

# THE PHILOSOPHY OF INTERNATIONAL AVIATION LAW

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*“International Air Law” has been justifiably arrested in a straight-jacketed approach centred on the classical doctrines of state sovereignty and sources, which is in addition to a limiting classicism in IAL’s discourses, methods, and meanings. This Article problematizes the said classicism on account of its distancing, and often dissociating, IAL from the global realities in civil aviation. It proposes an alternative approach to read IAL including rechristening it as “International Aviation Law,” a new epistemological and disciplinary category, which has a modernist approach, and which stays close to the reality of functions in civil aviation. In making a case for IAvL, the Article primarily draws on many renewalist and radical thinking in international law and elsewhere mindful of the prevailing global and economic realities. Motivated by the same, the Article lets orthodoxies to fall for making ground for an epistemological revolution in the regulation of civil aviation. The Article organizes its critique and construction under four major heads: Sovereignty, Sources, Subjects, and Meanings.*

## I. INTRODUCTION: DEFINING THE EPISTEMOLOGY

“International Aviation Law” is not an epistemological category with a disciplinary status, either in public law or in private law.<sup>1</sup> But “International Air Law” (IAL)—the subject matter of which is akin to what we would refer to here and later on re-design it as International Aviation Law—is such a recognized category, in public law, although it is mostly public and partly private in nature.<sup>2</sup> Most often, IAL has also been seen to be losing its epistemological identity due to the more popular “Air and Space Law” combination, an epistemology that has as its base nothing more than the geographical separation between Airspace and Outer Space—the subject matter of “Air Law” and “Space Law”, respectively.<sup>3</sup> Notwithstanding that convenient-but-prevalent distortion, both the subject matter and the philosophy of IAL has been the subject of serious scholarly reflection.<sup>4</sup>

In a seminal exposition on the philosophy of IAL, R.I.R. Abeyratne holds that the sovereign rights of states over their territory, including airspace, are at the

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1. See generally R.I.R. Abeyratne, *The Philosophy of Air Law*, 37 AM. J. JURIS. 135 (1992).

2. See generally H. A. WASSENBERGH, *ASPECTS OF AIR LAW AND CIVIL AIR POLICY IN THE SEVENTIES* (1st ed. 1970).

3. See Welf Heinrich, *Air Law and Space*, 5 ST. LOUIS U. L.J. 11 (1958); see also Stanley B. Rosenfield, *Where Air Space Ends and Outer Space Begins*, 7 J. SPACE L. 137 (1979).

4. See, e.g., RUWANTISSA ABEYRATNE, *CONVENTION ON INTERNATIONAL CIVIL AVIATION: A COMMENTARY* (2013).

core of all imaginations on IAL.<sup>5</sup> This position creates the paradox that it is the very doctrine of state sovereignty, which makes states' territories impregnable bastions in exclusion of others, which becomes the foundation for air travel across countries. Despite this paradox, and the philosophical rigidity on the inviolability of state sovereignty, the Convention on International Civil Aviation, 1944 (hereinafter Chicago Convention) has created a framework by which states, in exercise of their absolute sovereign rights, can allow civil aviation within and over their territories. The Chicago Convention celebrates this paradox by affirming in its Article 1 that "every State has complete and exclusive sovereignty over the airspace above its territory," and then in the subsequent clauses provides a series of exceptions which states can create,<sup>6</sup> only to reinstate the sovereign power of states in Article 89 by laying down that "[i]n case of war, the provisions of this Convention shall not affect the freedom of action of any of the contracting States affected."<sup>7</sup>

Thus IAL, as any other specialized branch of Public International Law (hereinafter international law) is based on the doctrine of state sovereignty, letting the "principle of nationality" govern international civil aviation relations.<sup>8</sup> This sort of seclusion in the shell of sovereignty by subjecting an activity, which requires a pan-global approach and participation for its development, to extreme government control is due to the ontology of destruction in its World War origins.<sup>9</sup> Whatsoever, state sovereignty continues to be the foundation of IAL.

Although the Chicago Convention honours state sovereignty, and the practice of civil aviation has been continuous exercise of and constant experiments in state sovereignty, the doctrine has not been free of scepticism in the IAL circles. Such scepticisms range from the doctrine rendering Chicago Convention "political" rather than "economic" to the doctrine antithesizing liberalization.<sup>10</sup> The doctrine has also been criticized for foiling the modernist spirit of the aviation industry

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5. See Abeyratne, *supra* note 1. See generally H. A. WASSENBERGH, *POST-WAR INTERNATIONAL CIVIL AVIATION POLICY & THE LAW OF THE AIR* (2nd rev. ed. 1962).

6. Izabela Krasnicka, *66 Years of the Chicago Convention on International Civil Aviation - New Trends in the International Law of the Air*, 1 *ANNALS CONSTANTIN BRANCUSI U. TARGU JIU, JURIDICAL SCIS. SERIES* 193, 196 (2010).

7. On the scope of Article 89 and the extent of retention of state sovereignty, see Appeal Relating to the Jurisdiction of ICAO Council (India v. Pak.), Judgment, 1972 I.C.J. 46, ¶ 40 (Aug. 18).

8. Pablo M.J. Mendes de Leon, *De Lege Ferenda: Explanation and Application to Public International Air Law*, in *AIR AND SPACE LAW: DE LEGE FERENDA: ESSAYS IN HONOUR OF HENRI A. WASSENBERGH* 53, 56 (Tanja L. Masson Zwaan & Pablo M.J. Mendes de Leon eds., 1992).

9. See Sarah Jane Fox, *The Evolution of Aviation in Times of War and Peace: Blood, Tears, and Salvation*, 31 *INT'L J. WORLD PEACE* 49 (2014). For support, see Waqar H. Zaidi, *Aviation Will Either Destroy or Save Our Civilization: Proposals for the International Control of Aviation, 1920-45*, 46 *J. CONTEMP. HIST.* 150 (2011) (arguing that given the dangers of international anarchy, international aviation was best left regulated and institutionalized).

10. See, e.g., Mendes de Leon, *supra* note 8; Fox, *supra* note 9; see also Ruwantissa Abeyratne, *Role of Civil Aviation in Securing Peace*, 19 *INT'L J. WORLD PEACE* 53, 54 (2002).

and rendering the Chicago Convention *passé*.<sup>11</sup> However, in spite of many such modernist cries, IAL does not modify its philosophy or imaginations. This is obvious from some of the expositions in the textbooks on the area:

The fact that states can impose limitations on flights of foreign aircraft stems from the principle embodied in the Paris Convention, namely that each state has complete and exclusive Sovereignty over the airspace above its national territory. The fundamental rule has been taken over and sanctioned in the Chicago Convention.<sup>12</sup>

In international aviation the concept of sovereignty is the keystone upon which virtually all aviation law is founded. Long even before the Wright brothers' historic flight in 1903, tensions between nations regarding issues of sovereignty had emerged because of trans-national sorties of balloons.<sup>13</sup>

However, given the historical undertones of the expositions, IAL can be given the benefit of doubt of being the product of an era which longed for peace, primarily through sovereign safeguards. It was an era that could have only thought about aviation with the shudder at the memories of a war which volleyed bullets from the skies and at the trepidation of an impending aerial attack. In this climate of apprehension, states felt it their onus to safeguard their territories from aerial threats of all forms, be that an armed attack or espionage. Hence, they advocated for absolute sovereign rights over their airspace, a right that allowed states to control and regulate their airspace at the exclusion of others, unless states think otherwise in the interest of international air travel. Abeyratne, drawing on O.J. Lissitzyn, summarizes this sentiment succinctly that “each State has exclusive sovereignty over its airspace; each State has complete discretion as to the admission of any aircraft into its airspace.”<sup>14</sup> Adolf A. Berle, Chairman of U.S. Delegation to the Civil Aviation Conference, Chicago, 1944 adds a moral dimension to the respect of state sovereignty as he declares that “[t]he use of the air . . . is subject to the sovereignty of the nations over which it moves. Nations ought therefore to arrange among themselves for its use in that manner which will be of the greatest benefit to all humanity, wherever situated.”<sup>15</sup>

While the above said being the historical character and ontology of IAL, it is quite natural for IAL to preserve the said classicism, as Abeyratne observes, “[i]n international aviation the concept of sovereignty is the fundamental

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11. See S.G. Sreejith, *Legality of the Gulf Ban on Qatari Flight: State Sovereignty at Crossroads*, 43 AIR & SPACE L. 191 (2018).

