absence of individuals within the system although state compliance with safety standards have a direct effect on individuals worldwide, the research further developed to indicate how the impact of air transport market

developments changed the aviation safety concept from international to global. The purpose of this analysis is to support the base for claiming to apply principles of administrative law type of mechanism for global governance of aviation safety. The reason for this goes back to the original idea which is to provide individuals and national courts to discuss state compliance with global aviation safety standards as part of the global administrative structure without restricted by state sovereignty issues.

In order to support this argument, the changing role of domestic courts was explored in Chapter V. Particularly, the impact of globalisation and human rights on national courts were underlined. Cases from different jurisdictions were discussed in order to illustrate the tendency of national courts to evolve common values. The analysis illustrated that the general approach of national courts to universal values is changing.

The notion of publicness that GAL theory suggests establishing common values endows national courts with a gateway to take common values into consideration. Cases, such as *Glenister*, supported the argument regarding the role of national courts in applying the publicness aspect of common values. Furthermore, the increasing judicial dialogue around the world was underlined. Although it is too early to claim that judicial dialogue and the role of national courts as trustees for humanity constitute a common approach to global issues such as aviation safety, there is a clear tendency among the national courts that give a hope for the future of developing a 'vision of a global aviation safety community of law' for the benefit of individuals. Decisions of national courts can establish precedents on the implementation of global aviation safety standards.

Therefore, the main research question 'would the administrative legal mechanisms suggested GAL theory allow national courts to apply aviation safety standards set by ICAO in SARPs' was answered positively.

Evidently the contemporary social and economic life is different from the time the public international law norms for aviation safety were established. The impacts of globalisation, liberalisation and deregulation on the air transport market are changing the market domains. The big industrial wheel is turning. While air companies ask for more freedom, states are seeking to receive economic benefits from the free air transport market developments. On the other hand, individuals are being affected by global market decisions, safety standards compliance and effective implementation of these standards by states - not only by their

states of nationality states but by all states - have no really effective power to be part of the check and balance system for the governance of aviation safety. This deficit can be overcome by national courts. National courts are the first institutions to which individuals can turn when the issue at stake relates to non-compliance with international regulations.

The impact of global regulations on individuals' daily life makes interpretation and enforcement of these regulations by national courts more important. By recognising individuals as addressees of the global regulatory regimes, Global Administrative Law (GAL) principles provide the possibility for individuals as part of global governance to challenge a state's implementation of global aviation safety regulations and compliance with them in national courts.

It is asserted in this research that proper checks and balances in global aviation safety can be improved by making them accessible in national courts to the individuals. Finally, establishing public awareness of global aviation safety standards will eventually create greater pressure on states to implement them.

Although overall the subject of the research is very broad and has links to many legal fields (from domestic laws to public international law, public international aviation law, international organisations law, international administrative law, global administrative law, global air transport market regulations), the research contributes to two fields in particular.

First is the public international aviation law, in particular, aviation safety. The governing treaty of international civil aviation, the Chicago Convention (1944), does not address individuals or passenger rights, rather it regulates states. This study shows a different perspective by addressing global governance for aviation safety. Therefore, it includes national courts and individuals as actors in global governance of aviation safety. Individuals can have a chance to raise questions about state compliance with global aviation safety standards that are regulated by SARPs in their national courts. This will eliminate the remoteness of individuals to globally regulated safety standards that affect them in their daily life.

Secondly, the study contributes to the emerging legal field of global administrative law. The study explores the applicability of GAL norms and principles, in particular in the field of civil aviation safety. The research explored the emerging legal theory, GAL, as a more responsive legal structure in addressing the issue of state compliance with global aviation safety

standards (SARPs), instead of assessing the issue within the limits of traditional public international law norms and principles. The reason for this is that the dynamics of life should not be ignored in developing the law.

In sum, the research concluded by responding positively to the question of whether the administrative legal mechanisms suggested by GAL theory allow individuals before national courts to apply global aviation safety standards set by the ICAO through SARPs. In this sense the research has made a contribution to the ongoing theoretical discussion among academics and practitioners of civil aviation safety concerning recent shifts modifications experienced in the system.

