

1976

Compensation Under the Warsaw Convention for Victims of Hijackings and Terrorist Attacks

Carol Lynne Tomeny

Follow this and additional works at: <https://brooklynworks.brooklaw.edu/bjil>

Recommended Citation

Carol L. Tomeny, *Compensation Under the Warsaw Convention for Victims of Hijackings and Terrorist Attacks*, 3 Brook. J. Int'l L. (1976).
Available at: <https://brooklynworks.brooklaw.edu/bjil/vol3/iss1/2>

This Note is brought to you for free and open access by the Law Journals at BrooklynWorks. It has been accepted for inclusion in Brooklyn Journal of International Law by an authorized editor of BrooklynWorks.

NOTES

COMPENSATION UNDER THE WARSAW CONVENTION FOR VICTIMS OF HIJACKINGS AND TERRORIST ATTACKS

INTRODUCTION

The Warsaw Convention¹ has generated enormous interest and controversy since its inception. Most criticism has focused upon the inequity of the Convention's ceiling on recoveries for passenger injury and death in international aviation while no limitation of liability usually exists for domestic aviation.² Indeed, a large portion of Convention litigation has involved attempts to avoid the Convention's liability limits, either by employing one of the methods provided by the Convention or by demonstrating the inapplicability of the Convention.³

Hijacking and terrorist activities have provided the bases of most recent Convention litigation and have led to attempts by injured plaintiffs to be absorbed into the Convention rather than to remain outside it and subject totally to local law. This note examines the Warsaw Convention itself and its modifying agreements in order to analyze the reasons for this change and the effect of the attempted expansion of the Convention to accommodate these activities. The meaning of key terms employed by the Convention and their interpretation by the courts of various States will be discussed.

I. BACKGROUND OF THE WARSAW SYSTEM

The Warsaw Convention is an international aviation agreement⁴ which is the product of conferences in Paris in 1925 and

1. Convention for the Unification of Certain Rules Relating to International Transportation by Air, *done* Oct. 12, 1929, 49 Stat. 3000 (1935-36), T.S. No. 876, 137 L.N.T.S. 11 [hereinafter cited as Warsaw Convention]. French is the only official language of the Convention. Warsaw Convention, art. 36.

2. See, e.g., *Report on the Warsaw Convention as Amended by the Hague Protocol*, 26 J. AIR L. & COM. 255, 265-67 (1959) [hereinafter cited as *Convention Report*]; The National Association of Claimants Counsel of America Bar Association Memorandum on the Warsaw Convention, the Hague Protocol and the IGIA Recommendations 12-14 (1963).

3. Warsaw Convention, arts. 20 & 21.

4. The agreement was signed in Warsaw by the original parties and later adhered to with reservation by the United States. Declaration of Adherence deposited at Warsaw, Poland, July 31, 1934, 49 Stat. 3000 (1935-36), T.S. No. 876, 137 L.N.T.S. 11.

Warsaw in 1929.⁵ The purposes of the Convention were to aid the infant international airline industry by establishing uniform rules governing international air carriage and to limit carriers' liability for potentially ruinous losses, thereby enabling them to obtain insurance and financial support.⁶ The limit established under the Convention was 125,000 Poincare francs⁷ (approximately U.S. \$8,300⁸). In return for the establishment of a limit, the carriers accepted a presumption of liability in suits brought under the Convention.⁹

In 1955, a diplomatic conference was convened at The Hague to amend the Convention. The resulting Hague Protocol¹⁰ increased the liability limit to 250,000 francs¹¹ (U.S. \$16,600¹²) — double the previous limit. The Protocol became effective on August 1, 1963. Although the United States had attended the Hague

5. The Comité International Technique d'Experts Juridique Aériens, a drafting committee established at the Paris Conference, developed the draft presented to the delegates at the Warsaw Conference. See COMITÉ INTERNATIONAL TECHNIQUE D'EXPERTS JURIDIQUE AÉRIENS, COMTE-RENDU (1926-30) [hereinafter cited as C.I.T.E.J.A. MINUTES].

6. Lowenfeld & Mendelsohn, *The United States and the Warsaw Convention*, 80 HARV. L. REV. 497, 498-99 (1967).

7. Warsaw Convention, art. 22.

8. Lowenfeld & Mendelsohn, *supra* note 6, at 499. This conversion figure has been the one most generally used by courts and commentators. However, the precise figure based upon the conversion rate for gold prior to 1971 is U.S. \$8,292.

Under an amendment to the Warsaw Convention proposed in a conference in Montreal in 1975, the limit of liability would be changed to 8,300 Special Drawing Rights as defined by the International Monetary Fund. The conversion into national currencies is to be "made according to the value of such currencies at the date of judgment." Additional Protocol No. 1 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929, *done* Sept. 25, 1975, I.C.A.O. Doc. 9154-LC/174-2, art. II at 261 (1975). This proposed amendment is not yet in effect; the traditional dollar approximations will be used throughout this note, without allowance for recent fluctuations in the price of gold.

9. Article 17 of the Warsaw Convention states the limits of carrier liability as to passenger injury and death. Article 20 relieves the carrier of this liability upon proof that "he and his agents have taken all necessary measures to avoid the damages or that it was impossible for him or them to take such measures." Article 21 provides the carrier with the defense of contributory negligence.

10. Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929, *done* Sept. 28, 1955, I.C.A.O. Doc. 7686-LC/140, art. XI, 478 U.N.T.S. 371 [hereinafter cited as Hague Protocol].

11. Hague Protocol, art. XI.

12. Lowenfeld & Mendelsohn, *supra* note 6, at 507. The franc-based liability limit would be replaced with 16,600 Special Drawing Rights under a proposed amendment to the Hague Protocol. Additional Protocol No. 2 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929 as Amended by the Protocol Done at the Hague on 28 September 1955, *done* Sept. 25, 1975, I.C.A.O. Doc. 9154-LC/174-2, art. II at 265 (1975). See note 8 *supra*.

conference and played an important role in the negotiations, it refused to ratify the agreement because of dissatisfaction with what was considered an inadequate liability limit.¹³

On November 15, 1965, the United States filed a formal notice of denunciation of the Convention.¹⁴ A conference was subsequently held in Montreal to attempt to reach an agreement which would satisfy the United States' demand for a higher limit.¹⁵ Although the meeting itself failed to produce an agreement, the International Air Transport Association intervened and arranged an interim agreement.¹⁶ The major international carriers would accept a \$75,000 limit as well as a waiver of their defense of due care, thus introducing the concept of absolute liability.¹⁷

A 1971 conference in Guatemala City attempted to further amend the Convention. The Guatemala Protocol¹⁸ incorporated the basic United States demand of 1966 by raising the limit to 1,500,000 francs¹⁹ (U.S. \$100,000²⁰) and eliminating the carriers'

13. Lowenfeld & Mendelsohn, *supra* note 6, at 532-46.

14. The denunciation was to be effective six months later unless there was a "reasonable prospect" for the establishment of a \$100,000 limit of liability, with a provisional agreement in effect by that date with a \$75,000 limit. 53 DEP'T STATE BULL. 923 (1965).

15. Lowenfeld & Mendelsohn, *supra* note 6, at 551. For a statement of the United States position, see Lowenfeld, *The United States and the Warsaw Convention*, 54 DEP'T STATE BULL. 580 (1966).

16. 31 Fed. Reg. 7302 (1966); 49 U.S.C. § 1502, n.1 (1970) [hereinafter cited as Montreal Agreement]. The Montreal Agreement would affect only passengers whose tickets indicate the United States as a point of embarkation, destination, or transit. Unlike other parts of the Warsaw system, the Montreal Agreement is a contractual arrangement between the United States and individual international air carriers, rather than a treaty negotiated by sovereign States. See Lacey, *Recent Developments in the Warsaw Convention*, 33 J. AIR L. & COM. 385 (1967).

