



Reimagining State Sovereignty in International Aviation Law: Towards a Functionalist Epistemology for the Global Airspace

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Introduction

The doctrine of state sovereignty has long served as the bedrock of international aviation law ever since its inception in the early twentieth century. Emerging from the geopolitical upheaval of World War I, it was rooted in pervasive post-war anxieties surrounding territorial security, national self-determination, and existential threats to fledgling nation-states.¹ In this climate, airspace was perceived not merely as physical territory, but as a symbolic extension of national defence and identity. The Paris Convention of 1919 explicitly codified this conception of sovereignty when it proclaimed that “every Power has complete and exclusive sovereignty over the airspace above its territory.”² This rigid territorial view persisted into the more enduring and globally scoped Chicago Convention of 1944, which remains the primary legal charter governing international civil aviation.³ Under Article 1 of that Convention, each State is vested with absolute authority over the classical airspace above its land and maritime zones, and it is empowered to enforce its national laws therein.⁴ Thus, sovereignty became the defining legal, political, and economic rationale underpinning civil aviation regimes.⁵

Impact of Globalisation

As the infrastructure for global transport expanded in the decades following World War II, so too did commercial air travel, evolving into a network of interlinked economies and shared international spaces. However, this globalisation has underscored the inherent paradox embedded within the sovereignty doctrine: it was sovereignty that enabled the very concept of regulated international air travel by legitimising exclusive airspace control, but it is that same exclusivity which now erects systemic barriers to efficient, coordinated, and safe aviation governance.⁶ For example, bilateral Air Service Agreements (ASAs), premised on sovereign permission, have created layers of regulatory fragmentation whereby each State negotiates port-to-port rights individually.⁷ While these agreements facilitate limited travel corridors, they also result in complexity, redundancy, and inefficiency on a global scale. Moreover, political disputes can unleash repercussions in aviation, as seen when States invoke sovereignty to implement airspace bans during international crises—such as the 2017 blockade of Qatari airspace—unilaterally halting flights and disrupting global supply chains.⁸

Compounding the problem is the surge of non-state actors—private airlines, air traffic

control operators, safety investigators, and technical services—whose activities transcend national borders yet lack formal legal recognition under traditional sovereignty-centred regimes.⁹ Contemporary aviation is driven by multinational airline corporations, cross-border codeshare agreements, and integrated air navigation systems.¹⁰ Their operations are governed by myriad regulatory actors, including the International Civil Aviation Organisation (ICAO) and the International Air Transport Association (IATA), both of which issue Standards and Recommended Practices (SARPs), Manuals, and Operational Protocols.¹¹ Though essential to aviation safety and standardisation, these texts are often classified as “soft law” and lack formal binding force under Article 38 of the ICJ Statute, reinforcing the invisibility of non-State activities within traditional legal categories.¹² Yet these actors collectively ensure system-wide continuity, safety, and compliance—while operating in a legal environment still dominated by territorial sovereignty.¹³

The Crisis

It is these evolving operational realities that precipitate a growing intellectual and doctrinal crisis. The classical view of sovereignty—untouchable, indivisible, and absolute—can no longer accommodate an ecosystem of shared authority, global interdependence, and multi-centred regulatory governance.¹⁴ In response, this Article advocates for an epistemological shift to what it calls **International Aviation Law (IAvL)**—a nuanced synthesis that retains State sovereignty while embedding it within a structurally plural and functionally adaptive legal framework. IAvL proposes several interlocking conceptual innovations.

First, IAvL understands sovereignty not as an end in itself, but as a positional authority. States continue to maintain sovereign control over their airspace, but they can delegate or

horizontally allocate facets of governance to international institutions (such as ICAO and IATA) and to private actors.¹⁵ This horizontal allocation of power builds on scholarship in international trade law and draws inspiration from Jackson’s functional sovereignty model.¹⁶ Under IAvL, States remain normatively sovereign but functionally networked—with power exercised collectively in areas like safety oversight, environmental control, and technological interoperability.

Second, IAvL redefines “sources of law” to transcend Article 38’s narrow scope. Formal treaties and customary norms remain vital, yet IAvL elevates multilateral aviation agreements (including ASAs), SARPs and Annexes, and technical manuals to a quasi-normative status.¹⁷ These soft law instruments, though not binding per se, carry moral and professional force manifested in self-regulation, global adoption, and domestic implementation.¹⁸ Thus, IAvL suggests a continuum of normativity, ranging from high-formality treaties to low-formality technical standards, all operational within a coherent legal informatics.

Third, IAvL advocates formal legal recognition for non-state actors. Major aviation players—airline groups, air navigation service providers, pilot unions, global training authorities—possess indispensable functional legitimacy and moral authority.¹⁹ IAvL proposes that these actors be granted participatory roles within dispute resolution mechanisms or be institutionalised in treaty bodies via advisory or consultative status.²⁰ Such recognition enhances regulatory capacity, guarantees representation of operational expertise, and bolsters legitimacy in regulation—reinforcing democracy in transnational governance.

