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Something Special in the Air and on the Ground: The Potential for Unlimited Liability of International Air Carriers for Terrorist Attacks under the Warsaw Convention and Its Revisions

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**SOMETHING SPECIAL IN THE AIR AND ON THE
GROUND: THE POTENTIAL FOR UNLIMITED
LIABILITY OF INTERNATIONAL AIR
CARRIERS FOR TERRORIST ATTACKS
UNDER THE WARSAW CONVENTION
AND ITS REVISIONS**

H. L. SILETS*

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I will send forth My terror before you, and I will throw into panic all the people among whom you come, and I will make all your enemies turn tail before you . . . I will drive them out before you little by little, until you have increased and possessed the land. — *Exodus* 22:27.

I. INTRODUCTION

THE OMNIPRESENT threat of terrorism¹ continues to

¹ For purposes of this article, the term "terrorism" will be defined as terror-inspiring violence containing an international element that is committed by individuals or groups against non-combatants, civilians, states, or internationally protected persons or entities in order to achieve political ends. For a detailed discussion of the definition of terrorism, see *infra* notes 185-217 and accompanying text.

The recent and dramatic rise of international terrorism has led some commentators to suggest that the world has "entered an 'age of terrorism', the pattern of which is unlike any other period in history when ideological and political violence occurred." Alexander & Finger, *Introduction to TERRORISM: INTERDISCIPLINARY PERSPECTIVES* at xi (Y. Alexander & S. Finger eds. 1977). Indeed, throughout the 20th century, and especially in the period following World War II, "[t]he use of terrorism as a political weapon has expanded to virtually every geographic and political area of the world." Comment, *International Legal and Policy Implications of an American Counter-Terrorist Strategy*, 14 DEN. J. INT'L L. & POL'Y 121 (1985). Risks International, a security consulting firm in Alexandria, Virginia, that tracks terrorism all over the world for a series of publications that is sent to corporate and government clients, has reported 25,000 terrorist incidents between 1970 and 1986. Kindel, *Catching Terrorists*, SCI. DIG., Sept. 1986, at 37. Six thousand incidents, or one-quarter of the 25,000 terrorist attacks reported, occurred within the two year period between 1984 and 1986. *Id.* Forty-one terrorist acts alone were committed by no fewer than fourteen terrorist groups against the people and property of twenty-one nations in a single six and one-half week period between September 1 and October 19, 1984. 84 DEP'T ST. BULL. No. 2093, Dec. 1984, at 86.

menace modern international civil aviation.² Recently, the growing wave of international terrorist attacks³ has

² The Convention Relating to the Regulation of Aerial Navigation, Oct 13, 1919, 11 L.N.T.S. 173 [hereinafter Paris Convention], signed in Paris after World War I, was the first multilateral treaty concerning air law. The Paris Convention demonstrates an early acceptance of the distinction between military and civil aviation. Article 32 of the Paris Convention, for example, states that "no military aircraft of a contracting State shall fly over the territory of another contracting State nor land thereon without special authorization." *Id.* art. 32. Nevertheless, each contracting party to the Paris Convention also agreed to allow freedom of innocent passage above its territory in time of peace to the civilian aircraft of every other contracting party to the Paris Convention with the exception of aircraft engaged in scheduled services. *Id.* arts. 2, 15.

The Convention on International Civil Aviation, *opened for signature* Dec. 7, 1944, 61 Stat. 1180, T.I.A.S. No. 1591, 15 U.N.T.S. 295 [hereinafter Chicago Convention], which specifically superseded the Paris Convention, *see id.* art. 80, makes similar distinctions between military and civil aviation. Article 3(b) of the Chicago Convention states that "[a]ircraft used in military, customs and police services shall be deemed to be state aircraft." *Id.* art. 3(b). Aircraft belonging to state-owned airlines would not fall within the "state aircraft" definition. *See id.* Although the Chicago Convention did not define the term "international civil aviation," the International Civil Aviation Organization (ICAO) Council has defined the comparable term "scheduled international air service" as a series of flights that: (a) pass through the airspace over the territory of more than one country; (b) are carried out by aircraft for the transport of passengers, mail or cargo for remuneration in such a manner that each flight is open to use by members of the public; and (c) are operated, in order to serve traffic between the same two or more points, either according to a published time-table or with such regularity or frequency that the flights constitute an identifiable systematic series. ICAO Doc. 7278/2, at 3 (1985).

³ The number of international terrorist incidents continued to grow throughout 1986. In December, 1986, the U.S. State Department announced that 620 international terrorist acts involving the citizens or territories of more than one country had been committed in the first nine months of 1986. *Terrorists Strike Again, But Victims Strike Back*, Associated Press, Domestic News, Jan. 1, 1987 (available on NEXIS). This statistic placed 1986 slightly ahead of the pace of international terrorist attacks for 1985, which saw a record total of 800 such incidents for the entire year. *Id.* For statistics of terrorist attacks not confined to just those incidents involving the citizens or territories of more than one country, *see supra* note 1 and accompanying text.

Flight International magazine recently reported that terrorism, sabotage or military attacks on civilian aircraft caused more than 25% of all air deaths in 1986. *See Terrorism to Blame for 25 Percent of Air Deaths*, United Press Int'l, Int'l News, Jan. 26, 1987 (available on NEXIS). Specifically, of the 607 people killed in civilian airline accidents worldwide in 1986, 219 people were killed in attacks by terrorists, guerrillas and various military forces. *Id.* David Learmount, air transport editor for Flight International magazine, stated that, "The risk of these deliberate disasters today has become apparently as constant a threat as that of human error or equipment failure." *Id.*

According to Israeli sources, terrorist attacks involving air carriers and airport

forced air carriers and airport authorities⁴ to implement increasingly elaborate and stringent security precautions.⁵

authorities worldwide provided the following statistics: (1) In 1985, there were twenty-eight hijackings and twenty-eight explosions at airports, airline offices and on aircraft, resulting in 415 fatalities; (2) In 1984, there were thirty hijackings, eighteen explosions at airports, airline offices and on aircraft, twelve explosive devices were found and dismantled, and eighteen other criminal acts involving aviation occurred, resulting in seventy-eight deaths; and (3) In the ten year period between 1976 and 1986, the average number of hijackings per year worldwide equaled thirty-two. Ott, *ICAO Advances Measures To Combat Terrorism*, Av. Wk. & SPACE TECH., Oct 13, 1986, at 32.

⁴ This article refers to only those carriers and airports that provide international flights on a daily basis.

⁵ In response to the mounting international terrorist threat, the Federal Aviation Administration (FAA) began implementing new and tighter security measures for U.S. air carriers in Europe and for a wider group of U.S. airports after the U.S. strike against terrorist targets in Libya on April 2, 1986. Ott, *FAA Tightens Airport Security to Counter Sabotage Threats*, Av. Wk. & SPACE TECH., April 21, 1986, at 31 [hereinafter *FAA Tightens Airport Security*]; see also Hersh, *Target Qaddafi*, N.Y. Times, Feb. 22, 1987, § 6 (Magazine), at 17, 20 (the author concludes that the primary goal of the U.S. bombing of Libya on April 2, 1986, was the assassination of Libyan leader Colonel Muammar el-Qaddafi). The FAA's escalation of airport and air carrier security measures to the maximum alert stage precipitated passenger body searches, additional X-ray inspections, the hand-examination of luggage, the holding of cargo for a minimum period of 24 hours in certain cases and an increase in armed security guards by U.S. airport authorities and U.S. air carriers. Ott, *FAA Tightens Airport Security*, *supra*, at 31.

In addition, concern over terrorist attacks on international flights led to the enactment of the International Security and Development Cooperation Act of 1985, Pub. L. No. 99-83, §§ 551-552, 1985 U.S. CODE CONG. & ADMIN. NEWS (99 Stat.) 190, 222-26 (to be codified in scattered sections of 49 U.S.C.). The Act instructs the Secretary of Transportation to evaluate airport security at international air terminals, to recommend corrective measures to foreign governments for remedying deficiencies, to inform the traveling public of a foreign government's deficiencies in implementing those recommendations, and to suspend air service — by both U.S. carriers to foreign airports with insufficient security precautions and by the carriers of those deficient nations to U.S. airports — where security creates impending dangers to travelers. *Id.*

Moreover, after a rise in airline terrorism abroad in 1986, see *supra* note 3 and accompanying text, that caused a stunning decline in overseas air traffic, two U.S. airlines reversed their marketing strategies and began publicizing improved airline security precautions. *Shift in Airline Strategy on Terrorism: Advertise Security*, Associated Press, Domestic News, June 17, 1986 (available on NEXIS). In June, 1986, Pan American World Airways, which flew to more European cities during the summer of 1986 than any other U.S. airline, announced the "formation of what it called an elite, highly visible security force to protect passengers and crew." *Id.* American Airlines, which provided flights to six European destinations in 1986, also said it was intensifying security procedures by requiring: (1) X-ray screening or hand inspection of all checked bags; (2) passport information when booking trans-Atlantic passage; (3) use of a questionnaire about checked bags at all U.S.

Nevertheless, airlines and airports still may be liable for damages caused when acts of terrorism injure international air travelers.⁶

The Warsaw Convention of 1929⁷ established the liability of air carriers for injuries to their passengers on international flights⁸ and "in the course of any of the

cities; and (4) detailed inspections of all airplanes prior to departure. *Id.* Both American and Pan Am imposed a \$5 surcharge per passenger to help cover the costs of the increased security programs. *Id.* A TWA spokeswoman said that it also would add a \$5 surcharge but would not publicize its anti-terrorist program. *Id.*; see also Greenberg, *Hotels, Airlines: The High Cost of Hidden Fees*, L.A. Times, Feb. 1, 1987, § 7 (Travel), at 2, col. 1.

On November 4, 1986, at the annual meeting of the 147 member International Air Transport Association, executives from the world's major airlines condemned terrorism and urged national governments to help defray the costs of maintaining security systems to protect civilian aircraft, passengers, and airports. *Airlines Urge Governments To Enforce Anti-Terrorist Measures*, Reuters, Ltd. Nov. 4, 1986 (available on NEXIS). David Coltman, managing director of British Caledonian Airways, called on countries around the world to finance more of the growing anti-terrorist security costs faced by airlines and stated: "Acts of terrorism are aimed at governments, not at airlines." *Id.* Nations that presently help airlines meet the additional costs of anti-terrorist security measures, which frequently total hundreds of millions of dollars, include France, the Netherlands and West Germany. *Id.*

⁶ See *infra* notes 26-299 and accompanying text.

⁷ The formal title of the Warsaw Convention is the Convention for the Unification of Certain Rules Relating to International Transportation by Air, *opened for signature* Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11, *reprinted in* 49 U.S.C. app. § 1502 (1982) (adherence of the United States proclaimed Oct. 29, 1934) [hereinafter Warsaw Convention]. The Warsaw Convention is a multilateral treaty signed by the United States, and as such, constitutes part of the supreme law of the land in the U.S., thereby preempting contrary state and local laws. U.S. CONST. art. VI, § 2; see *Missouri v. Holland*, 252 U.S. 416, 434-35 (1920) (treaties made under United States authority are binding law even within the territorial limits of a state and may override a state statute); see also *Indemnity Ins. Co. v. Pan Am. Airways*, 58 F. Supp. 338, 339-40 (S.D.N.Y. 1944) (stating that the Warsaw Convention, being a treaty made by the President with the advice and consent of the Senate, is the law of the land in the United States).

⁸ Air carrier liability for injuries sustained on domestic flights falls within the ordinary rules of negligence unless a statutory rule exists to the contrary. See Comment, *Liability of Air Carriers for Injuries to Passengers Resulting From Domestic Hijackings and Related Incidents*, 46 J. AIR L. & COM. 147 (1981). The Warsaw Convention, however, regulates all flights whose origin and destination are both within the territory of two signatory nations in accordance with the contract of carriage. Warsaw Convention, *supra* note 7, art. 1(2). If both the origin and destination are within the territory of one signatory nation, the Convention still applies when there is an agreed-upon stopover within the territory of another nation, irrespective of whether the nation is or is not a party to the treaty. *Id.*

operations of embarking or disembarking" from a flight.⁹ Originally, the Convention limited the liability of air carriers to 125,000 Poincare francs, or approximately \$8,300.¹⁰ The actual recovery limit on air carrier liability differs from country to country, however, depending on what modification was adopted by the country in which the appropriate court of review is situated. In countries that adhere to the Hague Protocol,¹¹ for example, the liability limit rises to \$16,600.¹² In countries that recognize the Montreal Agreement,¹³ the limitation on liability is in-

⁹ Warsaw Convention, *supra* note 7, art. 17.

¹⁰ *Id.* art. 22. Article 22 provides in pertinent part that "[i]n the transportation of passengers the liability of the carrier for each passenger shall be limited to the sum of 125,000 francs." *Id.* The unit of reference is "to the French franc consisting of 65-1/2 milligrams of gold at the standard of fineness of nine hundred thousandths." *Id.* art. 22, para. 4. "These sums may be converted into any national currency in round figures." *Id.* Between 1934 and 1972, this amount was the equivalent of \$8,300. See Comment, *Aviation: Enforceability of Warsaw Convention Limits on Liability in the United States*, Franklin Mint Corp. v. Trans World Airlines, Inc., 24 HARV. INT'L L.J. 183, 185-86 (1983).

This limitation on liability was considered a primary purpose of the Warsaw Convention. 1 L. KREINDLER, *AVIATION ACCIDENT LAW* § 11.01 [2] (rev. ed. 1986). The liability limitation was created to protect the infant airline industry from the potentially devastating financial burdens of passengers' claims. See *In re Air Crash in Bali, Indonesia*, 462 F. Supp. 1114, 1118-19 (C.D. Cal. 1978), *rev'd on other grounds*, 684 F.2d 1301 (9th Cir. 1982); Lowenfeld & Mendelsohn, *The United States and the Warsaw Convention*, 80 HARV. L. REV. 497, 498-99 (1967); Note, *A Proposed Revision of the Warsaw Convention*, 57 IND. L.J. 297 (1982).

¹¹ Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, *opened for signature* Sept. 28, 1955, 478 U.N.T.S. 371, ICAO Doc. 7686 —LC/140, *reprinted in* A. LOWENFELD, *AVIATION LAW* 955 (2d ed. Doc. Supp. 1981) [hereinafter *Hague Protocol*]. The United States has not ratified this Protocol. See Lowenfeld & Mendelsohn, *supra* note 10, at 504-16.

¹² Article 11 of the Hague Protocol amended article 22 of the Warsaw Convention to provide that "the liability of the carrier for each such passenger is limited to the sum of two hundred and fifty thousand francs." *Hague Protocol, supra* note 11, at art. 11. Although the limitation on liability is set forth in the Protocol in francs, the debate over the limitation was framed in terms of francs or dollars, and set at 250,000 francs, or \$16,600. See Lowenfeld & Mendelsohn, *supra* note 10, at 506-09. The \$16,600 liability limitation is absolute in that it contains no provision for inflation or currency fluctuations.

¹³ Agreement Relating to Liability Limitations of the Warsaw Convention and the Hague Protocol, Civil Aeronautics Board Agreement No. 18,900, *approved by* Civil Aeronautics Board, Order No. E-23680, *reprinted in* A. LOWENFELD, *AVIATION LAW* 971 (2d ed. Doc. Supp. 1981), *explained in* 49 U.S.C. app. § 1502 (1982) [hereinafter *Montreal Agreement*].

creased to \$75,000.¹⁴ For those countries adhering to the Guatemala Protocol,¹⁵ the liability limit continues to rise to \$100,000.¹⁶ The most recent revision of the Warsaw Convention¹⁷ further raises the maximum recovery limit to approximately \$120,000¹⁸ and also allows signatory nations to establish supplemental compensation plans that could increase the liability limitation to \$200,000.¹⁹

The limitations on air carrier liability provided for by the Warsaw Convention and its progeny²⁰ do not apply, however, if "willful misconduct" can be proven on the part of the air carrier, its agents or employees.²¹ Critics of security measures instituted and maintained by air carriers and airport authorities assert that appropriate courts of review should find "willful misconduct" when adequate security measures are available but have not been employed fully to protect airline passengers.²² Proponents of this view argue that judicial enforcement of the willful misconduct exception to limited liability for airports and airlines necessarily will allow for more adequate compensation of injured passengers, and perhaps, also will lead to

¹⁴ *Id.* at ¶ 1(1). The \$75,000 liability limit is expressed in U.S. dollars. *See id.*
¹⁵ Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, *done* March 8, 1971, ICAO Doc. No. 8932 (1971), *reprinted in* A. LOWENFELD, *AVIATION LAW* 975, 978 (2d ed. Doc. Supp. 1981) [hereinafter *Guatemala Protocol*]. The United States has not ratified the *Guatemala Protocol*.