12. See generally ISABELLA H.P. DIEDERIKS-VERSCHOOR, AN INTRODUCTION TO AIR LAW (2012).

13. See generally RONALD I. C BARTSCH, INTERNATIONAL AVIATION LAW: A PRACTICAL GUIDE (1st ed. 2012).

14. Abeyratne, *supra* note 10, at 73.

15. WASSENBERGH, *supra* note 5, at 11.

postulate upon which other norms and virtually all air law is based.”<sup>16</sup> Therefore, no matter how much revolutionary calls one makes for it, IAL has a discursive character that unfolds from state sovereignty. However, the progressive musings within IAL cannot be ignored either, as they evince a situational awareness and a temporal consciousness of being in liberal socio-economic conditions of cut-throat competition and dynamism. The existing epistemological framework of IAL does not have the space to provide for the discursive rationality of globalization. Reaffirming this position, Michael Milde writes, though on only focusing on one aspect of a much larger problem, “[t]he perspectives of the globalization of international trade make it apparent that the complex network of hundreds of un-coordinated bilateral agreements is an obstacle to liberalization of this economic activity.”<sup>17</sup> Milde further points out that international law not only creates any obstacle but also submits many possibilities thanks to the renewalist spirit and re-imaginings therein.<sup>18</sup> Hence, it is critically essential to transcend the limited epistemology of IAL, creating newer designs of knowledge and discursive patterns which have the potential to organize the governance of civil aviation. Accordingly, this Article advances a case for a new disciplinary category, International Aviation Law (IAvL).

In making a case of IAvL, we use, albeit only to some extent and for the purpose of critically appraising them, the historical legacy of IAL, its normative character, its doctrinal framework, and its reasoning. We, however, primarily draw on many renewalist and radical thinking in international law and elsewhere mindful of the prevailing industry, market, and socio-cultural realities. Motivated by the global realities and relying on the rationalist modernism of international law, we shatter orthodoxies to make ground for an epistemological revolution in the regulation of civil aviation. We organize our critique and construction under 4 major heads: Sovereignty, Sources, Subjects, and Meanings.

## II. SOVEREIGNTY

The concept of state sovereignty in IAL has a historical legacy, which entrenches the concept deeply and firmly in the discipline and in its application, respectively.<sup>19</sup> Post War anxieties played a huge role in resisting the pull of the analogies of free-seas and in negating absolute freedom of air, limiting the freedom of air to a simple “right of passage” through the airspaces of states.<sup>20</sup> This position of states led to the formulation of Article 1 of the Chicago Convention, which celebrates the absolute sovereign rights of states over their air spaces, which was nothing but the importation of the “overstrained” notion of

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16. Abeyratne, *supra* note 10.

17. MICHAEL MILDE, INTERNATIONAL AIR LAW AND ICAO 108 (2008).

18. *Id.*

19. On the historical legacy of the principle of state sovereignty in air law, see J. F. LYCKLAMA & NIJEHOLT, AIR SOVEREIGNTY (2013).

20. See D. Goedhuis, *Sovereignty and the Freedom in the Air Space*, 41 TRANSACTIONS GROTIUS SOC'Y 137, 141 (1955).

state sovereignty in its ontological originality and completeness.<sup>21</sup> D. Goedhuis points out that there was an “uncompromising insistence upon the right of unlimited sovereignty.”<sup>22</sup> However, he attributes that insistence to an ignorance of the potential social role of civil aviation and the public interest it would generate.<sup>23</sup>

The discourses in IAL, despite having civil aviation as their subject matter and dealing with the many potentialities of civil aviation, take a certain pride in adhering to the classical notion of sovereignty. However, in these discourses the paradox of the restrictiveness of state sovereignty against the need to transnationally organize civil aviation stays as subconscious influences, primarily arising from a disciplinary commitment to international law. The text below is indicative of said influence:

As our civilization is projected more and more into the Air Age, the navigable airspace will be increasingly utilized for daily concerns.

. . . .

There was . . . established a dual form of sovereignty, one which is basically “internal” in character, and the other “external” in effect. The several states reserved to themselves the power to regulate matters affecting their own people, but whenever those matters required action and treatment with other states or foreign nations, the national government was to exercise its “external” powers.<sup>24</sup>

Alexander Engvers’ exposition on the scope of state sovereignty in air further captures and illustrates said influence:

The formal eminence of the principle of sovereignty prohibits other states to have any rights in other air spaces than their own. *In practice*, the situation for the civil aviation is different. The more functional principle of sovereignty neutralizes the formal one. Without a system for cooperation between the states, international traffic would not be possible (emphasis added).<sup>25</sup>

IAL would not soon come out of this influence. The discipline’s claim of being a specialized branch of international law and the resulting commitment to the principles of the discipline only deepened the sense of respect for the doctrine of state sovereignty. Even when civil aviation expanded its scope globally, the

21. *Id.* at 144.

22. *Id.* at 150.

23. *Id.* at 150-51.

24. Madeline C. Dinu, *State Sovereignty in the Navigable Airspace*, 17 J. AIR L. & COM. 43, 44 (1950).

25. Alexander Engvers, *The Principle of Sovereignty in the Air: To What Extent Can It Be Upheld Against Ariel Intruders?* 20 (2001) (Master Thesis, University of Lund) (on file with University of Lund), Exjobb3.doc (lu.se) [<https://perma.cc/R7N3-UHYW>] (Swed.).

importance of state sovereignty only increased within the discipline as the said expansion was seen as a broadening of the domain of activity regulated by international law. However, the paradox of civil aviation being governed through the exceptions to the doctrine of absolute state sovereignty—e.g., prior consent, mutual agreement between states, and freedoms of air—also grew with the expansion of civil aviation.

However, the expansion of civil aviation led to a larger need to emphasise on the safety of aircraft. Accordingly, on 10<sup>th</sup> May 1984, the Assembly of the International Civil Aviation Organization (ICAO) amended the Chicago Convention by introducing Article 3 *bis*, which requires the states “to refrain from resorting to the use of weapons against civil aircraft in flight.”<sup>26</sup> Since this clause has the potential to regulate states’ exercise of absolute sovereignty over their airspaces, which could have been a matter of grave concern among the member states, Article 3 *bis* (b) conferred on the states the power to require an intercepting flight to land in their territory—of course, in exercise of the sovereignty of states. This sub clause also authorizes states to “resort to any appropriate means consistent with relevant rules of international law.”<sup>27</sup> Thus, the determination to look beyond the state sovereignty doctrine towards the safety of aircraft, despite the temporal relevance of the move and the modernism of thought, collapsed in the classical comforts of the sovereignty doctrine.<sup>28</sup> From an epistemological perspective, if at all Article 3 *bis* has to be given any credit, it should be for institutionalizing the earlier said paradox—now the paradox, is in the form of dichotomy between sovereignty and safety.<sup>29</sup>

During globalization, as international law underwent a revolutionary transformation in its form and substance, the doctrine of state sovereignty came under a scrutiny of relevance. In narrating the developments leading to the transformation of international law, Emmanuelle Jouannet notes, “the failure of classical liberal conceptions of liberty (and of sovereignty) became apparent and industrial and post-industrial capitalism increasingly gave rise to problems.”<sup>30</sup> One of the growing concerns was relating to the extent to which the inwardness of absolute state sovereignty can help to achieve global efficiency through interdependency.<sup>31</sup> This concern was particularly applicable to civil aviation, as globalization has broken the monopoly of state-ownership of airlines, which

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26. Convention on International Civil Aviation arts. 3 *bis*, Dec. 7, 1944, 15 U.N.T.S. 295 [hereinafter Chicago Convention].