To operationalise IAvL in legal epistemology, the Article is divided into six parts. Part II reviews the emergence of aviation sovereignty in the Paris and Chicago Conventions, identifying its roots in post-war strategic realpolitik. Part III analyses how globalisation,

liberalisation, and airline privatisation have strained the classical framework. Part IV delineates the horizontal allocation of power model, combining theoretical insight with practical examples like ICAO's adoption of Article 3 bis and joint safety oversight strategies. Part V critiques the sources of law paradigm, arguing for the integration of soft law, ASAs, and industry protocols into formal normative regimes. Part VI calls for formal legal standing to be accorded to non-state actors whose roles are essential yet invisible in traditional state-centric structures. The Conclusion synthesises these arguments and charts a normative roadmap for the future of IAvL in navigating next-generation challenges like drone governance, climate regulation, and cybersecurity in aviation.

Ultimately, the paradox of sovereignty in aviation cannot be resolved by discarding it entirely—sovereignty remains symbolically and normatively indispensable. Instead, the solution lies in contextualising sovereignty within a system of functionally shared governance—retaining its territorial integrity while reflecting the demands of global connectivity. IAvL offers such a reconfigured epistemology: one that harmonises state prerogatives with transnational realities, soft law norms with treaty obligations, and non-state agency with democratic legitimacy. It offers more than a theoretical innovation—it poses a practical blueprint for legal and policy reform. Only by shifting from sovereignty as command to sovereignty as contribution can international aviation law fulfill its founding mission: to guarantee safe, efficient, and equitable global travel in an era defined by interdependence.

The Evolution and Tension of State Sovereignty in International Airspace

The principle of state sovereignty in airspace traces its formal origins to the aftermath of World War I, widely recognised as the first full-scale conflict to deploy military aviation on a

massive level.²¹ The 1919 Paris Convention, drafted by the International Commission for Air Navigation, unequivocally enshrined this principle: “every Power has complete and exclusive sovereignty over the airspace above its territory.”²² This declaration was not merely a normative statement—it reflected a palpable global anxiety surrounding territorial integrity. The advent of military aircraft and aerial bombardment during the war had shattered any illusions about the inviolate nature of national borders. The Paris Convention thus emerged as a collective reassurance that nations could reassert control through legal mechanisms.

This sovereignty doctrine was given renewed and enduring force by Article 1 of the Chicago Convention of 1944, a key moment in international diplomacy when states collectively envisioned a framework for post-war civil aviation.²³ The Convention's progenitors recognised that, although airspace must be regulated to promote global air travel, it could not be left unguided. Hence, sovereignty was reaffirmed as the legal and political foundation for all other aviation norms.²⁴ At its core, the doctrine served a dual purpose: it protected nations from unwanted intrusion while simultaneously legitimising international cooperation through regulated entry and exit.

Yet this principle was more than a mere abstraction; it represented a legal codification of lived historical experience. The traumas of air warfare—including strategic bombing, espionage flights, and aerial reconnaissance—underscored the existential vulnerability of nations. Civil aviation, emerging from this milieu, operated from within a skeletal legal architecture designed to contain these existential threats.²⁵ Thus, sovereignty became both a shield and a tool: a shield against foreign intrusion and a tool to legitimise regulated cooperation.

The historical context reveals why early aviation law proceeded with a dual agenda: facilitating international movement while strictly defining

its boundaries. Bilateral agreements—later institutionalised as Air Service Agreements (ASAs)—reflected the Westphalian principle that state consent was indispensable for transboundary activities.²⁶ These agreements did more than operationalise aviation; they expressed political sovereignty, reinforcing each state’s power to regulate, permit, or deny access to its skies.

This tension between sovereignty and cooperation was highlighted in the jurisprudence of the International Court of Justice. In *Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan)*, the Court explicitly recognised a state’s broad discretion under Article 1 of the Chicago Convention.²⁷ States held nearly exclusive control over their airspace, a principle reinforced by treaty law. Yet, the Court also acknowledged that this sovereignty was not limitless; it was subject to constraints “based on the letter and spirit” of international legal commitments.²⁸ The decision thus captured the inherent structural paradox: sovereignty was absolute when asserted in isolation, yet inherently limited by cooperative international frameworks.

This model gained traction in customary international law, treaty practice, and scholarly commentary. Sovereignty became virtually synonymous with legal subjecthood and authority in aviation. The Chicago Convention itself created the International Civil Aviation Organisation (ICAO) to promote global harmonisation of standards, yet it did so without sacrificing state primacy.²⁹ States remained the sole members and the only participants empowered to enforce or modify global aviation rules. ICAO served predominantly as a facilitator and coordinator—not a supranational authority capable of violating the principle of sovereignty.

However, the doctrinal supremacy of classical sovereignty began to face serious challenges throughout the latter half of the twentieth

century, as aviation took on an increasingly globalised, commercial character.³⁰ Airlines began cross-border operations, air traffic control services became regionally integrated, and multinational corporations entered the aviation space. These changes exposed the inherent inefficiencies of absolute sovereignty: fragmented regulatory systems, costly duplication of standards, and slow treaty-making processes unable to keep pace with technological advancements.

