Some Considerations of the Draft for the Convention on an Integrated System of International Aviation Liability

Doo Hwan Kim

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I. INTRODUCTION

THE WARSAW CONVENTION of 1929 (the Warsaw Convention), though amended many times during the past several decades, remains the sole convention regulating air carriers. The Warsaw Convention contains a set of international principles designed to promote uniformity in resolving legal claims arising out of contracts for international air carriage. The Warsaw Convention, combined with several subsequent conventions and protocols, establishes a complicated international legal system for international carriage by air called the Warsaw system of international carriage by air. The Warsaw system consists of the Warsaw Convention, the Guadalajara Convention of 1961, a supplementary convention, and the following six protocols: 1) the Hague Protocol, 2) the Guatemala Protocol, 3) the Montreal Additional Protocol No. 1, 4) the Montreal Additional Protocol No. 2, 5) the Montreal Additional Protocol No. 3, and 6) the Montreal Additional Protocol No. 4.

The Warsaw Convention imposes the burden of proof on the air carrier instead of the victim, thus presuming the air carrier’s fault for personal or property damages caused

* Dean, Professor of Law, LLD, College of Law, Soong Sil University, Seoul, the Republic of Korea.
during international air carriage. The Warsaw system places liability for damages suffered in the course of or in the event of an interruption of operation of the aircraft on the air carrier. However, the Warsaw system does limit the air carrier's liability to a certain amount of money depending upon whether the resulting injury is personal injury or death, or the loss, damage or destruction of cargo. The Warsaw Convention has been amended many times to increase the maximum amount of damages for which an air carrier is liable for personal injury or property loss because of an increasing desire to protect passengers injured during an international flight.

The Rome Convention of 1933 (the Rome Convention), amended in 1952 and again in 1978, provides for limited liability for damages caused by foreign aircraft to third parties on the surface during international carriage by air. Like the Warsaw Convention, the Rome Convention imposes no-fault liability (strict liability) on the air carrier. Both the 1952 and the 1978 amendments raised the ceiling on damages, and the 1978 amendment adopted the SDR as the currency unit.

Both the Warsaw Convention and the Rome Convention...
tion have played a major role in the international legal system for air transportation. Many amendments have been proposed to each convention due to the rapid technological developments in aviation, the changes in social and economic environments, the difficulties in proof and discovery of facts, and the need for increasing protection of injured passengers. Not all of the proposed amendments have been enacted, however. As a result, the international legal system for air transportation is presently complicated and tangled. Since the early 1970s, many aviation law professors and lawyers have tried to integrate and simplify the international legal system for air transportation.

The International Civil Aviation Organization (ICAO) and the affiliated organization of the United Nations have finally made a resolution which recognizes the need for a new draft for the Warsaw Convention to make the Warsaw system more integrated and less complicated. Hopefully, a new proposal for an integrated system can be devised in the near future.

Professor Bin Cheng of London University, chairman of the Air Law Committee of the International Law Association (ILA), and Professor Jacqueline Dutheil de la

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7 JAPAN AVIATION ASS'N, AIR TRANSPORTATION 337 (1981).

8 The International Law Association (ILA) was created by law professors and lawyers from around the world in Brussels in 1873. They wrote the York-Antwerp Rules concerning General Average and other conventions concerning collisions between ships, air transportation, and space law. The ILA, an authoritative research organization, has its headquarters in London. It has established branch offices in the U.S.A., France, West Germany, Italy, the Soviet Union, Poland and Japan and has more than 4,500 members.

The ILA holds its conferences once every two years. The ILA has held its conferences in Hague (1970), New York (1972), New Delhi (1974), Madrid (1976), Manila (1978), Belgrade (1980), Montreal (1982), Paris (1984), and Seoul (1986). The 63rd Conference will be held in Warsaw in 1988. Many famous lawyers, law professors, including law professors from Eastern Europe and the Soviet Union,
Rochère have written a "draft of the convention on an integrated system of international aviation liability covering surface damage caused by foreign aircraft during international carriage by air." The Draft for the Convention (the Draft) written by Prof. Bin Cheng places unlimited liability for personal injury or death and limited liability for loss, damage or destruction of cargo caused by an air accident on the international air carrier. The liability is an absolute, secured and channeled liability which imposes a much heavier liability on international air carriers than the existing Warsaw system.

The purpose of Professor Bin Cheng's Draft is to unify the provisions of the Warsaw Convention which limit air carrier liability under an air transportation contract for personal or property damages and the provisions of the Rome Convention which limit the tort liability of a foreign air carrier for damage caused to third parties on the surface. This proposal calls for the integration and unification of contract and tort liability within one convention. It could dramatically and fundamentally reform the Warsaw system and could become the basis for unification of international private aviation law. Thus, it is worthwhile to study the Draft for the Convention even though it is not expected to become an effective convention in the near future. In light of the importance of the Draft, this analysis will now turn to an explanation and brief history of the Draft, including its background, framework, and guiding principles. This analysis will then conclude with comments and my own opinions concerning the Draft.9

9 The proposed Draft was discussed by both aviation law professors and lawyers at the air law session of the 60th Conference of the ILA held at Montreal, Canada from August 29 to September 4, 1982, but was not adopted. Instead, the Conference decided that the Draft should be analyzed and reviewed by the air law session.
II. A Brief History of the Draft for the Convention

The Air Law Committee of the ILA has discussed the liability problems of air carriers since the Helsinki Conference of 1966. The air law session of the London Conference of the ILA (1967) initiated a discussion concerning the possibility of an integrated system of air carrier liability. This discussion first raised the issue of the desirability of imposing an absolute, unlimited and secured liability upon air carriers in an effort to deal with the problems of an air carrier’s civil liability to passengers and other interested parties.10