27. *Id.*

28. See generally HIDEAKI SHINODA, RE-EXAMINING SOVEREIGNTY: FROM CLASSICAL THEORY TO THE GLOBAL AGE (2000); BEHIND AND BEYOND THE CHICAGO CONVENTION, THE EVOLUTION OF AERIAL SOVEREIGNTY (Pablo Mendes de Leon & Niall Buissing eds., 2019); Abeyratne, *supra* note 10.

29. Abeyratne, *supra* note 10, at 70-71.

30. Emmanuelle Jouannet, *What is the Use of International Law? International Law as a 21st Century Guardian of Welfare*, 28 MICH. J. INT'L L. 815, 826 (2007).

31. See Kyle Bagwell & Robert W. Staiger, *Domestic Policies National Sovereignty and International Economic Institutions*, 116 Q. J. ECON. 519 (2001) (U.K.).

prompted the states to abandon their operational policies meant to fulfil the prestige of national air carriers that was predicated on the classical sense of sovereignty, and respond to the demands of the market.<sup>32</sup> Globalization has brought the civil aviation industry within the context of liberal markets which necessitate open skies policies, interstate flights connecting global regions and cities, providing hubbing facilities, and greater exercise of the freedoms of air.<sup>33</sup> The major hindrance to the fulfilment of these requirements is the classical idea of absolute sovereignty of states, celebrated and glorified in the Chicago Convention.

The doctrine of absolute state sovereignty has been very restrictive in terms of what global society wants. Hence, use for sovereignty in globalizing conditions, according to Martti Koskenniemi, has been a way to express states' "disappointment" "about the diminishing spaces of collective re-imagining, creation, and transformation of individual and group identities."<sup>34</sup> These expressions of disappointment often take the form of invocation of sovereignty by states against "unavoidable necessities of a global modernity."<sup>35</sup> Many times, the cause of disappointment is less the mounting anxiety apropos of liberal capitalism and more the competitive advantage and market power of another state. The finest illustration of the same can be air blockades and similar protectionist and anticompetitive measures in the name of national security.

John H. Jackson, in submitting a modern idea of state sovereignty, tries to minimize causes of disappointment of states. He proposes a late-modernist understanding of the concept which he calls "horizontal allocation" of power (HAL).<sup>36</sup> HAL is a non-hierarchical, linear "functional division" of work by states among locally, regionally, and globally situated state and non-state actors.<sup>37</sup> HAL is in contradistinction to the vertical allocation of power—in the latter, states allocate the decision-making power to governmental actors through their "separation of powers" formula within the vertical of state. While that very well serves the pre-global models of public governance, globalization has transformed the socio-political terrain and structures. The internationalization of governance has invited the need for more rational models of decision-making.

The HAL model of sovereignty helps states to preserve their classical notion of sovereignty by which territories, population, people, decision-making etc. remain with the state. However, yet another dimension of the exercise of classical

32. On shifting state priorities in civil aviation, see Ken Button, *The Impacts of Globalisation on International Air Transport Activity: Past Trends and Future Perspectives* 7-8 (Global Forum on Transport and Environment in a Globalising World, Nov. 10-12, 2008), <https://www.oecd.org/greengrowth/greening-transport/41373470.pdf> [<https://perma.cc/WX7F-QWKB>].

33. *See id.*

34. Martti Koskenniemi, *What Use for Sovereignty Today?*, 1 *ASIAN J. INT'L L.* 60, 70 (2011).

35. *Id.*

36. John H. Jackson, *Sovereignty-Modern: A New Approach to an Outdated Concept*, 97 *AM. J. INT'L L.* 782, 791 (2003).

37. *Id.* at 794.

sovereignty alongside the above would be power allocation for optimizing global efficiency, especially of and through global institutions.<sup>38</sup> Under such power allocation, state remains the essential core from which power centrifugally flows to relevant actors while payoffs of such allocation, including efficient outcomes, centripetally moves towards the state and its constituents. In pursuit of said efficiency, states should change their perspectives, as power allocation does not hinge on the age-old concept of state consent which is voluntary submission of state to systems or voluntary granting of privileges to others. In another word, the passivity and disinclination often associated with consent is simply absent in HAL.<sup>39</sup> Rather, power-allocation is based on comparative functional advantage of each actor—governmental and non-governmental—performing the tasks they are best at performing. Such participation and performance thereof will be based on the principles of “interdependence,” accountability, and fairness.

In the context of IAL, so far there has been a rudimentary application of the principle of state sovereignty, which has allowed the states to race to the bottom by erecting blockades and imposing bans, including imposing unilateral trade sanctions.<sup>40</sup> Such rudimentary application of the doctrine will have the effect of market-impeding measures which in turn can affect public interest. Hence, IAvL should adopt a more rational approach to state sovereignty. Such a rational approach should not be limited to open skies policies and bilateral agreements—which are only liberal bestowal of state consent and particularized exercise of state sovereignty, respectively—but should also extend to frameworks of HAL. Further, rational approach entails a more policy-oriented approach, giving space for economic considerations as against normative practices.

Being at a time when international law experiences what Neil Walker calls, “sovereignty surplus”—that is, the surplus caused by the “recomposition, raising, rationing, reinforcement and reduction of sovereignty” in socio-political modernity—lingering concerns, if any, surrounding the re-contextualization of state sovereignty through HAL gets rationalized and addressed.<sup>41</sup> However, the

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38. *Id.* at 794-97.

39. However, consent can be “active and enthusiastic” while it can also be “passive and grudging.” On the various conceptual and functional imageries of consent, see Jonathan S. Davies, *Neoliberalism, Governance, and the Integral State 18* (Critical Governance Conference, University of Warwick, Dec. 13–14, 2010), [https://warwick.ac.uk/fac/soc/wbs/projects/orthodoxies/conference2010/papers/101219\\_davies\\_j.pdf](https://warwick.ac.uk/fac/soc/wbs/projects/orthodoxies/conference2010/papers/101219_davies_j.pdf) [<https://perma.cc/6YDH-S7G8>].

40. While in most commentaries and textbooks, authors have made a careful explanation of how civil aviation functions during wartime, specifically in the context of Article 89 of the Chicago Convention, often steering away from mentions of air blockades, bans, etc. *See, e.g.*, Abeyratne, *supra* note 1. Certain other authors have majorly looked at air blockades as an issue of politics and a practice under the larger customary law and principles, like trade sanctions. It has been emphasised to be a political concern of a state, merely within the larger exercise of its sovereignty. *See* K.A.D. Camara, *Costs of Sovereignty*, 107 W. VA. L. REV. 385, 411 (2005). *See generally* Michael N. Schmitt, *Aerial Blockades in Historical, Legal, and Practical Perspective*, 2 U.S. A.F. ACAD. J. LEGAL STUD. 21 (1991).

41. Neil Walker, *The Sovereignty Surplus*, 18 INT'L J. CONST. L. 370 (2020).



IAvL does not aim at transcending the classical sovereignty never to return to it again, but it believes in the interoperability or various meanings of sovereignty without giving the classical notion the doctrinal or functional prevalence over other meanings.

