East African Journal of Social and Applied Sciences (EAJ-SAS)
Vol.2, No.1 Publication Date: April. 20, 2020
ISSN: (Online) 2714-2051, (Print) 0856-9681
The current issue and full text archive of this journal is available at: http//www.mocu.ac.tz

Cite this article as: Mtani, B.T. (2020). Jurisprudential Inquiry into the Scope, Principles, and Standards of Air Law, *East African Journal of Social and Applied Sciences,* 2(1), 114-125.

JURISPRUDENTIAL INQUIRY INTO THE SCOPE, PRINCIPLES, AND STANDARDS OF AIR LAW

Bosco Thomson Mtani
Department of Law,
Moshi Co-operative University, Moshi-Kilimanjaro – Tanzania
Email:bosco.mtani@mocu.ac.tz or boscomtani@gmail.com

ABSTRACT
This work through table research is critically analysing the jurisprudential inquiry into the scope, principles, and standards of Air Law. The article further discusses how the development of science and technology has brought new challenges in air navigation. These challenges include the making of unmanned (pilotless) aircraft, the problem of flight tracking in remote airspace, and lastly air pollution through emission of toxic air by aircraft. The first two challenges pose a threat to the territorial sovereignty of Member States to International Civil Aviation Organisation (ICAO) and in some situation goes against principles and standards governing air navigation. The author, therefore, calls for collective action between ICAO and her Member States to address these challenges and find the way forward without jeopardising innovations for the development of air navigation. Views of other philosophers who did not entirely dwell in discussing this topic but somehow shed some light on this issue has been considered

Key Terms: *Law, Air Law, Standards of Air Law, International Civil Aviation Organisation*
Paper Type: *Research Paper*
Type of Review: *Peer Review*

1. INTRODUCTION

State sovereignty is a fundamental principle in International law. This principle provides for the autonomy of a state to exercise her powers within her boundary without any interruption from external forces. In a legal sense, a territory is a combination of three things that we would like to term it SEAL which stands for sea, air and land. These three major areas are governed by different international and domestic laws. One of the areas that have recently caught the attention of jurist is Air Law. Ugonna (2015)[1] stated that the body of Air Law is referred with different names in different jurisdictions, for instance, Aeronautical Law is currently being used especially in Romance languages, while Air Law is practically adopted in the rest regimes such as American and African. In response to the growing importance of this field of law in this article, we shall consider the global standard of Air Law and disparity between the law and the practices in different regimes. In the first instance, we shall start our discussion by defining key terms.[2]

This article explores the jurisprudential inquiry into the scope, principles, and standards of Air Law. In this regard, the author discusses the historical development of Air Law, the scope, principles and standards of Air Law. The discussion is largely on the international system of Air Law and in some instance international law requirements *vis-à-vis* the socio-economic realities on the developing countries such as Tanzania. The article further examines the challenges posed by the development of science and technology in contemporary civil aviation and the way forward. Broadly, this article contains an introduction, the context of the discussion, clarification of key concepts,

[1] Ugonna, E.A. (2015). The Scope and Limit of Air Law, Retrieved from https://www.academia.edu/13600257/THE_SCOPE_AND_LIMIT_OF_AIR_LAW

[2] Ugonna, *Ibid*

the discussion on scope, principles and standard of Air Law, and a summary of the discussion and recommendations.

2. DEFINITION OF THE KEY TERMS

Under this part, definitions are assigned to the identified key terms of this study. The idea behind is to enable readers to know the meaning attached to different concepts herein. This is in response to the recognition of the fact that the same concepts may vary their meaning in a different context or other disciplines. The main key terms in the topic of this study are Law, Air Law, Standards of Air Law and the International Civil Aviation Organisation. Unless these terms are defined it will become difficult for a reader to assign meaning.

2.1 The law

There is no single agreed definition of the term law. Therefore there are many definitions of law. There are dictionary definitions and definitions given by different authors.[3] For purposes of our study, we can simply say that law is the norms governing a society which are in the form of acts, Rules, Regulations, Orders which are made by the State and they are sanctioned by the State. On the international arena, laws take a form of treaties.

2.2 Air Law

The very term "Air Law" is a controversial and imprecise but it has been used in practice for over a century. It is argued that this term was first coined, in its French form, by Professor Ernest Nys at the University of Brussels in 1902 in his report to the Institut de Droit International on subject ***"droit et aerostat"***. At this time a year before the Wright Brothers flew the first heavier than air machine, the growing operation of balloons, dirigibles and Zeppelins attracted the attention of the leading legal scholars around the World. Cheng, B., (2020) states that Air Law is the body of law directly or indirectly concerned with civil aviation. Aviation in this context extends to both heavier-than-air and lighter-than-air aircraft. Air-cushion vehicles are not regarded as aircraft by the International Civil Aviation Organization (ICAO), but the practice of individual states in this regard is not yet settled. The earliest legislation in Air Law was a 1784 decree of the Paris police forbidding balloon flight without a special permit.[4]Because of the essentially international character of aviation, a large part of Air Law is either international law or international uniform law (rules of national law that have by agreement been made internationally uniform). In as far as International Air Law is concerned, it hardly needs a mention since an international agreement or an amendment thereto is binding only to states parties.