Unfortunately, because urgent problems regarding the international legal system for hovercraft and the international regulation of aircraft hijacking took precedent during the 53rd Conference of the ILA in 1968, discussion of an integrated system for air carrier liability was suspended until 1976. During the 57th Conference of the ILA held in Madrid in 1976, a report concerning an integrated system for the liability of air carriers based upon the principles of absolute, unlimited and secured liability was submitted by Canadian Professor R. H. Mankiewicz.11 Thus, the air law session of the ILA resumed discussion of an integrated system for air carrier liability. For the purpose of handling this topic, the Air Law Deliberation Committee was established which consisted of such famous air law specialists as Professor H. K. Böckstiegel, Dr. M. Bodenshatz, D. P. Chauveau, Dr. W. Guldimmann, Professor R. H. Mankiewicz, Professor N. M. Matte, and Professor R. Nys. The Air Law Deliberation Committee considered a memorandum dealing with an integrated liability system for air carriers submitted by Professor Bin Cheng. In consideration of some opinions presented by the committee, Pro-

11 Id. at 472.
Professor Bin Cheng rewrote the report on an integrated liability system. The revised report was then transferred to the Air Law Deliberation Committee of the 59th Conference of the ILA held at Belgrade on August 19, 1980.\textsuperscript{12}

Professor Bin Cheng explained the details of his report to the Air Law Deliberation Committee, but he received much critical opposition. The Belgrade Conference of 1980 advised that three guiding principles be addressed in future air law sessions. First, an integrated system of civil aviation liability should be initiated with regard both to damage sustained by passengers or caused to baggage or cargo during international carriage by air, and to damage caused to third parties on the surface by foreign aircraft. Second, all claims should be channelled through the carrier and the operator of the aircraft respectively. Third, a carrier’s liability for personal injuries, including death, should be absolute, unlimited and secured. The committee recommended that a Draft be prepared in accordance with Professor Bin Cheng’s report and the above three principles before the Montreal Conference of 1982.\textsuperscript{13}

As a result, a brief Draft was submitted at the 60th Conference of the ILA held in Montreal in 1982. It consisted of four articles written by Professor Mankiewicz in accordance with the above three principles and a detailed Draft consisting of seventy-nine articles written by Professor Bin Cheng with the cooperation of Professor Jacqueline Dutheil de la Rochère. The following section of this article focuses on the detailed Draft written by Professor Bin Cheng.

III. THE BACKGROUND OF THE DRAFT FOR THE CONVENTION

The Draft for the Convention proposes a liability principle applicable both to an international air carrier’s con-
tract liability for damages caused during air carriage and to a foreign aircraft's tort liability for damages caused to third parties on the surface. The Draft provides that the air carrier or the operator of the aircraft shall bear absolute, unlimited and secured liability and all claims shall be channelled through the carrier and the operator of the aircraft respectively. Such a liability principle seems radical and progressive.14

A. Issues With Respect to the Warsaw Convention

Since the conclusion of the Warsaw Convention in 1929, technology has advanced and national incomes have increased. In addition, the value of life and property have increased substantially. Due to changes in economic and social circumstances, the difficulty in burden of proof, the move from fault liability to absolute liability, and the influence of court judgments regarding aircraft accidents, the Warsaw Convention has been amended many times through protocols, agreements and conventions.15 Despite its many amendments, the Warsaw Convention has played an important role in air transportation legal

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14 The background for Professor Bin Cheng's radical proposal may be summarized from the articles written by Professor Bin Cheng, his reports submitted to the Belgrade Convention of 1980 and to the Montreal Convention of 1982, and articles written by Professor K. Fujita. Cheng, Fifty Years of the Warsaw Convention: Where Do We Go From Here?, 1979 ZEITSCHRIFT FUR LUFT UND WELTRAUMRECHT 373 (1979) [hereinafter Fifty Years].

15 Study, supra note 3, at 85. The Warsaw Convention, which concluded in 1929, has been either amended or supplemented through the Hague Protocol of 1955, the Guadalajara Convention of 1961, the Montreal Agreement of 1966, the Guatemala Protocol of 1971 and the Montreal Additional Protocols Nos. 1, 2, 3, and 4. However, the Warsaw system of international carriage by air was complicated by the fact that the Diplomacy Committee of the United States Senate refused to ratify the Montreal Additional Protocols Nos. 3 and 4, which are not yet effective. In my opinion, if the United States had ratified the Montreal Protocols Nos. 3 and 4, Korea and Japan might have ratified them, thereby promoting an amendment to existing aviation laws which would describe the civil liability of air carriers more concretely.

In Great Britain, the Carriage by Air and Road Act of 1979 reflects the contents of the Montreal Additional Protocols Nos. 3 and 4. Furthermore, according to a decision of the British Civil Aviation Office, British Airways and British Caledonian Airways incorporated the provisions of the Protocols into the general terms and conditions of their air transportation contracts in April, 1981. Id.
problems. At present, more than 110 countries are affiliated with the Warsaw Convention and more than 100 countries are affiliated with the Hague Protocols. In addition, in accordance with domestic laws on domestic air transport of the contracting country, the Warsaw Convention extends to non-Warsaw air transportation. Assuredly, the Warsaw Convention is the most important and widely used convention in the area of private aviation law.\(^{16}\) As to why the Warsaw Convention was accepted worldwide and has lasted so long, my opinions are as follows:

1) the Warsaw Convention has provisions for very comprehensive regulations and, unlike the Hague Protocols, it covers passengers and baggage as well as cargo;

2) the Warsaw Convention's provisions and regulations are very simple. When a passenger suffers death or personal injury, or cargo or baggage is damaged, destroyed, or lost, the air carrier bears the burden of proof and is presumed to be at fault. The air carrier’s liability is limited, however, to a specified amount of money unless it is guilty of willful misconduct or gross negligence;

3) the provisions of the Warsaw Convention are compulsory and mandatory, so they can be effectively applied and efficiently enforced (Convention Article 24). The provisions for compulsory adjudicative jurisdiction (Convention Article 28) make litigation speedy and efficient as well.

While the Warsaw Convention has merit, it also has many weaknesses. After World War II, the United States tried to withdraw from the Warsaw Convention, arguing that the maximum amount for air carrier liability was too low and unreasonable. At that time, the liability of an air carrier for each passenger killed or injured was limited to $8,300. Because the maximum limited amount included attorney's fees, which are higher in the United States than in any other country, the maximum limited amount was

\(^{16}\) Fifty Years, supra note 14, at 373.
considered relatively lower in the United States than in other countries. Through mediation with the International Civil Aviation Organization (ICAO) and the International Air Transport Association (IATA), the United States cancelled its withdrawal proposal. Due to the attempted withdrawal of the United States, the Montreal Agreement was concluded in 1966. It provided for absolute liability and raised the maximum amount of liability. Although the Montreal Agreement increased the maximum limited amount nine times to $75,000, however, the American dissatisfaction with the limited amount continued.