17. 1 L. KREINDLER, AVIATION ACCIDENT LAW § 12A.01 (1971).

18. Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, Signed at Warsaw on 12 October 1929, *done* Mar. 8, 1971, I.C.A.O. Doc. 9040-LC/167-2 at 183 [hereinafter cited as Guatemala Protocol].

19. Guatemala Protocol, art. VIII. Provision was also made for individual nations to sponsor a plan of supplemental compensation. Guatemala Protocol, art. XIV.

20. A. LOWENFELD, AVIATION LAW § 6.2, at VI-142 (1972). Provision was made for automatic increases after the fifth and tenth years following the effective date of the treaty unless such increase was vetoed by a two-thirds vote. Guatemala Protocol, art. XV. Each increase would be approximately \$12,500. *Id.* at VI-142, n.f. Thus after ten years in effect, the liability limit would be raised to approximately \$125,000.

According to a proposed amendment to the Guatemala Protocol, 100,000 Special Drawing Rights would replace the current franc-based liability limit. Additional Protocol No. 3 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929 as Amended by the Protocols Done at the Hague on 28 September 1955 and at Guatemala City on 8 March 1971, *done* Sept. 25, 1975, I.C.A.O. Doc. 9154-LC/174-2, art. II at 269 (1975). See note 8 *supra*.

defense of due care.²¹ The Protocol was signed by the delegates, but has not yet become effective.²²

The passenger's route, as stated on his ticket, determines which international agreement governs his action for injury or death — the Convention, the Hague Protocol, or the Montreal Agreement. The Convention applies only if the contract of carriage (*i.e.*, the ticket) encompasses "international transportation," which is defined as including: any carriage in which Convention countries are the places of departure and destination regardless of the status of any intermediate stops; and any carriage in which a single Convention country is the point of departure and destination, if there is an intermediate stop in a foreign country.²³ A similar scheme determines the applicability of the Hague Protocol²⁴ and the Guatemala Protocol.²⁵ The Montreal Agreement, however, applies whenever the United States is the point of departure or destination, or a specified intermediate stop, as listed on the ticket.²⁶

An example will demonstrate the peculiar and often inequitable results reached through the present system. An XYZ Airlines flight is scheduled to depart from Country #1 (a Convention party), making intermediate stops in Country #2 (a signatory of the Convention as modified by the Hague Protocol) and Country #3 (not a member of the Warsaw system), and arrive in the United States (a party to the Montreal Agreement). The flight is hijacked after leaving Country #2, resulting in passenger injury claims.

Passenger A's ticket states that his passage is from Country #1 to Country #3. A is not subject to the Convention liability limits since the place of destination is a non-Convention party.

21. Guatemala Protocol, art. IX. Under Article 20, paragraph 1 of the Warsaw Convention, a carrier is relieved of all liability "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." Article VI of the Guatemala Protocol retains this language but rather than applying to all liability, relief is limited to damage resulting from delays. In an action for personal injuries or death, the only defense the carrier retains in the Guatemala Protocol is that of contributory negligence. Guatemala Protocol, art. VIII.

22. The Protocol requires ratification by thirty States, with a further requirement that five of those States must account for 40% of the total scheduled international air traffic in 1970 by members of the International Civil Aviation Organization. Guatemala Protocol, art. XX.

23. Warsaw Convention, art. 1.

24. Hague Protocol, art. XVIII.

25. Guatemala Protocol, art. XVI.

26. Montreal Agreement, *supra* note 16.

Passenger *B* holds a round-trip ticket between Country #2 and Country #3; *B* is covered by the Hague Protocol although both departure and arrival are within the same country, since a foreign country is an intermediate stop and Country #2 is a Hague Protocol signatory. *B*'s limit of liability thus would be approximately \$16,600. Passenger *C*'s ticket provides passage from Country #1 to Country #2; *C* is thus covered by the Convention limit of approximately \$8,300 since both are Warsaw signatories, although Country #2 also signed the Hague Protocol. Passenger *D* holds a round-trip ticket from Country #1 to the United States. Here the Montreal Agreement limitation of \$75,000 would control since the United States is an intermediate stop. A fifth result would be possible if the Guatemala Protocol, with its approximately \$100,000 liability limit, becomes effective.²⁷

Under this patchwork system, passengers injured on the same aircraft may be entitled to differing recoveries: unlimited liability if the passenger's trip is not covered by the Warsaw system; an \$8,300 limit under the Convention; a \$16,600 limit under the Hague Protocol; and a \$75,000 limit under the Montreal Agreement.

While the manner in which the ticket is written controls the application of the Warsaw system, the particular factual circumstances determine whether a party to an action would desire to avoid Convention coverage. Relevant factors include the gravity of the injury, the place of occurrence, and the possible negligence of the carrier.

In the recent cases involving hijacking and terrorist attacks at foreign airports, the plaintiffs, rather than the airlines, have sought to fit within the Warsaw Convention. In a typical hijacking case, the disadvantages to an injured passenger of limitations on the carrier's liability are completely outweighed by the fact that the carrier's liability is absolute under the Montreal Agreement, which covers the great majority of United States plaintiffs. Generally, most passengers suffer relatively minor, if any, physical injuries. Consequently, the compensable damages would be relatively moderate and likely to fit within the limits of the Convention, particularly if the Montreal Agreement, with its higher ceiling of \$75,000, is applicable.

In actions for severe injuries or death caused by terrorist

27. See A. LOWENFELD, *supra* note 20, at § 6.31, at VI-142; Lowenfeld & Mendelsohn, *supra* note 6, at 501.

attacks on passengers in foreign airports, a plaintiff's reasons for attempting to fit within the Warsaw Convention are even more compelling than in hijacking cases. Plaintiff is provided with a financially solvent carrier as a defendant. Such defendant is usually subject to the jurisdiction of United States courts and is either deprived of its defenses of due care under the Montreal Agreement, or is subject to a presumption of liability under the Warsaw Convention. There is also the possibility of avoiding the limits of liability if willful misconduct by the carrier²⁸ or lack of notice of the limits²⁹ is proven, or if a separate action against the carrier's agent or servant³⁰ is feasible.

In an action against a carrier outside the Convention, although the carrier is not subject to a liability limitation, the passenger is required to prove the carrier's negligence without even a presumption in his favor. This is often an impossible task since in a typical action the terrorists have not been passengers of the defendant airline and were not on defendant's property or within defendant's control. If an action against the carrier is not feasible, the injured plaintiff's only possible remedies are either a very unpromising action against a terrorist likely to be

28. See *Berner v. British Commonwealth Pacific Airlines, Ltd.*, 219 F. Supp. 289 (S.D.N.Y. 1963) ("willful misconduct" need not be an act intended to result in injury, but rather one voluntarily committed despite the knowledge that harm would very likely result from the action).

29. See *Lisi v. Alitalia-Linee Aeree Italiane S.P.A.*, 370 F.2d 508 (2d Cir. 1966), *aff'd*, 390 U.S. 455, *reh. denied*, 391 U.S. 929 (1968); *Warren v. Flying Tiger Line, Inc.*, 352 F.2d 494 (9th Cir. 1965). These cases are based upon Article 3 of the Warsaw Convention which provides that a carrier loses its limitation of liability if it "accepts a passenger without a ticket having been delivered." This delivery requirement has been broadly construed to require that adequate notice of the limitations of liability be provided the passenger.