¹⁶ *Id.* art. VIII. This liability limitation of \$100,000 is based upon the official U.S. redemption rate of \$35 per ounce of gold that was maintained at the time of the signing of the *Guatemala Protocol*. Comment, *The Revised Warsaw Convention and Other Aviation Disasters*, 8 CUMB. L. REV. 764, 789 (1978). By 1978, the new value of the liability limitation under the *Guatemala Protocol* was approximately \$133,367 due to two devaluations of the U.S. dollar and increases in the official price of gold. *Id.*

¹⁷ Additional Protocol No. 3 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, *done* Sept. 25, 1975 at Montreal, ICAO Doc. No. 9147 (1975), *reprinted in* 73 DEP'T ST. BULL. 631 (1975) [hereinafter *Montreal Protocol No. 3*]; A. LOWENFELD, *AVIATION LAW* 985 (2d ed. Doc. Supp. 1981).

¹⁸ *Montreal Protocol No. 3*, *supra* note 17, art. 2.

¹⁹ *Id.*

²⁰ *See supra* notes 7-19 and accompanying text.

²¹ *Warsaw Convention*, *supra* note 7, art. 25; *see infra* notes 260-299 and accompanying text.

²² *See, e.g.*, Broder, *Airport Security*, N.Y.L.J., July 11, 1985, at 4, col. 4.

a reduction in the total number of airport terrorist incidents occurring annually worldwide.²³ Conversely, others charge that abolishing the liability limits of the Warsaw Convention and its supplementary revisions would unfairly shift the burden of preventing and suppressing potential terrorist attacks from governmental authorities²⁴ to air carriers.²⁵

This article will begin with an examination of the history and development of the Warsaw Convention and its subsequent supplementary revisions. It then will attempt to frame a working definition for the worldwide phenomenon known as "terrorism." This article also will discuss the expansion of liability in cases involving willful misconduct and the prevention of terrorist incidents, as well as the various security measures available to airlines and airports that may be used to avert and suppress the threat of potential terrorist attacks.

²³ See, e.g., *id.*

²⁴ Hans J. Morgenthau, Professor of Political Science at the New School for Social Research, has observed that:

Terrorism presents established governments with a number of problems unprecedented in modern history. Traditionally, governments have possessed a monopoly of organized physical violence which they would use against other governments monopolistically endowed in a similar way or against individual citizens violating the legal order. It is new in modern history that a group of citizens would band together, challenging the monopoly of organized violence in the hands of the government.

Morgenthau, *Foreward to TERRORISM: INTERDISCIPLINARY PERSPECTIVES*, *supra* note 1, at vii.

Alfred P. Rubin, Professor of Political Science at the University of California at Los Angeles, argues that governments naturally shoulder the greatest responsibility for preventing and suppressing terrorism because

[t]he act of terrorism constitutes a common crime under the municipal law of the territory (or of the flag-state of the aircraft or vessel) where it occurs

It is presumed that the normal law of any society is able to maintain order in that society . . . [Thus, any] threat to society posed by some acts . . . is enough to justify the kind of enforcement activity that would be necessary to suppress that threat.

Rubin, *International Terrorism and International Law*, in *TERRORISM: INTERDISCIPLINARY PERSPECTIVES*, *supra* note 1, at 121, 122-23.

²⁵ See *Airlines Urge Governments To Enforce Anti-Terrorist Measures*, Reuters Ltd., Nov. 4, 1986 (available on NEXIS); see also *supra* note 5 and accompanying text.

II. DEVELOPMENT OF INTERNATIONAL AIR CARRIER LIABILITY

A. *The Warsaw Convention*

On October 12, 1929, the Warsaw Convention was completed and opened for signature in Warsaw, Poland.²⁶ The Convention, a multilateral treaty²⁷ that became effective on February 13, 1933,²⁸ was drafted in order to achieve two primary objectives: (1) to provide a uniform system of regulation governing international civil aviation;²⁹ and (2) to limit the potential liability of international air carriers for accidents.³⁰ The parties to the treaty

²⁶ See Note, *Aeronautics Law — Warsaw Convention — Federal Court Abrogates Article on Liability Limitation*, 7 SUFFOLK TRANSNAT'L L.J. 429, 433 n. 28 (1983). "The Warsaw Convention was the result of two international conferences held in Paris in 1925 and Warsaw in 1929, and of the work done by the interim Comité International Technique d'Experts Juridique Aériens (CITEJA) created by the Paris Conference." Lowenfeld & Mendelsohn, *supra* note 10, at 498.

²⁷ One hundred fourteen countries were parties to the Warsaw Convention as of July 1976, including: Afghanistan, Algeria, Argentina, Australia (including Norfolk Island), Austria, Bahamas, Barbados, Belgium, Benin, Botswana, Brazil, Bulgaria, Burma, Cameroon, Canada, China (People's Rep.), Colombia, Congo (Brazzaville), Cuba, Cyprus, Czechoslovakia, Denmark (not including Greenland), Dominican Rep., Ecuador, Egypt, Ethiopia, Fiji, Finland, France (including French colonies), Gabon, The Gambia, Germany (Dem. Rep.), Germany (Fed. Rep.), Ghana, Greece, Grenada, Guinea, Guyana, Hungary, Iceland, India, Indonesia, Iran, Iraq, Ireland, Israel, Italy, Ivory Coast, Jamaica, Japan, Kenya, Korea (Dem. Rep.), Laos, Latvia, Lebanon, Lesotho, Liberia, Libya, Liechtenstein, Luxembourg, Madagascar, Malaysia, Mali, Malta, Mauritania, Mauritius, Mexico, Mongolia, Morocco, Nauru, Nepal, Netherlands (including Curacao), New Zealand, Niger, Nigeria, Norway, Pakistan, Papua New Guinea, Paraguay, Philippines, Poland (including Free City of Danzig), Portugal, Romania, Rwanda, Saudi Arabia, Senegal, Sierra Leone, Singapore, Somalia, South Africa (including South-west Africa), Spain (including colonies), Sri Lanka, Sudan, Surinam, Swaziland, Sweden, Switzerland, Syrian Arab Republic, Tanzania, Tonga, Trinidad and Tobago, Tunisia, Uganda, Union of Soviet Socialist Republics, United Kingdom, United States, Upper Volta, Venezuela, Vietnam, Western Samoa, Yemen (Aden), Yugoslavia, Zaire, and Zambia. 3 Av. L. Rep. (CCH) ¶ 27,054 (July 1976); see also A. LOWENFELD, AVIATION LAW ch. 7, § 4.1 (2d ed. 1981) (stating that after the United Nations Charter, the Warsaw Convention is the next most widely adopted of all treaties).

²⁸ See Lowenfeld & Mendelsohn, *supra* note 10, at 501-02.

²⁹ The Preamble to the Warsaw Convention states that the Convention was designed to regulate "in a uniform manner the conditions of international transportation by air in respect of the documents used for such transportation and of the liability of the carrier." Warsaw Convention, *supra* note 7, at preamble.

³⁰ Warsaw Convention, *supra* note 7, arts. 17-25.

included in its provisions limitations on the potential liability of air carriers in order to attract capital and avoid disabling losses, thereby fostering the growth of the then-nascent airline industry.³¹

The Warsaw Convention establishes an "international code declaring the rights and liabilities of the parties to contracts of international carriage by air."³² The Convention contains several major provisions that provide a uniform system for documenting baggage checks, passenger tickets and waybills³³ on international flights.³⁴ It also

³¹ When the Warsaw Convention was submitted to the United States Senate in 1934, Secretary of State Cordell Hull stated:

It is believed that the principle of limitation of liability will not only be beneficial to passengers and shippers as affording a more definite basis of recovery and as tending to lessen litigation, but that it will prove to be an aid in the development of international air transportation, as such limitation will afford the carrier a more definite and equitable basis on which to obtain insurance rates, with the probable result that there would eventually be a reduction of operating expenses for the carrier and advantages to travelers and shippers in the way of reduced transportation charges.

SENATE COMM. ON FOREIGN RELATIONS, MESSAGE FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING A CONVENTION FOR THE UNIFICATION OF CERTAIN RULES, S. EXEC. DOC. NO. G, 73d Cong., 2d Sess. 3-4 (1934); see also Lowenfeld & Mendelsohn, *supra* note 10, at 499 (stating that the limitation on liability was intended to encourage the growth of the infant airline industry by helping airlines "attract capital that might otherwise be scared away by the fear of a single catastrophic accident").

³² Note, *Up in the Air Without a Ticket: Interpretation and Revision of the Warsaw Convention*, 6 FORDHAM INT'L L. J. 332, 335 (1982-83) (quoting Grein v. Imperial Airways, [1937] 1 K.B. 50, 75 (C.A. 1936)); see Warsaw Convention, *supra* note 7, preamble; see also Rosman v. Trans World Airlines, 34 N.Y.2d 385, 396, 314 N.E.2d 848, 854 (1974) ("[t]he apparent purpose of the entire Convention is uniformity among its diverse adherent Nations — the achievement, so far as possible, of a uniform body of law as to the various subject matters which are covered"). The Preamble to the Warsaw Convention states that the various parties drafted the agreement in recognition of "the advantage of regulating in a uniform manner the conditions of international transportation by air in respect of the documents used for such transportation and of the liability of the carrier. . . ." Warsaw Convention, *supra* note 7, preamble.

³³ See Warsaw Convention, *supra* note 7, arts. 3-4 (ticketing and baggage check) and arts. 5-16 (waybills).

³⁴ The Warsaw Convention only applies to "international transportation," which is defined as:

any transportation in which, according to the contract made by the parties, the place of departure and the place of destination, whether or not there be a break in the transportation or a transshipment, are

helps alleviate confusion and conflict of laws problems³⁵ by setting standard liability limitations for air carriers in cases of accidents that cause death or injury to passengers, and in cases of damage to or loss of cargo.³⁶

Yet, the Warsaw Convention achieves its greatest notoriety by placing an absolute limit on air carrier liability in the event of passenger death or personal injury.³⁷ Article 17 of the Convention³⁸ presumes air carrier liability for passenger injury or death caused by an "accident" occurring either aboard the aircraft or while embarking or disembarking.³⁹ Thus, once a plaintiff passenger proves that an accident resulting in personal injury or death occurred

situated either within the territories of two High Contracting Parties, or within the territory of a single High Contracting Party, if there is an agreed stopping place within a territory subject to the sovereignty, suzerainty, mandate or authority of another power, even though that power is not a party to this convention. Transportation without such an agreed stopping place between territories subject to the sovereignty, suzerainty, mandate, or authority of the same High Contracting Party shall not be deemed to be international for the purposes of this convention.

Id. art. 1, para. 2. The term "High Contracting Parties" denotes those nations that participated in the drafting of the Warsaw Convention and later accepted the treaty as a signatory, by adherence or ratification. *See also supra* notes 2 and 27 and *infra* note 57 and accompanying text. For an acceptance of the Convention through "adherence," *see infra* note 65 and accompanying text.

³⁵ *See* I C. SHAWCROSS & M. BEAUMONT, *AIR LAW VII* (i) 89 (4th ed. 1984); Matte, *The Warsaw System and the Hesitations of the U.S. Senate*, 8 *ANNALS AIR & SPACE L.* 151, 153 (1983) (noting that "[t]he most important reason for achieving uniformity was to avoid serious and complicated conflicts of law problems which could arise in the absence of a treaty").

³⁶ *See* Warsaw Convention, *supra* note 7, arts. 17-30.

³⁷ *Id.* arts. 17, 22.

³⁸ Article 17 of the Warsaw Convention states:

The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

Id. art. 17.

³⁹ *Id.* According to the negotiating history of the Warsaw Convention, article 17 was debated extensively. The First International Conference of Private Air Law, held in Paris in 1925, specified that "[t]he carrier is liable for accidents, breakdowns, and delays." Conference Internationale de Droit Privé Aerien 87 (1936), *cited in* *Air France v. Saks*, 470 U.S. 392, 401 (1985). Nevertheless, the Second International Conference on Private Air Law, which reconvened in Warsaw in 1929, considered the revised draft of the agreement that the International

either on the airplane or while the passenger was embarking or disembarking, the burden of proof shifts from the passenger to the air carrier.⁴⁰ Accordingly, in order to avoid liability, the air carrier must prove that it took "all necessary measures" to avoid the accident,⁴¹ or that the passenger was contributorily negligent.⁴²

In exchange for placing this strong presumption of liability on the air carrier under article 17,⁴³ the air carrier's liability is limited to 125,000 Poincare francs,⁴⁴ or approx-

Technical Committee of Aerial Experts (in French, Comité Internationale Technique d'Experts Juridiques Aériens (CITEJA)) submitted:

The carrier shall be liable for damage sustained during carriage: (a) in the case of death, wounding, or any other bodily injury suffered by a traveler; (b) in the case of destruction, loss, or damage to goods or baggage; (c) in the case of delay suffered by a traveler, goods or baggage.

International Conference on Air Law Affecting Questions, Minutes, Second International Conference on Private Aeronautical Law, Oct. 4-12, 1929, Warsaw 264-65 (R. Horner & D. Legrez trans. 1975) [hereinafter Minutes].

⁴⁰ See Warsaw Convention, *supra* note 7, arts. 20, 21. Article 20 of the Warsaw Convention states:

(1) The carrier shall not be liable if he proves that he and his agents have taken *all necessary measures* to avoid the damage or that it was impossible for him or them to take such measures.

(2) In the transportation of goods and baggage the carrier shall not be liable if he proves that the damage was occasioned by an error in piloting, in the handling of the aircraft, or in navigation and that, in all other respects, he and his agents have taken *all necessary measures* to avoid the damage.

Id. art. 20 (emphasis added).

⁴¹ *Id.* art. 20, para 1. Nowadays, however, the common law doctrine of *res ipsa loquitur* automatically shifts the burden of proof to the air carrier due to the difficulty in proving negligence in accidents involving civil aviation. Comment, *An Extension of the Warsaw Convention's Protection: Julius Young Jewelry Mfg. Co. v. Delta Airlines*, 5 N.C.J. INT'L L. & COM. REG. 497 n.1 (1980). Article 20's shift in the burden of proof from passenger to air carrier, therefore, has become unnecessary. *Id.*; see Hjalsted, *The Air Carrier's Liability in Cases of Unknown Cause of Damage in International Air Law — Part I*, 27 J. AIR L. & COM. 1 (1960).

⁴² Warsaw Convention, *supra* note 7, art. 21.

⁴³ *Id.* art. 17. The strong presumption of liability placed on air carriers is particularly significant to plaintiffs in aviation tort cases because injured victims often cannot muster the requisite expense and expertise needed to prove an air carrier's negligence. See Reukema, *No New Deal on Liability Limits for International Flights*, 18 INT'L LAW. 983, 994 (1984).

⁴⁴ Warsaw Convention, *supra* note 7, art. 22, para. 1. The Warsaw Convention defines the Poincare franc as a coin "consisting of 65-1/2 milligrams of gold . . . [that] may be converted into any national currency in round figures." *Id.* art. 22, para. 4; see also *supra* note 10 and accompanying text. When the United States

imately \$8,300,⁴⁵ under article 22.⁴⁶ Moreover, the air carrier's liability for loss of or damage to cargo is limited to 250 Poincare francs per kilogram,⁴⁷ which equals approximately \$9.07 per pound.⁴⁸

Although the drafters of the Warsaw Convention adopted a liability limit for death or personal injury that

abandoned the gold standard in the 1970s, the dollar value of the Poincare franc was calculated by converting the value of 65-1/2 milligrams of gold into U.S. dollars. See Martin, *The Price of Gold and the Warsaw Convention*, 4 AIR L. 70 (1979); Heller, *The Value of the Gold Franc — A Different Point of View*, 6 J. MAR. L. & COM. 73, 91-92 (1974); Heller, *The Warsaw Convention and the "Two Tier" Gold Market*, 7 J. WORLD TRADE L. 126, 129 (1973).

⁴⁵ See Warsaw Convention, *supra* note 7, art. 22. The dollar equivalent of \$8,300 has been used since the devaluation of the franc by the U.S. in 1933. See Lowenfeld & Mendelsohn, *supra* note 10, at 499 n.10; see also *Block v. Compagnie Nationale Air France*, 386 F.2d 323, 325 (5th Cir. 1967) (determining that 125,000 Poincare francs converted into \$8,291.87 U.S. dollars in the late 1960s); *In re Aircrash at Kimpo Int'l Airport, Korea, on November 18, 1980*, 558 F. Supp. 72, 73 (C.D. Cal. 1983) (stating that the 125,000 Poincare franc limitation on liability was worth \$8,291.88 in 1965).