The original drafters of the Warsaw Convention are not to blame for the relatively low amount of limited liability because Article 22, Paragraph 4 of the Warsaw Convention linked the maximum limited amount to the Poincare Franc. Instead, governments of member countries are to blame, because they adopted the official price of gold to measure the maximum limited amount. This limited amount was lower than the amount fixed by the original drafters. Influenced by changes in the currency system, a court upheld a calculation based upon the free market price of gold. As a result, the 21st air law session of the ICAO in 1974 discussed the problem of the conversion of the gold franc into national currencies. A resolution was passed providing that the calculation of foreign exchange should not be based on the free market price of gold. Thus, Montreal Additional Protocol Nos. 1, 2, 3 and 4 adopted the Special Drawing Right (SDR) system of the

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17 Article 22, Paragraph 4 of the Warsaw Convention provides that the sums mentioned in Paragraph 3 shall be deemed to refer to the French franc consisting of 65 and 1/2 milligrams gold of millesimal fineness 900.


International Monetary Fund instead of the gold franc.21 With regard to the maximum amount of air carrier liability, the problem of conversion of the gold franc was solved by adopting the SDR as the measure of the maximum amount. Nevertheless, the Warsaw Convention should be amended more fundamentally.22

B. Reasons Why the Warsaw Convention Should be Amended

Many economic and social changes have occurred since the Warsaw Convention was effectuated. First, due to the rapid development of science and technology in the aeronautic industry, the age of propeller aircraft transportation is gone. This is the age of transportation by supersonic jet aircraft. Compensation for damages caused by aircraft accidents has increased in dollar amount as well as in volume. Air carrier liability should extend to loss of expectation of leisure activities, as well as to damage to property, and mental and physical injuries.

Second, because the aircraft industry is a very complicated assembling industry, it utilizes many people in a variety of jobs, including parts manufacturers, air service suppliers, airport employees, air traffic controllers, governmental agencies, and manufacturers or suppliers of aircraft facilities. When victims are not satisfied with the limited amount for which an airline corporation is liable under the current limited liability system, they tend to bring claims against the manufacturer of the aircraft or

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the air traffic controller for the balance of their damages which are not thoroughly compensated by the airline corporation. The Warsaw Convention does not cover claims against parties other than the air carriers. Thus, the air carrier may take advantage of the liability limitation, while the aircraft manufacturer or the air traffic controller cannot. This disregards equity and distributive justice.

Third, the liability limitation in the Warsaw system is controversial and questionable. The Warsaw Convention allowed the limitation of air carrier liability because the aircraft business was very dangerous and risky at the time of the Warsaw Convention. It seemed fair and reasonable that the air carrier should not be fully responsible for all the damages caused by an accident, and that the passenger should bear part of the risk or damage. In light of the developments in technology and safety of air transportation, this reason for the liability limitation does not exist anymore.

Fourth, because the Warsaw Convention is very complicated, the passengers receiving compensation for damages caused in the same aircraft accident have very different rights according to the jurisdiction in question even though the passengers paid the same freight. This discriminates among the passengers and cannot be justified anymore.

Fifth, insurance poses a problem. Nowadays almost all the damages resulting from air transportation are covered by insurance. The final and ultimate payer of the premium is the passenger or consignor of cargo. The problems of indemnity in insurance law are closely related to social justice problems. Influenced by the development of insurance, some scholars have argued for the principle

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23 Every country has its own method for determining the damages for which the air carrier is liable. Therefore, if there is no liability limitation, the amount of money the injured passenger receives depends upon the jurisdiction in question and its criteria for compensation. As a result, the passengers of the same aircraft receive varying and unequal treatment. Thus, discrepancy and inequity among passengers will always exist without some fixed, limited amount of liability per passenger applicable in all jurisdictions.
of absolute liability. When the Montreal Agreement of 1966 adopted the principle of absolute liability, it simplified the procedure for claiming damages.

The Warsaw system has played a very important role in the transportation of passengers. Professor Bin Cheng asserts, however, that the present air law system could not settle air law problems and disputes without dramatic and comprehensive reforms of the Warsaw Convention. On the other hand, Professor Karl Heinz Bocksteigel, Professor A. Tobolewski and Esq. Deter Martin have asserted that even partial reform can solve the problems.²⁴

IV. THE PLAN AND STRUCTURE OF THE DRAFT FOR THE CONVENTION

A. Plan

The most serious problem with the current liability system results from the fact that, because of the danger and risk of air transportation at the time of the Warsaw system, the Warsaw Convention focused on the protection of the interests of air carriers. Nowadays, as a result of increasing technology, the pressure is mounting to impose much heavier liability on the air carrier than before in order to protect the passengers and other consumers. The Draft proposes provisions that are fair to consumers, that protect users such as passengers and that make procedures simple and convenient. The Draft describes an integrated liability system to the extent that it covers all the civil air carrier’s liabilities with respect to damages sustained by passengers or baggage or cargo during an international carriage by air, as well as damages caused by foreign aircraft to third parties on the surface.

The reasons for integrating provisions for damages caused by foreign aircraft to third parties on the surface

with provisions for damages sustained by passengers, baggage or cargo are as follows: 1) the civil operator's liability with respect to the former gives rise to the same or similar problem with respect to the latter; 2) the provision of the Amended Rome Convention of 1952 for the civil operator's liability with respect to damages caused to third parties on the surface by foreign aircraft has not worked; and 3) although amended at Montreal in 1978, the Warsaw Convention needs sweeping and comprehensive reform in order to solve its fundamental problems.\textsuperscript{25} The resolution and recommendation of the air law session of the ILA held at Belgrade in 1980 provided the fundamental framework which unifies and consolidates the civil air carrier's liability with respect both to damages caused to passengers, baggage or cargo based upon the transportation contract and to damages caused to third parties on the surface based upon the concept of tort.