Economic liberalisation further complicated the puzzle. Models such as the U.S. “freedoms of the air” system and the European Union’s single aviation market demonstrated how mutual recognition of regulatory standards could facilitate efficiency without eroding sovereignty.³¹ In other regions, open skies agreements enabled greater connectivity and lowered fares by prioritising market access—though often at the expense of traditional sovereign control.³²

Privatisation and deregulation marked another seismic shift. When major airlines transitioned from government-owned entities to private corporations, they entered markets governed by multiple jurisdictions and by international treaties.³³ Corporations—unlike states—operate under corporate governance rules and commercial law, often enmeshed in complex webs of contractual obligations. This led to a mismatch: a legal order predicated on state consent proved ill-equipped to grasp the reality of global aviation actors whose activities spanned multiple sovereign territories.

Moreover, sovereignty began to be weaponised. In geopolitical standoffs, states invoked exclusive airspace control to impose sweeping restrictions. The 2017–2021 Gulf crisis, during which several Gulf Cooperation Council members enforced airspace bans against Qatar, revealed how sovereignty could be used as a blunt instrument with far-reaching economic and humanitarian consequences.³⁴ Such

instances laid bare the tension between legal sovereignty and practical interdependence. At once legally sanctioned, these bans underscored how sovereignty could be used to sabotage multilateralism, rather than serve it.

Emerging challenges—cybersecurity for critical aviation systems, unmanned aircraft systems (drones), environmental regulations—further strain the classical model. As these issues transcend national boundaries and evolve rapidly, states frequently entrust regulatory collaboration to international bodies and technical experts.³⁵ The doctrine of sovereignty no longer sufficiently encapsulates the layered complexity or the urgency of modern aviation governance.

In response to this disconnect, contemporary scholarship calls for a transformative epistemological shift. Instead of discarding sovereignty, it should be reconceptualised as a functional tool within an integrated, pluralistic legal framework. Sovereignty can operate horizontally—shared with international institutions, industry bodies, and non-State actors—without losing its normative force.³⁶ This reimagining does not weaken sovereignty; rather, it embeds it within a legal matrix that reflects operational interdependence and recognises that global aviation thrives on collaborative governance.

By viewing sovereignty as a bounded yet adaptable authority, legal doctrine can preserve national prerogatives while allowing flexible regulation aligned with technical and operational needs. Such a change would not only bridge the disjunction between legal theory and practical governance but also elevate safety, efficiency, and fairness—ensuring that sovereignty remains relevant, resilient, and supportive of the ambitions of twenty-first-century aviation.

Sovereignty and Globalisation in Aviation Law.

The classical conception of sovereignty in international aviation law, long grounded in rigid territorial claims, has come under significant strain amid sweeping globalisation. Civil aviation has evolved far beyond a series of disconnected domestic systems into a highly integrated global transport network. This transformation includes a complex interdependence of airlines, regulatory bodies, and infrastructure spanning continents, combined with fierce market competition and rapid technological advances. Under such conditions, the sovereignty-centric model—once a shield against foreign intrusion—has increasingly revealed itself as a structural impediment to transnational coordination, safety, and liberalised air transport.³⁷

A primary manifestation of this tension lies in the proliferation of bilateral Air Service Agreements (ASAs), many built upon the “Bermuda model.” These agreements, rooted in reciprocity and sovereign consent, serve as the legal foundation for inter-state commercial aviation.³⁸ While ASAs enable cross-border flights, they have resulted in a patchwork of uncoordinated treaties that create regulatory fragmentation and inefficiencies.³⁹ Each agreement often carries unique terms governing routes, frequencies, and pricing. As a result, airlines face significant operational complexity, and passengers experience uneven access and service quality. ICAO itself has noted that this fragmented treaty network hinders liberalisation and diminishes global connectivity.⁴⁰

These structural deficiencies are compounded by the doctrine of the “freedoms of the air.” Introduced at Chicago in 1944, these freedoms sought to enhance cross-border travel, but they remain deeply anchored in sovereign prerogatives. Freedom rights—such as the Fifth Freedom, which allows an airline from

one country to carry passengers between two other countries on a single flight—must still be individually negotiated.⁴¹ Unlike a truly open register, each state must explicitly consent to permit that freedom. This sovereignty-based bargaining deprives markets of greater competition and fails to serve consumer or regional economic interests effectively.⁴²

These limitations are highlighted sharply during international crises. In 2017, the Gulf Cooperation Council (GCC) countries—Saudi Arabia, the United Arab Emirates, Bahrain, and Egypt—imposed an airspace blockade against Qatar. Qatari-registered aircraft were suddenly barred, causing widespread flight cancellations, reroutes, and logistical chaos.⁴³ ICAO described the blockade as a politicised interference with air services that effectively upended established routes and global supply chains.⁴⁴ That episode illustrates how sovereignty can transform from a defensive doctrine into an offensive geopolitical weapon, imposing disproportionate burdens on aviation connectivity and security.