2.3 The Standards of Air Law

Standards of Air Law are fundamental tenets for global aviation safety and efficiency in the air and on the ground. The establishments of these standards which are technically known as International Standard and Recommended Practice (SARPS), as well as Procedures for Air Navigation (PANS), are fundamental tenets of International Civil Aviation Organisation's (ICAO) mission, role and that of Convention on International Civil Aviation (Chicago Convention). Therefore SARPs are technical specifications adopted by the Council of ICAO per Article 37 of the Convention on International Civil Aviation to achieve "the highest practicable degree of uniformity in regulations, standards, procedures and organization concerning aircraft, personnel, airways and auxiliary services in all matters in which such uniformity will facilitate and improve air transport.[5] Section 2 of the Tanzania Civil Aviation Act, (Cap.80 Revised Edition 2006) inclusively defines Air Standard by stating that they include technical and safety standards relating to the aeronautical airport services; air navigation services and air transport services. This definition is also adopted by other Tanzania Civil Aviation Regulations. The Tanzania Civil Aviation Authority as established under section 24 of the Tanzania Civil Aviation Act, (Cap.80 Revised Edition 2006) is responsible to promote, monitor compliance of the said Act and issue of new standards and rules from time to time.

---

[3] The Advanced Learner's Dictionary of Current English 2nd Edition defines the word Law as:

Rule made by the authority for the proper regulation of a community or society or correct conduct in life.

Osborn in A Concise Law Dictionary the word law is defined as:

Hobbes defines law as:

The commands of him or them that have a coercive Power. *A* ***law is an obligatory rule of conduct.***

[4] Cheng, B., (2020) Air Law, Retrieved from http://www.britannica.com/topic/air-law

[5] 'Standards and Recommended Practices'. Accessed from https://en.wikipedia.org/wiki/ Standards_and_Recommended_Practices

2.4 International Civil Aviation Organisation (ICAO)

ICAO a specialised agency of the United Nations formed by a Convention drawn up at the International Civil Aviation Conference which took place in Chicago from 1 November to 7 December 1944. Its headquarters is located in the Quartier International of Montreal, Quebec, Canada. ICAO has now 193 Member States. ICAO mission is achieving the sustainable growth of the global civil aviation system by serving 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.[6]

3. HISTORICAL BACKGROUND OF AIR LAW

The historical background of Air Law was firstly attempted by Johannes Stephan Dancko in his doctoral thesis titled "***De jure princips aereo***" (on the Duke's right with respect to the air) to University of Viadrina (Frankfurt/Order) in 1687. This work was rediscovered and reprinted in 2001 as the facsimile of an original Latin text by the Cologne University Institute of Air and Space Law, together with German translation, as a private publication.[7]The author of this thesis accepts that the air belongs to everyone, but preserves for the ruler (Duke) special *patrimonium* (special inherent rights) prohibiting the general population to hunt birds or to use wind for windmills without authorisation or even to display fireworks in the air. It can be concluded that this is the basis for sovereignty over air space doctrine. [8]

In the second half of the eighteenth century when mankind experienced first manned flight- just a year before the French revolution and the American war of Independence. The hot air balloon constructed by brothers Joseph Michael-and Etienne-Jacques Montgolfier took off in Annoy on 4 June 1783, in Versailles on 19 September 1783 (with a crew of Sheep, a rooster and a duck) and in Paris on 21 November 1783 with a human crew.[9] This hot air balloon was a primitive machine built of fabric, paper, ropes, and wicker basket and the hot air was generated by an open fire pit fed with wood, straw and paper. This balloon was not controlled by a person but rather depended on the mercy of the prevailing wind. Therefore its landing represented a major hazard of fire in some places like in densely populated cities of France.

Taking into consideration this fact, on 23 April 1784, a lieutenant of Police in Paris issued a directive that balloons must not be operated in the city without prior police permission. The directive was meant for the protection of people on the ground and their properties.[10] This is the first account of the aviation law in the history of mankind. Hot air balloons were soon followed by balloons filled with hydrogen, then dirigibles and airships (Zeppelins) and history were made on 17 December 1903 when the brothers Orville and Wilbur Wright accomplished twelve seconds powered, heavier than air controlled sustained flight with a pilot aboard at Kitty Hawk, North Carolina. During this test, there was no legal framework in America to govern aviation.[11]On 25 July 1909, French aviator Louis Bleriot crossed the English Channel between Les Barraques, France, and Dover, England a distance of thirty-eight (38) kilometre flown in thirty-seven (37) minutes. There was no legal framework to authorise take-off or landing in a foreign land, above all even a pilot did not take his passport or any documents for purpose of identification. The event was rejoiced by the newspaper of the day that "England is no longer an island"[12]

Military interest in aviation appeared at an early age. Balloons were used in wars, revolutions and espionage by taking pictures of the belligerent force or carrying weapons. Military observed Balloons were used in the French

---

[6] Weld, E.M.,(1953) ICAO and the Major Problems of International Air, Transport, Journal of Air Law and Commerce, Volume 20, Issue 4, Article 5. Also, see 'International Civil Aviation Organization'. Retrieved from https://en.wikipedia.org/wiki/International_Civil_Aviation_Organization

[7] De Iure Principis Aereo, Francofurti ad Odram Anno MDCLXXXVII, Literis Christofori Zeitleri.