30. An additional device employed to escape the Warsaw Convention liability limits has been the bringing of a negligence action against a servant or agent of the carrier. Since servants and agents often have contractual indemnification rights, it is usually the carrier which bears the cost of the judgment, and the limitation of liability is thus circumvented. Authority in this area is split, with a separate recovery outside the Convention permitted in *Pierre v. Eastern Airlines, Inc.*, 152 F. Supp. 486 (D.N.J. 1957), but denied in *Chutter v. K.L.M. Royal Dutch Airlines*, 132 F. Supp. 611 (S.D.N.Y. 1955), and *Wanderer v. Sabena*, 1949 U.S. Av. 25 (Sup. Ct., N.Y. County Feb. 10, 1949).

This issue has recently been revived in a case involving the alleged bombing of a T.W.A. plane, where the court permitted a separate action against employees of the carrier. *Reed v. Wiser*, 13 Av. Cas. 18,426 (S.D.N.Y. Apr. 19, 1976). It is likely that a similar strategy of separate actions against officers and employees with responsibility for security procedures will be employed in hijacking cases, should the *Reed* action succeed on the merits. Although permitting separate actions against agents and employees is technically required by the language of the Convention, which only covers carriers, it is violative of the intention of the Warsaw Convention to limit the carrier's liability and accomplish by indirect means a result not permitted directly under the Convention.

judgment-proof,³¹ or an action against the airport operator, an often expensive and uncertain procedure in a foreign country, involving the application of foreign law, and lacking the advantages of either absolute liability or the presumption of liability.

Therefore, except in the case of death or serious injury occurring in such a manner that the liability of the carrier can be readily proved using standard principles of law, attempts are likely to be made in actions arising from a hijacking to fall within the protection of the Warsaw Convention.

II. ANALYSIS OF ARTICLE 17

Article 17 of the Warsaw Convention concerns airline liability for passenger injury and death and states in the translation from the official French text:

The carrier shall be liable for damages 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.³²

Most recent litigation in the context of hijacking and terrorist activities has centered upon the precise meaning of the key words and phrases in this article. Three principal issues have arisen: the meaning of the word "accident"; the question whether the phrase "wounding . . . or any other bodily injury" encompasses mental distress; and the precise limits entailed by the phrase "on board the aircraft or in the course of any of the operations of embarking or disembarking."

A. *The Meaning of the Word "Accident"*

The prerequisite to the application of the Convention and the resulting liability of a carrier under Article 17 is the occurrence of an "accident."³³ In *Husserl v. Swiss Air Transport Co., Ltd.*³⁴ [hereinafter referred to as *Husserl I*], the issue examined was whether the hijacking of a Swiss aircraft after takeoff from Zurich, followed by a forced landing in the desert near Amman, Jordan, was an "accident" imposing liability under Article 17.

31. McClintock, *Skyjacking: Its Domestic Civil and Criminal Ramification*, 39 J. AIR L. & COM. 29, 40 (1973).

32. Warsaw Convention, art. 17.

33. *MacDonald v. Air Canada*, 439 F.2d 1402, 1404 (1st Cir. 1971).

34. 351 F. Supp. 702 (S.D.N.Y. 1972), *aff'd per curiam*, 485 F. 2d 1240 (2d Cir. 1973).

The court held that hijacking is an "accident" based upon its interpretation of the Montreal Agreement and upon policy considerations.³⁵

The district court noted that the Montreal Agreement established "absolute liability" regardless of fault or negligence,³⁶ and commented that the press releases by the State Department concerning the Agreement did not mention the term "accident."³⁷ The tariff filed pursuant to the Montreal Agreement stated that

[n]othing 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.³⁸

From this, the court drew the inference that it was intended that a carrier could be held liable to injured third parties not connected with the willful sabotage or hijacking.³⁹ In examining policy considerations, the court observed that the carrier is in the best position to take action to avoid the injury, to insure against the occurrence, and to distribute the costs.⁴⁰

Husserl I has been criticized by British authority as representing too broad a construction of the Montreal Agreement.⁴¹

[A] landing after a hijacking, or a precautionary landing because of a bomb warning in a place not provided for in the contract of carriage, which does not result in an accident, does not give rise to a valid claim under article 17 of the Warsaw Convention . . . even though it may be alleged that e.g. nervous shock has been suffered.⁴²

Reliance by the *Husserl I* court on the wording of the Montreal Agreement has also been criticized.⁴³

It was incorrect for the *Husserl I* court to base its decision upon the ground that the Montreal Agreement instituted a system of absolute liability. The Montreal Agreement did not

35. 351 F. Supp. at 702.

36. *Id.* at 703.

37. *Id.* at 706.

38. *Id.* at 707.

39. *Id.*

40. *Id.*

41. 2 HALSBURY'S LAWS OF ENGLAND para. 1377, n.2 (4th ed. 1973).

42. *Id.*

43. *Id.*

change the wording of the liability of carriers under Article 17;⁴⁴ it merely waived the defense of due care previously available to the carrier under Article 22 and raised the liability ceiling to \$75,000.⁴⁵ For an injury to be compensable under Article 17, the requirement remains that it result from an accident; absolute liability would then arise for those enumerated injuries caused by the accident.

The district court, in relying upon the Montreal Agreement, applied the rule that it is permissible "to look to the subsequent action of the parties for the interpretation of the treaty in areas clearly not anticipated at the time."⁴⁶ Consequently, the attitude of the Montreal Agreement concerning sabotage could be considered in determining whether similar acts, such as hijacking, should fall within the coverage of the Convention. The fallacy of this argument, however, is that the Convention is an agreement among nations, while the Montreal Agreement is a contract between the United States and individual carriers. Since the parties involved are totally different, it is not possible to view the phrase "subsequent actions of the *parties*" as modifying the original agreement.

However, the court was correct in holding that hijacking falls within the word "accident." A treaty is generally interpreted by looking to the usual meaning of its terms, "provided that they are not expressly used in a certain technical meaning, or that another meaning is not apparent from the context."⁴⁷ Most definitions of "accident" which mention intent stress a distinction based upon the cause of the injury.⁴⁸ The important distinction in such definitions is that the injury not be the fault of the injured, rather than whether the injury is intentionally or negligently caused by acts of third parties. Thus, since injury resulting from a hijacking is not a result of the intentional act of the injured passenger, it

44. 439 F.2d at 1405 n.

45. Montreal Agreement.

46. 351 F. Supp. at 707.

47. 1 L. OPPENHEIM, INTERNATIONAL LAW § 554, at 952 (8th ed. H. Lauterpacht 1955).

48. See, e.g., "Accident . . . [2]c. An unexpected happening causing loss or injury which is not due to any fault or misconduct on the part of the person injured" WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 11 (unabr. ed. 1961) (emphasis added);

Accident In its most commonly accepted meaning or in its ordinary or popular sense, the word may be defined as meaning a fortuitous circumstance, event or happening, without any human agency, or if happening wholly or partly through human agency, an event which under the circumstances is unusual and unexpected by the person to whom it happens.

BLACK'S LAW DICTIONARY 30 (4th rev. ed. 1968) (emphasis added).

would be an "accident" within this definition.

A further substantiation for the proposition that hijacking is included within the term "accident" can be found by looking to the intention of the parties⁴⁹ as expressed in the debates of the Convention.⁵⁰ In the predecessor to Article 17 (Article 21), no reference was made to an accident or event. Instead, liability was defined in terms of losses occurring during the period of carriage. The final draft of Article 21 submitted to the Warsaw delegates stated:

The period of carriage, within the meaning of this Convention, begins at the moment when the passengers, goods or baggage enter the aerodrome of departure, and ends at the moment when they leave the aerodrome of destination [A]ny loss, damage, or delay, subject to proof to the contrary, is presumed to have occurred during carriage⁵¹

This broadly-worded article was rejected by a vote of the delegates. They felt that liability under the Convention should not be as broad for passengers as it is for goods and baggage.⁵²

49. The basic aim of treaty interpretation is to ascertain the intent of the parties who have entered into agreement, in order to construe the document in a manner consistent with that intent.