Globalisation has further eroded the doctrinal purity of sovereignty through structural shifts in ownership and operation. Privatisation of airlines—evident in carriers such as Lufthansa, British Airways, and Air India—has blurred the lines between state and corporate interests.⁴⁵ Airports themselves have seen foreign investments and cross-border partnerships, creating multi-jurisdictional operational regimes.⁴⁶ These transformations have produced a global aviation ecosystem in which commercial entities operate across sovereignties, raising complex questions of regulation, liability, and jurisdiction. Domestically grounded legal frameworks are now ill-equipped to capture this transnational commercial reality.

New challenges have also emerged at the intersection of technology, safety, and environmental responsibility. Cybersecurity

threats to aviation—such as GPS spoofing or airport systems hacking—do not respect national boundaries and demand coordinated international countermeasures.⁴⁷ Similarly, environmental concerns, particularly greenhouse gas emissions, expose the inadequacy of state-led regulation. Atmospheric pollution travels indiscriminately across borders, necessitating supranational responses like ICAO's Carbon Offsetting and Reduction Scheme for International Aviation (CORSIA).⁴⁸ Moreover, the rapid integration of unmanned aerial vehicles (UAVs) transcends traditional airspace boundaries and governance protocols.⁴⁹ These intangible threats expose the limitations of sovereignty, which hinges on defined space and jurisdiction rather than systemic risk.

Another frontier is passenger rights, which exist in an uncomfortable liminal space between domestic consumer protection laws and aviation treaties. Some regulatory regimes—such as EU Regulation 261/2004—offer robust remedies for delays or cancellations, even for flights departing non-EU countries.⁵⁰ However, when similar protections exist elsewhere, no comprehensive global framework ties into sovereignty-based treaty regimes. Airlines often struggle to reconcile overlapping jurisdictions and standards, leading to both compliance risks and consumer confusion.

Thus, the sovereignty-centric model, when left unmodified, not only impairs safety and efficiency but also undermines equity and fairness. Patrons in less liberalised markets shoulder higher costs, and global suppliers face uncertain regulation.⁵¹ The fragmentation of governance violates the principle of non-discrimination in how air carriers and passengers are treated. It also introduces systemic vulnerabilities in emergency coordination—say, during volcanic ash clouds or global pandemics—where rapid, coherent responses become essential.

Given these multifaceted shortcomings, it becomes apparent that treating sovereignty as the foundational and exclusive basis for international aviation law no longer serves the world's systems or interests. The next section turns to how this model can adapt through a more flexible and functional understanding of sovereignty—one that recognises interdependence and shared governance across borders.⁵²

Towards Functional Sovereignty – The Horizontal Allocation of Power

The rigid doctrine of vertical sovereignty—where each state exercises exclusive jurisdiction within clearly demarcated territory—no longer aligns with the operational dynamics of contemporary global aviation. In response, legal scholars have advanced models grounded in structural interdependence and functionality. One prominent proposal is the Horizontal Allocation of Power (HAL), articulated by John H. Jackson in the context of the World Trade Organisation (WTO).⁵³ Jackson's insight offers a blueprint for reforming aviation governance: sovereignty need not be diminished; instead, its exercise is redistributed across a network of qualified actors—including states, international institutions, and private entities—according to their functional competencies.

Under HAL, sovereignty is preserved in principle but reconfigured in practice. States maintain territorial jurisdiction, yet they selectively devolve authoritative powers horizontally.⁵⁴ These delegated powers are assigned based on institutional strength, technical expertise, and comparative advantages. For example, the International Civil Aviation Organisation (ICAO), a specialised UN agency, develops airworthiness, safety, and navigation standards, while the International Air Transport Association (IATA)—a private sector consortium—designs commercial protocols, fares, and

ticketing systems. ICAO and IATA collaborate on technical and operational best practices, such as the Dangerous Goods regulations and Cabin Safety recommendations, but neither function as a sovereign state.⁵⁵

The HAL construct is particularly apt for aviation, given its complexity: safe, efficient air travel depends on seamless coordination across national boundaries. If sovereignty is retained yet shared, operational coherence is more likely to be achieved.⁵⁶ For instance, ICAO's *Annexes to the Chicago Convention* provide standardised procedures applicable in every jurisdiction. Although they are technically non-binding, strong peer pressure and domestic legislation elevate these Annexes to quasi-mandatory status.⁵⁷ Thus, power—initially judicial or legislative—can migrate horizontally into functional execution.

An example of early HAL in action is the 1984 insertion of Article 3 bis into the Chicago Convention. This article prohibits the use of weapons against civil aircraft and outlines lawful interception procedures.⁵⁸ Although states retain sovereignty over their airspace, they implicitly accepted a regulatory regime permitting ICAO oversight. Though enforcement remains the responsibility of states, unilateral entry is restrained by pre-agreed procedural norms. By sharing regulatory expectations, technical safety oversight transcends rigid territorial prerogatives.