### III. SOURCES

Classical discourses on the sources of IAL are predicated on Article 38(1) of the Statute of the International Court of Justice,<sup>42</sup> although scholars of IAL have a much richer list to submit.<sup>43</sup> According to Paul Stephen Dempsey,

[T]he sources of Public International Air Law are: multilateral conventions; ICAO SARPs; bilateral agreements (e.g., traffic rights, safety, security); customary International Law; intergovernmental decisions and regulations (e.g., those of the European Union); national legislation and regulation; administrative practice and procedure; contracts (e.g., air carrier alliance agreements, airport agreements); judicial opinions; jurisprudence of courts interpreting all the above in cases and controversies brought before them.<sup>44</sup>

Additionally, according to Edward McWhinney,

The legal framework of international civil aviation is complex and variegated, consisting in part of a few multilateral conventions; in part, of a large number of bilateral treaties or agreements made between different countries; and in part of municipal, internal legal systems—both statutory and common. Beyond that, of course, the law of international civil aviation operates within general international law, including general customary international law to the extent that it has not been specifically departed from by treaty provisions.<sup>45</sup>

Most of the Scholars of IAL prefer to present the sources of IAL in this extensive fashion.<sup>46</sup> That is to say, by using Article 38(1) as a base, they develop the sources of IAL to range from multilateral and bilateral treaties to contracts between airline companies.<sup>47</sup> Literally, every potential domain of regulation in civil aviation is fitted into the scope of Article 38(1), which at times comes at the cost of normative clarity.<sup>48</sup> Perhaps one reason for this act of claiming inclusion

42. *See generally* Statute of the International Court of Justice, U.S.T.S. 993.

43. Edward McWhinney, *International Law and the Freedom of the Air—The Chicago Convention and the Future*, 1 RUTGERS-CAMDEN L.J. 229, 231 (1969).

44. PAUL STEPHEN DEMPSEY, *PUBLIC INTERNATIONAL AIR LAW* (2017).

45. McWhinney, *supra* note 43, at 231.

46. *See e.g.*, PABLO MENDIS DE LEON, *INTRODUCTION TO AIR LAW* (10th ed. 2017); *see* HUGH THRILWAY, *THE SOURCES OF INTERNATIONAL LAW* (2nd ed. 2019).

47. *STUDIES IN INTERNATIONAL AIR LAW: SELECTED WORKS OF BIN CHENG* 36 (Chia Jui Cheng ed., 2018).

48. The prominent example in this regard is the effort to stretch the scope of Customary

into Article 38(1) is the search for coherence and legitimacy. And beyond that? Perhaps, as Duncan Hollis formulates, out of the interpretative ambition to gain an extra legitimacy and a sense of justice to the application of what is deemed as law.<sup>49</sup>

Whatsoever, what is problematic with this approach is that it prioritizes certain sources over the other and leaves the rest to stay relevant and legitimate through certain hermeneutical functions. This concern can be refuted theoretically.<sup>50</sup> However, when domains of normativity assert influence due to historically conceived pre-eminence, many regulations in the sub-normative spaces get obscured irrespective of the latter's value in the domain. This is what happened to the many extended sources of IAL: they are uncomfortably placed within the normative ambit of Article 38(1) with no historically given legitimacy or normativity, except for the aspirations of scholars and an illusory sense of legitimacy.

We are less keen on undermining such aspirations or asserting the irrelevance of the extension of the sources in Article 38(1) to IAL. Rather, we advance a case for transcending the fixation of IAL with Article 38(1). As we earlier submitted a case for the revised approach to state sovereignty, which should become the bedrock for IAvL, we also submit a case for a revised approach to the sources of IAvL, which is less based on the historical normative conception of Article 38(1) and more on the liberal approach to the source doctrine in international law.

Pertinent in this regard is the thought that if state sovereignty is imagined beyond the core dimension of supreme state power, how relevant should be the classical source doctrine, which is based on the sovereign consent to be bound. It also invites all the postmodern critiques of source doctrine—of it being a positivistic dogma, of its putative formality, of its abstractedness, and of its “methodological pretensions”—into consideration.<sup>51</sup> One particularly noteworthy criticism is against the idea that the source doctrine in international law is meant to keep state's political preferences away from law. Although this “distancing” is professed unabashedly in positivist discourses, it cannot be true, as states always had political preferences, and they did keep them close to international law. Source doctrine, therefore, essentially provides a statement of the foundations of international law,<sup>52</sup> helps in the search for law,<sup>53</sup> and provides a sense of structure to international law.

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International Law For a detailed discourse on the scope of Article 38(1) in IAL, see generally DIEDERIKS-VERSCHOOR, *supra* note 12; BARTSCH, *supra* note 13.

49. Duncan B. Hollis, *Sources in Interpretation Theories*, in THE OXFORD HANDBOOK OF THE SOURCES OF INTERNATIONAL LAW 422 (Samantha Besson & Jean d'Aspremont eds., 2017).

50. See Michael Akehurst, *The Hierarchy of the Sources of International Law*, 47 BRIT. Y.B. INT'L L. 273 (1975).

51. On such critiques, see MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENTS 303-87 (2005).

52. *Id.* at 305.

53. Robert Y. Jennings, *What is International Law and How Do We Tell It When We See It?*, 19 INT'L LAW. 1033 (1985).

Therefore, the source doctrine in Article 38(1) is predominantly an *ex post facto* statement on international law that international law has been originating in a certain way—through treaties, custom, general principles, and often through judges and publicists. However, the doctrine captures the evolution of international law only until a certain historical point in time; but not beyond that. The shift in the socio-politic of the world towards a global society has changed the algorithm of international law that there are considerations at play in interstate relations which are beyond the theoretical and functional competency of Article 38(1).<sup>54</sup> The doctrine as it is now does not fully comprehend actual state behaviour.<sup>55</sup> Hence, as in the case of state sovereignty, there has to be a utility-based approach to the source doctrine which can accommodate the “liberal rationalism” that drives state behavior and help states (and non-state actors) accomplish their goals in areas of international relations.

This is precisely the demands of IAvL that the source doctrine shall have the scope to contain structures of regulation and control which govern civil aviation, rather than constraining behavior through a grid of normativity. But what is advanced herein is not a plea for deformalizing the source doctrine, but to blur, for the sake of tractability, the distinction between legal and non-legal or the legal and the new-legal. Such an approach will help scholars of IAL from strenuously stretching many of the actual means of control to get included in Article 38(1).

The regulation and organization of civil aviation primarily and predominantly are through the many international conventions (multilateral and bilateral), Standard and Recommended Practices (SARPs), and Standard Operating Procedures (SOP). International conventions—which are multilateral—establish the regime, lay down basic rules, and provide institutional mechanisms for settling and sometimes mediating disputes. And international conventions—which are bilateral—provide frameworks of mutuality. The Chicago Convention, 1944; the Tokyo Convention, 1963;<sup>56</sup> the Montreal Convention, 1971,<sup>57</sup> —all of them comfortably fit into the treaty family. The several unification conventions establishing the liability of carriers provide the design and methods of unification of national practices, e.g. the Warsaw Convention, 1929 and the Montreal Convention, 1999, and their supplementary conventions and protocols.<sup>58</sup> IAvL

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54. See MARTTI KOSKENNIEMI, *SOURCES OF INTERNATIONAL LAW* xi (2016).

The doctrine of the sources of international law is part and parcel of an abstraction-oriented formalism that finds it increasingly difficult to defend itself against the various ‘realist’ and policy-oriented styles of legal argument that form today’s diplomatic and doctrinal mainstream.