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APPENDICES

Appendix A Freedoms of the Air²⁷⁹

<p style="text-align: center;">First Freedom of the Air</p>	<p>the right or privilege, in respect of scheduled international air services, granted by one State to another State or States to fly across its territory without landing (also known as a <i>First Freedom Right</i>)</p>
<p style="text-align: center;">Second Freedom of the Air</p>	<p>the right or privilege, in respect of scheduled international air services, granted by one State to another State or States to land in its territory for non-traffic purposes (also known as a <i>Second Freedom Right</i>)</p>
<p style="text-align: center;">Third Freedom of The Air</p>	<p>the right or privilege, in respect of scheduled international air services, granted by one State to another State to put down, in the territory of the first State, traffic coming from the home State of the carrier (also known as a <i>Third Freedom Right</i>).</p>
<p style="text-align: center;">Fourth Freedom of The Air</p>	<p>the right or privilege, in respect of scheduled international air services, granted by one State to another State to take on, in the territory of the first State, traffic destined for the home State of the carrier (also known as a <i>Fourth Freedom Right</i>).</p>
<p style="text-align: center;">Fifth Freedom of The Air</p>	<p>the right or privilege, in respect of scheduled international air services, granted by one State to another State to put down and to take on, in the territory of the first State, traffic coming from or</p>

²⁷⁹ *Manual on the Regulation of International Air Transport* (Doc 9626, Part 4.1-8) <https://www.icao.int/Meetings/atconf6/Documents/Doc%209626_en.pdf>

	destined to a third State (also known as a <i>Fifth Freedom Right</i>).
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ICAO characterizes all "freedoms" beyond the Fifth as "so-called" because only the first five "freedoms" have been officially recognized as such by international treaty.

Sixth Freedom of The Air	the right or privilege, in respect of scheduled international air services, of transporting, via the home State of the carrier, traffic moving between two other States (also known as a <i>Sixth Freedom Right</i>). The so-called Sixth Freedom of the Air, unlike the first five freedoms, is not incorporated as such into any widely recognised air service agreements such as the " <i>Five Freedoms Agreement</i> "
Seventh Freedom of The Air	the right or privilege, in respect of scheduled international air services, granted by one State to another State, of transporting traffic between the territory of the granting State and any third State with no requirement to include on such operation any point in the territory of the recipient State, i.e the service need not connect to or be an extension of any service to/from the home State of the carrier.
Eighth Freedom of The Air	the right or privilege, in respect of scheduled international air services, of transporting cabotage traffic between two points in the territory of the granting State on a service which originates or terminates in the home country of the foreign carrier or (in connection with the so-called Seventh Freedom of the Air) outside the territory of the granting State (also known as a <i>Eighth Freedom Right</i> or " consecutive cabotage ")
<i>Ninth Freedom of The Air</i>	the right or privilege of transporting cabotage traffic of the granting State on a service performed entirely within the territory of the granting State (also known as a <i>Ninth Freedom Right</i> or " stand alone cabotage ")

Appendix B Multilateral/regional Agreements, Arrangements and Commitments for Liberalization²⁸⁰