HAL also offers a framework for resisting sovereignty-driven economic blockade strategies, such as those seen during the Gulf blockade of Qatar (2017–2021). The ICAO Council deemed the action to be inconsistent with international agreements, reflecting the primacy of functional safety over political discretion.⁵⁹ Under HAL, shared regulatory obligations limit states' ability to weaponise sovereignty without collective censure.

Approaching HAL from a normative standpoint, one may regard it as reconciling

sovereignty with systemic rationality. States willingly cede governance facets where technical and regulatory benefits outweigh unilateral control.⁶⁰ Consider aviation emissions: ICAO's CORSIA scheme (Carbon Offsetting and Reduction Scheme for International Aviation) compels uniform greenhouse gas reporting and mitigation efforts. Here, mutual recognition and binding permission for cross-border CO₂ management demonstrate HAL at work.

Moreover, HAL encourages horizontal cooperation without necessitating cession of sovereignty. States retain ultimate decision-making power but exercise it collaboratively. Mutual Recognition Agreements, Safety Oversight Audits, and Joint Pilot Licensing (e.g., between Singapore, Australia, and the United States) exemplify this method.⁶¹ Such instruments foster efficiency while preserving state agency—an equilibrium between national autonomy and international coherence.

Emerging areas of concern underscore HAL's value. Unmanned Aerial Vehicles (UAVs) represent a governance frontier crossing sovereign airspace. Designing an interoperable UAV regulatory system—covering airworthiness, operation, and safety—is impossible under siloed state authority alone. HAL facilitates shared legislative and technical approaches.⁶² Similarly, cybersecurity threats to air navigation infrastructure demand globally coordinated standards—a mandate that transcends unilateral governance.⁶³ Platform-based pilot assessment and fitness monitoring (for example, by EASA in Europe) also embody HAL principles, merging state oversight with institutional databases that collect and analyse real-time performance indicators.⁶⁴

Finally, HAL reshapes the accountability architecture in aviation. Shared governance complicates enforcement, but it also enhances transparency. Bodies like ICAO's Universal Safety Oversight Audit Programme (USOAP) assess states' compliance with Annexes,

regardless of whether those Annexes are formally binding.⁶⁵ By making audit results public and linking them to airline insurance and liabilities, HAL creates incentives for collective compliance. States that deviate from agreed standards face reputational and economic consequences, even as they retain formal sovereign status.

In sum, the HAL framework presents a robust alternative to antiquated notions of vertical sovereignty. It maintains essential state prerogatives while aligning authority with institutional competence. By reconfiguring governance along horizontal lines, HAL promotes operational coherence and legal flexibility, thus advancing the epistemological shift toward International Aviation Law (IAvL)—a system grounded not in exclusionary power but in shared responsibility and functional synergy.

Sources of Law Beyond Article 38 – Embracing a Pluralistic Epistemology

The classical approach to identifying sources of international law originates from Article 38(1) of the Statute of the International Court of Justice (ICJ), which lists treaties, customary international law, general principles of law recognised by civilised nations, and, as subsidiary means, judicial decisions and scholarly writings.⁶⁶ This schema has served general international law well by providing a clear hierarchy for normative authority. However, the specialised domain of international aviation law reveals significant limitations within this framework. Aviation practices unfold within a highly technical, operationally complex environment that demands agility, standardisation, and coordination across 192 member states. Relying solely on Article 38 instruments risks rendering the normative system too rigid and slow to adapt.

First, technical standards and recommended practices, such as ICAO's Standards and

Recommended Practices (SARPs), have evolved into normative mechanisms with practical, albeit indirect, binding force.⁶⁷ Though SARPs lack formal treaty status, they are adopted by states through domestic regulation and peer-compliance mechanisms. States must notify ICAO of any “differences” to SARPs—a requirement that fosters transparency and a global baseline of aviation standards.⁶⁸ Over time, SARPs have become indispensable for regulating airworthiness certification, flight operations, air navigation services, and environmental controls. The generic hierarchy of Article 38 fails to capture the role of SARPs in shaping operational norms across borders.

Second, industry protocol and governance emerging from bodies like the International Air Transport Association (IATA) carry considerable normative force, especially in commercial and logistics domains. While IATA protocols are not recognised under conventional international law, airlines rely on them to maintain interoperability, safety, efficiency, and quality. For example, IATA’s Operational Safety Audit (IOSA) program sets a global benchmark for aviation safety; airlines accredited through IOSA are widely accepted in commercial partnerships.⁶⁹ The collective action catalysed by IATA has effectively created a peer-enforced global standard, reduced compliance costs and increasing trust among carriers.

Third, bilateral and regional Air Service Agreements (ASAs)—though technically treaty-based—create ad hoc normative regimes with contractual obligations, dispute resolution mechanisms, and performance standards.⁷⁰ These ASAs often include provisions on safety audits, insurance requirements, slot coordination, and environmental standards. While they may vary in scope, several incorporate mutual recognitions of certifications and licenses, reducing redundancy and facilitating cross-border operations. In effect, ASAs operate as quasi-legal frameworks that combine treaty authority with operational

specificity—something neither traditional treaties nor convention annexes alone can accomplish.