⁴⁶ Article 22 of the Warsaw Convention states:

(1) In the transportation of passengers the liability of the carrier for each passenger shall be limited to the sum of 125,000 francs. Where, in accordance with the law of the court to which the case is submitted, damages may be awarded in the form of periodical payments, the equivalent capital value of the said payments shall not exceed 125,000 francs. Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability.

(2) In the transportation of checked baggage and of goods, the liability of the carrier shall be limited to a sum of 250 francs per kilogram, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of the value at delivery and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that that sum is greater than the actual value to the consignor at delivery.

(3) As regards objects of which the passenger takes charge himself the liability of the carrier shall be limited to 5,000 francs per passenger.

(4) The sums mentioned above shall be deemed to refer to the French franc consisting of 65-1/2 milligrams of gold at the standard of fineness of nine hundred thousandths. These sums may be converted into any national currency in round figures.

Warsaw Convention, *supra* note 7, art. 22; see also *supra* notes 10 and 44 and accompanying text.

⁴⁷ Warsaw Convention, *supra* note 7, art. 22, para. 2; see also *supra* note 46 and accompanying text.

⁴⁸ See CAB Order No. 74-1-16, 39 Fed. Reg. 1526 (1974), implemented at 14 C.F.R. § 221.176 (1975).

was considered low in 1929,⁴⁹ they also included a provision that effectively provided injured passengers with an exception to the liability limitations of article 22. Article 25⁵⁰ removes the liability limitations benefiting air carriers if the injured passenger can prove that the willful misconduct of the carrier, its agents or employees caused the accident and damage in question.⁵¹ If, on the other hand, the injured passenger caused or contributed to the accident or damage in question, then the court in which the action is brought may apply the law of its jurisdiction to exonerate the air carrier in whole or in part.⁵²

Any action to which the Warsaw Convention applies can only be brought subject to its provisions.⁵³ Whenever its provisions apply, therefore, the Warsaw Convention furnishes the exclusive means for recovering damages from air carriers.⁵⁴ In addition, although air carriers may enter independently into agreements to raise existing limitations on liability,⁵⁵ any subsequent treaties tending to establish a lower liability limit than that provided in Article

⁴⁹ Lowenfeld & Mendelsohn, *supra* note 10, at 499. The low limitation on liability for death or personal injury to a passenger was included in the Warsaw Convention in order to encourage the growth and survival of international civil aviation. See *id* at 499-500; see also *supra* note 31 and accompanying text.

⁵⁰ Article 25 of the Warsaw Convention states:

(1) the carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability, if the damage is caused by his *willful misconduct* or by such fault on his part as, in accordance with the law of the court to which the case is submitted, is considered to be equivalent to *willful misconduct*.

(2) Similarly the carrier shall not be entitled to avail himself of the said provisions, if the damage is caused under the same circumstances by any agent of the carrier acting within the scope of his employment.

Warsaw Convention, *supra* note 7, art. 25 (emphasis added).

⁵¹ Lowenfeld & Mendelsohn, *supra* note 10, at 503.

⁵² Warsaw Convention, *supra* note 7, art. 21; see also *supra* note 42 and accompanying text.

⁵³ Warsaw Convention, *supra* note 7, art. 24, para. 2.

⁵⁴ See *Husserl v. Swiss Air Transp. Co.*, 388 F. Supp. 1238, 1242-47 (S.D.N.Y. 1975) (stating that the substantive law of the United States applies to injuries not contemplated by the Warsaw Convention).

⁵⁵ See *infra* notes 71-86 and accompanying text; see also *supra* notes 11-19 and accompanying text.

22 of the Warsaw Convention are expressly void.⁵⁶

The Warsaw Convention, by its terms, applies "to all international transportation of persons . . ." ⁵⁷ by air carriers for hire.⁵⁸ According to the Convention, the passenger ticket, which serves as the contract between air carriers and passengers,⁵⁹ must contain certain "particulars,"⁶⁰ must be in writing, and must be delivered to the passenger.⁶¹ An air carrier's failure to deliver the ticket to the passenger or to list any of the "particulars," especially a statement of the air carrier's liability, nullifies the Convention and the carrier's limitation on liability for the subsequent death of or personal injury to a passenger.⁶² In choosing the forum for an action against an air carrier, the plaintiff must file suit "in the territory of one of the High Contracting Parties" where the carrier is domiciled or has its principal place of business, where the contract between the parties for air transportation was made, or at the destination stipulated in the contract.⁶³

Although the United States was an observer rather than an official party to the international conferences that for-

⁵⁶ Warsaw Convention, *supra* note 7, art. 23.

⁵⁷ *Id.* art. 1, para. 1; *see also supra* note 34 and accompanying text.

⁵⁸ Warsaw Convention, *supra* note 7, art. 1, para. 1.

⁵⁹ The Warsaw Convention regulates the ticket issued by the carrier and accepted by the passenger which is the "contract" between parties. *See In re Air Crash in Bali, Indonesia*, 462 F. Supp. 1114, 1120-21 (C.D. Cal. 1978), *rev'd on other grounds*, 684 F.2d 1301 (9th Cir. 1982); *see also Note, supra* note 32, at 338.

⁶⁰ Warsaw Convention, *supra* note 7, art. 3, para. 1. Article 3 of the Warsaw Convention states:

(1) For the transportation of passengers the carrier must deliver a passenger ticket which shall contain the following particulars: (a) The place and date of issue; (b) The place of departure and of destination; (c) The agreed stopping places . . . ; (d) The name and address of the carrier or carriers; (e) A statement that the transportation is subject to the rules relating to liability established by this convention.

Id.

⁶¹ *Id.* art. 3, para. 2.

⁶² *See, e.g., Ross v. Pan Am. Airways*, 299 N.Y. 88, 85 N.E.2d 880, 885 (1949) ("[D]elivery of a ticket is thus a condition set up by the Convention itself, as a determinant of the applicability, or no, of the Convention's limited liability rules. . . .").

⁶³ Warsaw Convention, *supra* note 7, art. 28.

mulated the Warsaw Convention,⁶⁴ the United States adhered⁶⁵ to the treaty in 1934⁶⁶ upon the recommendation of the executive branch⁶⁷ and after several European nations had ratified it.⁶⁸ On July 31, 1934, the United States deposited its instrument of adherence to the Warsaw Convention in the Republic of Poland's Ministry of Foreign Affairs archives as directed by article 37 of the treaty.⁶⁹ The Warsaw Convention went into effect for the United States on October 29, 1934.⁷⁰

B. *The Hague Protocol*

From the time it adhered to the Convention, however, the United States expressed dissatisfaction with the low limits on air carrier liability under the agreement.⁷¹ In ad-

⁶⁴ See Minutes, *supra* note 39, at 10 (acknowledging United States negotiators as official observers).

⁶⁵ See Warsaw Convention, *supra* note 7, art. 38. Article 38 provides nations that were not parties to the Convention's formulation a method by which the treaty can be adopted. Specifically, article 38 states:

(1) This convention shall, after it has come into force, remain open for adherence by any state. (2) The adherence shall be effected by a notification addressed to the Government of the Republic of Poland, which shall inform the Government of each of the High Contracting Parties thereof. (3) The adherence shall take effect as from the ninth day after the notification made to the Government of the Republic of Poland.

Id.

⁶⁶ On June 15, 1934, the United States Senate approved the Warsaw Convention by the two-thirds vote required by the U.S. Constitution. U.S. CONST. art. II, § 2, cl. 2; see 78 CONG. REC. 11, 577 (1934) (Senate approved resolution of ratification supporting adherence to Warsaw Convention by voice vote with no floor debate).

⁶⁷ While the executive branch of the government may enter into treaties with other nations, ratification remains within the exclusive province of the United States Senate. See *Franklin Mint Corp. v. Trans World Airlines, Inc.*, 690 F.2d 303, 311 (2d Cir. 1982), *aff'g* 525 F. Supp. 1288 (S.D.N.Y. 1981), *aff'd*, 466 U.S. 243 (1984).

⁶⁸ By the end of 1933, 12 nations including most of the European countries had ratified the Warsaw Convention. Lowenfeld & Mendelsohn, *supra* note 10, at 501-02.

⁶⁹ *Id.* at 502.

⁷⁰ *Id.* Essentially, the U.S. became a High Contracting Party to the agreement. *Id.*; see also *supra* note 34 and accompanying text.

⁷¹ Almost immediately after the United States adhered to the Warsaw Convention in 1934, some in this country began proposing revisions of the limitations on air carrier liability provided by the Convention. See Lowenfeld & Mendelsohn,

dition, the special protection guaranteed to international air carriers under the low liability limitations of the Warsaw Convention became less justified⁷² as the aviation industry grew much safer,⁷³ more stable and increasingly profitable. Moreover, in developed nations such as Great Britain, France and the United States, recoveries in domestic airline accidents far surpassed the amount of recovery allowed under the Warsaw Convention for international aviation accidents.⁷⁴ Thus, in order to address the long-standing debate over the inadequacies of the Warsaw Convention, an international diplomatic conference was convened at the Hague in September 1955.⁷⁵

At the Hague Conference, the United States delegation became the leading champion of a higher limitation on air carrier liability.⁷⁶ The United States delegates originally proposed an amendment to the Warsaw Convention that would increase the liability limit from \$8,300 to 375,000 Poincare francs, or approximately \$25,000.⁷⁷ After considerable debate and compromise, however, the United States delegates settled for a liability limit of \$16,600 for passenger death or injury.⁷⁸ The parties at the Hague Conference also altered the language of the willful mis-

supra note 10, at 504. Proponents of a higher liability limitation argued that raising the limit would not adversely affect the airline industry because air carriers could obtain low-cost liability insurance. *Id.*; see also Note, *supra* note 32, at 341.

⁷² See Lowenfeld & Mendelsohn, *supra* note 10, at 504; see also A. LOWENFELD, AVIATION LAW, ch. 7, § 4.1 (2d ed. 1981).

⁷³ Noting that the aviation industry was past its early stages of existence, one court stated that "[t]he pioneering conditions and the lack of technical advancement and passenger safeguards which faced the industry when [the] Warsaw [Convention] was adopted have been supplanted by a technologically and commercially mature industry." *In re Aircrash in Bali, Indonesia*, 462 F. Supp. 1114, 1125 (C.D. Cal. 1978), *rev'd on other grounds*, 684 F.2d 1301 (9th Cir. 1982).

⁷⁴ Loggans, *Personal Injury Damages in International Aviation Litigation: The Plaintiff's Perspective*, 13 J. MARSHALL L. REV. 541, 545 (1980).

⁷⁵ Lowenfeld & Mendelsohn, *supra* note 10, at 504-05.

⁷⁶ *Id.* at 506-07.

⁷⁷ *Id.* at 506.

⁷⁸ Hague Protocol, *supra* note 11, art. 11. The Hague Protocol exactly doubled the Warsaw Convention limitation on liability to 250,000 Poincare francs, or approximately \$16,600. See Lowenfeld & Mendelsohn, *supra* note 10, at 507; see also *supra* note 12 and accompanying text.

conduct provision,⁷⁹ so that damage created by an act of the carrier with intent to cause damage, or with recklessness and knowledge that damage will probably result, establishes willful misconduct.⁸⁰

Although the United States delegates at the Hague were not entirely satisfied with the small increase in the liability limitation,⁸¹ the United States signed the resultant agreement known as the Hague Protocol in 1956.⁸² It was not until 1959 that President Eisenhower submitted the agreement to the United States Senate where it remained in committee for two years.⁸³ The Senate Foreign Relations Committee supported the Hague Protocol,⁸⁴ but the Senate failed to take any action.⁸⁵ Thus, the \$8,300 liability limit under the Warsaw Convention remained in effect

⁷⁹ Some argue that article 25 of the Warsaw Convention was modified to render willful misconduct more difficult to prove. See Lowenfeld & Mendelsohn, *supra* note 10, at 505-06. For a discussion of the willful misconduct provision embodied in article 25 of the Warsaw Convention, see *supra* notes 50-51 and accompanying text.

⁸⁰ Hague Protocol, *supra* note 11, art. XIII (amending art. 25 of the Warsaw Convention).

⁸¹ See Lowenfeld & Mendelsohn, *supra* note 10, at 510.

⁸² As of June 1983, 86 nations had ratified the Hague Protocol, including: Afghanistan, Algeria, Argentina, Australia, Austria, Bahamas, Bangladesh, Belgium, Bulgaria, Byelorussian S.S.R., Cameroon, Canada, Chile, China (People's Rep.), Congo (Brazzaville), Cuba, Cyprus, Czechoslovakia, Dahomey, Denmark, Dominican Rep., Ecuador, Egypt, El Salvador, Fiji, France, Gabon, German Democratic Republic, Germany (Fed. Rep.), Greece, Guatemala, Hungary, Iceland, India, Iran, Iraq, Ireland, Israel, Italy, Ivory Coast, Jordan, Korea, Korean People's Democratic Rep., Kuwait, Laos, Lebanon, Lesotho, Libya, Luxembourg, Malagasy Republic, Malawi, Malaysia, Mali, Mexico, Monaco, Nauru, Nepal, Netherlands, New Zealand, Niger, Nigeria, Norway, Pakistan, Papua New Guinea, Paraguay, Poland, Portugal, Rumania, Saudi Arabia, Senegal, Seychelles, Singapore, South Africa, Spain, Sudan, Sweden, Switzerland, Syrian Arab Republic, Swaziland, Togo, Tonga, Tunisia, Turkey, Ukrainian S.S.R., U.S.S.R., United Arab Republic, Venezuela, Yugoslavia, Zambia, and Zimbabwe (Notification of Succession). 3 Av. L. Rep. (CCH) ¶ 27,128 (June 1983).

⁸³ See Lowenfeld & Mendelsohn, *supra* note 10, at 515-16.

⁸⁴ While the committee recommended that the Hague Protocol be ratified, it also stated that if insurance legislation, mandating that domestic air carriers provide additional insurance protection of up to \$50,000 plus \$10,000 for medical expenses, was not enacted within a reasonable time after ratification of the Protocol, the Warsaw Convention and the Hague Protocol both should be denounced. *Hague Protocol to the Warsaw Convention: Hearings Before the Senate Committee on Foreign Relations*, 89th Cong., 1st Sess. 6-7 (1965).

⁸⁵ See Lowenfeld & Mendelsohn, *supra* note 10, at 515-16.

in the United States.⁸⁶

C. *The Montreal Agreement*

As it became clear that the United States Senate would not ratify the Hague Protocol, it also became increasingly apparent that many senators categorically opposed any type of liability limitations.⁸⁷ Pressure aimed against the low liability limitations of the Warsaw Convention seemed to indicate the likelihood of an impending denunciation of the Warsaw Convention by the United States pursuant to article 39 of the treaty.⁸⁸ Although reluctant to denounce the Warsaw Convention,⁸⁹ United States government officials saw no alternative but to give notice of denunciation⁹⁰ due to the growing discrepancy between recoveries for domestic and international civil aviation accidents.⁹¹ Thus, in order to emphasize the seriousness of its position, the United States submitted a formal Notice of Denunciation of the Warsaw Convention to the government of Poland on November 15, 1962.⁹² Nevertheless, the de-

⁸⁶ 1 L. KREINDLER, *AVIATION ACCIDENT LAWS* § 12.03[3] (1986).

⁸⁷ See generally Lowenfeld & Mendlesohn, *supra* note 10, at 515-63.

⁸⁸ See *id.* at 546-52. Article 39 of the Warsaw Convention states:

(1) Any one of the High Contracting Parties may denounce this convention by a notification addressed to the Government of the Republic of Poland, which shall at once inform the Government of each of the High Contracting Parties.

(2) Denunciation shall take effect six months after the notification of denunciation, and shall operate only as regards the party which shall have proceeded to denunciation.

Warsaw Convention, *supra* note 7, art. 39.

⁸⁹ Denunciation of the Warsaw Convention by the United States would be a setback not only to the development of international civil aviation law, but also to international cooperation as a whole. Lowenfeld & Mendelsohn, *supra* note 10, at 534, 548-49.

⁹⁰ *Id.* at 549.

⁹¹ *Id.* at 553 (citing Civil Aeronautics Board (CAB) charts that demonstrate: "(1) the average recovery between 1950 and 1964 for a fatality on a Warsaw [international aviation] case was 6,489 dollars as compared to 38,499 average recovery on a non-Warsaw [domestic aviation] case and (2) during the . . . period [of 1958-64], the average recovery for a fatality on a non-Warsaw case had risen to over 52,000 dollars.").

