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AIR CARRIERS' LIMITATION OF LIABILITY AND AIR PASSENGERS' ACCIDENT COMPENSATION UNDER THE WARSAW CONVENTION

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The author was awarded the 1962 Braniff Essay Award in Aviation Law, an annual award in memory of the late Thomas E. Braniff, airline pioneer, established by Roger J. Whiteford and Hubert A. Schneider of the law firm of Whiteford, Hart, Carmody and Wilson, Washington, D.C.

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ON September 22, 1961, the U.S. Interagency Group on International Aviation (IGIA)¹ invited comments on the relationship of the United States to the Hague Protocol² amending the *Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by air*.³ Specifically, two questions were posed: (1) whether or not the State Department should recommend that the President withdraw the request to the Senate for advice and consent to the Hague Protocol; (2) whether or not the United States should withdraw from participation in the Warsaw Convention by giving the required six months' notice.

The "Warsaw Convention" of 1929 is today the most widely accepted treaty on international commercial law.⁴ The amendments made at The Hague in 1955, which will become effective after ratification by 30

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¹ Composed of the Departments of State, Commerce, and Defense; the Federal Aviation Agency; and the Civil Aeronautics Board. See IGIA Doc. 23/1.3 (Hearings, Dec. 18, 1961); see also Documents of the Air Coordinating Committee (ACC), Legal Division, ACC Doc. 51/22.28 (Revised), 22.28(A), 22.28(B).

² Protocol signed at The Hague on Sept. 28, 1955; ICAO Doc. 7632; 1955 U.S. & Can. Av. 521; Strauss, *Air Laws and Treaties of the World*, An Annotated Compilation Prepared for the Committee on Science and Astronautics, H.R. 87th Cong., 1st Sess. 1332 (G.P.O. 1961). Cf. Minutes of The Hague International Conference on Private Air Law 1955, held under the auspices of the Int'l Civil Aviation Organization (ICAO); ICAO Doc. 7686-LC/140, 2 vol. (Montreal 1956). The conference was preceded by drafting sessions of the Comité International Technique d'Experts Juridiques Aériens (CITEJA) in 1946, and of the ICAO Legal Committee (1946-53).

³ Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on Oct. 12, 1929, entered into force on Feb. 13, 1933; 137 L.N.T.S. 11, No. 3145. Adherence advised by U.S. Senate on June 15, 1934; adherence declared on June 27, 1934; proclaimed Oct. 29, 1934, 49 Stat. 3000, T.S. No. 876; 1934 U.S. Av. 239. Cf., Minutes of the IIème Conférence Internationale de Droit Privé Aérien 1929, (Warsaw 1930), reprinted ICAO Doc. 7838. The Conference was preceded by drafting sessions of the CITEJA (1926-28).

⁴ As of April 1, 1961, the Convention was in force in 57 states, and in more than 60 dependent territories, colonies, etc. See 27 J. Air L. & Com. 375 (1960); 1960 U.S. & Can. Av., Treaty Data xii. The following are *not* members of the Convention: 4 states of the "socialist camp" (Albania, Cuba, North Korea, Outer Mongolia), 8 states of Asia and the Middle East (Afghanistan, Iran, Iraq, Saudi-Arabia, South Korea, Thailand, Turkey, Yemen), and 12 Latin-American states (Bolivia, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, Guatemala, Nicaragua, Panama, Paraguay, Peru, Uruguay).

states,⁵ have been commented upon by legal writers both here and abroad.⁶ The discussion centers around the carrier's liability towards passengers, previously limited to approximately \$8,300 per passenger under the Warsaw Convention,⁷ and now doubled to approximately \$17,000, under the Hague Protocol.⁸ A group of compensation lawyers in the United States sees the Protocol as a chance to withdraw from the Convention entirely.⁹

With respect to the two questions posed by the IGIA memorandum, it would appear that they can be reduced to a single one. For, if the United States does *not* withdraw from the Convention, the only logical step is the immediate ratification of the Hague Protocol. Mere inaction; i.e., no ratification, would have the effect of perpetuating the present (low) limitation of liability, which neither advocates nor opponents of the Hague Protocol would desire. If, however, the United States *does* withdraw, there is no question of ratifying the Hague Protocol.¹⁰

Consequently, there is really only one question to answer: Should the United States withdraw from the Warsaw Convention?