Agreement/Arrangement	Year of Conclusion	Parties
AFRICA		
Yamoussoukro Declaration on a New African Air Transport Policy (commitments)	- Adopted on 7 Oct 1988 (by Transport Ministers); - Amended on 9 Sep 1994	All member States of AU
Yamoussoukro Decision (YD) Relating to the Implementation of the Yamoussoukro Declaration Concerning the Liberalization of Access to Air Transport Markets in Africa (Ministerial Decision) of the African Union (AU, then Organization of African Unity (OAU))	- Adopted on 14 Nov 1999 (by Transport Ministers); - Signed on 12 Jul 2000 (by Heads of State); - EIF on 12 Aug 2000 for 44 States who ratified Abuja Treaty	Algeria, Angola, Benin, Botswana, Burkina Faso, Burundi, Cameroon, Cape Verde, Central African Republic, Chad, Comoros, Dem. Rep. of the Congo, Congo, Cote D'Ivoire, Djibouti*, Egypt, Equatorial Guinea***, Eritrea**, Ethiopia, Gabon*, Gambia, Ghana, Guinea, Guinea Bissau, Kenya, Lesotho, Liberia, Libyan Arab Jamahiriya, Madagascar*, Malawi, Mali, Mauritania***, Mauritius (withdrew in 2004), Mozambique, Namibia, Niger, Nigeria, Rwanda, Sahrawi Arab Democratic Republic, Sao Tome and Principe, Senegal, Seychelles, Sierra Leone, Somalia*, South Africa***, Sudan, Swaziland***, Tanzania, Togo, Tunisia, Uganda, Zambia and Zimbabwe; [States with * mark did not ratify Abuja Treaty;

²⁸⁰ Overview of Regulatory and Industry Developments in International Air transport, Annex A Multilateral/Regional Agreements, Arrangements and Commitments for Liberalization by ICAO Secretariat, September 2016

http://www.icao.int/Meetings/a39/Documents/Overview_of_Regulatory_and_Industry_Developments_in_International_Air_Transport.pdf

		State with ** did not sign Abuja Treaty; States with *** mark ratified Abuja Treaty after 12 Aug 2000]
Common Market for Eastern and Southern Africa (COMESA) Air Transport Liberalisation Programme	<ul style="list-style-type: none"> - Adopted in May 1999 (Legal Notice No. 2 of 1999); - Phase I was applied on 1 Oct 1999; - Phase II was put in abeyance in December 2000 awaiting the Competition Regulations of 2004 and the Joined Competition Authority (JCA) of 2008 and its subsequent operationalization. 	Angola (withdrew from COMESA activities in 2006) *, Burundi, Comoros*, Dem. Rep. of the Congo*, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Libyan Arab Jamahiriya (became a member of COMESA on 3 Jun 2005) *, Madagascar, Malawi*, Mauritius*, Namibia (withdrew from COMESA on 2 May 2004) *, Rwanda, Seychelles*, Sudan, Swaziland*, Tanzania (withdrew from COMESA on 2 Sep 2000) *, Uganda, Zambia and Zimbabwe; [<i>States with * mark did not implement the programme</i>]
Agreement on Air Transport of the Economic and Monetary Community of Central Africa (CEMAC)	<ul style="list-style-type: none"> - Signed on 4 May 1999 - EIF on 25 Jun 1999 	Cameroon, Central African Republic, Republic of Congo, Gabon, Guinea, Tchad
Common Program on Air Transport of the West African Economic and Monetary Union (WAEMU)	<ul style="list-style-type: none"> - First package was adopted on 27 Jun 2002; - Second package was adopted on 18 Nov 2002; 	Benin, Burkina Faso, Cote D'Ivoire, Guinea Bissau, Mali, Niger, Senegal and Togo
Banjul Accord Group (BAG) Agreement	- Signed on 29 Jan 2004	Cape Verde, Gambia, Ghana, Guinea, Nigeria, Liberia and Sierra Leone
Multilateral Air Service Agreement (MASA) for the BAG	- Signed and provisional application on 29 Jan 2004	Cape Verde, Gambia, Ghana, Guinea, Liberia, Nigeria and Sierra Leone
Declaration on the Establishment of a Single African Air Transport Market	- Adopted on 31 Jan 2015 (Decl.1(XXIV))	All Member States of AU