55. *Id.*

56. Convention on Offences and Certain Acts Committed on Board Aircraft, Sept. 14, 1963, 704 U.N.T.S. 220.

57. Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 17, 1971, 974 U.N.T.S. 178.

58. The Warsaw System comprises of the Convention for the Unification of Certain Rules for International Carriage by Air, 1929; the Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, 1955; Convention Supplementary to the

should find high utility in the functions of these conventions and be less concerned about them being international conventions as per Article 38(1)(a) or about their normativity. Why such an inattention to irrelevancies is recommended?

See the case of Montreal Agreement, 1966. It is an “agreement” which establishes a regime of absolute liability of the air carrier. This system was proposed in order to avoid the exorbitant expenses of accident-related litigation under a fault-based system which existed earlier. Cost-wise too, the fault-based system was found to be increasing the burden of airlines.<sup>59</sup> Hence, an absolute liability regime was proposed with an upper monetary limit through the Montreal Agreement, 1966. The Agreement, unlike the name suggests, is not an international convention, but a compromise formula which had the United States, then threatening a walk-out of the Warsaw system, continuing within the system.<sup>60</sup> As per the strict positivistic approach, Montreal Agreement is not international law. However, hardly there is any IAL scholar who prefers to keep the Montreal Agreement, 1966 out of their discourse. This is for the reason that the liability regime which exists today on air carrier’s liability is the imagination of the Montreal Agreement, 1966. It has a historical role and character which “underpins” the existing normal in law, although not by way of any patterned behavior of actors as in the case of norms.<sup>61</sup> The Agreement has become “a developmental story which helps to explain a concept or value or institution” which is indispensable for sustaining the normativity.<sup>62</sup> The narratives on the technologies of law-making practices, as in the case of Montreal Agreement, better inform and apply the existing law than objective normativity.<sup>63</sup> The Montreal Agreement, 1966 is thus a narrative framework which helps the law sustain its normativity. Remove the Agreement, IAL story becomes incomplete. Hence, IAvL has to reclaim the significance of Montreal Agreement, 1966 and

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Warsaw Convention for the Unification of Certain Rules for International Carriage by Air Performed by a Person other than the Contracting Carrier, 1961; the Montreal Agreement, 1966; Protocol to Amend the Convention for the Unification of Certain Rules for International Carriage by Air, 1971; Montreal Protocols, 1975; and the Convention for the Unification of Certain Rules for International Carriage by Air, 1999. For detailed discussions on these conventions, see generally DIEDERIKS-VERSCHOOR, *supra* note 12.

59. See generally Joseph N. Oner, *The Montreal Agreement and Enterprise Liability*, 33 J. AIR L. & COM. 603 (1967) (advancing the rationale for the regime of enterprise liability as against fault-based liability).

60. The Montreal Agreement was entered into between the Civil Aeronautical Board and “the air carriers operating passenger transport with a stopping place in the USA.” *The Postal History of ICAO: The Warsaw System on Air Carriers Liability*, ICAO, [https://applications.icao.int/postal-history/the\\_warsaw\\_system\\_on\\_air\\_carriers\\_liability.htm](https://applications.icao.int/postal-history/the_warsaw_system_on_air_carriers_liability.htm) [<https://perma.cc/7PLC-4NPA>].

61. Daniel Woolf, *Getting Back to Normal: On Normativity in History and Historiography*, 60 HIST. & THEORY 469, 469 (2021).

62. Maksymilian Del Mar, *Legal Norms and Normativity*, 27 OXFORD J. LEGAL STUD. 355, 360 (2007).

63. See *id.* at 364.

its likes and shall have a source doctrine which does not constrain functions and delimit law to the threshold of normativity.

Similarly, SARPs are integral part of IAL. Being standards, although they find place within the Chicago Convention, 1944 (as annexures) and have the institutional approval of ICAO, they are considered to be soft law “beyond the zone of normativity.”<sup>64</sup> In fact, it is SARPs which keep aviation law dynamic through their constant response to shifting geo-political and economic conditions, thereby effectively responding to public interest. SARPs prescribe “the limits of legal conduct [and] allow a certain margin of attainment within the bounds of reason.”<sup>65</sup> The global society characterized by unpredictability and disparate patterns of occurrences requires the “infusion of discretionary element into the legal requirement.”<sup>66</sup> Such facilitation being the real purpose of SARPs, evaluating them based on notions of legal normativity would be antithetical to the existential philosophy of IAL. Herein comes the relevance of IAvL.

As SARPs set standards, SOPs set the “rules of the game.” They are the functional inputs in civil aviation which coordinate behavior through a pre-set pattern of actions intending a preconceived outcome. To reimagine norms in international relations, Raymond Cohen points out that norms, to influence actor behavior, need not be actor-universal; rather they can be “partnership-specific” as SOPs are. That is to say, expediency and convenience, so long as they do not lead to disorderliness, can be the guide of action “to pursue internal welfare.”<sup>67</sup> In civil aviation, there is a heavy reliance on SOPs, all of which are oriented towards the outcomes of “safety.” Such SOPs exist at various levels of civil aviation ranging from airports to flights, for various functions ranging from security-check to baggage handling, and at various stages of the operations of the flight ranging from pre-flight procedures to landing and taxiing. These SOPs obtain orderliness in action and efficiency in outcomes in civil aviation.

Considering the role played by the controls and regulations at the sub-normative spaces, IAvL should be revolutionary enough to transcend the classical positivist obsession with normativity and the source doctrine. Modes of control must be decided based on the current realities and the preferences of states and other global actors. More states are finding “soft law” as a “design element” of international instruments and to have broader spaces to accommodate the rational self-interest of states.<sup>68</sup> The choice of soft law also increases compliance, as the states do not find the voluntarily chosen guidelines of self-regulation antithetical

64. BRIAN F. HAVEL & GABRIEL S. SANCHEZ, *PRINCIPLES AND PRACTICE OF INTERNATIONAL AVIATION LAW* 62-63 (2014).

65. On the margin of attainment, see Chicago Convention arts. 37-38 . Notes, *Standards in International Law*, 34 HARV. L. REV. 776, 776 (1921).

66. *Id.*

67. See Raymond Cohen, *Rules of the Game in International Politics*, 24 INT’L STUD. Q. 129, 130-31 (1980).

68. Andrew T. Guzman, *The Design of International Agreements*, 16 EUR. J. INT’L L. 579, 582-85 (2005); see also Kenneth Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT’L ORG. 421, 444 (2000).

to their interest and find them helpful in maximizing payoffs and achieving optimal outcomes.<sup>69</sup> It is in the backdrop of these developments that IAvL aims at a reimagination of the source doctrine comprised of International Conventions, SARPs, and SOPs—with a renewed understanding of norms and normativity. This perspective brings rules of the game like SOPs, which facilitate functions, to the centre of law, instead of pushing them to the peripheries.

#### IV. SUBJECTS

Although the theme “subjects of international law” has been a matter of focus in international law scholarship, subjects have received scant attention in IAL. Not only IAL but most of the specialized branches of international law also did not pay deserving attention to subjects, which could be due to the perception that epistemological questions are to be pursued within the parent discipline. The importance of focusing on subjects is primarily that subjects help specialised branches of law build their deontological foundations and positivistic character. It is through the rights and duties of subjects that law acquires the force of imperativeness—again a positivist credo.<sup>70</sup> Positivism also fictionalizes subjects to give them recognition as legal entities.<sup>71</sup> Even from a non-positivistic rational approach, subjects help determine self-interest—although a subject is not always the epicentre of self-interest—which must be pursued through the means of law. Whatsoever, focus on subjects, helps the branch of law to better explain the functions of its doctrines and their routine enactments in various social and legal contexts.