⁹² *Department of State Press Release No. 268*, 53 DEP'T ST. BULL. 923 (1965). The notice of denunciation was a diplomatic note sent by the United States Embassy in

nunciation, which would not become effective until May 15, 1966,⁹³ explained that the United States wished to remain in the uniform and cooperative Warsaw system.⁹⁴ In particular, the United States suggested that it would withdraw the denunciation if there was a reasonable prospect that a new international agreement could be reached providing a new limitation on liability in the area of \$100,000.⁹⁵ In light of the six month deadline for revocation of the denunciation, an international diplomatic conference, subsequently known as the Montreal Conference, convened in Montreal in 1966 in order to amend the low liability limitations of the Warsaw Convention.⁹⁶ The parties at the Montreal Conference, however, failed to establish new limits on air carrier liability, and the conference closed without reaching an agreement.⁹⁷

Responding to the imminent threat of U.S. denuncia-

Warsaw to the government of Poland. Lowenfeld & Mendelsohn, *supra* note 10, at 551.

⁹³ See Warsaw Convention, *supra* note 7, art. 39, para. 2 (providing that denunciation will not become effective until six months after formal notification of denunciation); see also *supra* note 88 and accompanying text.

⁹⁴ Department of State Press Release No. 268, 53 DEP'T ST. BULL. 923 (1965). The Notice of Denunciation recognizes that:

To this end, the United States of America stands ready to participate in the negotiation of a revision of the Warsaw Convention which would provide substantially higher limits, or of a convention covering the other matters contained in the Warsaw Convention and Hague Protocol but without limits of liability for personal injury or death.

Id. at 925.

⁹⁵ *Id.* The press release announcing the denunciation stated that:

The United States would be prepared to withdraw the notice of denunciation deposited today if prior to its effective date of May 15, 1966, there is a reasonable prospect of an international agreement on limits of liability in international air transportation in the area of \$100,000 per passenger or on uniform rules but without any limit of liability, and if, pending the effectiveness of such international agreement, there is a provisional arrangement among the principal international airlines waiving the limits of liability up to \$75,000 per passenger.

Id. at 924.

⁹⁶ See Lowenfeld & Mendelsohn, *supra* note 10, at 563-75. Even after the delegates had convened in Montreal to establish a new limitation on air carrier liability, the Notice of Denunciation was not withdrawn. *Id.* at 563.

⁹⁷ *Id.* at 575.

tion of the Warsaw Convention, United States and foreign officials looked for an acceptable accommodation that would allow the United States to continue its participation in the Warsaw system.⁹⁸ Less than a week before the effective date of the United States denunciation, all United States air carriers and most foreign carriers accepted an interim private agreement, commonly known as the Montreal Agreement,⁹⁹ pursuant to that provision of the Warsaw Convention which specifically allows airlines to contract with each other to increase existing liability limitations.¹⁰⁰ On May 14, 1966, the United States formally withdrew its denunciation of the Warsaw Convention, the day before it became effective.¹⁰¹

The Montreal Agreement is a contract between the United States and the principal United States and foreign international air carriers serving the United States¹⁰² that neither directly involves nations participating in the War-

⁹⁸ *Id.* at 587.

⁹⁹ Montreal Agreement, *supra* note 13. The Montreal Agreement is also known as the Montreal Interim Agreement. See, e.g., Loggans, *supra* note 74, at 547.

¹⁰⁰ Warsaw Convention, *supra* note 7, art. 22, para. 1. (specifying that "by special contract, the carrier and the passenger may agree to a higher limit of liability"); see also *supra* note 46 and accompanying text.

¹⁰¹ *Department of State Press Release No. 111*, 54 DEP'T ST. BULL. 956 (1966). On May 12, 1966, the Senate Foreign Relations Committee adopted a resolution that advised against withdrawing the Notice of Denunciation unless all U.S. air carriers agreed to waive the liability limitations up to \$75,000 inclusive of legal fees and costs. N.Y. Times, May 13, 1966, at 18, col. 3. The following day, May 13, 1966, the United States announced that it intended to remain within the framework of the Warsaw Convention. The United States also announced approval by the CAB of the Montreal Agreement, an interim accord submitted by the International Air Transport Association (IATA). *Department of State Press Release No. 110*, 54 DEP'T ST. BULL. 955, 955-56 (1966). The United States did not formally retract the denunciation until the next day, May 14, 1966. *Department of State Press Release No. 111*, 54 DEP'T ST. BULL. 956, 956-57 (1966).

¹⁰² "The Montreal Agreement is not an international treaty but is merely an agreement between air carriers approved by the United States Government. Such an agreement is sanctioned by article 22(1) of the Warsaw Convention." Abramovsky, *Compensation for Passengers of Hijacked Aircraft*, 21 BUFFALO L. REV. 339, 351 n.67 (1972). For a complete list of all U.S. and foreign air carriers that have signed the Montreal Agreement, see 3 Av. L. Rep. (CCH) ¶ 27,130 (June 1983). See also 2 C. SHAWCROSS & M. BEAUMONT, AIR LAW, (D) 45-49 (4th ed. 1984) (listing the signatories to the Montreal Agreement).

saw system,¹⁰³ nor amends the Warsaw Convention itself.¹⁰⁴ Under the Agreement, the signatories agree to raise the liability limit from \$8,300 under the Warsaw Convention to \$75,000 per passenger¹⁰⁵ for death or injury occurring on international flights when the United States is a "point of origin, a point of destination, or scheduled stopping point."¹⁰⁶

In addition to raising the liability limitation to \$75,000, the Montreal Agreement suspends an air carrier's defense under article 20 of the Warsaw Convention¹⁰⁷ and instead provides for "no-fault" or absolute liability.¹⁰⁸ By imposing absolute liability on air carriers, the Montreal Agreement goes beyond both the presumption of liability standard of article 20 and the common law doctrine of *res ipsa loquitur*.¹⁰⁹ Thus, under the Montreal Agreement, the

¹⁰³ See Montreal Agreement, *supra* note 13 (noting that air carriers rather than nations participating in the Warsaw system signed the Montreal Agreement). Altogether, more than 150 air carriers, many of these foreign, adopted the Montreal Agreement. See A. LOWENFELD, AVIATION LAW, Ch. 7, at § 5.42 (2d ed. 1981); see also S. SPEISER & C. KRAUSE, AVIATION TORT LAW § 11.19 (1978).

¹⁰⁴ See *Maugnie v. Compagnie Nationale Air France*, 549 F.2d. 1256, 1259 n.6 (9th Cir.), *cert. denied*, 431 U.S. 974 (1977) (emphasizing that the Montreal Agreement is a contract among airlines rather than a treaty).

¹⁰⁵ The Montreal Agreement states that the "limit of liability for each passenger for death, wounding, or other bodily injury [is] \$75,000 inclusive of legal fees and costs. . . ." Montreal Agreement, *supra* note 13, § 1(1). The Agreement also specifies that if legal fees and costs are excluded, recovery is limited to \$58,000. *Id.*

¹⁰⁶ See *id.* § 1. Specifically, the Montreal Agreement states that its "limitations shall be applicable to international transportation by the carrier as in the [Warsaw] Convention or [Hague] Protocol which includes a point in the United States as a point of origin, point of destination, or agreed stopping place." *Id.* The Montreal Agreement also provides that the passenger ticket will determine whether the United States is "a point of origin, point of destination, or agreed stopping place." See *id.*; Note, *supra* note 32, at 345.

¹⁰⁷ Article 20 of the Warsaw Convention allows an air carrier to avoid liability if it can prove either that it took "all necessary measures" to avoid the damages in question, or that such measures were impossible to carry out. See *supra* notes 40-41 and accompanying text.

¹⁰⁸ See Montreal Agreement, *supra* note 13, § 1(2). The Montreal Agreement states that "[t]he Carrier shall not, with respect to any claim arising out of the death, wounding, or other bodily injury of a passenger, avail itself of any defense under Article 20(1) of [the Warsaw] Convention or [the Warsaw] Convention as amended by [the Hague] Protocol." *Id.*

¹⁰⁹ See *supra* note 41 and accompanying text. Under domestic aviation law, principles of negligence generally govern an air carrier's liability for passenger injury

mere proof that an accident occurred necessarily will lead to a recovery of at least \$75,000¹¹⁰ because an air carrier can no longer defend itself based on article 20 of the Warsaw Convention.¹¹¹

Since the Montreal Agreement incorporates all unamended provisions of the Warsaw Convention,¹¹² the willful misconduct exception of article 25 remains in force.¹¹³ The plaintiff who seeks unlimited damages, however, still shoulders the burden of proof.¹¹⁴ Recovery may exceed the \$75,000 limitation on air carrier liability imposed by the Montreal Agreement, therefore, whenever the plaintiff can prove willful misconduct on the part of the carrier.

D. *The Guatemala Protocol*

In 1970, the Civil Aeronautics Board (CAB)¹¹⁵ released

or death. *See Dickens v. United States*, 545 F.2d 886, 892 (5th Cir. 1977). Thus, the common law doctrine of *res ipsa loquitur* often aids negligence claims by permitting an inference of negligence on the part of the carrier. W. KEATON, PROSSER AND KEATON ON THE LAW OF TORTS 242-47 (5th ed. 1984).

¹¹⁰ Although it established absolute liability, the Montreal Agreement did not establish an absolute ceiling on liability. Recoveries exceeding the \$57,000 limitation on liability under the Agreement, therefore, can be imposed upon an air carrier if a plaintiff can prove the carrier's willful misconduct. *See Montreal Agreement, supra* note 13; *see also infra* notes 260-299 and accompanying text.

¹¹¹ Under the Montreal Agreement, the only issue to be resolved in litigation is whether the air carrier was guilty of willful misconduct. If willful misconduct is found, there is no limitation on the liability of the carrier. *See Montreal Agreement, supra* note 13, § 1(2).

¹¹² Lowenfeld & Mendelsohn, *supra* note 10, at 597.

¹¹³ The Montreal Agreement states that "[n]othing herein shall be deemed to affect the rights and liabilities of the Carrier with regard to any claim brought by, on behalf of, or in respect of any person who has willfully caused damage which resulted in death, wounding, or other bodily injury of a passenger." Montreal Agreement, *supra* note 13, § 1(2). The purpose is to prevent "[t]hose guilty of sabotage and persons claiming on their behalf. . . [from] recover[ing] any damages." *Department of State Press Release No. 110*, 54 DEP'T ST. BULL. 955, 956 (1966).

¹¹⁴ *See supra* notes 50-51 and accompanying text.

¹¹⁵ The CAB no longer exists. 49 U.S.C. § 1551(a)(3) (1982). The Airline Deregulation Act of 1978 gave the power formerly possessed by the CAB over interstate aviation and foreign air transportation in the United States to the U.S. Department of Transportation for use in consultation with the U.S. Department of State. *See Airline Deregulation Act of 1978*, Pub. L. No. 95-504, 94 Stat. 1705 (codified in scattered sections of 49 U.S.C.).

a study showing that \$100,000 did not satisfy even eight percent of all settlements reached in the United States for deaths occurring on domestic flights and that the average recovery actually surpassed \$200,000.¹¹⁶ Recognizing the growing discrepancy in recoveries between domestic aviation accidents and international aviation accidents,¹¹⁷ the United States joined with other members of the international community at a diplomatic conference held in Guatemala City in 1971 to revise the Warsaw Convention and the Hague Protocol.¹¹⁸

The resulting Guatemala City Protocol,¹¹⁹ an international treaty designed to amend the Warsaw Convention and the Hague Protocol, attempted to modernize the state of the law with respect to international air carrier liability.¹²⁰ The most significant change enunciated in the Guatemala City Protocol was an increase in the limitation on air carrier liability to \$100,000 for passenger death or injury.¹²¹ In exchange for increasing the liability limit, how-

¹¹⁶ *Aviation Protocols: Hearings Before the Senate Comm. on Foreign Relations*, 95th Cong., 1st Sess. 96 (1977) [hereinafter *Aviation Protocols Hearings*] (prepared statement of Lee S. Kreindler, Association of Trial Lawyers of America). The results of the CAB study were based upon information gathered from U.S. air carriers concerning aviation accidents that occurred between 1966 and 1970. For the results of this study, see *id.* at 23 (prepared statement and attachments of Peter B. Schwarzkopf, Assistant to the General Counsel, International Affairs, CAB).

¹¹⁷ *See id.*

¹¹⁸ Since the \$75,000 limit on liability under the Montreal Agreement only applied to flights arriving, departing or stopping in the United States, the \$8,300 liability limit of the Warsaw Convention and the \$16,600 liability limit of the Hague Protocol were still the applicable ceilings in most of the world. *See supra* notes 99-114 and accompanying text.

¹¹⁹ *See* Guatemala City Protocol, *supra* note 15.

¹²⁰ STAFF OF SENATE COMM. ON FOREIGN RELATIONS, 98TH CONG., 1ST SESS., REPORT ON MONTREAL AVIATION PROTOCOLS NOS. 3 AND 4, at 3 (Comm. Print 1983) [hereinafter SENATE REPORT]. Only 25 countries have signed the Guatemala City Protocol, including: Argentina, Belgium, Brazil, Canada, China, Colombia, Costa Rica, Denmark, Ecuador, El Salvador, France, Germany, Guatemala, Israel, Italy, Jamaica, Luxembourg, New Zealand, Nicaragua, Spain, Switzerland, Trinidad and Tobago, United Kingdom, United States, and Venezuela. 3 Av. L. Rep. (CCH) ¶ 27,129 (June 1983).

¹²¹ SENATE REPORT, *supra* note 120, at 3. This increased limitation on air carrier liability, which still was based on the Poincare franc, now was set at 1,500,000 francs. Guatemala City Protocol, *supra* note 15, art. VIII (amending article 22 of the Warsaw Convention). In addition to raising the liability limit to approximately

ever, the Guatemala City Protocol eliminated the willful misconduct exception of the Warsaw Convention, the Hague Protocol and the Montreal Agreement, thereby rendering the \$100,000 limitation on liability absolute.¹²² Moreover, at the insistence of the United States, the Guatemala City Protocol included a provision permitting individual nations to establish domestic compensation plans to supplement a passenger's \$100,000 limit on recovery.¹²³

E. *The Montreal Protocols*

After the Guatemala City Protocol had been opened for signature, and before the United States could consider its ratification, a series of international diplomatic conferences was held in Montreal primarily to negotiate detailed provisions concerning cargo shipments.¹²⁴ The Montreal Diplomatic Conference, the final conference of the series, was held in September 1975.¹²⁵ Against the background of a moribund international gold standard that still served as the basis for world currency conversion,¹²⁶ delegates at

\$100,000, the Guatemala City Protocol also increased the liability limitation on cargo from \$9 per pound to \$1,000 per passenger. SENATE REPORT, *supra* note 120, at 3.

¹²² See *supra* note 50 and accompanying text.

¹²³ SENATE REPORT, *supra* note 120, at 3. In accordance with this provision of the Guatemala City Protocol, the United States developed a supplemental compensation plan (SCP) in consort with the Prudential Insurance Company that would provide coverage totaling \$200,000 per passenger in addition to the approximately \$100,000 limit on air carrier liability under the Protocol. On July 20, 1977, the CAB approved this SCP as an inter-carrier agreement based on § 412 of the Federal Aviation Act of 1958, 49 U.S.C. § 1382 (1976). SENATE REPORT, *supra* note 120, at 3.

¹²⁴ SENATE REPORT, *supra* note 120, at 3. The 1974 ICAO Legal Subcommittee drafted preliminary cargo provisions that formed the basis for the Montreal Diplomatic Conference which convened in Montreal in September 1975. *Id.*

¹²⁵ *Id.* at 4; see *supra* note 124 and accompanying text.

¹²⁶ Until the early 1970s, the value of the United States dollar in terms of gold was maintained pursuant to the Bretton Woods Agreement of 1945. Bretton Woods Agreement Act, Pub. L. No. 79-171, ch. 339, § 2, 59 Stat. 512 (1945) (codified at 22 U.S.C. § 286 (1976)). The United States, however, suspended the redemption of U.S. dollars for gold at \$35 per ounce in 1971 in order to alleviate pressures that were raising the free market price of gold above the official price. See Comment, *supra* note 10, at 185-86. As a result, it became impractical to use

the 1975 Montreal Diplomatic Conference were persuaded to substitute the Standard Drawing Right (SDR)¹²⁷ for the existing Poincare franc conversion clause of the Warsaw Convention.¹²⁸

In total, the parties to the Montreal Diplomatic Conference adopted four separate protocols known collectively as the Montreal Protocols.¹²⁹ The first three protocols, Montreal Nos. 1-3, in effect substituted the SDR for the Poincare franc as the unit of conversion for calculating air carrier liability for passenger injury or death.¹³⁰ The fourth protocol, Montreal No. 4, amended the cargo provisions of the Warsaw Convention, as revised by the Hague Protocol.¹³¹

The Montreal Protocols, however, were not submitted to the United States Senate until 1977. Although it conducted hearings,¹³² the Senate Foreign Relations Committee did not recommend ratification of the Montreal Protocols until 1983.¹³³ When Montreal Protocols No. 3 and No. 4 came before the full Senate for approval in March 1983,¹³⁴ several factors initially indicated that the Protocols would be ratified.¹³⁵ Yet, when floor vote was

the official price of gold as the standard of conversion under the Warsaw Convention.