(SAATM)		
Solemn Commitment by AU Member States to the Implementation of the YD towards the Establishment of a SAATM by 2017	- Adopted on 31 Jan 2015 (Commitment (XXIV))	Benin, Cape Verde, Congo Republic, Cote D'Ivoire, Egypt, Ethiopia, Kenya, Nigeria, Rwanda, South Africa, Zimbabwe, Ghana and Sierra Leone
AMERICA		
A decision on Integration of Air Transport of the Andean Community (CAN, then Andean Pact until 10 Mar 1996)	- Signed & EIF on 16 May 1991 (D297); - Amended on 17 Jun 1992 (D320) and 27 May 1994 (D360, D361); Consolidated on 4 May 2004 (D582)	Bolivia, Colombia, Ecuador, Peru (suspended its obligations under the liberalization program from 27 Aug 1992 to 30 Jul 1997) and Venezuela (withdrew in Apr 2006)
Multilateral Air Services Agreement (MASA) of the Caribbean Community (CARICOM)	- Signed on 6 Jul 1996; - EIF on 17 Nov 1998, initially for eight States	Antigua and Barbuda (EIF in 2001), Bahamas**, Barbados, Belize, Dominica, Grenada, Guyana, Haiti** (became a member of CARICOM in 2002), Jamaica**, Montserrat**, St. Kitts and Nevis, St. Lucia, St. Vincent & The Grenadines (EIF in 2009), Suriname* and Trinidad and Tobago; [States with * mark did not ratify MASA; States with ** mark neither signed nor ratified MASA]
Agreement on Sub-regional Air Services (Fortaleza Agreement) of the Southern Common Market (MERCOSUR)	- Signed on 17 Dec 1996; - EIF on 9 Apr 1999 initially for three States	Argentina (EIF on 16 Feb 2004), Bolivia, Brazil, Chile (EIF on 12 Dec 2000), Paraguay and Uruguay (EIF on 5 Jul 1999)
Air Transport Agreement among the Members States and Associate	- Concluded tentatively on 11 July 2003;	Antigua and Barbuda*, Bahamas*, Barbados, Belize, Colombia*, Costa

Members of the Association of Caribbean States (ACS)	<p>- Opened for signature on 14 Feb 2004;</p> <p>- EIF on 19 Sep 2008, initially for 8 States and two territories</p>	<p>Rica**, Cuba, Dominica*, Dominican Republic**, El Salvador*, Grenada*, Guatemala, Guyana*, Haiti**, Honduras*, Jamaica, Nicaragua**, Panama, Saint Kitts and Nevis*, Saint Lucia*, Saint Vincent/Grenadines*, Suriname, Trinidad and Tobago**, Mexico*, Venezuela, Guadeloupe/Guiana/Martinique (France)*, Aruba (Netherlands), Netherlands Antilles (Netherlands) and Turks and Caicos Islands (the UK, became an associate member of ACS in 2006)*; [States with * mark did not sign ATA; States with ** mark did not ratify ATA]</p>
ASIA and PACIFIC		
CLMV Multilateral Agreement on Air Services	<p>- Signed on 4 Dec 2003;</p>	<p>Cambodia, Lao People's Dem. Rep., Myanmar and Viet Nam [Proceeded by the Agreement on the Establishment of Sub regional Air Transport Cooperation of CLMV States, Signed & EIF on 14 Jan 1998]</p>
<p>Memorandum of Understanding on Expansion of Air Linkages (IMT-Growth Triangle)</p> <p>Memorandum of Understanding on Expansion of Air Linkages (BIMP-East ASEAN Growth Area (EAGA))</p>	<p>- Signed & EIF on 10 Apr 1995;</p> <p>- Amended on 4 Sep 1996, 12 Jan 2001 and 11 Aug 2006</p> <p>- Signed & EIF on 12 Jan 2007</p>	<p>Indonesia, Malaysia and Thailand</p> <p>- Brunei, Indonesia, Malaysia and Philippines</p>
Pacific Islands Air Services Agreement (PIASA) of the Pacific Islands Forum	<p>- Concluded tentatively on 30 Oct 2002; Opened for signature on 16</p>	<p>The Cook Islands, Fiji*, Kiribati, Micronesia*, Nauru, Niue, Palau*,</p>