B. Structure

The Draft for the Convention is divided into two parts. Part One deals with international carriage by air, while Part Two deals with surface damage caused by foreign aircraft. Although both parts are based on the same guiding principles, they could be treated as two separate conventions. This would enable the two parts to be accepted, if necessary, separately. Part One takes as its point of departure the Warsaw Convention as amended at Hague in 1955, at Guatemala City in 1971, and by Montreal Additional Protocols Nos. 3 and 4. From this point of view, the consolidated text as found in the First Schedule to the United Kingdom Carriage by Air and Road Act of 1979 has been very helpful. The 1961 Guadalajara Supplementary Convention has also been incorporated into the Draft. Part Two takes as its point of departure the Rome Convention of 1952 as amended at Montreal in 1978.

\textsuperscript{25} Fujita, ICAO's Activity With Regard to Legal Problems and Its Recent Two Years Result, 26 Jurisprudence J. [Hougakoo Zassi] 504.
In order to make it easier to compare the Draft for the Convention with the Warsaw Convention, the Draft maintains, where possible, the articles and expressions of the Convention. The articles of the Warsaw Convention which were taken into consideration in the Draft, and the intent and purport of the articles of the Draft, are explained in the official comments to each article of the Draft. The first part of the Draft consists of forty-one articles, and the second part consists of thirty articles. The framework of the Draft is as follows:

Part One: International Carriage by Air
   Chapter I. Scope — Definitions (Articles 1 and 2)
   Chapter II. Documents of Carriage\(^{26}\)
      Section 1. Passenger Ticket (Article 3)
      Section 2. Baggage Check (Article 4)
      Section 3. Documents Relating to Cargo (Articles 5 to 16)
   Chapter III. Liability of the Carrier (Articles 17 to 30)
   Chapter IV. Provisions Relating to Combined Carriage (Article 31)
   Chapter V. General and Final Provisions ( Articles 32 to 41)

Part Two: Surface Damage by Foreign Aircraft
   Chapter I. Principles of Liability (Articles 1 to 10)
   Chapter II. Extent of Liability (Articles 11 to 14)
      (Because the Draft does not adopt the liability limitation system, the maximum amount provisions presented by the Rome Convention have been omitted in order to provide for unlimited liability);
   Chapter III. Security for Operator's Liability (Article 15) (Articles 16 to 19 of the Rome Convention have been omitted because they deal with the scheme of limited liability);

\(^{26}\) Although it is noted that the Draft for the Convention has more supplementary provisions than the Guatemala Protocol for dealing with the delivery of documents of carriage, they are largely based upon the related provisions of the Warsaw Convention. Fujita, \textit{Draft Convention on an Integrated System of International Aviation Liability Covering International Carriage by Air and Surface Damage Caused by Foreign Aircraft}, 29 \textit{Jurisprudence J. [Hougakoo Zassi]} 120 (1983).
Chapter IV. Rules of Procedure and Limitation of Action (Articles 20 to 22)
Chapter V. Application of the Convention and General Provisions (Articles 23 to 30)
Chapter VI. Final Provisions

V. Guiding Principles of the Draft for the Convention

The two parts of the Draft, one dealing with damage caused during carriage by air and the other with surface damage, are linked because they are both based on the same guiding principles: 1) liability for all damage arising during carriage by air or surface damage shall be unlimited; 2) this liability shall be absolute and secured, except for damage arising from delay; and 3) all claims arising from carriage by air and surface damage caused by foreign aircraft shall be channelled through the carrier and the operator respectively. The following section explains and discusses the guiding principles in more detail.

A. Absolute Liability

Since the Guatemala Protocol of 1971 adopted the strict liability principle, the presumption of fault placed on the air carrier has disappeared. However, opposition to the absolute liability principle still exists. In developed countries, absolute liability has become the controlling liability principle and plays a very important role in determining liability. Articles 17 to 21 of the Draft contain the absolute liability provisions. This absolute liability principle applies to all injury to passengers and cargo or baggage during international carriage by air. Delay damages, on the other hand, are still governed by the fault presumption principle.

Certain exceptions to absolute liability may apply so

that the air carrier avoids liability. For example, the Guatemala Protocol Article 17, Paragraph 2 provides that the air carrier is not liable if damage to baggage results solely from an inherent defect, quality or vice of the baggage. Article 18, Paragraph 2 of the Draft contains four exceptions to the absolute liability principle regarding damage caused to cargo by the following: (1) an inherent defect, quality or vice of the cargo; (2) defective packing of the cargo performed by a person other than the carrier or his servants or agents; (3) an act of war or an armed conflict; or (4) an act of public authority carried out in connection with the entry, exit or transit of the cargo.\textsuperscript{29} In the carriage of passengers, cargo or baggage, if the carrier proves that the person claiming compensation caused or contributed to the damage through negligence, a wrongful act, or an omission, the carrier shall be wholly or partly exonerated from his liability to such person. The burden of proof as well as exemption from liability of the air carrier in the carriage of passengers and cargo are provided for in more detail in Article 21 of the Draft.

B. \textit{Unlimited Liability}

Under the Warsaw Convention of 1929, the Hague Protocol of 1955, the Montreal Agreement of 1966, the Guatemala Protocol of 1971, the Montreal Additional Protocols Nos. 1, 2, 3, and 4 of 1975 and the Amended Rome Convention, the air carrier or aircraft operator bears only limited liability with respect to both personal injury and material loss caused by an aircraft accident. The limited liability provisions with respect to personal loss (death or injury to passenger) are omitted in the Draft for the Convention of 1982. Adoption of unlimited liability for personal injury was a radical suggestion, which shocked the worldwide air law society and gave rise to continuing arguments among air law scholars.