Fourth, quasi-judicial decisions and domestic case law have begun to treat non-traditional sources as interpretive aids—or even partially binding. European courts, such as the Court of Justice of the European Union (CJEU), have recognised ICAO SARPs or IATA protocols when adjudicating cases involving aviation safety and regulatory competence. Similarly, in Asia, arbitration panels have referenced IATA standards to determine liability and jurisdiction.⁷¹ Even ICAO’s own dispute resolution tribunals have referred to industry and operational norms to interpret treaty provisions. This practice signals a shift toward functional jurisprudence, which values effectiveness and practical consistency over formal source legality.

Fifth, soft law and global consensus contribute indirectly to de facto legal authority. Environmental formats—such as the Carbon Offsetting and Reduction Scheme for International Aviation (CORSA)—demonstrate that technical regimes can achieve broad, quasi-public legitimacy without being adopted as formal law.⁷² States, airlines, and airports voluntarily embrace CORSA obligations to signal environmental stewardship, even in the absence of domestic legal requirement.

Sixth, standards embedded in regional integration projects further dilute Article 38’s exclusivity. The European Common Aviation Area (ECAA), and its Air Transport Liberalisation Regulations, mirrors a functional legal order where EU law, national legislation, and ICAO annexes converge.⁷³ In the CARICOM region, CARICOM’s multilateral agreements and the Caribbean Single Market and Economy (CSME) actively enforce aviation standards across member states. These forms of regional governance repurpose Article 38 instruments through integrationist practice.

Finally, global technological shifts necessitate agile norm-making that cannot be captured effectively through Article 38's formal mechanisms alone. Emerging technologies like unmanned aircraft systems (UAS), artificial intelligence for air traffic control, and advanced satellite tracking services are accompanied by technical manuals, consensus-based regulations, and collaborative frameworks.⁷⁴ In many cases, states adopt these innovations wholesale—without awaiting formal treaty ratification—because the risks of technological lag are existential rather than legal.

Given these developments, the formal doctrine of legal sources must evolve to reflect complexity without compromising legitimacy. The epistemological approach of International Aviation Law (IAvL) embraces a layered normative structure, allowing formal treaties, customary law, SARPs, protocols, commercial standards, regional integration, and interpretive jurisprudence to coexist. Each normative layer performs a distinct function—treaties establish foundational authority, SARPs standardise operations, IATA protocols coordinate markets, regional frameworks ensure coherence, and jurisprudence adjudicates disputes.

This pluralistic architecture offers three major advantages:

- 1. Responsiveness:** Soft and informal norms adapt more quickly than treaty-making, enabling regulated aviation to stay ahead of technical advances.
- 2. Legitimacy:** Multi-stakeholder creation processes—through industry, technical bodies, and peer review—legitimise norms beyond state-centric ratification.
- 3. Effectiveness:** Layered law avoids zero-sum contests between safety, trade, and environmental goals by allowing specialisation and functional cooperation.

In conclusion, recognising sources beyond Article 38 is not merely academic—it is vital for harmonising the complexity of modern aviation. Without this epistemic expansion, the field risks regulatory fragmentation, safety gaps, and stagnation. IAvL offers a dynamic legal architecture capable of supporting an interconnected and rapidly evolving global aviation system.

Recognition of Non-State Actors in Aviation Governance

The classical model of international law operates on a state-centric premise, presupposing that only sovereign states can hold legal personality and bear rights and obligations under international law. However, global civil aviation defies this assumption. Airlines, pilots, air traffic control bodies, accident investigation agencies, and industry associations—none of which are states—exert profound influence over aviation safety, efficiency, and regulation. The invisibility of these non-state actors under classical doctrine is increasingly untenable, both normatively and operationally.⁷⁵

1. Multinational Airlines and Cross-Border Operations

Postprivatisation, many airlines function as multinational corporations. Institutions like Emirates, Lufthansa, and Air India, now publicly owned or traded, negotiate routes, pool costs, and coordinate logistics across countries. Their code-sharing agreements and interline partnerships possess significant cross-border implications for consumer safety, pricing transparency, and airport operations.⁷⁶ These ventures are legalised through regulatory approvals and treaties—not simply domestic oversight. In effect, airlines have become actors in their own right, shaping international norms through commercial networks that cannot be contained by conventional sovereignty.⁷⁷

2. Pilots and Air Traffic Controllers as Transnational Regulators

Pilots and air traffic controllers execute real-time decisions with global consequences. For instance, during inflight emergencies or unexpected diversions due to weather, pilots must coordinate instantaneously with foreign ATC systems, submit deviation reports, or declare “Mayday” across borders. Such decisions are guided by ICAO Standards and Recommended Practices (SARPs) and IATA Operational Manual directives.⁷⁸ Despite this, their legal standing is minimal: they lack direct access to dispute mechanisms, cannot influence rule-making directly, and hold little redress when harmed by cross-border regulatory disputes. This lacuna is acutely problematic where operational discretion collides with jurisdictional ambiguity—especially during emergencies or regulatory failures. Enhancing pilots’ and ATCOs’ legal recognition could improve accountability and alignment with technical expertise.⁷⁹