[8] Milde, M (2008), International Air Law and ICAO, Eleven International Publishing, p.6

[9] While brothers Montgolfier believed that they invented the new gas ("Montgolfier gas") produced by the fire that lifted the balloon, the buoyancy was created by the physical reality that hot air is much lighter than the surrounding atmosphere; the ages-old Archimedes principle explains the balloon is supported in the atmosphere by a force equal to the weight of air displaced by a balloon.

[10] Michael, *Ibid*

[11] *Ibid, p.7*

[12] *Ibid*

revolution at the end of the eighteenth century, during the Napoleon war, the United States Civil War (1861-1865), and Franco-Prussian war (1870-1871). The First International Peace Conference in 1899 at The Hague Prohibited "the discharge of projectiles from Balloons" but it applied only as a "moratorium" for five years. State practices in twentieth-century strengthened this stand by shooting down balloons that crossed their national boundary for espionage purposes such as taking photographs of fortifications. For instance, Russia shot down Germany Military balloons in 1904 and 1910. Similar incidents occurred on the Germany/Belgian and Germany/French border before the First World War. [13]

The 1910 Paris International Air Navigation Conference was convened in response to the event that took place between April and November 1908 whereby at least ten German Balloon crossed the frontier and landed in France carrying twenty-five aviators half of whom were German officers. The government of France wished not to cause international confrontation and hence called for the 1910 Conference. The main objective of the 1910 Conference was to regulate operational issues of flight into and over foreign territory. The major academic questions of this time which were carefully avoided by the conference were whether air space is free like high seas, or whether states reserved some rights over air space to a certain altitude, or whether other states enjoy the right of innocent passage. The 1910 Conference did not succeed to make the convention because different views paused by each party over the right of foreign aircraft to fly over the national territory. It ended with a draft convention which although did not result in a convention, it was a blueprint for the later convention to govern international air navigation.[14]

From 27 May to 01 June 1912 some leading legal thinkers of that time met at 27th Conference of International Law Association (ILA). It should be borne in mind that this event took place not because of the failure of the 1910 Conference to adopt the Paris International Air Navigation Convention. In this conference, the consensus was reached between those who advocated on freedom of navigation and sovereignty of a state over its air space to the effect that those who advocated for the latter won.[15]

In the year 1919 after the First World War, another conference was convened in Paris which led to the Paris Convention 1919. Due to the experience of the war in which aircraft played an important role for victorious, then they wanted to limit defeated Germany on the limit of commercial aviation to be allowed. By this time it was well settled that states should have the sovereign right over their air space. The Paris Convention, 1919 created the Inter-Allied Aeronautical Commission which was bestowed with a duty to consider the limits on commercial aviation to be allowed to defeated Germany. Moreover, the Commission was invited to prepare the convention on international aerial navigation time of peace in recognition of the development of technology and the need for the legal regime for peaceful intercourse of nations through aerial communication. The Paris Convention, 1919 was the first historical multilateral instrument relating to air navigation which is also a basis for domestic laws of contracting states on the same subject matter. The contracting states granted to themselves in time of peace "freedom of innocent passage" on a non-discriminatory basis. The Paris Convention further provided for prohibited zones, provision of nationality and registration of aircraft, certificate of airworthiness and competency, the establishment of international airways, cabotage and special regime for 'state aircraft'.[16]

The convention further established International Commission for Air Navigation (ICAN) which was the permanent commission under the direction of the League of Nations. One of the functions of ICAN was to amend annexes A-G to the convention which had the same forces as other provisions of the convention. Annexes contained detailed provisions on, among other things, nationality and registration of aircraft, certificate of airworthiness and competency, rules of the air, and signal to be used. The reason behind giving this task to ICAN is to avoid diplomatic conference in every amendment or update. The convention never achieved universal acceptance as its focus was in Europe only as by this time aviation could not cover trans-oceanic distance United

[13] *Ibid*
[14] *Ibid*, p.9
[15] *Ibid*
[16] *Ibid*, p.11

States did not sign this treaty because it gave annexes the same force as other provisions of the convention and the mandate to amend annexes were left to ICAN.[17]