\textsuperscript{29} Id. at 563; see Fitzgerald, \textit{The Warsaw Convention as Amended by the Montreal Conference on International Air Law}, \textit{1 ANNALS OF AIR \& SPACE L.} 49, 55 (1976).
Opponents emphasize that unlimited liability would make it very hard to calculate and fix the amount of the premiums and the insurable value for international aviation insurance. Professor Bin Cheng counters that the degree of premium increase would be relatively small, and that existing laws already impose unlimited liability on many parties, including manufacturers and corporations. In addition, unlimited liability has succeeded with regard to damage caused during domestic transportation by U.S. civil aircraft and even with respect to damage on the U.S. surface caused by British aircraft. Thus, no reason exists for maintaining the limited liability principle only for international carriage by air since the unlimited liability principle works very well for domestic air transportation in the United States.

Unlike the unlimited liability principle for personal loss, the Draft adopts a limited liability principle for loss, damage or delay of cargo or baggage in Article 22. The maximum amount for limited liability is based upon the currency unit of SDR of the IMF as described in the Montreal Additional Protocols of 1975. The Draft’s provisions for limited liability for damage caused to cargo or baggage are derived mainly from the Guatemala Protocol and the Montreal Additional Protocol No. 4 except for the following two improvements.

First, the maximum amount of limited liability is increased two or three times. In the carriage of baggage, the limited liability of the carrier in the case of destruction,

30 See Some Considerations, supra note 18, at 98.
31 Materials regarding how much the insurance premium is for domestic air transportation in the United States or Japan, where the unlimited liability principle applies to domestic air transportation, should be collected and analyzed before the Draft is enacted. In addition, materials regarding how much an insurance premium would increase for international carriage by air if the limited liability principle is replaced by the unlimited liability principle should be studied. Although the increase of insurance premiums seems to matter to large airline corporations of developed countries, the same amount of increase might be even more burdensome to the small or medium-sized airline corporations of developing countries.
32 Sixtieth Conference, supra note 28, at 564-65.
tion, loss, damage or delay went up to 2,000 SDR for each passenger,\textsuperscript{33} twice as much as the amount provided for in Guatemala Protocol No. 3. For the carriage of cargo, it increased to fifty SDR per kilogram,\textsuperscript{34} or three times the amount provided for by the Montreal Additional Protocol No. 4. Such an increase should protect the interests of passengers and cargo owners and induce carriers to improve security over baggage or cargo.

Second, the Draft prescribes that the sum of limited liability specified in Article 21 of the Draft shall not apply if it is proven that the damage resulted from a wrongful act or omission of the carrier, his servants or agents, or acts committed with intent to cause damage.

This exception considers the greater burden placed on the air carrier due to the absolute liability principle and to the increase in the maximum amount of limited liability. It brings the article back in line with the deepseated legal conviction of all civil law systems.\textsuperscript{35}

C. Secured Liability

Although the principle of absolute liability makes the legal procedure more efficient and the principle of unlimited liability for passenger injury or death insures sufficient compensation for victims, they do not make any sense if the air carrier does not bear the liability completely. Thus, the Draft establishes security or guarantee provisions to make sure the air carrier compensates the passenger or consigner thoroughly.\textsuperscript{36} The framework

\textsuperscript{33} Id. at 564.
\textsuperscript{34} Id.
\textsuperscript{35} Some Considerations, supra note 18, at 100.
\textsuperscript{36} Examples of international guarantees for secured payment are as follows: the Rome Convention of 1952 with regard to Surface Damage Caused to Third Parties by Foreign Aircraft, the OECD Convention regarding Nuclear Accident of July 29, 1960 (the Paris Convention of 1960), the Vienna Convention of 1963 regarding Civil Liability for Nuclear Accident, the Brussels Convention of 1962 regarding Liability of the Operator of Nuclear Ships, the Tanker Owner’s Voluntary Agreement on the Liability for Oil Pollution (TOVALOP), the Agreement on Provision Compensation with respect to Tanker Owner’s Liability for Oil Pollution, the International Convention on Civil Liability for Oil Pollution Damage of
Professor Bin Cheng developed is a three-fold method of guarantee involving (1) self insurance, (2) cooperative insurance, and (3) governmental insurance.\(^3\)

According to Professor Bin Cheng's framework, the first step involves the air carrier or the aircraft manufacturer taking self-insurance measures to cover its own liability.\(^3\) In this case, the air carrier or the airplane manufacturer may insure goods as well as take out self-insurance. If the first step is impractical, as its substitute the air carrier and the aircraft manufacturer may purchase compulsory or voluntary insurance through mutual cooperation.\(^3\) If this second step is too difficult, under the third step the government bears the ultimate liability and distributes the risk to all the people in case of damage caused to third parties on the surface.\(^4\)

Article 35A (1) of the Draft requires every carrier to maintain either insurance or some other form of financial security, including guarantee, covering his liability for such damage as may arise under this Draft in such amount, of such type and in such terms as the national State of the carrier may specify.\(^4\) The carrier may be required by the State in which he operates to provide evidence that it has fulfilled this requirement by producing appropriate certificates.\(^4\) This provision replaces Article 35A of the Guatemala Protocol on supplementary compensation schemes.\(^4\)

One of the most important principles in the integrated
liability system is the secured liability principle. Thus, some measures should be taken to insure the air carrier compensates for injuries. The kind of measures taken would depend on the State concerned. The State concerned may specify, at its discretion, the amount, type and terms of the financial security to be provided. In addition, the State may require its air carriers to establish some kind of indemnity club or compensation fund as in the maritime industry. This kind of measure could be accomplished through a multilateral agreement among states and thus be somewhat advantageous to the developing countries which have only small or medium-sized airline corporations. A system of secured liability ensures that compensation shall always be effectively paid.

In line with precedents set in the field of space activities, Article 35B provides that the State of the carrier becomes the ultimate guarantor if the carrier and any person furnishing financial security pursuant to Article 35A fail to meet their liabilities. Thus, Article 35B makes doubly sure that compensation will always be paid. Since the national State of the carrier will have to ensure that the liabilities of its carriers will be met in full, it is free to arrange the matter in any way it sees fit. In light of Article 35A, it is most unlikely that Article 35B will ever be invoked. But since it depends upon the type of measures the national State of the carrier takes, Article 35B,

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44 Id.
45 Id.
46 Id.
47 Id. An indemnity club or compensation fund can act either as a safety net for its participants, or as a form of mutual insurance which will take over the liability of the participants when it exceeds given limits. "In the latter event, limited liability of the carrier can be combined with full compensation to the victims of air accidents." Id.
48 Id. It would be helpful to get assistance from the ICAO, the IATA or other regional organizations. Id.
49 Id. The national State of the carrier also becomes responsible for the liabilities of the carrier in those cases where the State permits its carriers to obtain financial security only up to a specified maxima. Id.
50 Id. at 573-74.
51 Id. at 574.
like the unlimited liability principle, deserves severe discussion during the air law session of the ILA.