¹²⁷ The SDR is essentially a hybrid currency consisting of a weighted value of five major currencies calculated according to a specified formula. See Ward, *The SDR in Transport Liability Conventions: Some Clarification*, 13 J. MAR. L. & COM. 1, 3 (1981). The five currencies upon which the SDR is calculated are: (1) the United States dollar; (2) the Deutsche mark; (3) the French franc; (4) the Japanese yen; and (5) the British pound sterling. *Id.*; see Comment, *supra* note 10, at 184. On December 31, 1983, for example, one SDR was equivalent to 8.3475 French francs. 13 IMF Survey 17, 29 (Jan. 23, 1984).

¹²⁸ SENATE REPORT, *supra* note 120, at 4; see also *supra* note 46 and accompanying text.

¹²⁹ SENATE REPORT, *supra* note 120, at 4.

¹³⁰ *Id.*

¹³¹ *Id.* at 5.

¹³² See *Aviation Protocols Hearings*, *supra* note 116.

¹³³ SENATE REPORT, *supra* note 120, at 5.

¹³⁴ See generally 129 CONG. REC. S1838-40 (daily ed. Mar. 1, 1983); 129 CONG. REC. S2235-62 (daily ed. Mar. 7, 1983); 129 CONG. REC. S2270-79 (daily ed. Mar. 8, 1983).

¹³⁵ One factor that indicated that ratification was in the offing was the sixteen to one vote the Senate Foreign Relations Committee mustered to endorse the Proto-

taken, less than the required two-thirds of the Senate voted to ratify the Protocols.¹³⁶

The two major changes contemplated by the Montreal Protocols that received the most attention in the Senate concerned: (1) the establishment of absolute liability upon air carriers in the event of passenger death or personal injury, and (2) the elimination of the willful misconduct exception of the Warsaw Convention, the Hague Protocol and the Montreal Agreement.¹³⁷ The first of these two major changes proposed by the Montreal Protocols and hotly contested in the United States Senate, the imposition of absolute liability on air carriers,¹³⁸ came about as the direct result of removing the "all necessary measures" or "due care" defense previously permitted under article 20 of the Warsaw Convention.¹³⁹ Although the United States had been operating under a system of absolute liability for 17 years pursuant to the Montreal Agreement,¹⁴⁰ the Montreal Protocols represented the first multilateral treaty to include a no-fault provision.

The second major change provided by the Montreal Protocols that was debated by the Senate¹⁴¹ appeared in

cols. SENATE REPORT, *supra* note 120, at 5. Another indication that seemingly pointed to imminent ratification of the Protocols was the fact that the U.S. Senate had not rejected a treaty for over twenty years. See 129 CONG. REC. S2276 (daily ed. Mar. 8, 1983) (statement of Sen. Kassebaum). Nevertheless, the Senate heavily contested ratification of the Protocols. See generally 129 CONG. REC. S2235-62 (daily ed. Mar. 7, 1983); 129 CONG. REC. S2270-79 (daily ed. Mar. 8, 1983).

¹³⁶ *Vote in Senate Fails to Ratify Montreal Protocols on Liability*, AV. WK. & SPACE TECH., March 14, 1983, at 264.

¹³⁷ See generally 129 CONG. REC. S2235-62 (daily ed. Mar. 7, 1983); 129 CONG. REC. S2270-79 (daily ed. Mar. 8, 1983).

¹³⁸ See article 17 and article 20 of the consolidated text of The Provisions of the Revised Warsaw Convention Applicable to the United States in the Event of Ratification of Montreal Protocols 3 and 4 and Termination of 1929 Version of the Convention, *reprinted in* SENATE REPORT, *supra* note 120, at 23-37 [hereinafter Consolidated Text].

¹³⁹ See *supra* note 40 and accompanying text. While article 20 of the Consolidated Text allows air carriers to use the "all necessary measures" defense for damage caused by delay, it does not allow use of the defense for death or personal injury. See Consolidated Text, *supra* note 138, at 29.

¹⁴⁰ See Montreal Agreement, *supra* note 13, § 1(2).

¹⁴¹ The elimination of the willful misconduct clause perhaps served to generate more enthusiasm amongst those senators opposed to ratification of the Protocols

provisions eliminating the willful misconduct exception of article 25 of the Warsaw Convention,¹⁴² which previously permitted the amount of recovery to exceed the limitation on liability whenever the carrier's "willful misconduct" could be shown.¹⁴³ The Montreal Protocols created an unsurpassable limit on liability of 100,000 SDRs for passenger death or injury,¹⁴⁴ 1000 SDRs per passenger for damage to or loss of baggage,¹⁴⁵ and 17 SDRs per kilogram for damage, loss or delay in the carriage of cargo.¹⁴⁶ The elimination of the willful misconduct exception only becomes manifest in the provision of the Consolidated Text of the Warsaw Convention as amended by the Montreal Protocols that states, "[s]uch limits of liability constitute maximum limits and may not be exceeded whatever the circumstances which gave rise to the liability."¹⁴⁷

Elimination of the willful misconduct exception was objected to vehemently in the Senate debates by opponents of ratification such as Senator Ernest Hollings of South Carolina.¹⁴⁸ Senator Hollings stated in debate that the elimination of the willful misconduct exception would alert air carriers to the fact that even in cases of flagrant recklessness, their liability would never exceed the limits set in the Montreal Protocols.¹⁴⁹ Thus, Senator Hollings

than did any other proposed change. *See, e.g.*, 129 CONG. REC. S2246 (daily ed. Mar. 7, 1983) (statement of Sen. Hollings).

¹⁴² SENATE REPORT, *supra* note 120, at 17 (referring to articles 10 and 11 of Montreal Protocol No. 3).

¹⁴³ *See supra* note 50 and accompanying text.

¹⁴⁴ *See* Consolidated Text, *supra* note 138, art. 22, para. 1(a), at 30. One hundred thousand SDRs equaled approximately \$109,000 in March 1983. 129 CONG. REC. S2239 (daily ed. Mar. 7, 1983) (statement of Sen. Percy).

¹⁴⁵ *See* Consolidated Text, *supra* note 138, art. 22, para. 1(c), at 30.

¹⁴⁶ *See id.* art. 22, para. 2(a).

¹⁴⁷ *See* Consolidated Text, *supra* note 138, art. 24, at 32.

¹⁴⁸ 129 CONG. REC. S2246 (daily ed. Mar. 7, 1983) (statement of Sen. Hollings).

¹⁴⁹ *Id.* In particular, Sen. Hollings stated:

To remove from potential discovery the carelessness — or even recklessness — of airlines, both foreign and domestic, is to thwart one of the two primary goals of the American tort system: Prevention. To limit the possible recovery of an American family . . . is to destroy the other goal of our tort system, namely, compensation. The Montreal Protocols are unique in that they would nullify both goals simultaneously.

feared that the removal of the willful misconduct exception might prompt air carriers to relax safety precautions.¹⁵⁰ The subsequent failure of the Senate to ratify the Montreal Protocols¹⁵¹ created even more confusion and disarray than already existed in the area of international civil aviation law. Indeed, the situation regarding international air carrier liability did not become clear until thirteen months later when the United States Supreme Court announced its decision in *Trans World Airlines v. Franklin Mint Corp.*¹⁵²

F. *The Supreme Court's Decision in Franklin Mint*

The *Franklin Mint* case originated when the Franklin Mint Corporation (Franklin Mint) delivered a \$250,000¹⁵³ collection of numismatic materials to Trans World Airlines (TWA) for transportation from Philadelphia to London.¹⁵⁴ The shipment was subsequently lost.¹⁵⁵ Although it made no special declaration of value at the time the collection was delivered to TWA,¹⁵⁶ Franklin Mint brought suit in the United States District Court for the Southern District of New York to recover from TWA an amount greater than the liability limit set by the Warsaw Convention for the international transportation of cargo.¹⁵⁷

Id.

¹⁵⁰ *Id.*

¹⁵¹ Fifty senators voted to ratify the Protocols, forty-two voted against it, and one senator answered "present." See 129 CONG. REC. S2279 (daily ed. Mar. 8, 1983). This vote total fell far short of the required approval of two-thirds of the senators present. See *supra* note 136 and accompanying text.

¹⁵² 466 U.S. 243 (1984).

¹⁵³ *Franklin Mint Corp. v. Trans World Airlines*, 525 F. Supp. 1288, 1289 (S.D.N.Y. 1981), *modified*, 690 F.2d 303 (2d Cir. 1982), *aff'd*, 466 U.S. 243 (1984).

¹⁵⁴ *Franklin Mint*, 466 U.S. at 246.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* If Franklin Mint had made a special declaration of value at the time of delivery, and paid an additional fee, an amount not exceeding the declared value of the shipment would have been recoverable. See Warsaw Convention, *supra* note 7, art. 22, para. 2; see also *supra* note 46 and accompanying text.

¹⁵⁷ *Franklin Mint*, 690 F.2d at 304-05; see Warsaw Convention, *supra* note 7, art. 22, para. 2 (setting limitations on liability for international transportation of cargo).

The district court held that TWA's liability was limited to \$6,475.98 based on the Warsaw Convention.¹⁵⁸ The court derived this figure from the liability limit established by the Convention, the last official price of gold in the United States and the weight of the lost shipment of numismatic materials.¹⁵⁹ While the United States Court of Appeals for the Second Circuit affirmed the district court's judgment, it also ruled that 60 days from the issuance of its decision the Warsaw Convention's liability limits would be prospectively unenforceable in the United States.¹⁶⁰ In this regard, the Second Circuit reasoned that article 22 of the Warsaw Convention,¹⁶¹ which specified liability limits in terms of gold francs,¹⁶² became unenforceable in the United States because Congress abandoned the unit of conversion used by the Convention through its 1976 repeal of the Par Value Modification Act,¹⁶³ effective in 1978.¹⁶⁴ Thus, the Court of Appeals' conclusion that the liability limits of the Warsaw Convention were prospectively unenforceable in United States courts effectively abrogated the Convention.¹⁶⁵

In reviewing the Second Circuit's decision in *Franklin Mint*, the United States Supreme Court reinstated the validity of the Warsaw Convention, reversing the Second

¹⁵⁸ *Franklin Mint*, 525 F. Supp. at 1289.

¹⁵⁹ *Id.*

¹⁶⁰ *Franklin Mint*, 690 F.2d at 311.

¹⁶¹ See *supra* note 46 and accompanying text.

¹⁶² See *id.*; see also *Franklin Mint*, 466 U.S. at 254 n.25.

¹⁶³ Par Value Modification Act of 1972, Pub. L. No. 92-268, 86 Stat. 116 (1972), amended by Par Value Modification Act of 1973, Pub. L. No. 93-110, 87 Stat. 352 (1973) (formerly codified at 31 U.S.C. § 499 (1976)), repealed by Act of Oct. 19, 1976, Pub. L. No. 94-564, 90 Stat. 2660 (1976) (repealing the Par Value Modification Act effective April 1, 1978).

¹⁶⁴ *Franklin Mint*, 466 U.S. at 249-50. In this connection, the Second Circuit stated that by repealing the Par Value Modification Act:

Congress thus abandoned the unit of conversion specified by the Convention and did not substitute a new one. Substitution of a new term is a political question, unfit for judicial resolution. We hold, therefore, that the Convention's limits on liability for loss of cargo are unenforceable in United States Courts.

Franklin Mint, 690 F.2d at 311 (footnote omitted).

¹⁶⁵ *Franklin Mint*, 690 F.2d at 311.

Circuit's ruling that the Convention was prospectively unenforceable in United States courts.¹⁶⁶ The Supreme Court reached this conclusion by examining and analyzing two different issues. First, the Court discussed whether the repeal of the Par Value Modification Act by Congress rendered the liability limit of the Warsaw Convention unenforceable in the United States.¹⁶⁷ Second, the Court discussed the appropriate unit of conversion in determining the limitation on liability under the Warsaw Convention.¹⁶⁸

In determining whether the 1978¹⁶⁹ repeal of the Par Value Modification Act rendered the Warsaw Convention's liability limit unenforceable in the United States, the Supreme Court first noted the existence of "a firm and obviously sound canon of construction against finding implicit repeal of a treaty in ambiguous congressional action."¹⁷⁰ The Court found that neither the legislative history nor text of the act that repealed the Par Value Modification Act made any reference to the Warsaw Convention.¹⁷¹ Since "[l]egislative silence is not sufficient to abrogate a treaty,"¹⁷² the Court held that the repeal of the Par Value Modification Act was unrelated to the Warsaw Convention.¹⁷³ Thus, the Court concluded that "[t]he repeal of a purely domestic piece of legislation should . . . not be read as an implicit abrogation of any part of [the Warsaw Convention]."¹⁷⁴

After considering a number of policy questions,¹⁷⁵ the Court determined that "the erosion of the international

¹⁶⁶ *Franklin Mint*, 466 U.S. at 253. Technically, the Supreme Court affirmed the decision of the Second Circuit, because the Court of Appeals' conclusion that the Warsaw Convention was unenforceable in U.S. courts was to be applied prospectively only. See *Franklin Mint*, 690 F.2d at 311.

¹⁶⁷ *Franklin Mint*, 466 U.S. at 251-53.

¹⁶⁸ *Id.* at 254-60.

¹⁶⁹ See *supra* note 163 and accompanying text.

¹⁷⁰ *Franklin Mint*, 466 U.S. at 252.

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ See *id.* at 252-53.

gold standard and the 1978 repeal of the Par Value Modification Act cannot be construed as terminating or repudiating the United States' duty to abide by the [Warsaw] Convention's cargo liability limit."¹⁷⁶ Having reached this conclusion, the Court next sought to determine the appropriate unit of conversion in order to ascertain the liability limitations of the Warsaw Convention.

The Supreme Court held that the appropriate unit for converting the Warsaw Convention's liability limit into United States dollars was the last official price of gold in the United States.¹⁷⁷ The Court based its decision on a policy of judicial deference to the exclusive treaty-making powers¹⁷⁸ of the political branches of the United States government.¹⁷⁹ According to the Court, the liability limit set by the CAB of \$9.07 per pound for damage to or loss of cargo¹⁸⁰ "represented an Executive Branch determination, made pursuant to properly delegated authority, of the appropriate rate for converting the [Warsaw] Convention's liability limits into United States dollars."¹⁸¹ The Court, therefore, concluded that it was bound to uphold a cargo liability limit of \$9.07 per pound because "the CAB's decision to continue using a \$42.22 per ounce of gold conversion rate after the repeal of the Par Value Modification Act was consistent with domestic law and with the [Warsaw] Convention itself, construed in light of

¹⁷⁶ *Id.* at 253.

¹⁷⁷ *Id.* at 261. The Par Value Modification Act of 1973 set the last official price of gold at \$42.22 per ounce. See *supra* note 163.

¹⁷⁸ U.S. CONST. art. II, § 2, cl. 2.

¹⁷⁹ See *Doe ex dem. Clark v. Braden*, 57 U.S. (16 How.) 635, 657 (1853). In *Braden* the Supreme Court stated:

The treaty is therefore a law made by the proper authority, and the courts of justice have no right to annul or disregard any of its provisions, unless they violate the Constitution of the United States. It is their duty to interpret it and administer it according to its terms.

Id. The Supreme Court has upheld this reasoning in subsequent cases. See *Reid v. Covert*, 354 U.S. 1, 16-17 (1957); *Terlinden v. Ames*, 184 U.S. 270, 288-89 (1902).

¹⁸⁰ 14 C.F.R. § 221.176 (1975) (increasing the dollar-based limitation on liability to \$9.07 per pound of cargo).

¹⁸¹ *Franklin Mint*, 466 U.S. at 254.

its purposes, the understanding of its signatories, and its international implementation since 1929."¹⁸² Thus, by unequivocally declaring that the Warsaw Convention remains enforceable in the United States,¹⁸³ the Supreme Court ensured the Convention's continued applicability in typical international air accident litigation.¹⁸⁴

III. ATTEMPTING TO DEFINE INTERNATIONAL TERRORISM

Before determining whether a terrorist act may subject air carriers to unlimited liability under the willful misconduct exception of the Warsaw Convention,¹⁸⁵ it is necessary first to formulate a working definition of terrorism. It has become commonplace to assert that no generally accepted definition of terrorism exists.¹⁸⁶ Definitional problems¹⁸⁷ arise in large part because conduct that one

¹⁸² *Id.* at 261.