Maximov v. United States, 299 F.2d 565, 568 (2d Cir. 1962), *aff'd*, 373 U.S. 49 (1963).

50. A long-standing controversy exists concerning the use of preparatory materials. Proponents of their use state that all words must be viewed in the context of the preparatory materials to determine their intended meaning, and that to ignore the context of a treaty provision is to seek a sterile interpretation of the words at the expense of the parties' intention. See Vienna Conference, 1st Session, Official Records of Meetings 167-68, U.N. Doc. A/Conf. 39/11 (1969) (comments of United States Delegate McDougal).

Others oppose the liberal use of preparatory materials on the grounds that preliminary discussions are not necessarily the final views of the parties; that it is unfair to later acceding parties to the treaty to incorporate preliminary discussions; and that the use of such materials is a device employed by parties seeking to avoid the plain meaning of a treaty. *Id.* at 169-84 (especially the comments of the delegates from Uruguay, *id.* at 169-70, Poland, *id.* at 173-74, the U.S.S.R., *id.* at 175, France, *id.* at 175-76, and the United Kingdom, *id.* at 177-78).

The use of preparatory material has been explicitly approved by the Supreme Court and is often used in treaty construction.

In ascertaining the meaning of a treaty we may look beyond its written words to the negotiations and diplomatic correspondence of the contracting parties relating to the subject matter, and to their own practical construction of it.

Factor v. Laubenheimer, 290 U.S. 276, 294 (1933). *Accord*, Arizona v. California, 292 U.S. 341, 359-60 (1934).

51. D. GOEDHUIS, NATIONAL AIR LEGISLATION AND THE WARSAW CONVENTION 188 (1937); C.I.T.E.J.A. MINUTES 42, 45 (3d Sess. 1928) (original French text).

52. SECOND INTERNATIONAL CONFERENCE ON PRIVATE AERONAUTICAL LAW OCT. 4-12, 1929 WARSAW MINUTES 67-83 (R. Horner & D. Legrez transl. 1975) [hereinafter cited as WARSAW MINUTES].

Article 21 was resubmitted to the drafting committee and replaced by two articles: Article 17, covering passenger liability and limiting it to "accidents"; and Article 18, covering goods and baggage, having a wider scope, and using the word "occurrence" rather than "accident." This draft was accepted without comment.⁵³

The debate concerning the original Article 21 reflects the considerations which led the drafting committee to distinguish between passengers and baggage. A French delegate stated that the different treatment of passengers and goods was necessary because passengers have "independence," while baggage is totally under the control of the carrier.⁵⁴ Other delegates expressed concern that the passenger, through volitional acts, could place himself in a situation totally unconnected to the contract of carriage and beyond the carrier's control during stopovers, forced landings, or within the terminal building.⁵⁵

The delegates' major concern was that passengers could perform acts which would lead to their injury in areas outside the carrier's control; whether the wrongdoer's act was intentional or negligent was of secondary importance. Since goods and baggage are inanimate objects, no similar concern existed regarding causation and consequently "occurrence" rather than "accident" was considered the appropriate term. The belief was that the carrier should not accept a presumption of liability when the passenger had been injured by a third party in a geographical area not within the carrier's control. There was no intention that such an injury in an area within the carrier's control should not be considered an "accident" and fall within the Convention.

The French delegate's view that the "independence" of passengers constitutes the basis of the distinction between passengers and baggage⁵⁶ is consistent with the idea that the central concept in the term "accident" is that the injury must not be the result of an intentional act of the injured person. Thus, a hijacking could be considered an "accident" within this definition, since it is a sudden and unexpected event that is not intentionally caused by the injured passenger. Later cases involving hijacking

53. WARSAW MINUTES 206.

54. *Id.* at 73.

55. *Id.* See comments of the British delegate, *id.* at 68; the Italian delegate, *id.* at 70; the Hungarian delegate, *id.* at 72; the Soviet delegate, *id.* at 72; the French delegate Mr. Vivent, *id.* at 75; and the French delegate Mr. Ripert, *id.* at 80.

56. WARSAW MINUTES 67, 72-73.

and terrorism appear to support this concept since defendant airlines have either stipulated that hijacking is an accident, or failed to raise this issue.⁵⁷

B. *Mental Distress*

Much recent litigation resulting from hijacking has focused upon whether the phrase "wounding . . . or other bodily injury"⁵⁸ encompasses mental distress. This issue is particularly important in hijacking cases because often physical injuries are either very minor or nonexistent. Therefore, the court is faced with the problem of compensation of mental distress within the boundaries of Article 17 of the Convention.

Differing judicial opinions have been reached. It has been stated that mental distress not resulting from impact is not compensable (Judge Stevens' dissent in *Rosman v. Trans World Airlines, Inc.*⁵⁹); it is compensable only when a direct result of bodily injury (*Burnett v. Trans World Airlines, Inc.*⁶⁰); it is compensable if it is either caused by or is the result of physical injury (*Rosman v. Trans World Airlines, Inc.*⁶¹); it is compensable only if an appropriate cause of action exists under the substantive law of the jurisdiction (*Husserl v. Swiss Air Transport Co., Ltd.*⁶² [hereinafter referred to as *Husserl II*]); and that it is always compensable (*Krystal v. British Overseas Airways Corp.*⁶³).

The *Rosman*, *Burnett*, and *Husserl II* cases evolved from the same event. A Swiss Air and a T.W.A. aircraft were hijacked by members of the Popular Front for the Liberation of Palestine, who forced the pilots to land on a desert airstrip outside Amman, Jordan. The passengers and crew were held captive for a week on board the aircraft. The plaintiffs in these cases asserted claims of various physical injuries such as rashes and swollen feet, and also complained of mental distress due to anxiety and physical

57. In *Day v. Trans World Airlines, Inc.*, 528 F.2d 31, 33 (2d Cir. 1975), *cert. denied*, — U.S. —, 97 S. Ct. 246 (1976), and *Krystal v. British Overseas Airways Corp.*, 403 F. Supp. 1322, 1323 (C.D. Cal. 1975), both involving hijacking, the courts stated that defendant airlines did not dispute that the hijackings were "accidents" within the meaning of Article 17. In *In re Tel Aviv*, 405 F. Supp. 154, 155 (D.P.R. 1975), defendant Air France conceded that the terrorist attack within the airport was an "accident."

58. Warsaw Convention, art. 17.

59. 34 N.Y.2d 385, 400, 314 N.E.2d 848, 857, 358 N.Y.S.2d 97, 110 (1974).

60. 368 F. Supp. 1152 (D.N.M. 1973).

61. 34 N.Y.2d 385, 314 N.E.2d 848, 358 N.Y.S.2d 97 (1974).

62. 388 F. Supp. 1238 (S.D.N.Y. 1975).

63. 403 F. Supp. 1322 (C.D. Cal. 1975).

suffering after a week's exposure to extremes in temperature, food and water deprivation, and inadequate sanitation facilities.⁶⁴

In *Burnett* the district court held that only mental distress resulting from physical injury is compensable.⁶⁵ The court, stating that the French legal meaning of the terms used in the Warsaw Convention is controlling,⁶⁶ determined that "blessure" (translated as "wounding") may not encompass mental injuries since it is modified by the phrase "ou de tout autre lésion corporelle" (translated as "or any other bodily injury"). In addition, the court found that French law clearly distinguishes between bodily injury ("lésion corporelle") and mental injury ("lésion mentale").⁶⁷

Thus neither phrase could encompass mental distress without a basis of physical injury.⁶⁸ In addition, the court cited the Berne Convention on International Rail Transport where a provision similar to that of Article 17 was interpreted to permit such a recovery only after the phrase "ou mentale" was added.⁶⁹

The *Rosman* court also concluded that mental distress alone is not compensable under the Warsaw Convention, basing its conclusion on the ordinary meaning of the words "bodily injury," but allowed recovery for the mental suffering which resulted from a bodily injury.⁷⁰ Such bodily injury could be caused by physical impact, physical circumstances, or psychic trauma.⁷¹ Thus, mental distress is compensable according to the court's view if it either is the result of bodily injury or results in physical manifestations.