The conversations about subjects of international law beyond states became common only after globalization—a phenomenon that was preceded by the fall of orthodoxies and many previously held notions and determinisms. In the new mode of production, as states receded from the arena leaving it open for new global players, there felt a need to explain the status and role of global subjects in international law. According to Wolfgang Friedmann, there emerged various domains of function within international law, which classified subjects based on their functions to act in a particularized manner for the collective pursuit of “welfare”.<sup>72</sup> Although Friedmann’s logic is relevant, it is not fully applicable to the rise of new subjects in the wake of globalization. There are reasons and dynamics beyond Friedmann’s postulation.

In post-global law and legal scholarship, the concept of legal subject fell loose from its classical understanding of those bearing rights and duties. Before that, the deontology of law was the foundation of the relevance of the classical

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69. Guzman, *supra* note 68, at 584-85, 592; Abott & Snidal, *supra* note 68.

70. See *Subjects of International Law*, 35 *STUD. TRANSNAT'L LEGAL POL'Y* 61 (2003).

71. Problematising legal doctrines, for example, legal personality, due process and trademarks for their transcendental character. Cf. Felix Cohen, *Transcendental Nonsense and Functional Approach*, 35 *COLUM. L. REV.* 809 (1935).

72. See Wolfgang Friedmann, *The Changing Dimensions of International Law*, 62 *COLUM. L. REV.* 1147, 1162-65 (1962).

legal subject—e.g., parties, petitioner, citizen, and state, all imbued with rights and duties. There was an “objective coordination” of these subjects, as Georgios Del Vecchio articulates, in accordance with the ethical principles in law and the social morality of law.<sup>73</sup> The presence of these subjects in law, and their functions thereof, brought them to the public realm and, as Kristen Rundle refers to as “publicness”, sustained the subjecthood of the legal subject.<sup>74</sup> Private subjects, who although were functionaries in the realms of law, were not bearers of rights and duties. They, who were until then at the stage-left, the proverbial “periphery”—where they had a presence of silence as rightless and dutyless subjects—became “new voices”, and their voices became new perspectives. This revolution of representation and the presence of new voices and perspectives provides a more nuanced understanding of the functions of law, which helps break the dominance of the historically advantaged subjects of law, e.g. the state.

Particularly in the context of IAL, there were many subjects who, though functionaries, remained silent and devoid of perspectives in the larger-than-life presence of the state. Such subjects included pilot-in-command, co-pilot, cabin crew (safety officers), traffic controllers, air crash investigators, many employee union federations, and passengers. These functionaries, mostly present in the sub-normative landscape of IAL (e.g., the annexures of the Chicago Convention, SARPs, and SOPs), acted out the historically set agency of the state. But agency is perhaps a farfetched idea—is the relationship between the state and its functionaries a relationship of agency? Angelo Piero Sereni observes that,

Agency requires three parties: principal, agent, and the third party with whom the agent treats. It also requires a legal system by whose rules it is governed. For, being a legal phenomenon, agency can exist and produce its legal effects only within a legal system, i.e. international agency is governed by international law. Therefore, this relationship can exist only between parties recognized as subjects of international law. No international agency can be recognized where the alleged principal, agent or third party is not an international person.<sup>75</sup>

The functionaries in IAL do not act out any functions delegated by states. Sereni emphasizes that “international agency exists when a state empowers another to act for it in all, or almost all, its international relations.”<sup>76</sup> Functionaries do not perform any functions—international actions—delegated by states. If so, what is their legal status? Unfortunately, this question cannot be answered, as there is a fundamental problem with the classicist discourse of IAL, which has put in place a regime for states to engage in international relations in the domain of functions, in abject neglect of functionaries. From an international relations

73. Surya Prakash Sinha, *Why Has It Not Been Possible to Define Law*, 75 ARCHIVES FOR PHIL. L. & SOC. PHIL. 1, 5 (1989).

74. Kristen Rundle, *Legal Subjects and Judicial Persons: Developing Public Legal Theory through Fuller and Arndt*, 43 NETH. J. LEGAL PHIL. 212, 214 (2014).

75. Angelo Piero Sereni, *Agency in International Law*, 34 AM. J. INT'L L. 638, 639 (1940).

76. *Id.* at 640.

perspective, this is normal and must be so, as it establishes a regime for states to act out international relations while preserving their sovereignty. However, as seen from the modernism of safety replacing sovereignty as the core doctrine of IAL, and considering whether safety is what civil aviation aims for in the public interest, the discourse is seriously limiting. That is to say, the classicist discourse is motivated to preserve state sovereignty and hence sovereignty remains the base of all imaginations. Functionaries play their roles in the larger scheme of the state exercising its sovereign functions. They are silent, non-bearers of rights and have duties outside the jural correlative framework. Their phenomenology and performance are immaterial to be considered intrinsic to IAL.

However, IAvL proposes to create space for functionaries to get represented and speak. Their phenomenology must be studied in a cognitive framework such that their actions, emotions, dispositions, reasoning, and decision-making are understood as constituents of their performance and safety at large. Such an inclusion will help the roles and responsibilities of the functionaries—which are at present laid down in the sub-normative spaces like the Annexures of the Chicago Convention, in the notifications and guidelines of national civil aviation authorities, and in the operations manuals of airlines—to be in the juristic analytical eye such that the full potential of safety is realized.

By way of an illustration, let's take the case of pilots, a functionary in IAL. The only reference to pilots in the main body of the Chicago Convention is in Article 32 which deals with the licensing of pilots. Article 32, however, deals with the licensing of pilots through the license-issuing power of sovereign states, rather than as a measure of enhancing safety in civil aviation: “[t]he 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 licences issued or rendered valid by the State in which the aircraft is registered.”<sup>77</sup>

However, when licensing requirements of pilots are discussed in Annex 1 of the Convention, it speaks from the perspective of piloting skills and standards like licensing associated with it:

As long as air travel cannot do without pilots and other air and ground personnel, their competence, skills and training will remain the essential guarantee for efficient and safe operations. Adequate personnel training and licensing also instill confidence between States, leading to international recognition and acceptance of personnel qualifications and licences and greater trust in aviation on the part of the traveller.<sup>78</sup>

Despite this emphasis on safety and the potential role pilots could play in improving safety, the classicist discourse of IAL pushes the pilots to irrelevance by its preoccupation with the dogmatic understanding of subjects of international law.

The modernism of IAvL should not only let the functionaries be in focus, but also let their phenomenology be a matter of paramount consideration, as it is

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77. Chicago Convention, *supra* note 26, art. 32(a).

78. *Id.* annex I.



integral to their performance which in turn is integral to safety. IAvL should have room for safety-assurance frameworks like Crew Resource Management (CRM) which pays attention to the psychological and physiological conditions of the cockpit crew. Only a multidisciplinary approach towards safety would help break the dogmatism which limits states as the only subject of IAL in abject rejection of many functionaries who are safety professionals.

To illustrate this point further, the phenomenology of the pilot is unrepresented in the Chicago Convention, although Clause 2.4 of Annexure 2 (“Rules of the Air”) of the Convention recognizes that the “pilot-in-command of an aircraft shall have final authority as to the disposition of the aircraft while in command”.<sup>79</sup> This clause sets a psychological connection between the pilot and the plane—the human and the machine, the animate and the inanimate. This connection is crucial from a safety perspective such that there is due regard to the cognitive abilities of the pilot to understand the dispositions of the inanimate plane which has a certain “behaviour” driven by the laws of aeronautics. Moreover, the pilot is an “embodied ariel subject” whose reaction to high altitudes and unusual speeds and decision-making in such conditions should be subject to study from multidisciplinary perspectives.<sup>80</sup> Minus such perspectives, all legal affirmations of safety would be hollow semantics in regimes of normativity whereby the subjecthood of functionaries and their respective functions are outside the scope of legal imagination.