¹⁸³ The Supreme Court concluded "that the [liability] limit [of the Warsaw Convention] remains enforceable in United States courts." *Id.* at 253.

¹⁸⁴ See *supra* notes 166-182 and accompanying text.

¹⁸⁵ See *supra* notes 50-51 and accompanying text.

¹⁸⁶ B. JENKINS, INTERNATIONAL TERRORISM: A NEW MODE OF CONFLICT 9 (1975): STAFF OF HOUSE OF REPRESENTATIVES COMM. ON INTERNAL SECURITY, 93D CONG., 2D SESS., TERRORISM 5 (Comm. Print 1974); Baxter, *A Skeptical Look at the Concept of Terrorism*, 7 AKRON L. REV. 380 (1974) (arguing that the term international terrorism "is imprecise; it is ambiguous; and above all, it serves no operative legal purpose"); Dugard, *International Terrorism: Problems of Definition*, 50 INT'L AFF. 67 (1974); Dugard, *Towards the Definition of International Terrorism*, 67 AM. J. INT'L L. 94 (1973); Singh, *Political Terrorism: An Overview*, Paper Presented to the 34th Annual Meeting of the Midwest Political Science Association, in Chicago, Ill. (Apr. 29 - May 1, 1976) (stating that terrorism is politically motivated, selective in design, and effective in result).

¹⁸⁷ One commentator has noted that:

The problem of defining terrorism is compounded by the fact that terrorism has recently become a fad word used promiscuously and often applied to a variety of acts of violence which are not strictly terrorism by definition. It is generally pejorative. Some governments are prone to label as terrorism all violent acts committed by their political opponents, while antigovernment extremists frequently claim to be the victims of government terror. What is called terrorism thus seems to depend on point of view. Use of the term implies a moral judgment; and if one party can successfully attach the label *terrorist* to its opponent, then it has indirectly persuaded others to adopt its moral viewpoint. Terrorism is what the bad guys do.

B. JENKINS, *supra* note 186, at 2.

party classifies as terrorism may be viewed by others as the noble acts of "freedom fighters."¹⁸⁸

Nevertheless, "terrorism"¹⁸⁹ has been defined as "[a] policy intended to strike with terror those against whom it is adopted."¹⁹⁰ "Terror," in turn, describes "violence . . . committed by groups in order to intimidate a population or government into granting their demands. . . ."¹⁹¹ Yet, "violence," which characterizes a damaging or injurious action that is used to inspire terror,¹⁹² is distinguishable

¹⁸⁸ A recent analysis of international terrorism suggested that "[l]ike the crusader of a bygone era, the modern-day terrorist sees himself as being engaged in a just war in which right and justice are exclusively on his side and he is absolved from the customary restraints on the use of violence employed in his struggle." Dugard, *International Terrorism and the Just War*, in *THE MORALITY OF TERRORISM* 77 (D. Rapoport & Y. Alexander eds. 1982); see Wilkinson, *The Laws of War and Terrorism*, in *THE MORALITY OF TERRORISM*, *supra*, at 309 ("terrorism" is [often] merely a pejorative for 'guerrilla' or 'freedom fighter'").

¹⁸⁹ The term "terrorism" originated in the era of the French Revolution and the subsequent Jacobin dictatorship which used state-controlled terror as an instrument of political oppression and social control during the so-called Reign of Terror of the early 1790s. See Friedlander, *The Origins of International Terrorism*, in *TERRORISM: INTERDISCIPLINARY PERSPECTIVE*, *supra* note 1, at 31.

¹⁹⁰ XI OXFORD ENGLISH DICTIONARY 216 (1933). Ambassador Benjamin Netanyahu, the Israeli Ambassador to the United Nations, has defined terrorism as "the deliberate and systematic murder, maiming and menacing of the innocent to inspire fear for political ends." Address by U.S. Deputy Attorney General Arnold I. Burns, The Lawyers Division of the Anti-Defamation League Appeal 3 (Dec. 17, 1986) [hereinafter Burns' Address].

¹⁹¹ WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 1218 (1985).

¹⁹² See THE AMERICAN HERITAGE DICTIONARY 1350 (2d College ed. 1982). At least one commentator has insisted that

there is a sharp distinction between *violence* and *terror* which the contemporary literature too often blurs. Violence may well be a universal phenomenon, as inseparable from the human condition as is the sense of frustration and anxiety which produces that violence. To justify violence we usually argue that the persons we want to hurt either deserve punishment for misdeeds or that they deserve it because they can hurt us and *intend* to do so. A very different kind of logic is required to justify terror. The victims do not manifestly threaten us; they are innocent by conventional moral standards or by the evidence of our own senses. Terrorists, therefore, abandon ordinary conceptions and experiences, and they normally avoid speaking of their victims as persons. Depending on the context, the victims become symbols, tools, animals or corrupt beings. To be a terrorist one must have a special picture of the world, a specific consciousness. Terrorism, consequently, cannot be a universal phenomenon. It must be, and the evidence shows that is, an historical one,

from "force." Although the longstanding philosophical dichotomy between force and violence may seem pedantic, it is valuable to differentiate the legitimate use of force by the state and its agencies in restraining, preventing or punishing transgressions of the law, from the use of violence which, lacking the power of constitutional and legal sanction, is essentially arbitrary.¹⁹³

It also is useful for definitional purposes to distinguish terrorism from revolution. Although both terrorism and revolution are politically motivated, "revolution" describes "[a] sudden political overthrow . . . brought about from within a [political] system"¹⁹⁴ while "terrorism" describes an act that "occurs when the terrorist, seeking concessions from a state, international institution, multinational corporation or similar body applies violence against individuals or entities that have no direct connection to the dispute."¹⁹⁵ Moreover, "revolution," whose primary goal is to overthrow an established government,¹⁹⁶ does not necessarily embody negative connotations, whereas "terrorism," whose primary goal often is to coerce rather than to overthrow an established government, generally is considered "repulsive or shocking

emerging only at particular times and associated with particular developments in a people's consciousness.

Rapoport, *Introduction to THE MORALITY OF TERRORISM*, *supra* note 188, at xiii (some emphasis added).

¹⁹³ See Wilkinson, *supra* note 188, at 309.

¹⁹⁴ THE AMERICAN HERITAGE DICTIONARY 1058 (2d College ed. 1982). A revolt differs from an insurrection in that "[a] revolt goes beyond insurrection in aim, being an attempt actually to overthrow the government itself, whereas insurrection has as its objective some forcible change within the government. A large-scale revolt is called a rebellion and if it is successful it becomes a revolution." BLACK'S LAW DICTIONARY 1188 (rev. 5th ed. 1979).

¹⁹⁵ Burns' Address, *supra* note 190, at 3. In the resolution initiating the Convention to Prevent and Punish Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion that are of International Significance, 10 I.L.M. 255 (1971), which was adopted by the Organization of American States (O.A.S.) in 1971, the General Assembly of the O.A.S. stated that "[t]he political and ideological pretexs utilized as justification for these crimes [acts of terrorism] in no way mitigate their cruelty and irrationality or the ignoble nature of the means employed, and in no way remove their character as acts in violation of essential human rights." Resolution of June 30, 1970, 9 I.L.M. 1084 (1970).

¹⁹⁶ See *supra* note 194 and accompanying text.

. . . [and] beyond the limits society thinks tolerable. . . ."¹⁹⁷

International terrorism has been described as "a strategy of terror-inspiring violence containing an international element and committed by individuals to produce power outcomes."¹⁹⁸ According to some commentators, terrorism becomes international in character and scope "when it is (a) directed at foreigners or foreign targets, or (b) concerted by the governments or factions of more than one state, or (c) aimed at influencing the policies of a foreign government or the international community."¹⁹⁹ Others have defined international terrorism more broadly as violent actions having global repercussions or lying beyond the accepted standards of war and diplomacy.²⁰⁰

Even the United Nations *Ad Hoc* Committee on International Terrorism, which met during July and August of 1973, was unable to formulate a satisfactory definition of international terrorism.²⁰¹ As the United Nations General

¹⁹⁷ Rapoport, *supra* note 192, at xvi-xvii.

¹⁹⁸ Bassiouni, *An International Control Scheme for the Prosecution of International Terrorism: An Introduction*, in LEGAL ASPECTS OF INTERNATIONAL TERRORISM 485 (A.E. Evans & J.F. Murphy eds. 1978).

¹⁹⁹ Wilkinson, *supra* note 188, at 311.

²⁰⁰ B. JENKINS, *supra* note 186, at 10.

²⁰¹ *Report of the Ad Hoc Committee on International Terrorism*, 28 U.N. GAOR Supp. (No. 28) at 11-12, U.N. Doc. A/9028 (1973). Some Third World nations, including Algeria, Congo, Guinea, India, Mauritania, Nigeria, Southern Yemen, Syria, Tanzania, Tunisia, Yemen, Yugoslavia, Zaire and Zambia, proposed the following definition of "terrorism" that ultimately was rejected by the *Ad Hoc* Committee:

(1) Acts of violence and other repressive acts by colonial, racist and alien régimes against peoples struggling for their liberation, for their legitimate right to self-determination, independence and other human rights and fundamental freedoms;

(2) Tolerating or assisting by a State the organizations of the remnants of fascists or mercenary groups whose terrorist activity is directed against other sovereign countries;

(3) Acts of violence committed by individuals or groups of individuals which endanger or take innocent human lives or jeopardize fundamental freedoms. This should not affect the inalienable right to self-determination and independence of all peoples under colonial and racist régimes and other forms of alien domination and the legitimacy of their struggle, in particular the struggle of national liberation movements, in accordance with the purposes and principles of the Charter and the relevant resolutions of the organs of the United Nations;

(4) Acts of violence committed by individuals or groups of indi-

Assembly resolution that created the *Ad Hoc* Committee on International Terrorism amply demonstrated, many governments, especially those of the Arab, African and Eastern European bloc nations, concern themselves more with the legitimization of "wars of national liberation" than with the suppression of terrorism.²⁰² Conversely, most Western nations classify many national liberation movements, particularly those engaged in "violence with an international element designed to produce power outcomes," as terrorist in nature.²⁰³

With regard to terrorist attacks on diplomats, the United States Department of State has said:

All terrorist attacks involve the use of violence for purposes of political extortion, coercion, and publicity for a political cause[A]ll attacks . . . have one element in common: All terrorist attacks are acts of political violence. The terrorist is seeking to redress a political grievance, overthrow a political system, or publicize a political point of view.²⁰⁴

Although the State Department's analysis concerns terrorist attacks against diplomats, the proposed definition of terrorism contained therein applies with equal force to terrorist attacks perpetrated against civilian targets.²⁰⁵ Nevertheless, a senior Reagan Administration official recently subscribed to a much broader doctrinal definition of terrorism that classifies "hijacking aircraft, exploding bombs in marketplaces and other public places, attacking school buses and kindergartens, kidnapping businessmen, and taking civilian hostages . . .[as], objectively speaking, terrorist acts, *regardless* of the ultimate political purposes

viduals for private gain, the effects of which are not confined to one State.

Id. at 21.

²⁰² G.A. Res. 3034, 27 U.N. GAOR Supp. (No. 30) at 119, U.N. Doc. A/8730 (1972).

²⁰³ See generally CONTROL OF TERRORISM: INTERNATIONAL DOCUMENTS ix-xiv (Y. Alexander, M.A. Browne & A.S. Nanes eds. 1979).

²⁰⁴ Perez, *Terrorist Target: The Diplomat*, 82 DEP'T ST. BULL. 24-25 (Aug. 1982).

²⁰⁵ *Id.*

of the perpetrators."²⁰⁶ Although the Reagan Administration official justified this definitional approach by facetiously stating that "[t]here can never be ends so noble as to justify means such as these,"²⁰⁷ most commentators agree that a political purpose motivates terrorism.²⁰⁸

Thus, by compiling the most widely accepted and critically objective definitional elements available,²⁰⁹ international terrorism may be defined as terror-inspiring violence²¹⁰ containing an international element²¹¹ that is committed by individuals²¹² or groups against non-combatants, civilians, states, or internationally protected persons²¹³ or entities²¹⁴ in order to achieve political ends.²¹⁵ Having delineated the elements that comprise terrorist conduct, the first area of inquiry probes whether the Warsaw Convention's definition of "accident" covers terrorist conduct.²¹⁶ If, indeed, the Warsaw Convention does apply to terrorist incidents involving international air carriers, then the second area of examination should be whether an air carrier is subject to potentially unlimited

²⁰⁶ Burns' Address, *supra* note 190, at 3 (emphasis added).

²⁰⁷ *Id.*

²⁰⁸ See *supra* notes 198 and 204 and accompanying text. One analyst has stated that terrorism is "the systematic use of murder, injury, and destruction, or threats of murder, injury, and destruction to realize a *political end* such as repression, revolution, or a change in the policy of a regime. . . ." Wilkinson, *supra* note 188, at 310 (emphasis added).

²⁰⁹ See *supra* notes 185-208 and accompanying text.

²¹⁰ The phrase "terror-inspiring violence" comes from Bassiouni, *supra* note 198, at 485. It has been noted that this kind of violence, as opposed to the violence that results from force used by participants in a civil war or armed conflict, is "inherently indiscriminate in its effect. This is partly a consequence of the nature of much terrorist weaponry (bombs, land mines, etc.) and the frequent, deliberate terrorist attacks on the civilian population and public facilities. But is it [sic] also inherent in the objective of spreading terror." Wilkinson, *supra* note 188, at 310.

²¹¹ See *supra* notes 198-200 and accompanying text.

²¹² Former U.S. Ambassador to the United Nations Jeanne Kirkpatrick has described individuals engaged in terrorist activities as "the shock troops in a war to the death against the values and institutions of a society and the people who embody it." Burns' Address, *supra* note 190, at 3.

²¹³ See Perez, *supra* note 204, at 24-25.

²¹⁴ See Burns' Address, *supra* note 190, at 3; see also *supra* note 195 and accompanying text.

²¹⁵ See *supra* notes 204-208 and accompanying text.

²¹⁶ See *infra* notes 218-259 and accompanying text.

liability due to some form of willful misconduct on the carrier's part that prompted the terrorist incident in question.²¹⁷

IV. THE SCOPE OF THE WARSAW CONVENTION'S DEFINITION OF "ACCIDENT" UNDER ARTICLE 17

Article 17 of the Warsaw Convention²¹⁸ predicates the liability of an air carrier to its passengers upon the determination that an "accident occurred."²¹⁹ Unfortunately, however, the Warsaw Convention does not explicitly define the term "accident."²²⁰ The definition of "accident" as an element of liability under article 17, therefore, has been left to the determination of the courts.

A. *The Absolute Liability Standard*

After the air carriers' adoption of the Montreal Agreement in 1961,²²¹ a totally new system of absolute liability emerged,²²² and the interpretation of the accident prerequisite became increasingly significant.²²³ Courts rapidly

²¹⁷ See *infra* notes 218-259 and accompanying text.

²¹⁸ See *supra* note 38 and accompanying text.

²¹⁹ See *MacDonald v. Air Canada*, 439 F.2d 1402, 1404 (1st Cir. 1971) (holding that the occurrence of an accident is a threshold requirement for liability under article 17 of the Warsaw Convention); *Lautore v. United Airlines*, 16 Av. Cas. (CCH) 17,944 (S.D.N.Y. 1981) (case dismissed because plaintiff admitted there had been no "accident" within the meaning of article 17).

²²⁰ Another precondition to liability established by article 17 requires that the accident that caused the damage in dispute must have occurred on board the aircraft or in the process of embarking or disembarking. See Warsaw Convention, *supra* note 7, art. 17.

²²¹ See *supra* notes 87-117 and accompanying text. As a special contract between air carriers pursuant to the Warsaw Convention, the Montreal Agreement incorporates all of the Convention's unamended provisions. See *supra* note 112 and accompanying text; see also *supra* notes 100-104 and accompanying text. Since the Montreal Agreement did not amend article 17, the occurrence of an accident under the Warsaw Convention remains a precondition to liability under the Montreal Agreement as well. See *supra* note 112 and accompanying text.

²²² See *supra* notes 109-111 and accompanying text.

²²³ See G. MILLER, *LIABILITY IN INTERNATIONAL AIR TRANSPORT* 109-10 (1977). Since the adoption of the Montreal Agreement, the growing importance of determining conditions sufficient to hold air carriers liable has gained recognition among commentators:

[The Montreal Agreement] changes the whole outlook of the liabil-

expanded the definition of "accident" to include terrorist attacks²²⁴ and airline hijackings²²⁵ based on a theory of absolute liability of air carriers.²²⁶ Nevertheless, courts continued to avoid formulating a precise definition for the term "accident" under both the Warsaw Convention and the subsequent Montreal Agreement.²²⁷

ity regime since the carriers that are party to it have agreed to raise the liability limit to \$75,000 and, more importantly . . . to waive their right to use Article 20(1) of the [Warsaw] Convention which allows them to avoid liability if they prove that they had taken all necessary measures to avoid the damage or that it was impossible to take such measures. Thus, the carrier is in effect subject to a regime of strict liability and it is essential to determine the conditions in which injury or damage must occur before the carrier can be made responsible for it.