I. THE WARSAW CONVENTION AND THE CARRIERS' LIMITATION OF LIABILITY

Opponents of the Convention explicitly declare that "the only provision to which they object" is Article 22, limiting the air carrier's liability to a maximum, and thereby, allegedly, making the Convention unfair to the passenger.¹¹

⁵ As of April 1, 1961, 19 states had filed their ratifications with the Polish government, acting as depositary (Art. XXI, para. 3). Although some states seem to await action by the United States first, it may be expected that the required number of 30 ratifications (Art. XXII, para. 1) will be reached in 1962.

⁶ See Beaumont, *The Warsaw Convention of 1929 as Amended by the Protocol Signed at The Hague on Sept. 28, 1955*, 22 J. Air L. & Com. 414 (1955); FitzGerald, Comment, 34 Can. B. Rev. 326 (1956); Mankiewicz, *The Hague Protocol to Amend the Warsaw Convention*, 5 Am. J. Comp. L. 78 (1956); Calkins, *Grand Canyon, Warsaw and The Hague Protocol*, 23 J. Air L. & Com. 255 (1956); Reiber, *Ratification of the Hague Protocol*, 23 J. Air L. & Com. 272 (1956); Garnault, *Le Protocole de la Haye*, 10 Revue Française De Droit Aérien 6 (1956); Riese, *Die Internationale Luftprivatrechts-konferenz im Haag zur Revision des Warschauer Abkommens*, 5 Zeitschrift Für Luftrecht 4 (1956); Mankiewicz, *Conflits entre la convention de Varsovie et le protocole de la Haye*, 19 Revue Generale de l'Air 239 (1956); Whitehead, *Some Aspects of Warsaw Convention and The Hague Protocol to Amend*, 1957 Proceedings of A.B.A. Section of Insurance, Negligence and Compensation Law 37; Ass'n of the Bar of the City of New York, *Report on the Warsaw Convention as Amended by the Hague Protocol*, 26 J. Air L. & Com. 255 (1959).

⁷ Art. 22: "In the transportation of passengers the liability of the carrier for each passenger shall be limited to the sum of 125,000 francs."

⁸ Art. XI, amending Art. 22: "In the carriage of persons the liability of the carrier for each passenger is limited to the sum of 250,000 francs." In addition, a new paragraph, 4 of Art. 22, permits the court, in accordance with its own law, to award court costs, attorney's fees and other costs incurred if the carrier had not made a timely offer to settle the claim at an amount equal to or exceeding the judgment amount. If implemented by appropriate legislation, this provision could take care of the situation in the United States, where many lawyers take cases on a "contingency" basis, collecting as their fee from one-third to one-half of the damage award, if any, plus expenses. E.g., see Cony, Report on Los Angeles meeting of the Nat'l Ass'n of Claimants' Comp. Att'ys, Wall Street Journal, Aug. 6, 1956, p. 1, col. 1. Cf. Reiber, *supra* note 6, at 285, n. 29; Ehrenzweig, *Shall Counsel Fees Be Allowed?*, 26 Cal. S. B. J. 107 (1951).

⁹ See Cony, *supra* note 8.

¹⁰ Pursuant to Art. XXIII, para. 2, ratification of the Protocol has the effect of adherence to the Convention.

¹¹ Dissent by Ravage, Siff, Speiser, in the Report of the New York City Bar Ass'n, *supra* note 6, at 267; Letter from Stuart M. Speiser (for the Nat'l Ass'n of Claimants' Comp. Att'ys) to President Eisenhower, March 15, 1956, ACC Doc. *op. cit. supra* note 1, Attachment 5, at 3;

However, there is no legal possibility of providing an exempting reservation to this article.¹² The alternative, therefore, is not "for or against Article 22," but "for or against the Convention."

A. Fairness Of The Convention To The Passenger

A treaty provision can only be evaluated in its natural context; i.e., within the Convention as a whole. Whether the "conciliation of interests" between air carriers and air passengers has gone "wholly to the advantage of the carriers," as Professor Eliescu from the Rumanian People's Republic maintained in 1958,¹³ must be decided after consideration of *all* relevant provisions of the Convention.