D. Channeling of Liability

According to the Draft, the channeling of liability is due to the absolute, unlimited and secured liability imposed upon only the air carrier when damage results during international carriage by air. Liability is channeled directly through the air carrier. But if the carrier has paid compensation under the Draft for the personal injury or the death of a passenger, or for the destruction, loss of, or damage to baggage or cargo, then such a carrier could acquire by subrogation the rights of the person so compensated against any third party involved in the event that caused the injury or death, or the destruction, loss or damage of cargo.\(^5^2\)

The channeling of liability to the air carrier lowers the probability that a claimant will look to the aircraft manufacturer and other related persons for damages. As a result, an air carrier may receive indemnity through the London insurance market more easily, speedily and efficiently.\(^5^3\) In spite of the merits of channeling liability, a serious problem is whether the air carrier who compensated the claimant for the damage can really and efficiently execute the right of subrogation against the third party. On the one hand, the channeling of the air carrier’s liability becomes advantageous to the victims of the accident. On the other hand, the air carrier may bear more risk or more burden if execution of the right of subrogation is inefficient and difficult.

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\(^{52}\) The provisions detailing channeled liability are derived from the Guatemala Protocol and the Montreal Additional Protocol No. 4, and the wording has been borrowed from Article 9 of the 1963 Vienna Convention of Civil Liability for Nuclear Accident. See Yamazaki, *Legislation of Air Cargo Transportation*, No. 18, 19 J. AIR L. [KUHO] 83 (1976). The Draft for the Convention, Article 30K Section 1 stated: “[n]othing in this Draft for the Convention shall prejudice the question whether a person liable for damage in accordance with its provisions has a right of recourse against any other person.” *Some Considerations*, supra note 18, at 93.

\(^{53}\) *What Next?*, supra note 24, at 19.
VI. Critiques of the Draft for the Convention

A. Major Critiques

Professor Martin Bradley of the Air and Space Law Research Institute, McGill University, played the role of the Secretariat of the 60th Conference of the ILA in Montreal in 1982. He spoke on behalf of Director Nicolas M. Matte, Professor P. Haanappel, Professor Jean-Louis Magdelènat and Dr. Ludwig Weber. Professor Bradley stated that they took issue, not with the Draft, but with the principles underlying it that were agreed on at Belgrade. Another objection to the Draft was that the project was premature. In Bradley's opinion, the United States was on the threshold of ratifying Montreal Additional Protocol No. 3 and Montreal Additional Protocol No. 4, and it was probable that when the United States ratified, a substantial number of other states would follow suit. Bradley said that it seemed prudent, if this occurred, to see if the Warsaw/Hague/Montreal system would work in practice. Their critical argument on the principles of the Draft concluded with three points.

First, concerning the integrated liability system, disparate subjects are being mixed in the same instrument, and the disparate elements are liable to deter states from ratifying the Draft.

Second, regarding the channeling of claims, it is unjust to lay this burden solely on the aircraft operator. This solution deprives the victim of alternative and possibly superior sources of compensation. A Draft incorporating this principle is unlikely to enjoy sufficient industry support to

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64 Sixtieth Conference, supra note 28, at 586-87.
65 Id. at 586.
66 Id. at 586-87.
67 Id. at 587. The proposal of ratification of the Montreal Additional Protocols Nos. 3 and 4 was submitted to the Senate of the United States, but was rejected March 8, 1983. Tompkins, The Defeat of the Montreal Protocols in the United States Senate — What Next?, LLOYD'S AVIATION L. 1-6 (Sept. 15, 1983).
68 Sixtieth Conference, supra note 28, at 587.
69 Id.
secure a reasonable number of ratifications. 60

Finally, the principle of absolute, unlimited and secured liability is unacceptable to a large part of the international aviation community. 61 Thus, the Draft, incorporating all three components, would not receive the universal acceptance that is necessary to make it a valid substitute for the Warsaw system. 62 In principle, a provision on secured liability is desirable, but, in so far as it involves states as guarantors, it is premature with regard to the present state of development in international aviation. 63 Consequently, it is desirable to maintain the Warsaw Convention as amended through the Montreal Additional Protocols Nos. 3 and 4 for the time being. 64

Dr. M. Milde, Observer for the ICAO, submitted a legal opinion that bitterly criticized the Draft. 65 He expressed regret that at present the Draft represents an effort of only a few scholars and that it was not subjected in sufficient time to a more general discussion at a full meeting of the Air Law Committee of the Association. 66 Dr. Milde stated:

I, personally, have some serious misgivings about whether the draft is mature enough to be presented to a wider discussion in any international forum — such as ICAO or IATA — or whether it could be presented to Governments for further consideration. . . . Consequently, I formally suggest that the draft be sent back to the Air Law Committee for further consideration, study of economic data, jurisprudence and statistics on claims, so as to permit it to clarify by a wider consensus of the air law experts many issues which, at present, appear to be highly questionable and do not deserve the full endorsement of the Association. 67

60 Id. at 587.
61 Id.
62 Id.
63 Id.
64 Some Considerations, supra note 18, at 97, 108.
65 Id.
66 Id.
67 Id.
Dr. M. Milde has, in particular, basic doubts, misgivings and questions about the following seven issues:

(a) Eleven years have elapsed since the adoption of the Guatemala Protocol and seven years since the Montreal Conference which adopted Protocols 3 and 4. These documents represent a delicate compromise reluctantly accepted by the international community, and the present indications are that active steps are being taken to bring these instruments into force. It would be unfortunate if the actions by the Association were, in any way, to interfere with the promising trend of recent months which might bring the delicate compromise to a state of ripening and bearing fruit.