	Aug 2003; EIF on 13 Oct 2007 initially for 6 States	Papua New Guinea, Marshall Islands*, Samoa, Solomon Islands, Tonga, Tuvalu, and Vanuatu; [States with * mark did not sign PIASA]
ASEAN Multilateral Agreement on Air Services	- Signed on 20 May 2009; - EIF on 13 Oct 2009	Brunei, Cambodia, Indonesia*, Lao People's Dem. Rep., Malaysia, Myanmar, Philippines*, Singapore, Thailand, Viet Nam ; States with * mark did not accept protocols 5 and 6, which provide for third, fourth and fifth freedoms between capital cities
ASEAN Multilateral Agreement on the Full Liberalisation of Air Freight Services	- Signed on 20 May 2009; - EIF on 13 Oct 2009	Brunei, Cambodia, Indonesia*, Lao People's Dem. Rep., Malaysia, Myanmar, Philippines, Singapore, Thailand, Viet Nam; [States with * mark did not ratify or accept protocols 1&2 providing 3,4,5 freedoms to either designated or unlimited air international airports, respectively]
ASEAN Multilateral Agreement on the Full Liberalisation of Passenger Air Services	- Signed 12 Nov 2010; - EIF 13 Jun 2011	Brunei, Cambodia*, Indonesia*, Lao People's Dem. Rep.*, Malaysia, Myanmar, Philippines, Singapore, Thailand, Viet Nam. (States with * mark neither ratified not accepted Protocols 1 & 2 which provide 3rd/4th and fifth freedoms, respectively, between secondary cities)
Air Transport Agreement between the ASEAN Member States and China	- Signed on 12 Nov 2010;	Brunei, Cambodia, Indonesia, Lao People's Dem. Rep. Malaysia,

		Myanmar, Philippines, Singapore, Thailand and Vietnam
EUROPE and NORTH ATLANTIC		
Single Aviation Market of the European Union (EU, then European Community until 31 Oct 1993)	<ul style="list-style-type: none"> - The first package was adopted on 14 Dec 1987 with EIF on 1 Jan 1988 (L374); the Second package was adopted on 24 Jul 1990 with EIF on 1 Nov 1990 (L217); and the Third package was adopted on 23 Jul 1992 with EIF on 1 Jan 1993; - Full implementation on 1 Apr 1997 (L240); - Simplifying and readjusting on 1 Nov 2008 (L293) 	<p>Austria*, Belgium, Bulgaria****, Croatia (EIF 1 Jul 2013), Cyprus***, Czech Republic ***, Denmark, Estonia***, Finland*, France, Germany, Greece, Hungary***, Ireland, Italy, Latvia***, Lithuania***, Luxemburg, Malta***, Netherlands, Poland***, Portugal, Romania****, Slovak Republic***, Slovenia***, Spain, Sweden** and United Kingdom; [States with * mark started to apply the third package under EEA agreement on 1 Jan 1994 and switched side from EFTA to EU on 1 Jan 1995; State with ** mark started to apply the second package (subsequently third package) under Agreement on Civil Aviation on 6 Jul 1992 and EEA agreement on 1 Jan 1994, and switched side from EFTA to EU on 1 Jan 1995, States with *** applied EIF on 1 May 2004, States with **** applied EIF on 1 Jan 2007]</p>
Agreement on the European Economic Area (EEA), Annex 13 Transport - Initialled on 22 Oct 1991; Signed on 2 May 1992;	<ul style="list-style-type: none"> - Adjusted on 17 Mar 1993 (Protocol to remove Switzerland); - EIF on 1 Jan 1994; Amended several times since 1994 	<p>Austria*, Belgium, Bulgaria***, Croatia ^, Cyprus** , Czech Republic**, Denmark, Estonia**, Finland*, France, Germany, Greece, Hungary**, Iceland, Ireland, Italy, Latvia**, Liechtenstein, Lithuania**, Luxembourg, Malta**, </p>