Ibero-American Air Navigation Convention, 1926 (the Madrid Convention), was the result of political rivalry between Spain and the League of Nations and ICAN. Spain was not granted a permanent seat in the League and was not offered the same voting power as France or Italy. Due to these reasons Spain withdrew from the League of Nations and the former dictator of Spain Primo Di Rivera on 25th to 30th October, 1926 invited all Latin America States an 'Ibero-American Aviation Congress that met in Madrid. This conference came up with Ibero-American Air Navigation Convention, generally referred to as the Madrid Convention, 1926. The convention was a replica of The Paris Convention, only omitted the name League of Nations, and Permanent International Court of Justice. On 1933 Argentina and Spain denounced the convention and joined the League of Nations. This convention no longer exists.[18]

The Convention on Commercial Aviation-Havana Convention 1928 (the Havana Convention) was another regional contribution to the development of Air Law. It was adopted by Sixth Pan-American Conference in Havana on 20th January 1928. This convention dealt liberally with traffic rights. It excluded technical and operational aspects that were dealt with by the Paris Convention and the Madrid Convention. Further, it did not establish any permanent body or include any annexes. It provided that aircraft of the contracting states are to be permitted to discharge passengers and cargo at any airport authorised as a port of entry in any other contracting state, and to take on passengers and cargo destined to any other contracting state. This convention calls for multilateral agreement for its operation. The convention is no longer operational.[19]

During the Second World War aviation technology developed immensely. The Allied powers who were victorious were struggling to restore world peace. During the war, air navigation has proven to be an effective means of transport. After the war allied powers established various powers institutions such as Bretton Woods Institutions (World Bank and International Monetary Fund), FAO (Food and Agriculture Organisation), Now there was a need to establish an organisation to control air navigation as roads and railways were destroyed by war.[20]

On 11 September 1944, the President of the United States of America invited the representatives of fifty-four nations to meet in Chicago from 1 November to 7 December 1944 for the International Civil Aviation Conference. The conference was convened to "make arrangement for the immediate establishment for the provisional air routes and services" and "to discuss principles and methods to be followed in adoption of a new aviation convention. The 1944 Conference led to the adoption of the Chicago Convention, which is a great success in laying down legal regulations on International Civil Aviation for the post-war period and present time. The convention does not govern the grant of traffic right in the international scheduled carriage by air but there would be two separate and distinct instruments, in addition to the main convention, through which the state would mutually exchange, on a multilateral basis, reciprocal commercial rights referred to as "Freedom of Air". This aspect has been criticised by some jurists, but the author herein is of the view that it needs individual state agreement as it is to solve practical problems among states. The convention led to the establishment of the International Civil Aviation Organisation (ICAO). ICAO was established as a unit of the United Nations devoted to overseeing civil aviation. The Convention also provided various general principles governing international air service. Therefore it can be concluded that this conference was one of the most successful, productive and influential international conferences ever held by preparing the legal regulation of international civil aviation and laying the ground for the adoption of the following instrument;[21]

(a) The Convention on International Civil Aviation (opened for signature at Chicago on 7 December 1944).
(b) The International Air Services Transit Agreement ("two freedoms agreement") opened for signature on the same date.

[17] *Ibid*, pp. 11-12
[18] *Ibid*, 12
[19] *Ibid*, p.13
[20] Ibid, p.15
[21] Ibid, p.16

(c) The International Air Transport Agreement ("five freedoms agreement" also opened for signature on the same date).
(d) A standard form of bilateral agreements for the exchange of air routes (that assisted States in their bilateral negotiation and brought a high degree of consistency into the practice).
(e) An Interim Agreement on International Civil Aviation (that bridged over the period before the entry into force of the Convention on International Civil Aviation and served as a constitution for the Provisional international Civil Aviation Organization- PICAO).
(f) Extensive "Drafts of Technical Annexes" (documenting the scope of international consensus and cooperation in operational and technical matters of civil aviation).

4.0. SCOPE, PRINCIPLES, AND STANDARDS OF AIR LAW

4.1 Scope of Air Law

In understanding the scope of Air Law one has to discuss different theories laid down under this subject to determine the breadth of the layer of air that can be regarded to fall within the territory of a state. This has never been an easy question to answer. There was no consensus by jurists on the breadth of a layer of air. In this regard, jurists came with different theories at different times, each one justifying his stand by giving several reasons. It should be borne in mind that law is like a creature, it changes with time, and every theory laid the foundation for another, and might have been relevant for that particular time depending on the level of science and technology. The theories propounded were grouped into two major schools of thoughts namely; free air space, and sovereignty of the subjacent state in air space above its territory. The theories propounded by jurists in this regard led to the birth of the principle of sovereignty over the air space. The following are four theories in determining the scope of Air Law.