Judge Stevens stated in his *Rosman* dissent that actual physical impact is necessary under Article 17 and that mental injury was not intended to be encompassed within the Convention as a

64. 368 F. Supp. at 1158.

65. *Id.*

66. *Id.* at 1155. See *Block v. Compagnie Nationale Air France*, 386 F.2d 323, 330 (5th Cir. 1967), *cert. denied*, 392 U.S. 905 (1968). In *Rosman*, the New York Court of Appeals reached a similar result, although it followed a different analysis. The court used the ordinary meaning of the English words translated from the original French text of the Warsaw Convention. It found no need to delve into the French language, French law, or the legislative history of the Convention. 34 N.Y.2d at 393-95, 314 N.E.2d at 852-54, 358 N.Y.S.2d at 104-06. See 2 *BROOKLYN J. INT'L L.* 189, 199-200 (1975); 13 *COLUM. J. TRANSNAT'L L.* 452, 454-58 (1974); see generally J.W. SUNDBERG, *AIR CHARTER* 242-46 (1961).

67. 368 F. Supp. at 1156.

68. *Id.* at 1158.

69. *Id.* at 1157-58.

70. 34 N.Y.2d at 399-400, 314 N.E.2d at 857, 358 N.Y.S.2d at 109-10.

71. *Id.* at 399, 314 N.E.2d at 856, 358 N.Y.S.2d at 109.

separate cause of action; recovery for mental distress is a recent development in United States law and was not within the contemplation of the parties to a convention aimed at limiting carriers' liability in a risky new enterprise.⁷²

The court in *Husserl II* felt that the list of inculdible injuries in the Warsaw Convention was not meant to be exhaustive and that therefore this "vacuum" should be filled by a liberal interpretation;⁷³ the list should be "enumerated expansively to comprehend as many types of injury as possible for which there is normally legal redress."⁷⁴ This contention is difficult to support. First, no vacuum exists since the ordinary meaning of the words "wounding of a passenger or any other bodily injury" in both the French and English contexts precludes a finding that mental injury was intended. The *Husserl II* court's interpretation is contrary to the principle that the primary purpose of treaty interpretation is to effect the intention of the parties.⁷⁵ The primary purposes of the Convention were to limit the liability of carriers and to promote uniformity.⁷⁶ Both purposes are best served by limiting Article 17 liability to its express terms rather than by expanding compensation to limits beyond the contemplation of the parties.

The *Husserl II* court stated that mental distress without physical injury was compensable if such a cause of action would be permissible under the "otherwise applicable substantive law."⁷⁷ A broad view of Article 17 is also necessitated in the court's view by the fact that the Warsaw Convention has been interpreted as not creating a cause of action.⁷⁸ While this is the majority view in the United States,⁷⁹ the Convention does set limits under which the action may be brought⁸⁰ and among these limitations is the Article 17 requirement that liability result from death, wounding, or other bodily injuries. Article 24 states that

72. *Id.* at 403-04, 314 N.E.2d at 859, 358 N.Y.S.2d at 112.

73. 388 F. Supp. at 1250.

74. *Id.* at 1247.

75. See 1 L. OPPENHEIM, *supra* note 47.

76. See Lowenfeld & Mendelsohn, *supra* note 6.

77. 388 F. Supp. at 1253.

78. *Id.* at 1251-52.

79. See, e.g., *Komlos v. Compagnie Nationale Air France*, 111 F. Supp. 393, 401 (S.D.N.Y. 1952), *rev'd on other grounds*, 209 F.2d 436 (2d Cir. 1953), *cert. denied*, 348 U.S. 820 (1954); *Noel v. Linea Aeropostal Venezolana*, 247 F.2d 677, 679 (2d Cir.), *cert. denied*, 355 U.S. 907 (1957). But see C.N. SHAWCROSS & K.M. BEAUMONT, *AIR LAW* § 365, at 347 (1951).

80. 388 F. Supp. at 1252.

any actions covered by Article 17 must be brought subject to the Convention's conditions and limitations. As the New York Court of Appeals in *Rosman* stated:

[E]ven if plaintiff's actions for damages depended upon some other subsisting right of action . . . it does not follow that New York or any other jurisdiction can redefine the scope or substance of the carrier's liability as it is provided in the Convention.⁸¹

This expansive view of mental distress of *Husserl II* was followed in *Krystal*, a case involving the hijacking of a B.O.A.C. aircraft on a flight from Bombay to London. The fact pattern differs from the previous hijacking cases in that one of the two plaintiffs alleged solely mental distress.⁸² The court, relying upon a broad interpretation of Article 17, allowed recovery for mental distress without physical injury.⁸³ The court considered significant the fact that the notice given by airlines to passengers used the phrase "personal injury" rather than "physical injury."⁸⁴

There is no generally accepted view by commentators on the subject of recovery for mental distress. Coquoz⁸⁵ admits the wording is ambiguous and that a revision of the Article would be helpful.⁸⁶ Riese,⁸⁷ the foremost proponent of the inclusion of mental distress in Article 17, bases his conclusion upon strained logic. Rather than using the argument that "blessure" encompasses any wounding, mental or physical, Riese suggests that "blessure" means physical wounding and that "lésions corporelle" would be redundant if it were interpreted to signify only physical injury. Riese makes what he admits is a "free translation" of the French "lésion corporelle" to mean "Gesundheitsbeschädigung" (translated "injuries to the health"), and states that it encompasses psychic injury, among other things.⁸⁸ Similarly, the phrase "injuries to the health" replaces the words "lésion corporelle" in the translations incorporating Article 17 into the municipal law of

81. 34 N.Y.2d at 398, 314 N.E.2d at 856, 358 N.Y.S.2d at 108.

82. 403 F. Supp. at 1322-23.

83. *Id.* at 1324.

84. *Id.* at 1323.

85. R. COQUOZ, *LE DROIT PRIVÉ INTERNATIONAL AÉRIEN* 122 (1938).

86. *Id.*

87. O. RIESE, *LUFTRECHT* 442-43 (1949); see also O. RIESE & J. LACOUR, *PRECIS DE DROIT AÉRIEN* 264 (1951).

88. O. RIESE, *LUFTRECHT* 442-43 (1949).

Germany (in 1943)⁸⁹ and Norway (in 1960).⁹⁰

Although Riese's narrow view of "blessure" as limited to a physical wounding is justified by the text of Article 17, his conclusion that this necessarily makes "lésion corporelle" redundant and that therefore it must mean something other than physical injury, is incorrect.⁹¹ One can read Article 17 in its present form without concluding it is redundant. By the term "wounding" ("blessure") the article probably refers to injuries which are normally feared in a new and dangerous form of transportation, such as those resulting from airplane crashes, forced landings, falls, turbulence, propeller mishaps, and other accidents involving bodily contact. Thus, "toute autre lésion corporelle"⁹² would refer to such bodily injuries as food or chemical poisoning, ear injuries from changes in atmospheric pressure, and other internal injuries resulting from external events. The soundest view, therefore, appears to be that mental distress without physical injury or physical manifestations is not compensable, as was held in *Rosman*.