		Netherlands, Norway, Poland**, Portugal, Romania***, Slovak Republic**, Slovenia**, Spain, Sweden*, United Kingdom [States with * mark switched side within EEA from EFTA to EU on 1 Jan 1995; States with ** applied provisionally on 1 May 2004, EIF on 6 Dec 2005; States with **** applied provisionally on 1 Aug 2007, EIF 9 Nov 2011; States with ^ applied provisionally on 12 April 2014]
Agreement between the European Community and Swiss on Air Transport	- Agreed on 10 Dec 1998; Signed on 21 Jun 1999; EIF on 1 Jun 2002 (L114); amended on 25 Nov 2005 (L347) and 18 Oct 2006	European Union (then European Community) and Switzerland
Euro-Mediterranean Aviation Agreement with the EU	- Initialled on 14 Dec 2005; Signed & Provisional application on 12 Dec 2006 with Morocco, on 15 December 2010 with Jordan, and on 10 June 2013 with Israel.	All member States of EU and Morocco, subsequently with Jordan and Israel
Multilateral Agreement on the Establishment of A European Common Aviation Area (ECAA)	- Agreed on 20 Dec 2005; Signed on 9 Jun 2006; - A provisional application for some States in 2006-2007	All member States of EU, Albania, Bosnia and Herzegovina, Bulgaria*, Croatia**, The former Yugoslav Republic of Macedonia, Iceland, Montenegro, Norway, Romania*, Serbia and the United Nations Interim Administration Mission in Kosovo (UNMIK); [States with * mark became members of EU on 1 Jan 2007, States with ** mark became members of

		EU on 1 Jan 2013]
Agreement between the European Community and the West African Economic and Monetary Union on certain aspects of air services	- Signed 30 Nov 2009; - EIF pending	All member States of EU and the West African Monetary Union (Benin, Burkina Faso, Côte d'Ivoire, Guinea-Bissau, Mali, Niger, Senegal, Togo)
OTHER REGIONS		
Multilateral Agreement on the Liberalization of International Air Transportation (MALIAT, "Kona" agreement)	- Initialled on 2 Nov 2000; signed on 1 May 2001; - EIF on 21 Dec 2001; - Amended on 19 Apr 2004 (EIF on 27 Oct 2005)	Brunei*, Chile (signed on 5 Jan 2001; EIF on 9 Apr 2002; Protocol acceded on 7 Aug 2003, EIF on 10 Dec 2003) *, Cook Islands (acceded on 8 Mar 2006; EIF on 23 Jul 2006) *, Mongolia (acceded on 22 Aug 2007; EIF as cargo-only on 23 Feb 2008), New Zealand*, Peru (acceded on 21 Dec 2001, EIF on 17 May 2002, withdrew on 15 Jan 2005), Samoa (acceded on 4 Jul 2002; EIF on 9 Nov 2002), Singapore*, Tonga (acceded on 19 Sep 2003; EIF on 20 Jan 2004) and the United States; [States with * mark are the parties to Protocol]
Agreement on the Liberalization of Air Transport between the Arab States (Arab League)	- Opened for signature on 19 Dec 2004; - EIF on 18 Feb 2007 initially for five States	Algeria*, Bahrain, Egypt, Comoros*, Djibouti*, Iraq, Jordan, Kuwait*, Lebanon, Libyan Arab Jamahiriya*, Mauritania*, Morocco*, Oman, Palestine, Qatar*, Saudi Arabia*, Somalia, Sudan, Syria, Tunisia, United Arab Emirates* and Yemen; [States with * mark did not sign or ratify the agreement]
OTHER DOCUMENTS		