4.1.1 Intermediate Theory

This theory was laid down in 1902 by the French jurist Paul Fauchille who claimed that the air is free, and its freedom may only be limited by strictly defined rights belonging to the State underneath. According to this scholar the sovereignty of the landowner over the air space was limited to the maximum height of the buildings it could build; beyond this limit, the atmosphere was free and freely exploitable. He further proposed that States should only have exclusive rights in the airspace immediately over their territory up to an altitude of one thousand five hundred meters. This theory in simple words establishes the ability to exploit and use air as a limit to state sovereignty. According to this scholar the sovereignty of the landowner over the air space was limited to the maximum height of the buildings it could build; beyond this limit, the atmosphere was free and freely exploitable. [22]

4.1.2 Theory of the Unlimited Freedom

This theory developed from the law of the sea especially on the freedom of the high seas. This theory is supported by those who, having seen the advantages that the absolute freedoms of the seas have brought to the International community, thought that the same criteria could be applied to the air navigation. Therefore it can easily be concluded that this theory is a mere extension of freedom of the high seas. Under this theory, the contention is that the state should enjoy absolute freedom over its air. This view was reiterated in 1906 by Professor John Westlake of the United Kingdom who advocated no upward limit of State sovereignty. In the air the higher one ascends, the more damage the fall of objects will cause on the earth. If there exists a limit as to the sovereignty of the State over the oceanic space, none exists for the sovereignty of the State over the air space. The right of the subjacent State remains the same whatever may be the distance.

4.1.3 Theory of Absolute Sovereignty

This theory is opposing the first theory; it tries to put a limit in which state will have jurisdiction. It contends that state shall have sovereignty over its atmosphere. The limit here is the atmosphere, it implies that the state will not have the sovereignty to exercise her power at outer space. This theory opposes the Roman law principle *dominus soli est dominus usque ad sidera et usque ad inferos* applied in land law. [23]

[22] Shaw, M.N., (2008). International Law. 6th Edition, Cambridge University Press, New York.P. 490

[23] Shaw, M., *Ibid*

4.1.4 Theory of the Limited Sovereignty

It stemmed from the principle that the atmosphere is subject to the State power, but it introduced some limitations in favour of the air traffic of adequate means whose airworthiness could be proved by specific international certifications. This theory anticipated the following regime which was based upon a functional and not just spatial idea of air navigation.[24]

4.1.5 Contemporary Scope of Air Law

Discussion of these theories leads to the conclusion that under Article 1 of the Chicago Convention on International Civil Aviation, 1944 (The Chicago Convention) all states have complete and exclusive sovereignty over air space above their territory. This provision is the adoption of the theory of absolute sovereignty over airspace.

4.2 Principles of Air Law

The principles of Air Law are more or less the same as they apply in general international law. The only difference is that some few amendments have been done to suit this discipline of law. The following are the principles of Air Law.

4.2.1 Air Space Sovereignty Principle

The fundamental principle of Air Law is that every state has complete and exclusive sovereignty over the air space above its territory. By this principle, no aircraft of one state can enter the air space of another state without the permission of that other state sought and obtained.

This principle originated in international law. International law is based on the concept of the state. The state is built based on sovereignty, as such sovereignty is the foundation for the state, and exercise of such sovereign power is limited in the territory. This means without territory state cannot be recognised as a legal person under international law enjoying rights and duties.[25] This principle was unequivocally affirmed in the Paris Convention and subsequently by various other multilateral treaties. The principle is reiterated in the Chicago Convention. Airspace is now generally ending where outer space begins. This principle is to the effect that airspace is an extension of the state's land and maritime territorial or its complementary element. The logic behind this principle is that the State cannot impose its will within the territory of another State.[26]

Honourable John had this to say regarding this principle:[27]
'I see no good reason for postponing a systematic effort to explore and reach agreement on this question of delimiting the upward reach of territorial sovereignty, that is, the exclusive power and authority of the underlying state. It is not the kind of question, in my opinion, that will be answered by the accumulation of scientific knowledge or by further experience in space technology.'

As the International Court noted in the ***Nicaragua case***, ICJ Reports, 1986, pp. 14, 128; 76 ILR, p. 1. 'The principle of respect for territorial sovereignty is also directly infringed by the unauthorised over flight of a state's territory by aircraft belonging to or under the control of the government of another state.**'** The Court noted in the ***Benin/Niger case*** ICJ Reports, 2005, p. 142 that **'***a boundary represents the line of separation between areas of state sovereignty, not only on the earth's surface but also in the subsoil and the superjacent column of air'***.**

4.2.2 Principles of Criminal Jurisdiction

This principle contends that the state has primary jurisdiction over all events taking place in its territory regardless of the nationality of the person responsible. This is to the recognition of the fact that the state should have control

[24] Shaw, M., *Ibid*

[25] Ugonna, E.A. (2015). The Scope and Limit of Air Law, Retrieved from https://www.academia.edu/13600257/THE_SCOPE_AND_LIMIT_OF_AIR_LAW

[26] See also Cooper, J.C.,(1968). *Roman Law and the Maxim "Cujus est solum*" in International Air Law, reprinted in John Cobb Cooper, Explorations in Aerospace Law 54, 57–58

.