1. The Convention has established a uniform presumption of liability on the carrier's side (Article 20). Without the Convention, common law liability rules would require the passenger to prove the carrier's negligence unless "the case speaks for itself" (*res ipsa loquitur*), which again could be rebutted by the carrier.¹⁴ The "*res ipsa*" doctrine, doubtful in its application in general,¹⁵ has proven rather unsatisfactory in aviation cases,¹⁶ and would not, in any event, be available to American passengers suing abroad.¹⁷ In 1952, the United Kingdom abandoned this common law liability scheme in the field of air transport, and adopted the rules of the Warsaw Convention as its domestic air law.¹⁸

2. The Convention protects passengers against lower limitations¹⁹ and contractual waivers of liability.²⁰ It renders the carrier liable *without*

Wright, *Warsaw Convention's Damages Limitations*, 6 Clev.-Mar. L. Rev. 290 (1957). See also Editorial, *The Unequal Balance*, Wall Street Journal, Aug. 7, 1956, p. 8, col. 1, and Gardner, *So You're Going to Fly to London*, 43 A.B.A.J. 412 (1957).

¹² Reservation suggested by Speiser, letter *supra* note 11, at 5. But cf. Art. XXVI of the Hague Protocol, which clearly excludes exemptions of this kind.

¹³ Eliescu, *Système et limites de la responsabilité civile en droit aérien national et international*, Paper delivered to the 5th Int'l Conference on Comparative Law in Brussels 1958, 1 Gen. Rep. 531, 572 (Brussels 1960).

¹⁴ The amount of evidence required in the United States varies from state to state. E.g., *Smith v. Pennsylvania Central Airlines Corp.*, 76 F. Supp. 940 (1948); see also 92 A.L.R. 653 (1934), cited in ACC Doc., *op. cit. supra* note 1, at 4, n. 2.

¹⁵ E.g., Prosser, "*Res ipsa loquitur*" in *California*, Selected Topics on the Law of Torts 302, 375 (1953).

¹⁶ Hardman, *Aircraft Passenger Accident Law: A Reappraisal*, 1961 Ins. L.J. 688, 691, n. 14, points out that three prominent experts in aviation negligence litigation come to the general conclusion that although *res ipsa loquitur* is applicable in many cases, the plaintiff would be unwise to rely on it as juries have almost unanimously returned verdicts for the defendant in cases where it had been pleaded; Cf. Galiher, *Problems Confronting Trial Counsel in Aviation Cases*, 6 Catholic U. L. Rev. 149, 156 (1957); Lancaster, *Aviation Law*, 17 Texas B.J. 587, 613 (1954); and Speiser, *Aviation Negligence Cases*, 64 Case & Com. 8, 14 (1959). A study of airline cases submitted to juries on the theory of *res ipsa loquitur* revealed that in 22 out of 24 cases verdicts were returned for the defendant. McLarty, *Res Ipsa Loquitur in Aviation Passenger Litigation*, 37 Va. L. Rev. 55 (1957). See also Whitehead, *supra* note 6, at 41; Fenston, *Res Ipsa Loquitur*, Thesis, McGill U. (1953); Fenston, *Res Ipsa Loquitur in Aviation*, 1 McGill L.J. 209 (1953).

¹⁷ See the comparative study of Hjalsted, *The Air Carrier's Liability in Cases of Unknown Cause of Damage in International Air Law*, 27 J. Air L. & Com. 119 (1960).

¹⁸ The Carriage by Air (Non-International Carriage) (United Kingdom) Order, (1952) Statutory Instruments No. 158, (1952) C.L.Y.B. No. 201; see Knauth, Comment, (1952) U.S. & Can. Av. 145.

¹⁹ An often quoted (though out of date) tabulation of national laws limiting recovery to lower amounts than the Warsaw Convention may be found in ICAO Doc. 7450-LC/136, vol. II, Annex VI, Appendix VII (1953).

²⁰ The uniform "conditions of contract" issued in 1927 by the Vienna Conference of the Int'l Air Traffic Ass'n (IATA) contained sweeping exonerations from liability. The Warsaw Convention forced the Association to modify its uniform contract form in 1930 (Antwerp Conference). See 14 Droit Aérien 516 (1930). The new conditions entered into force at the same time as the Warsaw Convention (Feb. 13, 1933).

limitation if it fails to issue the proper "Warsaw" passenger ticket (Article 3, paragraph 2), and in the case of its or its agents' wilful misconduct (Article 25).²¹ It does *not* limit the liability of aircraft and component manufacturers, airport owners and operators, governmental agencies, maintenance organizations, etc.²²

3. The Convention grants to the passenger a choice among four jurisdictions in which to bring his action: the carrier's domicile, its principal place of business, its place of business through which the contract was made, or at the place of destination.²³ Without the Convention, actions arising from accidents abroad would not only be governed by foreign law,²⁴ but, according to the wrongful death statutes of several states of the Union such as Illinois²⁵ and Wisconsin,²⁶ some American courts would even "close their doors"; i.e., refuse to take jurisdiction, and instead send the plaintiff to some foreign court.²⁷

It is noteworthy that out of the 40 American cases dealing with passenger death or injury in international air carriage—37 of which involved the Warsaw Convention—only seven arose from accidents within the United States, six from accidents on the High Seas, and 27 from accidents in the territory of foreign states.