(b) Any draft on liability has to take into account a host of economic facts and data and the legal proposals have to be firmly based on a thorough [sic] economic analysis. I am afraid that it has not yet been done in the forum of the Association. The draft Convention represents a bold and original effort to unify the law but also, by its consequences, purports to unify the standard of living and cost of living in different parts of the international community.

(c) One of my basic problems is the concept of unlimited liability. In all probability such a concept would be fully acceptable to only one single State of the international community and could hardly represent a basis for unification of law. At the Guatemala City Conference, States have reluctantly, and in the spirit of compromise and accommodation accepted a 'high limit', but only as a part of a package which made that high limit unbreakable under any circumstances. It appears quite unrealistic to expect that unlimited liability would be acceptable to any significant portion of the international community. Furthermore, 'unlimited liability' is in fact not insurable and no insurer would give a blanket coverage and underwrite unknown risks which might reach astronomic proportions.

(d) I cannot agree that the cost of insurance premiums would represent only 'a toothpick in the olive in the martini' — this statement is unsupported by any convincing economic analysis, does not state what is the actual amount of the premiums and how those premiums would be influenced, and also disregards the fact that different
airlines have to pay different premiums according to the size of their fleet and the overall record of their operations. There is sufficient proof to state that, in general, the airlines of the developing countries with marginal operations have to pay premiums vastly in excess of those paid by well-established airlines of developed countries.

(e) The draft, in fact, triples the liability for cargo and baggage increasing the liability from 17 SDRs, per kilogram to 50 SDRs, per kilogram. There does not seem to be any economic justification for such an arbitrary dramatic increase, and the draft may lack, in this respect, credibility. Again, the introduction of the concept of fault in the carriage of cargo and baggage goes contrary to the Montreal Protocol No. 4 of 1975; at the Montreal Conference any effort to reintroduce the concept of fault with respect to cargo was soundly defeated, even in case of criminal acts of the carrier or its servants or agents.

(f) In the proposed Article 30L the waiver of immunity by States may be only an example of wishful thinking not supported by the practice of States.

(g) In Article 35B the introduction of 'State responsibility' is hardly convincing and no precedents or analogies could be quoted from the area of space law. In the field of space law States have accepted 'State responsibility' towards another State but not directly to any individual suffering damage; furthermore, such responsibility attaches in fact to State activities for the launching of spacecraft.

It seems that different viewpoints come from different occupational backgrounds. On the one hand, Dr. M. Milde has worked in the Air Law Committee of the ICAO for a long time. Therefore, his opinion is influenced by the present condition of the air industry. On the other hand, Professor Bin Cheng has suggested an ideal and future framework from a scholastic point of view.

B. Counter-reply of the Drafter

Professor Bin Cheng counter-replied to the above critiques. He had forecasted two of the critiques. He fore-
casted the "appropriate time" problem, in which opponents criticize the Draft because the United States may ratify the Montreal Additional Protocols Nos. 3 and 4. He also foresaw the problem of gaining support from the airline corporations and recognized the need to encourage and persuade, in advance, the airline corporations to support the Draft before delivering it to the States, since the States are reluctant to ratify the Draft at present.

In response to the criticism that the United States may ratify the Montreal Protocols, Professor Bin Cheng asserted that waiting and hoping for the United States to ratify the Montreal Additional Protocols Nos. 3 and 4 is a waste of time. Moreover, since the ILA is a kind of research institute, it is essential, important and inevitable for the members of the ILA to research and discuss the ideal framework to reform the Warsaw Convention dramatically and fundamentally. Professor Bin Cheng pointed out that it is senseless to say that the United States will not ratify the Draft at present. For example, the American representative asserted to the Air Law Committee of the ICAO in 1965 that it was very difficult for the United States to ratify the Rome Convention, since the absolute liability principle prescribed in the Rome Convention was totally contrary to the deep-rooted legal tradition of the United States. In a scant ten months after that assertion, however, the United States imposed absolute liability on foreign airlines carrying out business in the United States territory in accordance with the Montreal Agreement of 1966. Thus, Professor Bin Cheng concluded that it is naive to think that each State's position is changeable.

The cooperative drafter Professor J. D. de la Rochere also replied to the critique submitted by Professor M. Bradley. First, the research on the Draft by the ILA does not have any potential influence upon the possible ratifi-

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69 Fujita, A Survey on Compensation for Damage Caused to Passengers by International Aircraft Accidents, 17 Jurisprudence J. (Hougakoo Zassi) 90.
cation by the United States of the Guatemala Protocol and the Montreal Additional Protocols Nos. 3 and 4. Second, the purpose for distributing the Draft to the international organizations was not to make it conclusive, but to take into account the comments or responses made by the international organizations. Third, "unlimited liability" and "liability secured by the States" are not new topics at all.

Because the counter-replies submitted by the drafters are very abstract, the opponents are not satisfied with them. However, the Draft deserves continuous research and discussion.

C. Professor K. Fujita's Opinion

In balancing the burden on the air carrier under the absolute and unlimited liability principle with the interests of the victims, the Draft emphasizes only the responsibility of the air carrier. Professor Bin Cheng considers the burden placed on the air carrier by the Draft small and trivial, but his opponents disagree. Nobody knows how much claims will increase under an unlimited liability principle, particularly in the United States which permits tremendous amounts of compensation for damages. The inevitable increase in insurance costs will certainly be burdensome to small or medium-sized airline corporations. Without a detailed economic analysis of accident compensation, no conclusion can be drawn regarding the Draft's effect upon insurance costs. Since the unlimited liability principle is not the sole solution to meeting both the needs of the air carrier and those of consumers, it is too early to adopt the Draft.

The second point to be considered is that under Article 35B of the Draft, the national State of the carrier becomes responsible for the liabilities of the carrier on the premise that the State permits its carriers to obtain financial security only up to a specified maximum.\(^70\) It is questionable

\(^70\) *Sixtieth Conference, supra* note 28, at 573-74. Article 35B provides:
that the national State of a private carrier could be the ultimate guarantor of the carriers' business activities. The principle of secured liability should be entrusted to each State for its voluntary decision and should not be enforced by means of the Draft.