Eight Options for More Competitive Air Services with Fair and Equitable	<ul style="list-style-type: none"> - Agreed tentatively on 31 Oct 1995; Endorsed on 24 Jun 1997 (by Transport Ministers); - Supported on 19 Sep 1999 (by APEC Leaders); - Revised on 20 April 2004 	Australia, Brunei, Canada, Chile, China, Hong Kong SAR (China), Indonesia, Japan, Malaysia, Mexico, New Zealand, Papua New Guinea, Peru (acceded on 15 Nov 1998), Philippines, Republic of Korea, Russian Federation (acceded on 15 Nov 1998), Singapore, Chinese Taipei, Thailand, United States and Viet Nam (acceded on 15 Nov 1998)
Framework Agreement for the Integration of Priority Sectors (Sectoral Integration Protocol for Air Travel) of ASEAN (commitments)	<ul style="list-style-type: none"> - Signed on 29 Nov 2004; - EIF on 31 Aug 2005 	Brunei, Cambodia, Indonesia, Lao People's Dem. Rep., Malaysia, Myanmar, Philippines, Singapore, Thailand and Viet Nam
Declaration on The Sustainable Development of Air Transport in Africa: Key Milestones	<ul style="list-style-type: none"> - Adopted on 27 Mar 2015 	Participants of the Meeting on the Sustainable Development of Air Transport in Africa, held 25-27 March 2015 in Antananarivo, Madagascar
Statement on the Development of Air Transport in North America, Central America, the Caribbean and South America	<ul style="list-style-type: none"> - Adopted on 9 Oct 2014 	Participants of the ICAO Regional Air Transport Conference, held 7-9 October 2014 in Montego Bay, Jamaica
Declaration on The Development of Air Cargo in Africa: Key Milestones	<ul style="list-style-type: none"> - Adopted on 7 Aug 2014 	Participants of the First Meeting on Air Cargo Developments in Africa, held in Lomé, Togo, 5-7 August 2014
Status of the implementation on the establishment of the SAATM	<ul style="list-style-type: none"> - Jul 2016 	

Source: Texts of the agreements and aviation press

Updated: September 2016

Appendix C Global Alliances ²⁸¹

Alliance	Launch Date	Members
<p style="text-align: center;">STAR ALLIANCE</p> <p style="text-align: center;">(28 members Airlines)</p>	<p>May 1997</p>	<p>Air Canada, Lufthansa, SAS, Thai Airways International, and United Airlines (founded the Alliance in May 1997), Air New Zealand (March 1999), All Nippon Airways (October 1999), Austrian Airlines (with Lauda Air and Tyrolean Airways, March 2000), Singapore Airlines (April 2000), Asiana Airlines (March 2003), LOT Polish Airlines (October 2003), Adria Airways (December 2004), Croatia Airlines (December 2004), TAP Portugal (March 2005), Swiss (April 2006), South African Airways (April 2006), Air China (December 2007), Turkish Airlines (April 2008), EgyptAir (July 2008), Brussels Airlines (December 2009), Aegean Airlines (June 2010), Avianca (Jun 2012), Ethiopian Airlines (Dec 2011), Shenzhen Airlines (November 2012), Copa Airlines (June 2012), EVA Air (June 2013), Air India (Jul 2014), Avianca Brazil (July 2015).</p>
		<p>American Airlines, British Airways, Cathay Pacific Airways, Qantas (founded the alliance in February 1999), Iberia</p>

²⁸¹ Source : Overview of Regulatory and Industry Developments in international Air Transport , by ICAO Secretariat, September 2016, http://www.icao.int/Meetings/a39/Documents/Overview_of_Regulatory_and_Industry_Developments_in_International_Air_Transport.pdf p.17

<p style="text-align: center;">ONEWORLD</p> <p>(14 members airlines)</p>	<p style="text-align: center;">February 1999</p>	<p>(September 1999), Finnair (September 1999), Royal Jordanian (April 2007), Japan Airlines (April 2007), S7 Airlines (November 2010), Air Berlin (March 2012), Malaysian Airlines (February 2013), Qatar Airways (October 2012), SriLankan Airlines (May 2014), LATAM Airlines Group (March 2014).</p>
<p>SkyTeam</p> <p>(20 members airlines)</p>	<p style="text-align: center;">June 2000</p>	<p>Aeroméxico, Air France, Delta Airlines, Korean Air (founded the alliance in June 2000), CSA Czech Airlines (April 2001), Alitalia (July 2001), KLM Royal Dutch Airlines (September 2004), Aeroflot (April 2006), Air Europa (September 2007), Kenya Airways (September 2007), China Southern Airlines (November 2007), Vietnam Airlines (June 2010), Taron (June 2010), China Airlines (September 2011), China Eastern Airlines (June 2011), Middle East Airlines (February 2011), Saudia (May 2012), Xiamen Airlines (November 2012), Aerolíneas Argentinas (August 2012), Garuda Indonesia (March 2014)</p>