The countries to which plaintiffs—mostly American citizens—would have been referred for their actions, include Portugal,²⁸ Canada,²⁹ India,³⁰ Ireland,³¹ Brazil,³² Scotland,³³ Italy,³⁴ Greece,³⁵ Jamaica,³⁶ Mexico³⁷ and Liberia.³⁸

²¹ Redefined by the Hague Protocol, Art. XIII. See *Ulen v. American Airlines*, 186 F.2d 529 (D.C. Cir. 1949), 1949 U.S. Av. 338 (\$25,000 awarded). *Tuller v. K.L.M.*, 292 F.2d 775 (D.C. Cir. 1961) (\$350,000 awarded).

²² Report by New York City Bar Association, *supra* note 6, at 260. See *Coultras v. K.L.M.*, (S.D.N.Y. 1961), 1961 U.S. & Can. Av. 199.

²³ Art. 28, interpreted by American courts as an "implied consent by the carrier to be sued in the forums specified." *Berner v. United Airlines*, 157 N.Y.S.2d 884 (Ct. App. 1957), 1957 U.S. & Can. Av. 477. The forum requirements of Art. 28 have been interpreted liberally: see, e.g., *Winsor v. United Airlines*, 159 F. Supp. 856 (Del. D. 1958), 1960 U.S. & Can. Av. 33, ("principal place of business"); *In re Waldrep's Estate*, (9th Cir. 1958) 1958 U.S. & Can. Av. 534 ("place of destination").

²⁴ The "*lex loci delicti*" doctrine is constantly applied by some American courts, despite its inadequacy for modern air transport law. *Cf. Calkins*, *supra* note 6, at 255; see also *infra*, text at notes 216 through 223.

²⁵ Ill. Rev. Stat. (1957), c. 70, § 2.

²⁶ Wis. Stat. (1949), § 331.03.

²⁷ See *Reed v. Northwest Airlines* (N.D. Ill. 1954), 1954 U.S. & Can. Av. 45, distinguishing *First National Bank of Chicago v. United Airlines*, 342 U.S. 396 (1952), and denying jurisdiction over wrongful death which occurred in Japan.

²⁸ *Garcia v. P.A.A.*, 84 N.Y.S.2d 408 (App. Div. 1948), 1948 U.S. Av. 521; *Indemnity Insurance Co. v. P.A.A.*, 58 F. Supp. 338 (S.D.N.Y. 1945), 1945 U.S. Av. 46, 52; *Ross (Froman) v. P.A.A.*, 299 N.Y. 88, 13 A.L.R.2d 319, 1949 U.S. Av. 168, 1954 U.S. & Can. Av. 400; *Komlos v. Air France*, 209 F.2d 436 (2d Cir. 1953), 1953 U.S. & Can. Av. 471; *Royal Indemnity Co. v. Air France*, 18 F.R.D. 363 (S.D.N.Y. 1955), 1955 U.S. & Can. Av. 358; *Supine v. Air France*, 100 F. Supp. 214 (E.D.N.Y. 1951), 1951 U.S. Av. 448, 4 Av. Cases 17,691 (1955).

²⁹ *Wanderer v. SABENA*, (N.Y.S. 1949), 1949 U.S. Av. 25; *Salamon v. K.L.M.*, 281 App. Div. 965, 1955 U.S. & Can. Av. 80; *Ritts v. American Overseas Airlines*, 97 F. Supp. 457 (2d Cir. 1951), 1951 U.S. Av. 101; *Goepp v. American Overseas Airlines*, 305 N.Y. 838 (1953), 1953 U.S. & Can. Av. 503; *Scarf v. T.W.A.*, 233 F.2d 176 (2d Cir. 1956), 1956 U.S. & Can. Av. 232; *In re Waldrep's Estate*, (9th Cir. 1958) 1958 U.S. & Can. Av. 534.