Pilot fatigue is another critical element endangering the safety of flights. The Chicago Convention is silent on this, although its annexes are not. Annex 6 requires airline operators to be mindful of pilot fatigue when making duty allocations of pilots, as fatigue could cause a loss of alertness which could fail decision-making in the cockpit. The Annex also provides detailed guidelines on fatigue management. Further, “[o]ver the last several decades, scientific knowledge about circadian physiology, fatigue, and performance decrements has confirmed that flight and duty practices have caused aviators to experience performance-impairing fatigue from sleep loss or deprivation”.<sup>81</sup> However, IAL does not have the stomach for such studies or concerns. Hence, considering their relevance for safety and for them to gain the necessary focus, IAvL should create discursual space for the phenomenology of pilots.

The creation of such spaces by way of disruption to classical IAL discourse is easier said than done. What is needed is a philosophical-linguistic approach—a Foucauldian model subjectivation of returning to the selfhood of subjects to discover layers and conditions of performativity for subjects.<sup>82</sup> However, unlike

79. Chicago Convention, *supra* note 26, Para 2.4, Chapter 2, Annex II.

80. See Peter Hobbins, *Unearthing Airspace: The Historical Phenomenology of Aviation Artefacts*, 37 AUSTRALASIAN HIST. ARCHEOLOGY 43, 48 (2019).

81. Temesha Evans-Davis, *Pilot Fatigue: Unresponsive Federal Aviation Regulations and Increasing Cockpit Technology Threaten to Rock the Nation’s Pilots to Sleep and Compromise Consumer Safety*, 65 J. AIR L. & COM. 567, 579 (2000).

82. For a concise expression on the scope and application of the idea of subjectivation, see Deborah Youdell, *Subjectivation and Performative Politics—Butler Thinking Althusser and*

a resistance to the politics of subordination (read as silence) which Foucault expects postmodern subjects to make, in the context of the subjectivation of functionaries, what is needed is a “critique” of existing discourses that have been limiting subjects to domains of unfreedom.<sup>83</sup> IAvL, it is hoped, will be the site of such critiques to take subject to their freedom.

#### V. MEANINGS

Meanings have been pivotal in the hermeneutics of law, particularly as means to unlock legislative intention and will. However, beyond that type and level of analysis, meanings have been associated primarily with the language and semiotics of law. In that scheme of things, meanings have been means of disseminating social and cultural values and often they act as epicentres of normativity. In the latter vein Jan M. Broekman and Larry Catá Backer comment on meanings that “[m]eanings flow, engender, and have their own genetics, durable and untouchable in their ever-changing shape. When creating meaning, lawyers tend to fixate the unfixable. The fixation of meaning seems a major component of their ideology.”<sup>84</sup>

Indeed, meanings make realities and outcomes by territorializing words in contexts. Territorialization is *fixation* which is a sense of truth about words. Territorialization is both a legislative and political process which sets a correlation of contexts and outcomes using the means of law. All human experiences of social facts that fall outside this correlation fail to generate meanings, no matter their social import and cultural relevance. It is such a territorialization of certain words and the meaning-generation thereof in IAL which this part problematizes.

One of the fixated and deeply territorialized expressions in IAL is SARPs. SARPs play an essential role in regulating civil aviation and helping it achieve its functional objectives. However, despite them being standards, their source is limited to the annexes of the Chicago Convention. This narrowness of meaning could be a corollary of the otherwise well-intentioned Article 37 of the Chicago Convention which aims to secure maximum “degree of uniformity in regulations, standards, procedures, and organization” to facilitate and improve air navigation and safety.<sup>85</sup> Indeed, standards were seen as a means to greater safety, as they had the potential to “harmoniz[e] . . . conflicting interests and disparate economic potential” of the ICAO member states.<sup>86</sup> However, Article 37 also gave the mandate of setting, and amending from time to time, such standards to ICAO which has set ICAO’s exclusivity over the term SARPs and the SARPs-making

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*Foucault: Intelligibility Agency and the Raced-Nationed-Regioned Subjects of Education*, 27 BRIT. J. SOCIO. EDUC. 511 (2006).

83. *Id.*

84. Jan M. Broekman & Larry Catá Backer, *Semiotics in a New Key*, in *Signs in Law: A Source Book* 395, 405 (Jan M. Broekman & Larry Catá Backer, eds., 2015).

85. Chicago Convention, *supra* note 26, art.37

86. MILDE, *supra* note 17, at 165.

process.

But did Article 37 give such an exclusivity to ICAO and thereby limit the scope of SARPs to only ICAO-made standards? If we examine things semantically, and a bit semiotically, as they are in Article 37, there is a semantic precedence (in the discursive order of things) to the relevance of standards/SARPs. Article 37, in its operative part, simply states that SARPs can take a safe way forward—it is a declaratory statement on the potential role of SARPs. The meaning from here can go in any direction towards standards of all forms which can fulfil the objectives of Article 37. However, since Article 37 further gives ICAO the mandate to set such standards (“[t]o this end the International Civil Aviation Organization shall adopt and amend from time to time, as may be necessary, international standards and recommended practices,”)<sup>87</sup> it becomes a single unit of discourse, giving the discourse a unidirectionality towards ICAO and a meaning of its own in the ICAO’s functional and standards-making context.<sup>88</sup> In other words, there is a mnemonic construction in Article 37 that integrates the “communicative part” with the “coordinative part,” which has unified the discourse and limited its discursive context.

IAL, perhaps unconsciously, has been responsible to a certain extent in unifying the said discourse and putting it on a unidirectionality. An explanation for this is in order. Discussions on Article 37 in IAL generally surround the normativity, and compliance thereof, of SARPs. And when it comes to asserting the normative force of SARPs, in a positivist vein, reference is often made to the institutional character and law-making powers of ICAO and the normative impact of the Chicago Convention.<sup>89</sup> For example, a scholar, reflecting on the self-contained regime character of the Chicago Convention, asserts that “Article 37 requires States to undertake positive actions, i.e. give effect to SARPs, which is the *conditio sine qua non* to reach the very objectives of the treaty. Therefore, the primary duty that Article 37 calls for is an obligation of compliance.”<sup>90</sup>

The reason why SARPs demand such level of compliance, according to IAL, is primarily that compliance with SARPs is a treaty obligation and secondarily that SARPs are formulated and issued by a specialized agency of the United

87. Chicago Convention, *supra* note 26, art.37.

88. BERNARD S. JACKSON, SEMIOTICS AND LEGAL THEORY 12 (1987). *See generally* Debra Ziegeler, *Redefining Unidirectionality: Is there Life After Modality?*, in UP AND DOWN THE CLINE: THE NATURE OF GRAMMATICALIZATION 115 (Olga Fischer, Muriel Norde, & Harry Perridon eds., 2004).

89. *But see, e.g.*, Ruwantissa Abeyratne, *The Legal Effect of ICAO Decisions and Empowerment of ICAO by Contracting States*, 32 ANNALS AIR & SPACE L. 517 (2007); R.I.R. Abeyratne, *ICAO’s Strategic Action Plan: A Legal Analysis*, 45 ZEITSCHRIFT FÜR LUFT- UND WELTRAUMRECHT [ZLW] 231, 236-38 (1996); Paul Stephen Dempsey, *Compliance and Enforcement in International Law: Achieving Global Uniformity in Aviation Safety*, 30 N.C. J. INT’L L. 2, 13-19 (2004).

90. Ermanno Napolitano, *The Chicago Convention as a Self-Contained Regime*, 43 ANNALS AIR & SPACE L. 55, 71 (2018).

Nations.<sup>91</sup> While the normativity of SARPs is yet to be uncritically established, there has been greater emphasis on ICAO's standards-making power. This emphasis has limited the scope of SARPs to ICAO-made SARPs, as they are formulated in and through the annexes of the Chicago Convention in complete exclusion of other potential and relevant sources of SARPs.