C. *On Board, Embarking, and Disembarking*

The third area of recent litigation involving Article 17 concerns the scope of the phrase "on board the aircraft or in the course of any of the operations of embarking or disembarking."

On Board

In *Herman v. Trans World Airlines, Inc.*,⁹³ the defendant airline alleged that the Warsaw Convention did not apply to injuries sustained by passengers during the week plaintiffs were held captive by hijackers, since the flight had terminated and defendant's "aircraft was being used without its consent as a detention camp."⁹⁴ Reversing on other grounds, the Appellate Division agreed with the Supreme Court's rejection of defendant's argument, stating that plaintiffs were on board the aircraft during

89. D. LURLEAU, *LA RESPONSABILITÉ DE TRANSPORTEUR AÉRIEN* 214 (1961) (doctoral thesis).

90. *La Jurisprudence des Pays Scandinaves sur la Convention de Varsovie*, 29 *Revue Française de Droit Aérien* 21, 22 (1975) [hereinafter cited as *Rev. Fr. Dr. Aérien*].

91. A contention similar to that made by Riese was rejected by the district court in *Husserl II*, 388 F. Supp. at 1250.

92. See text accompanying note 67 *supra*.

93. 69 Misc. 2d 642, 330 N.Y.S.2d 829 (Sup. Ct.), *rev'd*, 40 App. Div. 2d 850, 337 N.Y.S.2d 827 (2d Dep't 1972), *rev'd*, 34 N.Y.2d 385, 314 N.E.2d 848, 358 N.Y.S.2d 97 (1974) (consolidated on appeal with *Rosman*).

94. 69 Misc. 2d at 645, 330 N.Y.S. 2d at 832.

the entire time and thus fulfilled the geographic requirements of Article 17.⁹⁵

In *Husserl II*, the district court took an expansive view of the phrase "on board the aircraft" and interpreted it to signify the entire time between embarkation and disembarkation.⁹⁶ Plaintiffs were permitted to recover for the mental distress suffered in an Amman hotel, after their return to Zurich, the original departure point. The court stated that this interpretation was consistent with the purposes of the Convention and that the Warsaw drafters had made such an assumption.⁹⁷ However, this construction of the phrase "on board the aircraft" is directly contrary to that intended by the drafters of the Convention. As previously stated,⁹⁸ an expansive draft article placing liability upon the carrier for losses and injury during the entire period of carriage, defined as encompassing the time of entry into the airport until leaving the airport upon arrival, was thoroughly discussed and explicitly rejected by a vote of the delegates.⁹⁹

During the discussion preceding the vote, two amendments were offered specifically covering the situation of a forced landing. The British proposal suggested terminating carrier liability for passenger injuries after a forced landing "when the [passenger] leaves the immediate proximity of the landing,"¹⁰⁰ while the Hungarian proposal would limit liability in such a situation to the period prior to the passenger's disembarkation of the aircraft.¹⁰¹ The two amendments were not voted upon since the preliminary vote rejected the original broadly-worded article which the amendments were meant to modify.¹⁰² The matter was referred to the drafting committee which submitted a new draft retaining the broad language with respect to baggage and goods and incorporating narrower geographical limitations with respect to passengers.¹⁰³

Thus a contention that the drafters "assumed" that "on board the aircraft" would encompass the entire period from the

95. 40 App. Div. 2d 853, 337 N.Y.S. 2d at 832. This question was not presented to the Court of Appeals.

96. 388 F. Supp. at 1247.

97. *Id.* at 1248.

98. See text accompanying notes 50-55 *supra*.

99. WARSAW MINUTES 67-83.

100. *Id.* at 68.

101. *Id.* at 71-72.

102. *Id.* at 83.

103. *Id.* at 166.

original embarkation to disembarkation at a scheduled arrival point is totally contrary to the ordinary meaning of the words "on board the aircraft" and also to the stated purpose of the delegates in explicitly rejecting such a broad interpretation. Nor is the *Husserl II* court's contention well founded that such an interpretation is necessitated by "the immense difficulty in determining proximate causation between accident and injury and to allocate between on board and off."¹⁰⁴ Courts are routinely called upon to make such distinctions, and should not avoid them by distorting the clear meaning of an international convention.

Embarking

Two recent decisions, *Evangelinos v. Trans World Airlines, Inc.*,¹⁰⁵ and *Day v. Trans World Airlines, Inc.*,¹⁰⁶ have discussed the scope of the operations of embarking in the context of a terrorist attack in the waiting room of the Athens airport. Plaintiffs were passengers on a departing T.W.A. flight. In both *Day*¹⁰⁷ and *Evangelinos*¹⁰⁸ plaintiffs had checked in at the ticket counter, cleared Greek government formalities, proceeded to the transit lounge where they were given boarding passes by T.W.A. employees, and were standing in line to be searched by Greek police when the attack occurred.

The district court in *Day* held that the operations of embarkation consisted of at least eleven steps, from the initial presenting of the passenger ticket to walking on board the aircraft. The passengers had already completed five of these steps at the time of the incident,¹⁰⁹ and therefore the Warsaw Convention was deemed applicable. This decision was affirmed by the Court of Appeals for the Second Circuit, which stated that a test based upon geographical limitations was unnecessarily rigid and that the Convention should be interpreted flexibly to conform to the procedures and risks inherent in present-day aviation.¹¹⁰

In *Evangelinos*, the district court held that

104. 388 F. Supp. at 1247.

105. 396 F. Supp. 95 (W.D. Pa. 1975), *rev'd on other grounds*, 14 Av. Cas. 17,101 (3d Cir. May 4, 1976).

106. 393 F. Supp. 217 (S.D.N.Y.), *aff'd*, 528 F.2d 31 (2nd Cir. 1975), *cert. denied*, 97 S. Ct. 246 (1976).

107. 528 F.2d at 32.

108. 396 F. Supp. at 97.

109. 393 F. Supp. at 221, 223.

110. 528 F.2d at 38.

[w]hen the passengers were waiting in line to proceed to the last gate of the terminal, they were not within the "operations of embarkation"¹¹¹

According to the court, the term "operations of embarkation" was a geographical designation.¹¹² In support of this position the court cited a discussion at the Fifth International Conference of Air Navigation at The Hague¹¹³ in 1930 in which the only controversy concerning the definition was whether the operations of embarkation begin when the passenger leaves the airport terminal for the aircraft or when he is in the actual process of stepping into the aircraft.¹¹⁴ This holding was reversed on appeal by the Third Circuit in an opinion closely following the reasoning by the district court and the Second Circuit in *Day*.

In support of the *Day* point of view were the deliberations of the Guatemala Conference of 1971. Several delegates were concerned that the draft language, which set the same spatial limitation as the original Article 17, would impose liability upon the carriers for injuries occurring within the terminal.¹¹⁵ However, the delegates voted to accept the draft as written.¹¹⁶

The *Day* rationale, however, contains logical inconsistencies, as was recognized by Judge Seitz in his cogent dissent in *Evangelinos*.¹¹⁷ The Second Circuit in *Day* stated that such a finding was consistent with the original purpose of the Warsaw Convention, since uniformity would be served by bringing all such actions under the Warsaw umbrella rather than leaving them to local law.¹¹⁸ This view may be refuted by the fact that by voting against the original broad article, the delegates distinctly demonstrated that they did not wish to have all possible situations encompassed within the Warsaw system for the sake

111. 396 F. Supp. at 103.

112. The *Day* court's expansive interpretation is a realization of the concern of some delegates to the Guatemala Convention that the draft language (which contained the same spatial limitation as Article 17 of the Warsaw Convention) would impose liability upon the carriers for injuries within the terminal. INTERNATIONAL CONFERENCE ON AIR LAW, GUATEMALA CITY, FEB.-MAR. 1971, MINUTES 31-45, I.C.A.O. Doc. 9040-LC/167.1 (1972) [hereinafter cited as GUATEMALA MINUTES].