3. Industry Associations: IFALPA, CANSO, IATA

Industry associations—such as IFALPA (International Federation of Air Line Pilots’ Associations), CANSO (Civil Air Navigation Services Organization), and IATA—develop and implement norms that strongly influence air travel. IFALPA’s Cabin Safety Conference influences ICAO Annex 6 regulatory content; CANSO’s Global Air Navigation Plan informs airspace modernisation; IATA’s IOSA program sets global benchmarks for airline safety and operational excellence.⁸⁰ These norms are globally adopted—whether or not they are formally adopted through multilateral treaties. Notably, neither IFALPA nor CANSO enjoy legal personality under the Chicago Convention; yet their authority and expertise effectively shape international legal outcomes.⁸¹

4. Mechanisms for Legal Recognition

Full state-like legal personality is neither

feasible nor desirable for non-state actors. Rather, strategic mechanisms can grant them meaningful participation in governance:

- **Consultative Status:** ICAO already recognises industry partners via Observer or Advisory status. Extending this to formal Association status with limited voting or procedural privileges would develop meaningful input in standard-setting.⁸²
- **Procedural Access in Dispute Resolution:** Allowing airline entities, crew unions, or airport operators to bring amicus curiae submissions or act as co-claimants in regional aviation suits would reflect their practical investment—and might improve compliance and responsiveness.⁸³
- **Treaty Implementation Committees:** Specialised committees under ASAs or environmental accords (like CORSIA) could include technical representation from airlines/associations, ensuring technical input and procedural legitimacy.⁸⁴

These innovations remain modest compared to formal legal subjecthood but would significantly enhance the relevance of non-state actors within global aviation governance.

5. Functional Benefits of Recognising NonState Actors

Incorporating non-state actors into International Aviation Law (IAvL) brings four key functional advantages:

1. **Enhanced Legitimacy:** Incorporation of operational stakeholders confers normative legitimacy—reflecting lived expertise and democratic inclusion in rule creation.⁸⁵
2. **Regulatory Efficacy:** Participation ensures rules are implementable, aligning drafting authority with

operational realities—minimising compliance strain and improving standard quality.⁸⁶

3. **Adaptive Capacity:** In rapidly evolving domains (drone regulation, cybersecurity, post-pandemic protocols), practitioners adapt faster than treaty drafting cycles. Legal inclusion accelerates rule responsiveness.⁸⁷
4. **Improved Accountability:** Non-state bodies often self-regulate; formal procedural standing would hold them publicly accountable for safety failings or legal breaches. This advances transparency and builds trust.

6. Case Studies in Inclusivity

- **Global Reporting Format (GRF)** for runway safety, codeveloped by ICAO and IHS Markit—a private technical data firm codesigning new runway friction standards, later adopted by ICAO annexes.⁸⁸
- **CANSO Operational Data Exchange**, which supports ICAO’s Global Air Navigation Plan with realtime statistical analysis of air navigation units.⁸⁹
- **ICAO Pandemic Response Task Force (2020)** included airline, airport, and pilot group representatives, shaping global quarantine standards and border management protocols.⁹⁰
- The **IATA/ICAO Facilitation Conference** is held jointly to align passenger data norms—demonstrating collaborative rulesetting beyond states.⁹¹

7. Epistemological Implications

In classical doctrine, only states make law; others comply. IAvL flips this dynamic. In userbuilt governance systems, nonstate

actors contribute to norm creation. Their insights bolster legitimacy, effectiveness, and accountability heretofore unrealised under sovereignty alone.⁹² When pilots steward compliance with SARPs, airlines support standardised technical norms, or ATCOs train to uniform protocols—they inherently participate in lawmaking. But they do so without recognition, eroding perceived fairness and effectiveness in the system.

8. Toward a New Optimal Architecture

While sovereignty underpins jurisdiction and enforcement, it must be complemented by a **layered legal hierarchy**:

- **Treaties & SARPs** as core.
- **ASA Implementation Committees** as regional technical mechanisms.
- **Amicus/Standing rights** for relevant nonstate stakeholders.
- **Public auditing regimes** (e.g., IOSA, USOAP) to track compliance and surface risk transparently.

This multitiered model supports both legal and operational coherence, while preserving democratic legitimacy and practical adaptability. It is, in essence, the functional backbone of IAvL.