Interestingly, IAL is conscious of the safety dimension of SARPs. This dimension is acknowledged in Article 37 and in the many discourses around Article 37. According to Francesco Giovanni Albissini, it is the ability of standards to create "uniformity" that makes SARPs relevant for safety.<sup>92</sup> Uniformity is hence the core value of standards as well as of recommended practices.<sup>93</sup> If that is the case, why did IAL not explore the potential of other sources that can generate uniform standards? The answer is because IAL has a classicism of imagination built in it, a classicism which associates itself to legal authority—norms, doctrines, rules, and institutions. However, when IAL transcends to IAvL through an epistemological revolution, the classicism would give way to the modernism of regulations which do not hanker for legitimacy in formal structures of legal and political power.<sup>94</sup> This approach makes standards set by many actors, including federations and consortiums in the aviation sector, relevant.

Standards are often issued in the form of guidelines by national civil aviation agencies (e.g., the FAA), the International Federation of Airline Pilots Association (IFALPA), the International Federation of Air Traffic Controllers Association (IFATCA), the International Air Transport Association (IATA), and, most importantly, in the form of recommendations in the reports of the air crash investigations conducted by investigating agencies (e.g., the NTSB), and sometimes as national legislations on civil aviation. These guidelines are often voices from the frontline which represent the pulses of function. Many times, they become inputs for ICAO's SARPs-making function. However, for relevant standards from the above sources, even if considered relevant by ICAO for becoming SARPs, they have to go through the time-consuming and laborious institutional process of ICAO.— This process includes scrutiny and analysis by Air Navigation Commission, deliberations within technical groups, expert reviews, institutional reviews, voting, adoption, and publication.<sup>95</sup> All the decisions within the said process are made on a consensual basis which often offsets the original standard/guideline.

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91. Broadly on the legal status of SARPs, see R.I.R. Abeyratne, *Some Recommendations for a New Legal and Regulatory Structure for the Management of the Offense of Unlawful Interference with Civil Aviation*, 25 *TRANSP. L.J.* 115, 128-32 (1997).

92. Francesco Giovanni Albissini, *The Rise of Global Standards: ICAO's Standards and Recommended Practices*, 18 *ITALIAN J. PUB. L.* 203, 214 (2016).

93. *Id.* at 215.

94. *See generally id.*

95. *See Making an ICAO Standard*, ICAO SAFETY, <https://www.icao.int/safety/airnavigation/pages/standard.aspx#5> [<https://perma.cc/37HM-UAZ5>] (Nov. 1, 2011); *see also* Albissini, *supra* note 92, at 220-23.

Hence, IAvL advances the case of SARPs breaking the semantic constraints of Article 37, which restricts them to annexes of the Chicago Convention. This is, however, not easy, as the semiology of meaning formation in civil aviation shows that the semiological phenomena in question—SARPs being ICAO-made standards—is deeply rooted in social, legal, and political conditions and imagination based on such conditions.<sup>96</sup> This is best evidenced by the many IAL discourses on the politics of mistrust which existed among states after World War II, the commercialization of civil aviation in the 1960s and 1970s, and the search for legality typical to any normative enterprise as IAL. Hence, a simple argument to broaden the scope of SARPs would be inadequate. Even semantically reconstructing the term through critical discourses would, as a prerequisite, require a semiological deconstruction which could lay bare the historical conditions and legislative histories, which had SARPs territorialized in ICAO. It is without doubt that such a re-telling of semiological histories should be the starting point of IAvL within its larger goal of broadening the scope of standards, as Anthony Beck observes that without going outside the text, semiology cannot explain “the power of an institution to create a legal category within a norm”.<sup>97</sup>

While reconstructing the meaning of SARPs to broaden the universe of standards is a larger epistemological goal, reimagining IAL into IAvL can be the earliest pragmatic act. Here, IAvL should use the potential of international law to provide a “framework within which words and actions may be assigned common meanings”.<sup>98</sup> Additionally, as proposed by Jaye Ellis, what is needed is a discourse-ethical approach which “explores the capacity of individual actors deliberately to create and modify intersubjective meaning through the use of everyday language, which is used to put forward arguments to support or challenge norms”.<sup>99</sup> That, however, would be a great start towards the desired modernism, which is akin to the “postconventional society” conceptualized by Habermas that, in the words of Ellis, does not “rely on reverence for the sacred, on tradition, or on myths of origin to provide legitimacy for the rules that govern our actions and interactions”.<sup>100</sup>

## VI. CONCLUSION

This Article set out to make a case for an epistemological upgrading of IAL to a new disciplinary category IAvL. It was driven by a sense of renewalism prevalent in international law circles. That sense is an anticipation of a new global reality—a reality of the political” and the “economical” staying closer to “legal,”

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96. We are informed of the semiological dimension of meaning formation by Anthony Beck’s review of Bernard Jackson’s *Semiotics and Legal Theory*. See Anthony Beck, *The Semiology of Law*, 7 OXFORD J. LEGAL STUD. 475 (1987).

97. *Id.* at 478.

98. Jaye Ellis, *International Regimes and the Legitimacy of Rules*, 27 ALTS.: GLOB., LOC., POL. 273, 278 (2002).

99. *Id.* at 282.

100. *Id.*

a reality of new power dynamics and public concerns, and a reality which prompts us to optimize accumulated knowledge in international law (doctrines, theories, procedures, and processes) for obtaining socially viable outcomes.<sup>101</sup> But we confess that we did not create an analytic out of this sense to make our case; rather, we used it to set a milieu to create an analytical framework to evaluate the epistemological adequacy and relevance of IAL.

Our point throughout this Article has been that the discourses in IAL have deeply entrenched historical memories, which have prompted the discipline to espouse a classicism of being restrictive of state actions. This has put IAL on a continuum of orthodoxies in which law routinely meets facts in a mode of correlation and framework of orthodoxy. We felt that this recurrence (of law-facts correlation) has created a technology to IAL that leaves no epistemic spaces for auto-critique and other voices of criticism and dissent. Indeed, there are sporadic expositions on the role of the aviation industry in the new world order; however, absent those voices being of a recognized critical quality, thanks to the sway of disciplinary classicism, they do not represent new approaches or voices of relevance. This is no fault of the speakers—they simply lacked representation.

We did not reinvent the wheel. We simply set out to expose the outdated classicism in IAL, especially in its doctrine, sources, subjects, and meanings. Classicism is a historical sense, a matter of pride, and a testimony of the self-becoming of a discipline. But, it should not be the sensibility prompting imagination in altogether different socio-temporal conditions. Hence, we examined the above four constituent categories which are representative of the essential constituents of a discipline, and which give the essential form and substance to any discipline. Our examination revealed a restrictiveness in IAL that deeply limits the potential of the discipline to actualize the possibilities in the aviation industry.

We did make a case for IAvL, which is a renewed discourse with a renewalist sensibility as has been rising in international law. In that vein, for IAvL, we argued for shifting doctrinal focuses, broadening the functional domains, re-imagining the normativity of law, and re-discovering meanings. But the accumulated wisdom of IAL is not going to become irrelevant; rather, it gets a new perspective—one of a transformative approach in an evolutionary vein. We have ended our examination of the four analytical categories with invocations of scholarly and philosophical positions. That, however, is not by way of a closure of the debate, but rather by way of providing gateways to further conversations in building IAvL.

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101. On this sense of renewalism generally and particularly, see Susan Marks, *Guarding the Gates with Two Faces: International Law and Political Reconstruction*, 6 IND. J. GLOB. LEGAL STUD. 457 (1999).