113. 2 GOUVERNEMENT NÉERLANDAIS, L'AÉROCLUB ROYAL DES PAYS-BAS, CINQUIÈME CONGRÈS INTERNATIONAL DE LA NAVIGATION AÉRIENNE, LA HAYE 1930, COMTE-RENDU 1173 (1931).

114. 396 F. Supp. at 101.

115. GUATEMALA MINUTES 31-45.

116. *Id.*

117. 14 Av. Cas. at 17,104.

118. 528 F.2d at 38.

of uniformity. The Convention was based upon a fault orientation and the concern expressed by numerous delegates about liability in situations totally unrelated to the fault of the carrier, events outside its control, and non-aviation-oriented events (such as injuries during stopovers, or within airport facilities)¹¹⁹ amply demonstrates that not all events were intended to be included in the Convention. While the *Day* decisions considered such a geographical interpretation of the phrase in question to be excessively rigid, both the preliminary discussions and the language of the Article itself demonstrate that a geographical distinction was indeed intended.¹²⁰

The *Day* courts implied that the Convention must be sufficiently flexible to encompass modern departure procedures at large international terminals, such as the Athens facility. However, the reality of such procedures in fact suggests a contrary conclusion. After the initial contact with the carrier's employees at the check-in counter (which is usually required to occur a minimum of 90 minutes before departure), the passenger is told to proceed to passport and currency controls, which are required by and totally controlled by local governments. Upon leaving such an area, the modern traveler often finds himself in an international bazaar composed of duty-free shops of every variety, restaurants, bars, banks, and other facilities. This transit area, as well as the airport building itself, is usually owned and controlled by an independent airport authority or a local government. The facilities used directly by the carriers are often leased, and the carriers' landing rights controlled by international treaties and local governmental regulations.¹²¹

The transit lounges are often, as at the Athens airport, communal areas where passengers awaiting embarkation on many different airlines mingle. In the Greek airport, the passengers were given their seat assignments in the transit lounge at a long counter shared by the representatives of T.W.A. and all the other airlines serving the airport.¹²² This was the only personal contact with the carriers until after the security search. Therefore, at best, the carriers maintain occasional contacts with the passen-

119. WARSAW MINUTES 68-83. See especially comments of the British delegate, *id.* at 68; the French delegates, *id.* at 75; and the Soviet delegate, *id.* at 72.

120. *Id.*

121. See generally B. CHENG, *THE LAW OF INTERNATIONAL AIR TRANSPORT* 381-411 (1962).

122. 396 F. Supp. at 97.

gers; they do not maintain control over them. Nor can the carrier exert any control over access to the waiting room. This is determined by government controls and airport operators.

The "flexible" approach offered by the *Day* court is contrary to the views expressed by many delegates to the Convention. The Soviet delegate stated that it is not logical for carriers to be held liable for injuries occurring in a terminal restaurant.¹²³ A French delegate expressed the view that a distinct separation exists between the functions of the airport operators and that of the carriers, and that the airport operators should be held liable for injuries occurring within the terminal building.¹²⁴ By their failure to define the term, the delegates left the precise determination of the point of embarkation to the courts. However, the judiciary should be bound by the clear intention of the parties as expressed in both preliminary and later statements by the delegates.

The district court in *Day* contended that although a terrorist attack is not an event within the contemplation of the parties, it is a risk inherent in modern aviation and therefore should be subject to the liability limits of the Convention.¹²⁵ Terrorist attacks have unfortunately focused upon national symbols in international contexts, such as a country's national airline and its passengers, diplomats, and athletic teams. International aviation has often been used as a target or a means of escape, but such a risk is one that often occurs in the *context* of aviation, not one that is necessarily *inherent* in aviation itself.¹²⁶

Disembarking

The issues involved in defining the operations of disembarkation are basically the same as those arising with respect to embarkation, although the district court in *Day* attempted to make a distinction upon the basis that there are "few activities if any which the carrier requires the passenger to per-

123. WARSAW MINUTES 72.

124. *Id.* at 75.

125. 393 F. Supp. at 222.

126. Judge Seitz, in his *Evangelinos* dissent, stated:

. . . [I]n my view, a terrorist attack inside an airport is no more likely than the bombing of a restaurant, bank, or other public place. Accordingly, I believe that the majority's conclusion that plaintiffs were injured as a result of a risk inherent in modern air travel is unwarranted. The particular hazards of terrorism which are unique to air navigation are simply not risks to which passengers in plaintiffs' proximity were exposed.

14 Av. Cas. at 17,104-05.

form at all, or in any specific sequence."¹²⁷ The *Evangelinos* district court correctly rejected this view, stating that the formalities of arrival are comparable to those of departure.¹²⁸

In *In re Tel Aviv*,¹²⁹ involving a terrorist attack in the baggage claim areas of the Tel Aviv airport, the district court held that the attack was outside the area of disembarkation, citing *MacDonald v. Air Canada*¹³⁰ as controlling.¹³¹ There, the Court of Appeals for the First Circuit stated that a fall occurring in a baggage claim area is not covered by the Warsaw Convention since the passenger "has reached a safe point inside of the terminal"¹³² Similar results were reached in *Felismina v. Trans World Airlines, Inc.*,¹³³ in which a passenger injured on an escalator in the terminal leading to the customs area and baggage claim was held to be "well beyond the point of disembarkation,"¹³⁴ and *Klein v. K.L.M. Royal Dutch Airlines*,¹³⁵ in which a passenger had already disembarked when injured on a conveyor belt in the baggage claim area.

Commentators and Foreign Courts

Commentators and foreign courts have generally made no distinction between embarkation and disembarkation with respect to the geographical area involved. A large majority have endorsed the view that the period spent in an airport terminal is not included in the definition of "in the course of any of the operations of embarking and disembarking." The generally accepted view is that the carrier's liability commences when the passenger leaves the building to walk to the plane (or if there is no building, when he steps onto the tarmac at the airport apron) and ceases at a similar point in the airport upon arrival.¹³⁶

Chauveau¹³⁷ and Guldemann¹³⁸ stress the risks of aviation in

127. 393 F. Supp. at 223.

128. 396 F. Supp. at 102.

129. 405 F. Supp. 154 (D.P.R. 1975).

130. 439 F.2d 1402 (1st Cir. 1971).

131. 405 F. Supp. at 156.

132. 439 F.2d at 1405.

133. 13 Av. Cas. 17,145 (S.D.N.Y. June 28, 1974).

134. *Id.*

135. 46 App. Div. 2d 679, 360 N.Y.S. 2d 60 (2d Dep't 1974).

136. H. DRION, LIMITATION OF LIABILITIES IN INTERNATIONAL AIR LAW §§ 72-76, at 82-87 (1954); GOEDHUIS, *supra* note 51, at 192-97; M. LEMOINE, TRAITE DE DROIT AÉRIEN; 539-40 (1947); N. MATEESCO MATTÉ, TRAITÉ DE DROIT AÉRIEN-AÉRONAUTIQUE 405 (2d ed. 1964); M. POURCELET, TRANSPORT AÉRIEN INTERNATIONAL ET RESPONSABILITÉ 40-44 (1964).