Conclusion: Charting the Future of International Aviation Law

International aviation law, long anchored in the doctrine of state sovereignty, now stands at a decisive crossroads. The classical framework—rooted in post-war anxieties and formalist conceptions of legal authority—is increasingly ill-suited to address the complexities of modern civil aviation.⁹³ Sovereignty, once a bulwark of national defense and border control, has created fragmentation, inefficiency, and obsolete policy deadlocks in a realm that demands adaptability, coordination, and technical precision.⁹⁴

First, the proliferation of bilateral Air Service Agreements (ASAs) has led to a fragmented legal landscape characterised by uneven international coverage, regulatory inconsistency, and elevated operational costs.⁹⁵ These agreements, grounded in reciprocity and territorial sovereignty, often fail to address emergent challenges such as drone integration, cross-border emergency response, or the environmental impact of aviation.⁹⁶ National pilots, controllers, and industry associations have been left to navigate a labyrinth of overlapping and sometimes conflicting frameworks, increasing both compliance burdens and safety risks.⁹⁷

Second, the classical system excludes non-state actors—airlines, pilots, technical associations—from meaningful participation in international law-making.⁹⁸ Despite making essential contributions to safety, efficiency, and innovation, these actors often lack formal legal recognition, procedural access, or accountability mechanisms under international law.⁹⁹ This absence not only limits legitimacy and buy-in but also prevents practical expertise from influencing policy and regulatory design.¹⁰⁰

Third, the exclusive reliance on Article 38 sources—the traditional pillars of treaties, custom, general principles, and scholarly writing—limits law's ability to respond effectively to rapid change.¹⁰¹ Soft-law instruments such as ICAO Annexes, IATA protocols, and region-specific frameworks (e.g., EU airline liberalisation or CORSIA) have become far more operationally relevant than the formal treaty-making process allows.¹⁰² Treating soft law as mere subsidiary means fails to reflect its de facto normative and enforcement power, risking regulatory fragmentation and legal incoherence.¹⁰³

Against this backdrop, the Article has advocated for an epistemological shift toward International Aviation Law (IAvL)—a comprehensive reimagining of how legal doctrine aligns with

the operational, institutional, and technological realities of contemporary aviation. IAvL rests on three core reforms demonstrated over the preceding directives:

1. From Territorial Sovereignty to Functional Authority

Sovereignty in IAvL becomes a *functional entitlement*, not merely a territorial marker. Rather than an indivisible prerogative, sovereignty becomes a fluid authority that can be horizontally allocated across states, international institutions, and private entities. This shift builds on models such as John H. Jackson's Horizontal Allocation of Power (HAL), which reallocate decision-making responsibilities to institutions best placed to deliver technical outcomes.¹⁰⁴

Under IAvL, states maintain sovereign authority but divest aspects such as technical standard-setting, safety audits, emissions tracking, and airspace coordination to ICAO, IATA, CANSO, and other specialised bodies.¹⁰⁵ States preserve final decision-making power but acknowledge that the system's integrity depends on cooperative institutional governance.¹⁰⁶

2. Expanding the Architecture of Legal Sources

IAvL recognises a layered normative framework in which Article 38 sources coexist with *quasi-normative instruments* such as Annexes, protocols, industry standards, and regional compacts.¹⁰⁷ ICAO's Standards and Recommended Practices (SARPs), while technically non-binding, are enforced through domestic legislation, multilateral auditing, and market incentives—elevating their practical authority.¹⁰⁸

Similarly, IATA's Operational Safety Audit (IOSA) program, though never treaties, shape carrier licensing, insurance, and interline partnerships.¹⁰⁹ Regional frameworks such

as the European Common Aviation Area (ECAA) or ASEAN Single Aviation Market align treaties, domestic law, and technical Annexes to create a sui generis hybrid system.¹¹⁰

Under IAvL, these soft-law instruments are not mere “subsidiary means” but fundamental components of international aviation governance. They provide agility in responding to emergent risks—like drones or cybersecurity—and deliver normative legitimacy through structured peer engagement and industry buyin.¹¹¹

3. Institutional Inclusion of Non-State Actors

IAvL asserts that non-state actors deserve meaningful roles in normative formation and enforcement. Airlines, crew unions, air navigation services, and passenger groups should receive structured consultative status in ICAO assemblies and technical bodies.¹¹² Dispute resolution mechanisms should allow for procedural access to airlines and unions via amicus curiae submissions or even joint-claimant status.¹¹³

Formal inclusion fosters practical legitimacy and encourages compliance by acknowledging the substantive stake these actors hold in the aviation ecosystem.¹¹⁴ Pilots and air traffic controllers—who operate under SARPs—gain a rightful voice in shaping those norms, enhancing transparency and functional accountability.¹¹⁵

Why IAvL Matters

1. Coherence

The IAvL framework integrates multiple legal layers into a harmonised system. This reduces redundancy and policy contradiction while ensuring clarity for regulators, carriers, and passengers.¹¹⁶

2. Legitimacy

By embedding operational actors in normative decision-making, IAvL enhances perceived fairness and fosters regulatory compliance. The world of aviation is no longer a realm where states alone dictate rules, but one where professionals co-construct them.¹¹⁷

3. Flexibility and Responsiveness

IAvL's validity arises from its capacity to adapt—via peer reviews, Annex updates, industry protocol revisions—without requiring lengthy treaty renegotiation. This agility is vital when responding to instantaneous challenges like cybersecurity breaches or pandemics.¹¹⁸

4. Safety and Accountability

Inclusion of non-state actors makes states and industry jointly responsible for compliance. ICAO's Universal Safety Oversight Audit Programme (USOAP) illustrates this, with audit findings having real-world impact on airline reliability, insurance, and bilateral trust.¹¹⁹

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