Third, channeling liability to the air carrier or the aircraft operator is desirable since such channeling is not too burdensome to air carriers. De facto channeling of liability is possible by fixing the maximum amount of liability and giving a domestic supplement to the dissatisfied claimants as under the Guatemala Protocol and the Montreal Additional Protocol No. 3.

Finally, the Draft is an integrated system of liability including both damages caused during international carriage by air based on contract and damages caused by foreign aircraft to third parties on the surface based on tort. However, separation of those liability provisions will make a more reasonable and secured liability system. The Draft should differentiate contract liability from tort liability and separate them from each other. Because enforcement of the liability principles as prescribed in the Draft will be difficult, it is too early to adopt the Draft.

VII. CONCLUDING REMARKS (AUTHOR'S PERSONAL OPINION)

I have explained the brief history of the Draft, its background, structure, guiding principles, critiques and counter-replies and Professor K. Fujita's opinion. Now, I would like to present my own opinion.

In cases where a carrier and the person furnishing financial security pursuant to Article 35A of this Convention both fail to meet their liabilities arising under this Convention, and in those cases where a contracting State permits its carriers to obtain financial security only up to specified maxima, the national State of the carrier becomes responsible for the liabilities of the carrier and of the person furnishing such financial security arising under the present Convention to the extent to which such liabilities have not been met.

Id.

*Some Considerations, supra* note 18, at 113-16.
Let me begin with a review of the guiding principles of Professor Bin Cheng’s Draft for the Convention, which proposes to dramatically revise the Warsaw system that has played such an important role in the international carriage by air for a half century. First, the “absolute and unlimited liability principle,” which has been the hot issue of the Draft, has several problems. Unlimited liability with respect to death or injury of passengers imposes a heavy burden on the air carrier. The international community will not easily disregard the limited liability system, which has existed for fifty years. Furthermore, under the unlimited liability principle, the amount of compensation for damages will differ according to the domestic laws of each country. As a result, the unlimited liability principle underlying the Draft entrusts to the States the selection of the liability system. The large gap in compensation amounts resulting from the application of different domestic laws may lead to international conflict among airline corporations and to dissatisfaction among passengers. In addition, the unlimited liability principle may give rise to an increase in insurance premiums, which in turn would make air transportation costs increase. Finally, the unlimited liability principle should not apply only to a passenger’s death or injury during international carriage by air, since other conventions, including conventions limiting shipowner’s liability, the convention on liability of the operators of nuclear ships, and the United Nations’ convention on international multimodal transportation, presently apply the limited liability principle. The Draft is idealistic but not realistic. It is realistic to maintain the limited liability system for the time being, to take the domestic supplement according to the Guatemala Protocol, and, of course, to ratify the Montreal Additional Protocols Nos. 3 and 4.

72 The Draft is different from the Warsaw Convention, the Hague Protocol, the Guatemala Protocol and the Montreal Additional Protocols, because it does not prescribe the maximum amount of liability with respect to passengers’ deaths or injuries.
The second guiding principle of the Draft, the secured liability provisions of Article 35B, ensures that the carrier's liability will be covered. It is unreasonable, however, for a State to be involved in private aviation activities and to become an ultimate guarantor of air carrier liability. A viable alternative might be the establishment of an international fund for compensation of air accident damages under the auspices of the ICAO or the United Nations.\footnote{International research and discussion of this alternative could begin with the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage of 1971.}

The third guiding principle of the Draft is the channeling of liability to the air carrier or aircraft operator as prescribed in Article 30 of the Draft. Such channeling of liability is necessary and essential to compensate the victims more efficiently and speedily.

The Draft should unify and integrate the complicated framework of the Warsaw system and the Rome Convention regarding an air carrier's liability for damages caused to third parties on the surface by foreign aircraft. The conventions, agreements and protocols which regulate international carriage by air at present are so complicated and divergent that only air law specialists understand the details. Integrating those conventions and agreements into one convention would solve many problems among passengers, cargo owners, air carriers and insurance companies. In view of the trend to unify private air laws, our efforts to integrate and unify the conventions and agreements in the past might be helpful and play at least a partial role in establishing worldwide uniform law in the future.\footnote{NOGAMI, THEORY OF AIR COMMERCIAL LAW 3-7 (1984).} The Draft itself, the guiding principles thereof, and the approach used in it, shall be important and essential material for those who are interested in the future reform of the Warsaw system.

One possible way to unify the rules of the Warsaw Convention and those rules regarding the assessment of dam-

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\footnote{International research and discussion of this alternative could begin with the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage of 1971.}

\footnote{NOGAMI, THEORY OF AIR COMMERCIAL LAW 3-7 (1984).}
ages, which may be idealistic, would be to establish a World Court of Aviation Law with jurisdiction to resolve claims arising out of international aviation disasters. In this court, the procedural and substantive law must be uniform and just. The creation of other international courts demonstrates that such a court is possible. This World Court of Aviation Law could hear any claim growing out of both international air crash accidents and transnational accidents in which the plaintiffs and defendants are from different nations. This alternative would eliminate the lack of uniformity of decisions under the Warsaw system. In addition, national courts would no longer have to apply their own choice of law analysis in choosing the applicable liability limits for cases that do not fall under the Warsaw system. Thus, creation of a World Court of Aviation Law would eliminate any disparity of damage awards among similarly situated passengers in non-Warsaw system cases.

The creation of a World Court on Aviation Law could provide the uniformity of decision currently lacking in claims arising out of commercial aviation accidents. Until a World Court of Aviation Law is established to handle such claims and to provide some measure of uniformity, attorneys acting in their client's best interest should closely scrutinize the court's choice of law rules.

It is urgently necessary for us to make a new Draft for the Convention on an Integrated System of International Aviation Liability and to create a World Court on Aviation Law to handle international aircrash litigation. I shall propose to make a new brief Draft for the Convention on


\[76\] The Warsaw system need not be destroyed, however. Professor Matte of McGill University suggests creating an International Court of Appeals or extending jurisdiction to the International Court of Justice at the Hague to decide Warsaw Convention cases.
an Integrated System of International Liability and to create a World Court of Aviation Law in the future.