137. P. CHAUVÉAU, DROIT AÉRIEN § 325, at 174 (1951).

138. W. GULDIMANN, INTERNATIONALES LUFTTRANSPORTRECHT 100 n.4 (1965).

reaching this conclusion. In the context of embarkation, Sullivan¹³⁹ states:

Most large airports are managed so that passengers for a particular plane are kept behind a gate until the ship is in position and ready to be loaded. The gate is then opened and the passengers walk to the plane. The very fact that a gate is used indicates that particular hazards exist ahead. It is at that point that the passenger passes from the custody of the waiting-room operator, to the custody of the person or corporation who is to perform the contract of carriage. This would seem then the logical place to draw the line.¹⁴⁰

The only major controversy has not been whether the above definition is too restrictive, as the *Day* court would feel, but whether it is too broad. It is generally characterized as the "liberal view" as compared with the view incorporated into the municipal law of Germany,¹⁴¹ Norway,¹⁴² and Sweden¹⁴³ that only the actual entering and leaving of the aircraft are included. An even more restrictive view is held in the Soviet Union: liability is not considered to commence until take-off and terminates upon landing.¹⁴⁴

British authority has approved the result in *MacDonald*, i.e., that although an arriving passenger retains that status in the terminal building, the Warsaw Convention does not apply after the passenger attains a point of safety within the terminal.¹⁴⁵ The view that there are definite spatial limitations upon the scope of Article 17 is also expressed in European judicial opinions. French decisions are particularly relevant since, as previously noted, French is the official language of the Convention. *Maché v. Cie Air France*¹⁴⁶ involved a passenger who was injured as he followed

139. Sullivan, *The Codification of Air Carrier Liability by International Convention*, 7 J. AIR L. & COM. 1 (1936).

140. *Id.* at 21.

141. W. GULDIMANN, *supra* note 138, at 101-02.

142. *La Jurisprudence des Pays Scandinaves sur la Convention de Varsovie*, *supra* note 90, at 122.

143. *Id.*

144. O. LURLEAU, *supra* note 89, at 216.

145. 2 HALSBURY'S LAWS OF ENGLAND, *supra* note 41, at para. 1377.

146. *Maché v. Cie Air France*, [1968] D.S. Jur. 515, 21 Rev. Fr. Dr. Aérien 343 (Cour d' Appel, Rouen), *aff'd*, Judgment of June 3, 1970, [1971] D.S. Jur. 373, [1970] 24 Rev. Fr. Dr. Aérien 311.

For a discussion of this complicated ten-year litigation involving decisions by the Cour d'Appel de Rouen in 1967, the Cour d'Appel de Paris in 1963, and the Tribunal de Grand Instance de la Seine in 1961, as well as decisions by the Cour de Cassation in 1966 and 1970, see *Cas, La Responsabilité du Transporteur Aérien Pour Dommages Causes aux Passagers au Cours d'Operations Aeroportuaires*, 31 Revue Générale de l'Air et de l'Espace 117 (1968); 29 Revue Generale del l'Air et de l'Espace 32, 35 (1966) (comments of E. Pontavice).

two airline employees from the airplane to the terminal. The passenger fell into a drain in the ground outside a customs yard while detouring around a construction site. The highest court in France, in a ruling even more restrictive than the view favored by commentators, stated that since the passenger had left the traffic apron and was thus some distance from the dangers of aviation, disembarking had ceased and the Warsaw Convention did not apply.¹⁴⁷

In the recent case of *Forsius v. Cie Air France*,¹⁴⁸ another French court held that a passenger who fell on a slippery floor in an airport corridor near the customs area was not in the course of disembarking as required by Article 17. A third French case, *Cie Air France v. Nicoli*,¹⁴⁹ held that a passenger injured by a motorized luggage cart while walking to the airplane from the terminal was covered by the provisions of the Warsaw Convention. In a fourth French case, *Fratani-Bassaler v. Air France*,¹⁵⁰ the Warsaw Convention was found to apply to a fall by a passenger on steps leading down to the airplane (although the carrier was permitted to use defenses available under the Hague Protocol).

Courts in the Netherlands¹⁵¹ and Germany¹⁵² in cases involving embarkation have reached conclusions consistent with the French holdings.¹⁵³ These decisions are in accord with the majority of commentators who feel that liability begins after a passenger passes through the final gate and heads toward the airplane, and ceases upon entry into the terminal building.

CONCLUSION

The recent history of Article 17 has been one of attempted

147. Judgment of June 3, 1970, [1971] D.S. Jur. at 373, [1970] 24 Rev. Fr. Dr. Aérien at 314.

148. Judgment of Feb. 19, 1973, [1973] 27 Rev. Fr. Dr. Aérien 216 (Tribunal de Grande Instance de Paris, 4e Ch. 1re Sect.).

149. Judgment of Apr. 2, 1971 (Cour d'Appel, Paris), [1971] 25 Rev. Fr. Dr. Aérien 1973.

150. Judgment of Nov. 14, 1967 (Cour d'Appel, Aix-en-Provence), [1968] 22 Rev. Fr. Dr. Aérien 201.

151. *Richardson v. Koninklijke Luchtvaart Mij.* (Tribunal D'Arondissement de Haarlem, 4-V-1971), *Revue de Droit Uniform* 365 (Neth. 1975) (Warsaw Convention does not apply to an accident in the baggage claim area although the passenger was voluntarily returning to the aircraft).

152. Judgment of Mar. 11, 1961, 11 *Zeitschrift für Luftrecht und Weltraumrechtsfragen* 78 (Kammergericht I.O.U. 61.60, 1962) (passenger injured on stairs after leaving the waiting room to board an airplane is within Article 17).

153. However, an Austrian case lends support to the viewpoint expressed in *Day*.

judicial expansion of its scope. With respect to the type of event resulting in liability, the intentional acts of third parties would now appear to be included within the meaning of the term "accident." The nature of the resulting injuries that are compensable have been expanded to include recovery for mental distress even without physical injury. The spatial limitations have been enlarged by attempts to change the geographical criterion "on board the aircraft" into one of time frame, and to expand the spatial connotations of "all the operations of embarking and disembarking" by use of the criteria of control and purpose.

Many decisions seem to have been unduly based upon policy considerations rather than upon the intent of the parties to the Warsaw Convention. Such decisions not only are contrary to accepted basic principles of treaty interpretation, but may result in substantial inequities when applied in differing circumstances. The terms of the Convention should not be stretched beyond both the ordinary meaning of the words comprising the text of the treaty, and the intention of the parties as reflected in preliminary discussions and later statements by the delegates. A more desirable goal would be that favored by Judge Stevens in his *Rosman* dissent¹⁵⁴—to establish a method of compensation for victims of hijacking and terrorism under the Convention or the Montreal Agreement similar to new systems in areas of the United States compensating victims of crime.¹⁵⁵

This objective could be accomplished through a multilateral agreement reached under the auspices of the United Nations, or possibly through an amendment to the present Warsaw system. The mechanics established by the Guatemala Protocol for supplemental compensation above the \$100,000 limit by individual nations on a voluntary basis could be expanded to an obligatory system on a multilateral basis.

Upon the implementation of such a system of compensation, current judicial attempts to expand the boundaries of the Convention would be rendered unnecessary. Liability would not be

Liability was held to commence when the flight is called rather than when the passengers pass through the gate. Judgment of Apr. 27, 1972, [1972] OGH 54.

154. 34 N.Y. 2d at 404, 314 N.E. 2d at 852, 358 N.Y.S. 2d at 112.

155. See generally Floyd, *Victim Compensation Plans*, 55 A.B.A.J. 159 (1969); Lam-born, *The Methods of Governmental Compensation of Victims of Crime*, 1971 U. ILL. L. FORUM 655; *Symposium: Governmental Compensation for Victims of Violence*, 43 S. CAL. L. REV. 1 (1970).

imposed upon the airlines for injuries caused by the actions of third parties in areas beyond the carrier's control, and the injured passenger would be guaranteed full and adequate compensation without the necessity of expensive and time-consuming litigation.

Carol Lynne Tomeny