Id. (footnote omitted).

²²⁴ See *Evangelinos v. Trans World Airlines*, 550 F.2d 152, 156 (3d Cir. 1977) (en banc) (terrorist attack on airline passengers is an accident under article 17 of the Warsaw Convention); *Day v. Trans World Airlines*, 528 F.2d 31, 32 (2d Cir. 1975) (air carrier held liable under article 17 for terrorist attack on passengers waiting to board aircraft), *cert. denied*, 429 U.S. 890 (1976). *But see In re Tel Aviv*, 405 F. Supp. 154, 155 (D.P.R. 1975) (terrorist attack occurring in baggage claim area not an accident under article 17), *aff'd sub nom. Martinez Hernandez v. Air France*, 545 F.2d 280 (1st Cir. 1976).

²²⁵ See *Karfunkel v. Compagnie Nationale Air France*, 427 F. Supp. 971, 975 (S.D.N.Y. 1977) (planned and deliberate hijackings of airliners are accidents within meaning of article 17 of the Warsaw Convention); *Krystal v. British Overseas Airways Corp.*, 403 F. Supp. 1322, 1323 (C.D. Cal. 1975) (hijacking constitutes an "accident" within meaning of Article 17); *Husserl v. Swiss Air Transport Co.*, 351 F. Supp. 702, 707 (S.D.N.Y. 1972) (hijacking constitutes "accident" under the Warsaw Convention), *aff'd per curiam*, 485 F.2d 1240 (2d Cir. 1973); *Compagnie Nationale Air France v. Giliberto*, 74 Ill. 2d 90, 101, 383 N.E.2d 977, 980 (1978) (hijacking of airplane, and other acts of terrorism committed during international flights, are accidents within the meaning of article 17), *cert. denied*, 441 U.S. 932 (1979).

²²⁶ See *Reed v. Wiser*, 555 F.2d 1079, 1081 (2d Cir. 1977). Although the liability system of the Warsaw Convention is based on fault, air carriers, stripped of the due care defense, are strictly liable for "accidents" under the Montreal Agreement. See *Maugnie v. Compagnie Nationale Air France*, 549 F.2d 1256, 1258-59 (9th Cir.) (Montreal Agreement creates a system of absolute liability for air carriers), *cert. denied*, 431 U.S. 974 (1977); *Day v. Trans World Airlines*, 528 F.2d 31, 37 (2d Cir. 1975) (absolute liability is imposed on air carriers under Montreal Agreement), *cert. denied*, 429 U.S. 890 (1976).

²²⁷ See *Husserl v. Swiss Air Transport Co.*, 351 F. Supp. 702, 706-07 (S.D.N.Y. 1972), *aff'd per curiam*, 485 F.2d 1240 (2d Cir. 1973) [hereinafter *Husserl I*]. In *Husserl I*, the court stated that "the Montreal Agreement seems to resolve whatever doubt might have existed over the construction of the word 'accident'." *Id.* at 706. The court reasoned that:

It is significant that press releases of the State Department and the

Instead, courts frequently used policy considerations to justify the imposition of an absolute liability standard upon air carriers. Perceiving passenger protection as one of the primary goals of the Warsaw Convention,²²⁸ courts sought to determine what type of liability system would best effectuate this policy objective. Impressed by the possibility of unobstructed accident investigations and swifter settlements, courts, therefore, began to utilize an absolute liability standard based on the Warsaw Convention and the Montreal Agreement in order to better protect passengers.²²⁹

B. *Reappraising the Absolute Liability Standard*

Application of the absolute liability standard, however, created difficulties when courts confronted cases involving injuries²³⁰ occurring on routine international flights not caused by abnormal events or circumstances.²³¹ In

order of the Civil Aeronautics Board do not mention the word "accident" in the context of recovering for personal injury, but rather accept the proposition that the Montreal Agreement imposes a system of "absolute liability" upon the carrier.

Id. (citations omitted).

Extending the reasoning of the *Husserl I* court, the courts in the terrorist attack cases again skirted the "accident" question by focusing instead on the issue of embarkation and disembarkation. See *supra* note 224 and accompanying text.

²²⁸ See *Day v. Trans World Airlines*, 528 F.2d 31, 37 (2d Cir. 1975) (finding that passenger protection is one of the principle goals of the Warsaw Convention), *cert. denied*, 429 U.S. 890 (1976).

²²⁹ *Id.*

²³⁰ Article 17 of the Warsaw Convention permits recovery for "wounding" or "bodily injury." See *supra* note 38 and accompanying text. The issue that typically arises in cases of terrorist incidents involving international air carriers is whether article 17 provides recovery for mental distress absent some physical injury or manifestation. See, e.g., *Krystal v. British Overseas Airways Corp.*, 403 F. Supp. 1322, 1323 (C.D. Cal. 1975) (recovery for emotional distress allowed under Montreal Agreement); *Husserl v. Swiss Air Transport Co.*, 388 F. Supp. 1238, 1242-45 (S.D.N.Y. 1975) (damages for mental distress recoverable under both the Warsaw Convention and the Montreal Agreement) [hereinafter *Husserl II*]. But see *Burnett v. Trans World Airlines*, 368 F. Supp. 1152, 1158 (D.N.M. 1973) (recovery for mental anguish not permitted under the Warsaw Convention); *Rosman v. Trans World Airlines*, 34 N.Y.2d 385, —, 314 N.E.2d 848, 857 (1974) (Warsaw Convention does not allow recovery for psychological trauma in and of itself). See generally *Recovery for Mental Harm Under Article 17 of the Warsaw Convention: An Interpretation of Lésion Corporelle*, 8 HASTINGS INT'L & COMP. L. REV. 339 (1985).

²³¹ See *infra* notes 232-259 and accompanying text.

Warsaw v. Trans World Airlines,²³² the United States District Court for the Eastern District of Pennsylvania became the first court to examine this issue.²³³ The plaintiff in that case was a passenger who sought to recover damages for permanent hearing loss that was triggered by the routine repressurization of the cabin of the jet aircraft in question as it descended from a high altitude to land.²³⁴ The court, after noting that all previous courts defined accidents as unusual and unanticipated events proximately causing injury,²³⁵ ruled that an injury arising "from ordinary, anticipated and required programmed changes in the aircraft's operation, all of which were performed purposefully under the careful control of the plane's crew in the normal and prudent course of flight control is not [an accident]."²³⁶ Thus, the court held that an abnormal happening²³⁷ was the appropriate standard for determining whether an "accident" occurred.

C. *The Ninth Circuit's Reacceptance of the Absolute Liability Standard*

In *Saks v. Air France*,²³⁸ the United States Court of Appeals for the Ninth Circuit attempted to disregard the abnormal occurrence standard proposed by the Court in *Warsaw* for determining when an accident has occurred.²³⁹ In *Saks*, a passenger on an international flight suffered a permanent hearing loss in her left ear allegedly due to normal cabin pressurization changes during the landing of an aircraft operated by the defendant airline, Air France.²⁴⁰ The district court, relying on the unusual

²³² 442 F. Supp. 400 (E.D. Pa. 1977).

²³³ *Id.* at 401-05.

²³⁴ *Id.*

²³⁵ *Id.* at 410 (the court distinguished *MacDonald v. Air Canada*, 439 F.2d 1402 (1st Cir. 1971) based on the lack of external factors that could have induced the injury in question).

²³⁶ *Id.* at 413.

²³⁷ *Id.*

²³⁸ 724 F.2d 1383 (9th Cir. 1984), *rev'd*, 470 U.S. 392 (1985).

²³⁹ *Warsaw*, 442 F. Supp. at 413.

²⁴⁰ *Saks*, 724 F.2d at 1384.

or abnormal occurrence standard,²⁴¹ found that nothing unexpected or unusual had affected the aircraft's depressurization system. Thus, the district court held that Air France was not liable for damages because no accident had occurred within the meaning of article 17 of the Warsaw Convention.²⁴²

The Ninth Circuit, however, explicitly rejected the abnormal occurrence standard adopted by the district court for determining when an accident has taken place.²⁴³ Instead, the court of appeals held that the Montreal Agreement creates a shift from a negligence to an absolute liability standard for all injuries proximately caused by events occurring during air travel.²⁴⁴ Under the Ninth Circuit's absolute liability standard, therefore, the scope of the article 17 "accident" includes injuries resulting from any incident connected with normal aircraft operations.²⁴⁵

D. *The Supreme Court's Rejection of the Absolute Liability Standard*

The United States Supreme Court reversed the Ninth Circuit's absolute liability standard for determining the scope of the term "accident" under both the Warsaw Convention and the Montreal Agreement.²⁴⁶ The Court began its opinion by differentiating between the cause and effect of an injury,²⁴⁷ stressing that "it is the *cause* of the injury that must satisfy the definition [of the term 'accident'] rather than the occurrence of the injury alone."²⁴⁸

²⁴¹ *Id.* The district court relied on two cases out of the Third Circuit as judicial support for the unusual or abnormal occurrence standard. See *DeMarines v. KLM Royal Dutch Airlines*, 580 F.2d 1193 (3d Cir. 1978); *Warshaw v. Trans World Airlines*, 442 F. Supp. 400 (E.D. Pa. 1977).

²⁴² *Saks*, 724 F.2d at 1384.

²⁴³ *Id.*

²⁴⁴ See *id.* at 1386-87.

²⁴⁵ See *id.* at 1384-88.

²⁴⁶ *Air France v. Saks*, 470 U.S. 392 (1985).

²⁴⁷ *Id.* at 399. The Court noted that "American jurisprudence has long recognized this distinction between an accident that is the *cause* of an injury and an injury that is itself an accident." *Id.* (emphasis in original).

²⁴⁸ *Id.* (emphasis in original).

Thus, in order to hold an air carrier liable for passenger injuries under article 17, the Court stated that "the passenger [must] be able to prove that some link in the chain [of causes to the injury] was an unusual or unexpected event external to the passenger."²⁴⁹

The Supreme Court supported the unusual or unexpected occurrence standard for defining the term "accident" by finding that the Montreal Agreement did not establish absolute liability for air carriers.²⁵⁰ The Court initially held that the Montreal Agreement expands air carrier liability by requiring airlines to waive the right to defend claims on the grounds that all necessary and possible measures were taken to avoid the passenger's injury.²⁵¹ Nevertheless, the Court reasoned that the Montreal Agreement does not impose absolute liability on air carriers.²⁵² Rather, the Court stated that "[u]nder the Warsaw Convention as modified by the Montreal Agreement, liability can . . . be viewed as 'absolute' only in the sense that an airline cannot defend a claim on the ground that it took all necessary measures to avoid the injury."²⁵³

Thus, because of the Supreme Court's holding in *Air France v. Saks* that an air carrier is liable "only if a passenger's injury is caused by an unexpected or unusual event or happening that is external to the passenger,"²⁵⁴ the fact that the intentional acts of third parties rather than the carrier caused the injury in question will not preclude air carrier liability.²⁵⁵ Although it did not specifically address

²⁴⁹ *Id.* at 406.

²⁵⁰ *Id.* at 406-407. The Court found that the characterization of the Montreal Agreement as imposing absolute liability on air carriers "is not entirely accurate" because specific provisions of the Warsaw Convention that "operate to qualify [air carrier] liability, such as the contributory negligence defense of Article 21 or the 'accident' requirement of Article 17," were not waived by the parties to the Montreal Agreement. *Id.* at 407.

²⁵¹ *Id.* at 406-407.

²⁵² *Id.*

²⁵³ *Id.* at 407.

²⁵⁴ *Id.* at 405.

²⁵⁵ See, e.g., *Husserl I*, 351 F. Supp. at 707 ("the innocent victims of willful acts by [third parties] are to be able to recover from the carrier, even in respect to acts of sabotage to the aircraft . . . [I]t was the final intent of the parties [to the Montreal

the issue of air carrier liability for the intentional acts of third parties, the Court stated that the unusual or unexpected happening standard for determining whether an accident occurred "should be flexibly applied after assessment of all the circumstances surrounding a passenger's injuries. . . . For example, lower courts in this country have interpreted Article 17 broadly enough to encompass torts committed by terrorists or fellow passengers."²⁵⁶ Based on the unusual or unexpected occurrence standard adopted by the Supreme Court,²⁵⁷ therefore, passenger injuries caused by international terrorist incidents perpetrated by third parties and unrelated to the normal operation of international commercial air carriage fall within the term "accident" under both the Warsaw Convention and the Montreal Agreement. Thus, terrorist incidents may subject an air carrier to liability of up to \$75,000 per passenger²⁵⁸ unless "willful misconduct" on the part of the carrier can be shown.²⁵⁹

V. THE WILLFUL MISCONDUCT EXCEPTION

A. Defining "Willful Misconduct"

The Warsaw Convention's "willful misconduct" exception, which was preserved by the Montreal Agreement,²⁶⁰ provides for unlimited damages if the plaintiff can prove the air carrier's willful misconduct.²⁶¹ Thus, in order to recover more than the \$75,000 liability limit allowed

Agreement] to render the carriers liable to the innocent victims of such intentional acts [by third parties]."); see also *Evangelinos v. Trans World Airlines*, 396 F. Supp. 95, 100 (W.D. Pa. 1975) (Montreal Agreement did not attempt to limit application of the term "accident" to exclude the criminal acts of third parties), *rev'd on other grounds*, 550 F.2d 152 (3d Cir. 1977) (en banc).

²⁵⁶ *Saks*, 470 U.S. at 405 (citations omitted); see *supra* notes 224-225 and accompanying text.

²⁵⁷ See *supra* notes 246-254 and accompanying text.

²⁵⁸ See generally *supra* notes 87-114 and accompanying text discussing the Montreal Agreement.

²⁵⁹ See generally *supra* notes 50-51 and notes 113-114 and accompanying text.

²⁶⁰ See *supra* notes 112-113 and accompanying text.

²⁶¹ See Warsaw Convention, *supra* note 7, art. 25; see also *supra* note 50.

under the Montreal Agreement,²⁶² the plaintiff must show that the accident²⁶³ in question was proximately caused by the willful misconduct of either the air carrier, its agents or employees.²⁶⁴

Although article 25 of the Warsaw Convention does not define "willful misconduct,"²⁶⁵ several courts have attempted to formulate a workable definition of the willful misconduct exception. For example, the United States District Court for the Southern District of New York has defined willful misconduct as "the willful performance of an act that is likely to result in damage or willful action with a reckless disregard of the probable consequences."²⁶⁶ In addition, some courts have required proof of actual prior knowledge before imposing liability for willful misconduct.²⁶⁷ A finding of willful misconduct on the part of an air carrier, which is a prerequisite for

²⁶² See *supra* note 105 and accompanying text.

²⁶³ For a discussion involving the definition of the term "accident," see *supra* notes 218-259 and accompanying text.

²⁶⁴ See *supra* notes 50-51 and accompanying text.

²⁶⁵ See *supra* note 50 and accompanying text.

²⁶⁶ *Wing Hang Bank v. Japan Air Lines*, 357 F. Supp. 94, 96-97 (S.D.N.Y. 1973) (no "willful misconduct" exists when airline's valuable freight storage area, from which a package shipped on an international flight was stolen, was guarded, monitored by closed circuit television cameras, and was robbed only once during previous year).