[27] The Honorable John A. Johnson, First General Counsel of the United States. National Aeronautics and Space Administration, 1961.

of crime within his/her territorial boundary. Likewise, ships and aircraft on state's register consider quasi-territory. It should be borne in mind that the territorial jurisdiction of State extents over its land, its national airspace, its internal water, its territorial sea, its national aircraft, and its national vessels. The jurisdiction of a state is not only for crimes committed on its territory but also crimes have effects within its territory.

On the other hand, states are free to arrange the right of each one to exercise certain jurisdiction within each national territory. The most significant recent examples of such arrangements are the 1991 France-United Kingdom Protocol Concerning Frontier Control and Policing, under which the frontier control laws and regulations of each State are applicable and may be enforced by its officers in the control zones of the other; the 1994 Israel-Jordan Peace Treaty, under which the Israeli criminal laws apply to the Israeli nationals and the activities involving only them in the specified areas under Jordan's sovereignty, and measures can be taken in the areas by Israel to enforce such laws. There are various grounds for exercising criminal jurisdiction discussed herein below as follow;

4.2.2.1 Passive personality principle

The passive personality principle is one among the international law principles that allow states, in limited cases, to claim jurisdiction to try foreign national for offences committed abroad that may affect her citizens. In the *Yunis case,* 924 F.2d 1086 (1991) United States courts decided that they had jurisdiction over Yunis (a Lebanese national) based on the passive personality principle because two United States nationals were abroad the Jordanian airline that Yunis hijacked.

4.2.2.2 Nationality principle

This principle implies that a State jurisdiction extends to its nationals and actions they take beyond its territory. The notion of the principle is that the link between the individual and the nation is personal irrespective of location. Criminal jurisdiction based on nationality is universally accepted. Nationality extends to, Person, Ship and Aircraft. The state is presumed to have legal authority over space objects whether in his territory or out of his territory basing on the theory of nationality. The general rule is that in most countries laws are assumed not to operate extra-territorially unless expressly stated so. Such jurisdiction extends over nationals and persons whose conduct affects the state national or against another state whose conducts affects state nationals .

In the international arena, the state may commit offences as natural persons. In this regard, it should be borne in mind that in such a situation state will have to take responsibility for her actions. This is because states are endowed with rights and duties. If there is a breach of duty under Air Law by a state, the remedy that may be claimed and awarded is the rectification of the act done/ breach committed or reparation for damage.

4.2.2.3 Protective Principle

The protective principle implies that a State may exercise jurisdiction over an alien who commits an act outside its territory, which is deemed prejudicial to its security and interests. It is justified based on protection of State's vital interests, particularly when the alien commits an offence prejudicial to the State, which is not punishable under the law of the country where he resides and extradition is refused. This principle is often used in treaties providing for multiple jurisdictional grounds concerning specific crimes, such as the 1979 Hostage Convention and the 1970 Hague Aircraft Hijacking Convention.

4.2.2.4 Universality Principle

This principle gives universal jurisdiction to all states over the crime against international customary law. This principle allows for the assertion of jurisdiction in cases where the alleged crime may be prosecuted by all states. No physical intervention in another state territory is permissible-limits of jurisdiction as such.

4.2.3 Treaty Principles

Bearing in mind that Air Law is controlled by treaties in any form in the same trend automatically principles of treaties will apply to Air Law. Treaties are the primary source of Air Law. Treaties in this regard can be defined as agreement legally binding between states. It is legally binding when the state gives consent by signing, ratifying, acceding or exchange the note for a treaty. Treaties can be amended by the protocol as per procedures set therein and every member has a right to denounce such treaty as such withdraw her membership. In this regard, this

study discusses various principles of treaties along with the respective authority. The following are principles of treaties.[28]

'Pacta Sunt Servanda'

The obligatory nature of treaties is founded upon the international customary law principle that agreements are binding (*pacta sunt servanda*).[29] *Pacta sunt servanda* is a Latin maxim which means an agreement must be kept. This means parties to an Air Law treaty are bound by its terms and condition. Parties must heed to their obligation imposed by the treaty because they gave consent when signing and ratifying such a contract. This principle is reflected and reaffirmed by Article 26 of the Vienna Convention on the Law of Treaties, 1969

'Pacta Tretis Nec Nocent Nec Prosunt'

It is the general rule of international law that treaty binds only parties to it.[30] This rule reflects sovereignty and independence of state for the reason that a state shall be bound by a treaty if it gave its consent.[31] There are several ways in which a state may express its consent to an international agreement. It may be signalled, according to Article 11 of the Vienna Convention on the Law of Treaties, 1969 by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval, and accession or by any other means, if so agreed. This means a treaty can never impose an obligation to a third party. The third-party can neither be called upon to fulfil treaty obligation nor enjoy any benefit thereof. This means that parties that did not sign and ratify the particular treaty in question are not bound by its terms. This is a general rule and as illustrated in the *North Sea Continental Shelf* case **(**supra), where West Germany had not ratified the relevant Convention and was therefore under no obligation to heed its terms. This rule is not absolute as where treaties reflect international customary law, and then non-parties are bound, not because it is a treaty provision but because it reaffirms a rule or rules of international customary law.[32]