Appendix D **Eight Critical Element of a safety oversight system.** ²⁸²

ICAO Contracting States, in their effort to establish and implement an effective safety oversight system, need to consider the critical elements for safety oversight (CE). Critical elements are essentially the safety defence tools of a safety oversight system and are required for the effective implementation of safety-related policy and associated procedures. States are expected to implement safety oversight critical elements in a way that assumes the shared responsibility of the State and the aviation community. Critical elements of a safety oversight system encompass the whole spectrum of civil aviation activities, including areas such as aerodromes, air traffic control, communications, personnel licensing, flight operations, airworthiness of aircraft, accident/incident investigation, and transport of dangerous goods by air. The effective implementation of the CE is an indication of a State's capability for safety oversight.

ICAO has identified and defined the following critical elements of a State's safety oversight system:

Eight Critical Element (CE) of a safety oversight system

CE-1. Primary aviation legislation.	The provision of a comprehensive and effective aviation law consistent with the environment and complexity of the State's aviation activity and compliant with the requirements contained in the Convention on International Civil Aviation.
CE-3. State civil aviation system and safety oversight functions	The establishment of a Civil Aviation Authority (CAA) and/or other relevant authorities or government agencies, headed by a Chief Executive Officer, supported by the appropriate and adequate technical and non-technical staff and provided with adequate financial resources. The State authority must have stated safety regulatory functions, objectives and safety policies.

²⁸²ICAO Universal Safety Oversight Audit Programme Continuous Monitoring Approach Results (1 January 2013 to 31 December 2015) 11.
<https://www.icao.int/safety/CMAForum/Documents/USOAP_REPORT_2013-2016.pdf> accessed 24 July 2019

	<p>Note.— The term “State civil aviation system” is used in a generic sense to include all authorities with aviation safety oversight responsibility which may be established by the State as separate entities, such as: CAA, Airport Authorities, Air Traffic Service Authorities, Accident Investigation Authority, and Meteorological Authority.</p>
<p>CE-4. Technical personnel qualification and training</p>	<p>The establishment of minimum knowledge and experience requirements for the technical personnel performing safety oversight functions and the provision of appropriate training to maintain and enhance their competence at the desired level. The training should include initial and recurrent (periodic) training.</p>
<p>CE-5. Technical guidance, tools and the provision of safety-critical information</p>	<p>The provision of technical guidance (including processes and procedures), tools (including facilities and equipment) and safety-critical information, as applicable, to the technical personnel to enable them to perform their safety oversight functions in accordance with established requirements and in a standardized manner. In addition, this includes the provision of technical guidance by the oversight authority to the aviation industry on the implementation of applicable regulations and instructions.</p>
<p>CE-6. Licensing, certification, authorization and approval obligations.</p>	<p>The implementation of processes and procedures to ensure that personnel and organizations performing an aviation activity meet the established requirements before they are allowed to exercise the privileges of a licence, certificate, authorization and/or approval to conduct the relevant aviation activity.</p>
<p>CE-7. Surveillance obligations</p>	<p>The implementation of processes, such as inspections and audits, to proactively ensure that aviation licence, certificate, authorization and/or approval holders continue to meet the established requirements and function at the level of competency and safety required by the State to undertake an aviation-related activity for which they have been licensed, certified, authorized and/or approved to perform. This includes the surveillance of designated personnel who perform safety oversight functions on behalf of the CAA.</p>

CE-8. Resolution of safety concerns

The implementation of processes and procedures to resolve identified deficiencies impacting aviation safety, which may have been residing in the aviation system and have been detected by the regulatory authority or other appropriate bodies.

Note.— This would include the ability to analyse safety deficiencies, forward recommendations, support the resolution of identified deficiencies, as well as take enforcement action when appropriate.