²⁶⁷ See, e.g., *Berner v. British Commonwealth Pac. Airlines*, 346 F.2d 532, 536 (2d Cir. 1965) (willful misconduct requires knowledge that damage probably would occur); *Pekelis v. Transcontinental & W. Air*, 187 F.2d 122, 124 (2d Cir.) ("[w]illful misconduct in the intentional performance of an act *with knowledge* that the performance of that act will probably result in injury or damage, or it may be the intentional performance of an act in such a manner as to imply reckless disregard of the probable consequences . . . [or] the intentional omission of some act, *with knowledge* that such omission will probably result in damage or injury, or the intentional omission of some act in a manner from which could be implied reckless disregard of the probable consequences of the omission") (emphasis added), *cert. denied*, 341 U.S. 951 (1951); *Maschinenfabrik Kern, A.G. v. Northwest Airlines*, 562 F. Supp. 232, 240 (N.D. Ill. 1983) (willful misconduct exists when "an act or omission is taken with knowledge that the act probably will result in injury or damage or with reckless disregard of the probable consequences"); *Saaybe v. Penn Cent. Transp.*, 438 F. Supp. 65, 69 n.6 (E.D. Pa. 1977) (willful misconduct indicates the desire to cause the obtained result, or the knowledge that such result was substantially likely to occur); see also *Grey v. American Airlines*, 227 F.2d 282, 285 (2d Cir. 1955), *cert. denied*, 350 U.S. 989 (1956); *American Airlines v. Ulen*, 186 F.2d 529, 533 (D.C. Cir. 1949).

awarding unlimited liability,²⁶⁸ therefore, remains a question of fact to be determined by a jury that employs the definition or standard of "willful misconduct" prevailing in the jurisdiction of the forum court.²⁶⁹

The Warsaw Convention, however, excuses an air carrier from liability if it is proven that "all necessary measures" were taken to avoid the accident or that it was impossible to take such measures.²⁷⁰ Nevertheless, most air carriers agreed to waive the "due care" defense with the Montreal Agreement.²⁷¹ For example, air carriers signing the Montreal Agreement agreed that they were best able to develop preventive security precautions for controlling access to aircraft, most qualified to assess and prevent aviation risks and most able to distribute the costs of preventing airline injuries.²⁷² Thus, in order to avoid potential unlimited liability for willful misconduct, air carriers must ensure through every available means that terrorists and hijackers are not able to succeed in placing either weapons or explosives aboard any aircraft scheduled for international flight.

B. *Protection Against the Potential Unlimited Liability of Air Carriers Through Increased Security Precautions*

When the frequency of airline hijackings first began to rise in 1968,²⁷³ the United States government organized a task force to develop a system designed to detect potential hijackers without requiring a complete search of each passenger.²⁷⁴ The task force suggested using two proce-

²⁶⁸ See *supra* notes 50-51 and accompanying text.

²⁶⁹ See, e.g., *Maschinenfabrik*, 562 F. Supp. at 240.

²⁷⁰ Warsaw Convention, *supra* note 7, art. 20, para. 1. The "due care" defense of article 20 provides: "The carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures." *Id.*; see also *supra* note 107 and accompanying text.

²⁷¹ See *Husserl I*, 351 F. Supp. at 703 n.1.

²⁷² *Id.* at 707.

²⁷³ See A. EVANS & J. MURPHY, *LEGAL ASPECTS OF INTERNATIONAL TERRORISM* 5 (1978) [hereinafter A. EVANS & J. MURPHY].

²⁷⁴ A. LOWENFELD, *AVIATION LAW*, ch. 8, § 2.32 (2d ed. 1981).

dures to detect potential hijackers and terrorists: personality analysis and metal detection.²⁷⁵ The personality analysis, or "hijacker profile,"²⁷⁶ developed by a team of psychologists and federal investigators,²⁷⁷ is still an important preliminary screening device at many airports.²⁷⁸ The metal detector,²⁷⁹ however, remains the primary system for screening persons for weapons since its installation at airport departure gates became mandatory in all United States airports in 1973.²⁸⁰

In response to the increased terrorist threat to air carriers following the United States bombing of Libya in 1986,²⁸¹ United States air carriers and airports began implementing new and more stringent security measures that included initiating passenger body searches,²⁸² increasing armed guards,²⁸³ ordering additional x-ray²⁸⁴

²⁷⁵ *Id.*

²⁷⁶ The "hijacker profile" is a personality sketch of potential airline hijackers that contains about twenty-five behavioral characteristics that previous hijackers tended to demonstrate. See Dailey, *Development of a Behavioral Profile for Air Pirates*, 18 VILL. L. REV. 1004 (1973). The federal government has kept the specific characteristics included in the "hijacker profile" confidential for security reasons. See also *United States v. Lopez*, 328 F. Supp. 1077, 1086 (E.D.N.Y. 1971).

²⁷⁷ A. LOWENFELD, *supra* note 274, ch. 8, § 2.32.

²⁷⁸ *Terrorist Hijack Spurs U.S. Review of Int'l Security*, AV. WK. & SPACE TECH., JUNE 24, 1985, at 32.

²⁷⁹ A metal detector is a device typically attached to two standing poles through which prospective passengers walk. *United States v. Slocum*, 464 F.2d 1180, 1182 (3d Cir. 1972). A metal detector registers positive readings whenever an amount of ferrous metal equivalent to that contained in a small handgun is carried through the device. *Id.*

²⁸⁰ Dept. of Transportation Press Release No. 103-72, Dec. 5, 1972 (commanding the mandatory use of passenger screening devices by January 5, 1973) (reprinted in *United States v. Davis*, 482 F.2d 893, 902 n.25 (9th Cir. 1973)).

²⁸¹ See *FAA Tightens Airport Security*, *supra* note 5, at 31; Hersh, *Target Qaddafi*, N.Y. Times, Feb. 22, 1987, § 6 (Magazine), at 17; see also *supra* note 5 and accompanying text.

²⁸² *FAA Tightens Airport Security*, *supra* note 5, at 31.

²⁸³ After the 1986 U.S. bombing raid on Libya, heavily armed FAA police wearing body armor were put on patrol at Washington's Dulles International Airport. *Id.* at 32. Officials at New York's John F. Kennedy International Airport, on the other hand, refused to post heavily armed police and armored vehicles outside the airport terminal, a security technique much in evidence at European airports in recent years. *The MacNeil/Lehrer NewsHour: Terrorism* (PBS television broadcast, May 26, 1986) (Transcript No. 2781 available on NEXIS). As Henry De Geneste, who oversees the police force at JFK International, stated: "[The] concern is if

and hand-examination of luggage, and holding cargo in certain cases for a minimum twenty-four hour period in advance of flight.²⁸⁵ Nevertheless, standard security measures continue to remain vulnerable to a new generation of plastic weapons, such as plastic guns and plastic explosives.²⁸⁶

American Science and Engineering, a Boston-based company that manufactures x-ray machines, has developed a new machine, called the Model Z, that will help combat the threat of plastic weapons.²⁸⁷ The Model Z is able to detect plastic, as well as metal, and also can detect plastic explosives where standard machines cannot.²⁸⁸ Although several foreign airlines and governments already have purchased the machine, no United States airline had done so as late as May 1986.²⁸⁹

In addition, the FAA recently announced plans to test an advanced detection system designed to prevent bombs or other explosive devices from being loaded into the cargo holds of airplanes.²⁹⁰ Successful deployment of this new detection instrument would provide automatic discovery of weapons and explosive materials, and virtually 100 percent screening of all baggage and freight being

you have your people visible with heavy armament, the would-be . . . terrorist, . . . when he surveils an airport and looks to see where your police people are deployed, . . . knows then . . . [Instead,] we keep our people [at JFK International] in patrol cars patrolling the airport." *Id.*

²⁸⁴ *FAA Tightens Airport Security*, *supra* note 5, at 31. As of May 1986, JFK International was using the only x-ray van in the United States. *The MacNeil/Lehrer NewsHour: Terrorism* (PBS television broadcast, May 26, 1986) (Transcript No. 2781 available on NEXIS). The x-ray van used at JFK International is a device that can be wheeled into the cargo bay of any airline in order to x-ray suspicious baggage bound for the cargo hold of an aircraft. *Id.*

²⁸⁵ *FAA Tightens Airport Security*, *supra* note 5, at 31.

²⁸⁶ *The MacNeil/Lehrer NewsHour: Terrorism* (PBS television broadcast, May 26, 1986) (Transcript No. 2781 available on NEXIS).

²⁸⁷ *Id.*

²⁸⁸ *Id.*

²⁸⁹ *Id.*

²⁹⁰ *U.S. Will Test Bomb Detector For Air Cargo*, *N.Y. Times*, Apr. 18, 1987, at 1, col. 5; see *New Security Measures Sought in Wake of Hijackings, Bombings*, Associated Press, July 29, 1985 (available on NEXIS).

placed aboard aircraft.²⁹¹ Another explosives detector still in development, that bases its detection capability on an analysis of vapors from the objects being searched, eventually may be used to screen people and carry-on baggage at airport boarding gates.²⁹² Thermedics, Inc., the company that is developing this particular vapor-detection equipment, claims that the prototype analyzers "are capable of detecting not only dynamite but also TNT and the previously undetectable plastic explosives, PETN and RDX."²⁹³ Thus, international air carriers, and airport authorities as well, soon will be able to use additional and more technologically sophisticated detection devices to thwart potential terrorist incidents.

Until this new generation of technology is made widely available, however, air carriers still may employ more traditional and proven security measures in order to actively prevent terrorist occurrences, and therefore, to avoid the possibility of unlimited liability that accompanies the willful misconduct of an air carrier whenever affirmative steps are not taken to stop potential terrorist incidents. For example, in order to minimize the risk of terrorist attack, air carriers could require that luggage can be checked in for a flight only by ticketed passengers at the air carrier's ticket counter.²⁹⁴ This would eliminate the possibility of a terrorist driving up to the entrance of an

²⁹¹ *New Security Measures Sought in Wake of Hijackings, Bombings*, Associated Press, July 29, 1985 (available on NEXIS). The heart of this new system is a detection chamber, able to examine each item of luggage or cargo in six seconds, that operates by bombarding the items to be examined with streams of slowed neutrons. *U.S. Will Test Bomb Detector For Air Cargo*, N.Y. Times, Apr. 18, 1987, at 1, col. 5. This process makes it possible to detect the presence of nitrogen, which is a component of all known explosives. *Id.* This detection process is known as "thermal neutron activation." *Id.* at 13, col. 2.

²⁹² N.Y. Times, Apr. 18, 1987, at 13, col. 1. This vapor-detection system operates by picking up vapors from objects and people. *Id.* at 13, cols. 2-3. The detection equipment then identifies the specific chemicals producing the vapors. *Id.* at 13, col. 2.

²⁹³ *Id.* at 13, col. 3.

²⁹⁴ Dept. of Transportation Press Release No. 67-85, June 27, 1985 (statement of U.S. Secretary of Transportation Elizabeth Dole) [hereinafter DOT Press Release No. 67-85] (available from Office of the Assistant Secretary for Public Affairs, Washington, D.C.).

air terminal, checking bomb-laden luggage aboard a flight and then driving away.²⁹⁵

Air carriers and airport authorities also must ensure that airline personnel are individually screened before being allowed access to any aircraft.²⁹⁶ In addition, air carriers should subject security personnel to intense scrutiny in order to ensure that their duties are being performed effectively.²⁹⁷ An airline executive once concluded that "terrorists have demonstrated that they will do what they want, when they want, no matter what is done."²⁹⁸ Fortunately, statistics show that as airport and air carrier security has tightened and become increasingly more vigorous in the decades since the late 1960s, there has been a corresponding decrease in the number of successful hijackings per year.²⁹⁹ Thus, air carriers have performed their

²⁹⁵ In response to this possibility, the United States eliminated curbside check-in for luggage on international flights following the hijacking of a TWA jet to Beirut in June 1985. See *U.S. Will Test Bomb Detector For Air Cargo*, N.Y. Times, Apr. 18, 1987, at 13, col. 1; see also DOT Press Release No. 67-85, *supra* note 294. The U.S. government also declared that only ticketed passengers with positive identification would be able to check-in luggage at airline ticket counters. DOT Press Release No. 67-85, *supra* note 294.

²⁹⁶ Due to the fact that many airports experience a labor turnover rate that can be as high as 200 percent annually, background investigation of new personnel may not be conducted thoroughly. *Sixty Minutes: Airport* (CBS television broadcast, Dec. 1, 1985). In order to counteract this problem, the International Air Transport Association (IATA) of air carriers has suggested that all cleaning, catering and other personnel at airports be searched by some method before gaining access to the airport tarmac to perform their duties. *IATA Experts Focus on Airport Ramp Security*, Av. WK. & SPACE TECH., Dec. 2, 1985, at 31.

²⁹⁷ See *Better Technology or Better Technicians?*, N.Y. Times, June 23, 1985, at 13, col. 1.

²⁹⁸ Skrzycki, *Can We Secure the World's Skies?*, 99 U.S. NEWS & WORLD REP., July 8, 1985, at 32.

²⁹⁹ Although almost ninety hijackings occurred each year in 1969 and 1970, the overall number of hijackings decreased into the sixties in both 1971 and 1972. A. EVANS & J. MURPHY, *supra* note 273, at 5. As airports and air carriers began to institute tighter and more effective security measures, the number of airline hijackings occurring per year continued to drop into the twenties from 1973 through 1977. *Id.* Since 1978, the number of airline hijackings has remained at a rate of less than thirty-five per year. *Making the Sky Secure*, TIME, July 1, 1985, at 21. Terrorist incidents increased in the mid-1980s, however, due in large part to a decrease in vigilance in implementing aviation security programs. See Kotait, *Security of Int'l Civil Aviation — Role of ICAO*, 7 ANNALS OF AIR & SPACE L. 95, 96 (1982).

affirmative duty to passengers by developing and following any number of strict security measures that help prevent terrorist attacks. If an air carrier's security precautions are found to be inadequate, however, the air carrier may be found guilty of willful misconduct, and therefore, subject to potential unlimited liability for passenger injuries caused by terrorist attack.

VI. CONCLUSION

The Warsaw Convention and its progeny often prevent victims of terrorism from adequately recovering for their injuries. Although various revisions have been proposed but never ratified by the United States, the United States Supreme Court has ruled that the Warsaw Convention, with its limitation on liability, continues to remain applicable in the United States for typical international air accident litigation cases. Under the Montreal Agreement, however, international air carriers independently agreed to raise the \$8,300 liability limit of the Warsaw Convention to \$75,000 per passenger for death or injury occurring on international flights, a liability limit still in force to date. Yet, under the Warsaw Convention, air carriers face the possibility of unlimited liability if an injured plaintiff can prove that the accident in question occurred as a result of the air carrier's willful misconduct.

In order to determine whether or not the Warsaw Convention covers terrorist occurrences, it is necessary first to determine the nature and scope of terrorism itself. While no universal legal definition of terrorism exists, by compiling the most widely accepted and critically objective definitional elements available, it is possible to define international terrorism as terror-inspiring violence containing an international element that is committed by individuals or groups against non-combatants, civilians, states, or internationally protected persons or entities in order to achieve political ends.

Based on this definition of terrorism, it becomes necessary to determine whether terrorist activity falls within the

meaning of the "accident" predicate to liability under article 17 of the Warsaw Convention. While the Warsaw Convention does not explicitly define the term "accident," the Supreme Court has held that an injured passenger must prove that an unusual or unexpected event external to the passenger in some way caused the injury in question in order to recover. Thus, terrorist incidents fall within the article 17 definition of the term "accident," and therefore, are covered by the Convention.

In order to exceed the Montreal Agreement's \$75,000 per passenger liability limitation, however, an injured passenger has the burden of proving that the air carrier's willful misconduct in some way contributed to or caused the injury in question. Generally, in order to prove willful misconduct, the passenger must show that the air carrier acted or failed to act, knowing that to do so would or could lead to injury or damage, with reckless disregard of the probable consequences. Nevertheless, a finding of willful misconduct on the part of an air carrier, which is a prerequisite to imposing unlimited liability, remains a question to be determined by a jury using the definition or standard of "willful misconduct" prevailing in the jurisdiction of the forum court.

Under the Warsaw Convention, however, if an air carrier proves that "all necessary measures" were taken to avoid the accident or that it was impossible to take such measures, an air carrier is excused from unlimited liability. Thus, in order to avoid potential unlimited liability for willful misconduct, air carriers must ensure through every available means that would-be terrorists and hijackers are not able to evade airline or airport security precautions.

Thus, in order to protect airline passengers from the horrors of terrorist attack, air carriers and airport authorities must work together to strengthen and to increase security precautions both in the air and on the ground. History has shown, however, that without either governmental or monetary incentives, air carriers too often have

neglected to provide security measures that could prevent terrorist incidents from occurring. Yet, through the willful misconduct provision of the Warsaw Convention, air carriers face the possibility of unlimited liability for failure to implement proper preventative precautions against terrorists.

Courts, therefore, should broadly construe the willful misconduct provision of the Warsaw Convention in order to find unlimited liability for passenger injuries whenever air carrier security precautions are lacking. In this way, the courts can help ensure air carrier safety and prevention against terrorist attack. Since the airline industry is no longer a fledgling, and since airlines are routinely subjected to unlimited liability in United States domestic air crash litigation, there is no longer any need to protect airlines from potentially debilitating lawsuits. Broad construction of the willful misconduct provision of the Warsaw Convention would provide substantial recovery to those injured passengers in immediate need. Moreover, air carriers still would be held responsible for acts of willful misconduct. Air carriers, therefore, would have an incentive to increase, improve and maintain security precautions designed to thwart potential terrorist attacks. Because the airline industry is no longer nascent and no longer in need of protection, there now is a need for a uniform standard of air carrier liability on international flights that will protect the innocent and injured United States air traveling public.