This general rule of law like other rules has never escaped exception whereby a third party to a treaty can be bound by it if a provision of such a treaty has imposed a new customary law as the principle of state sovereignty under Air Law. Another example of this would be the laws relating to warfare adopted by the Hague Conventions earlier in the 21st century and now regarded as a part of international customary law.[33]

Jus Cogens

This refers to the general principles under international law that every state must observe. Non-observance of these rules will be tantamount to rejecting the very foundation of their legal system. Article 53 of Vienna Convention on the Law of Treaty, 1969 prohibits any derogation to these rules and considers any treaty that was concluded in contravention of *jus cogens* as *void ab initio*. Moreover, Dr. Agarwal (2006) stated that if any *jus cogens* have come into existence and there is a treaty conflicting such rule then the treaty will automatically be terminated and members shall be released from any obligation thereof.[34]

---

[28] For instance, the Tokyo convention 1963 enacted new international standards for the treatment of criminal offences on or involving aircraft. The Montreal Convention of 1999 updated the carrier liability provisions of the Warsaw Convention. While the Cape Town Treaty of 2001 created an international regime for the registration of security interests in aircraft and certain other large movable assets.

[29] *Ibid*, at p.94

[30] Article 34 of Vienna Convention on the Law of Treaties.1969 See also Malcolm, *Ibid*, at. p.928

[31] The Permanent Court of International Justice declared in the *Free Zones PCIJ, Series A/B, No. 46, 1932, pp. 147–8; 6 AD, pp. 362, 364.*case that:

> *the question of the existence of a right acquired under an instrument drawn between other states is . . . one to be decided in each particular case: it must be ascertained whether the states which have stipulated in favour of a third state meant to create for that state an actual right which the latter has accepted as such.*

[32] Shaw, M., *Op Cit*, at p.95

[33] This is provided for under Article 2(6) of the United Nations Charter which states that:

> *the organisation shall ensure that states which are not members of the United Nations act in accordance with these principles so far as may be necessary for the maintenance of international peace and security.*

[34] Agarwal, H.O., (2006**), International Law and Human Rights**, 13th Edition, Central Law Publications, 107, Darbhanga Colony, Allahabad-211002 at pp.321-22

Good Faith

Under this principle, a state is required by international law to carry all treaty obligations in good faith. Hence States may not invoke a provision of its internal law as a justification for its failure to carry out an international obligation. This is a general principle of international law and finds its application in the law of treaties under Article 27 of the Vienna Convention on the Law of Treaties, 1969.[35] This goes without saying that members of any Air Law treaty have to act in good faith in executions of provisions of relevant convention. The International Court dealt with this question in ***Cameroon* v. *Nigeria*,** CJ Reports, 2002, pp. 303, 430, where it had been argued by Nigeria that the Maroua Declaration of 1975 between the two states was not valid as its constitutional rules had not been complied with. The Court noted that the Nigerian head of state had signed the Declaration and that a limitation of his capacity would not be 'manifest' unless at least properly publicised. This was especially so since heads of state are deemed to represent their states to perform acts relating to the conclusion of treaties. In **Nuclear Test Case** (Australia V. France), the ICJ Reports (1974) at p.268 the International Court of Justice stated that the principle of good faith is "one of the basic principles governing the creation and performance of a legal obligation.

Rebus Sic Stantibus

This is another treaty principle that holds that treaty obligation holds only as long as the fundamental conditions and exceptions that existed during the time of creation hold. This is the reason as to why Article 48 of the Vienna Convention on the Law of Treaties, 1969 stipulate that a state may only invoke an error in a treaty as invalidating its consent to be bound by the treaty if the error relates to a fact or situation which was assumed by that State to exist at the time when the treaty was concluded and formed an essential basis of its consent to be bound by the treaty. But any State cannot invoke the defence of an error if the State knew or ought to have known of the error, or if it contributed to that error, then it cannot afterwards free itself from the obligation of observing the treaty by pointing to that error. This position was also reiterated in the **Temple Case**, ICJ Reports, 1960,

Moreover in **Fisheries Jurisdiction Case** (the United Kingdom v. Iceland), ICJ Reports (1997), 7 at p. 64-5 para 104 the International Court of Justice considered the doctrine *of rebus sic stantibus* by denying the contention of Iceland by deciding the dangers to Iceland interests resulting from new fishing techniques cannot constitute a fundamental change concerning the lapse or subsistence of the jurisdictional clause in bilateral agreement The same principle applies under the Air Law

4.3 Standards of Air Law

ICAO has created some regulations for aviation safety, security, efficiency, regularity and environmental protection. The organisation also regulates operating practices and procedures covering the technical field of aviation. These regulations provide for standards to be observed in aviation set some standard and recommended practices to be observed by every Member State. Standards are mandatory provisions to be observed by every contracting state while recommended practices are optional. There are eight annexes to the Chicago Convention, 1944 that refers to standard and recommended practices which intend to provide uniform standards and practices of aviation to the Member States. These annexes contain definitions, standards and recommended practices. Article 38 of the Chicago Convention, 1944 states that no contracting state can depart from some recommended practices. If such a state wants to depart from such practice should inform ICAO within 60 days, and subsequently, ICAO shall inform contracting parties. The importance of standards and recommended practices is to provide an equal right to air transport, managing aviation safety risk, ensure good faith, equal opportunity, and minimise expense and penalties and right of participation. As far as our work is concerned we will deal with standards of aviation as laid down by ICAO through different legal instruments. The following are the standards set by ICAO.

(a) Personal licensing
(b) Rules of the air
(c) Meteorological service for International air Navigation
(d) Aeronautical Charts
(e) Units of measurement to be used in air and ground operations
(f) International Commercial Air Transport-Aeroplanes

[35] Shaw, M., *Op Cit*, at p.941

(g) International General Aviation-Aeroplanes
(h) International Operations-Helicopters
(i) Aircraft Nationality and Registration Marks
(j) Airworthiness of Aircraft
(k) Facilitation Radio Navigation Aids
(l) Communication Procedures
(m) Communication Systems
(n) Surveillance Radar and Collision Avoidance System
(o) Aeronautical Radio Frequency Spectrum Utilization
(p) Air Traffic Services
(q) Search and Rescue
(r) Aircraft Accident and Incident Investigation
(s) Aerodrome Design and Construction
(t) Heliports
(u) Aeronautical Information Services
(v) Environmental Protection-Aircraft Noise
(w) Environmental Protection-Aircraft Engine Emissions
(x) The Safe Transport of Dangerous Goods by Air
(y) Safety Management
(z) Air Traffic Management (PANS-ATM)

5. CONCLUDING REMARKS

The law of the sea has made an immense contribution to the development of freedom of navigation on air. Despite this contribution, Air Law has disregarded the concept of innocent passage as applied under the law of the sea. Aircraft may only traverse the airspace of states with the agreement of those states, and where that has not been obtained an illegal intrusion will be involved which will justify interception or shooting down of such aircraft. The good example of this principle is the incident of 2015 whereby China alleged to have shot American Drone which was flying over her air space without authorisation. The well functioning of Air Law needs signing of bilateral or multilateral treaties which permit airliners to cross and land in the territories of the contracting states under-recognised conditions and the light of the accepted regulations, but also by the development of the law of outer space.

Moreover, modern air navigation is affected by several factors. The development of science and technology has brought a new challenge in air navigation with the making of unmanned (pilotless) aircraft that needs to be integrated into civil aviation. This may lead to violation of Air Law principles and standards with impunity. In the case of Military Drones which carries military operations may be denied to belong to any state when it is discovered in air space of foreign territory. Likewise problem of relating to the flight tracking in remote airspace pause a challenge to the territorial sovereignty of Member States to ICAO. The developing countries like Tanzania have a shortage of powerful aircraft radar that could track aircraft in remote airspace. On the other hand in regards to standards, there is a problem of safety and security of commercial flights and poor response to global health emergencies which threaten the health of the Member States of ICAO and the world at large. Lastly, there is a problem of meeting emission standards of aircraft that leads to air pollution through emission of toxic air. ICAO in collaboration with Member States should address these challenges and find the way forward collectively. The author acknowledges ICAO has demonstrated proactive and collaborative leadership on the safe integration of remotely-piloted aircraft systems (RPAS) and sub-orbital aircraft and operations into the global civil aviation framework while ensuring it does not hinder the spirit of innovation.[36]

REFERENCES

Cheng, B. (2009). The Law of International Air Transport, Library of World Affairs, No. 47.

[36] Addressing Emerging Issues in International Civil Aviation Promptly and Effectively. Retrieved from https://www.icao.int/about-icao/DrAliu/Pages/Addressing-Emerging-Issues-in-International-Civil-Aviation-Promptly-and-Effectively.aspx

Stevens & Sons Ltd.

Cheng, B. (1998). Studies in International Space Law, Clarender Press, Oxford.

Jenks, C. W. (1965). Space Law, Stevens & Sons, London.

M. A. D. (1932). The Law of the Air, Butterworth & Co. Ltd, London.

Milde, M. (2012). International Air Law and ICAO, Essential Air and Space Law, Volume 10.

Shawcross & Beaument (2016). The Law of Air, Lexis Nexis Butterworths, UK Shaw, M.N.

Shaw, M. N. (2008). International Law. 6th Edition, Cambridge University Press, New York.

Singh, A. (2015). The Law of Carriage (Air, Land & Sea), 5th Edition, Eastern Book Company.

Weld, E. M. (1953). ICAO and the Major Problems of International Air, Transport, Journal of Air Law and Commerce, Volume 20, Issue 4, Article 5.