³⁰ *Branyan v. K.L.M.*, *Barrows v. K.L.M.*, *Gratke v. K.L.M.*, *Werkley v. K.L.M.*, 13 F.R.D. 425 (S.D.N.Y. 1953), 3 Av. Cases 18, 219 (1953).

³¹ *Pekelis v. Transcontinental & Western Air*, 187 F.2d 122 (2d Cir. 1950), 1951 U.S. Av. 1; *Bergeron v. K.L.M.*, (S.D.N.Y. 1961), 1961 U.S. & Can. Av. 17; *Tuller v. K.L.M.*, 292 F.2d 775 (D.C. Cir. 1961); *Coultras v. K.L.M.*, 1961 U.S. & Can. Av. 199.

³² *Bochory v. P.A.A.*, (N.Y. App. Div. 1957), 1957 U.S. & Can. Av. 180; *In re Hoover's Estate*, 11 Pa. D. & C.2d 9 (Pa. Orphan's Ct. 1957), 1957 U.S. & Can. Av. 366.

4. The foregoing would make it clear that the Convention has improved the American passenger's legal position in international air carriage. In exchange, "balances were sought to be struck between passengers and carriers."³⁹ The principle of limited liability provides such a balance, as Secretary of State Hull indicated in his letter to President Franklin D. Roosevelt.⁴⁰ This letter has been quoted with approval by the courts.⁴¹

B. Public Policy And Limitations Of Liability

Even if the principle of limited liability is evaluated independently and out of its treaty context, it is difficult to see why it should be "indefensible morally, sociologically, and economically."⁴²

The reference to morals, sociology and economics apparently purports to imply that the limitation is contrary to public policy.

1. Limitations of liability can hardly be contrary to the public policy of those American states which have Workmen's Compensation or Wrongful Death statutes which limit recovery to maximum amounts.⁴³ However, since the Warsaw Convention as a treaty constitutes part of the "supreme law of the land,"⁴⁴ "overriding state law and policies,"⁴⁵ the question is one of federal public policy. This issue has been decided by the courts which have held (1) that the limitation provision does not infringe on the constitutional right of Congress to regulate commerce;⁴⁶ and (2) that it does not deprive American citizens of their constitutional right to trial by jury.⁴⁷

2. A comparison with the laws of other civilized countries hardly supports the allegation that limited liability is an "immoral" principle. The liability rules of the Warsaw Convention have been adopted with little or no change, for the *domestic* air laws of the following states: the United

³⁹ *Finne v. K.L.M.*, 11 F.R.D. 336 (S.D.N.Y. 1951), 1951 U.S. Av. 365.

⁴⁰ *Sherman v. T.W.A.*, (N.Y.S. 1960), 1960 U.S. & Can. Av. 297.

⁴¹ *Philios v. Transcontinental & Western Air*, (N.Y. City Ct. 1953), 1953 U.S. & Can. Av. 479.

³⁸ *DaCosta v. Caribbean International Airways*, (S.D.Fla. 1955), 1955 U.S. & Can. Av. 481.

³⁷ *Sheldon v. P.A.A.*, 74 N.Y.S.2d 578 (App. Div. 1947), 1947 U.S. Av. 546.

³⁶ *Dunning v. P.A.A.*, (D.D.C. 1954), 1954 U.S. & Can. Av. 70.

³⁵ *Markowitz, J.*, in *Berner v. United Airlines*, 4 Av. Cases 17,924, 17,926 (1956).

⁴⁰ Sen. Doc. Ex. C., 73rd Cong., 2nd Sess., at 3; 1934 U.S. Av. 240.

⁴¹ *Ross v. P.A.A.*, 1949 U.S. Av. 168, 176; *Komlos v. Air France*, 1952 U.S. & Can. Av. 310, 320.

⁴² *Ravage, Siff, Speiser*, dissent *supra* note 11, at 268.

⁴³ Colorado-\$25,000, Colo. Rev. Stat. Ann., § 41-1-3 (1953); Connecticut-\$25,000, Conn. Gen. Stat. Rev., § 52-555 (supp. 1958); Illinois-\$30,000, Ill. Rev. Stat., c. 70 § 1, 2 (1959); Kansas-\$25,000, Kan. Gen. Stat. Ann. § 60-3203 (1949); Maine-\$20,000, Me. Rev. Stat. Ann., c. 165, § 10 (1954); Massachusetts-\$20,000, Mass. Ann. Laws, c. 229, § 6(E) (1955); Minnesota-\$25,000, Minn. Stat. Ann., § 573.02 (1947); Missouri-\$25,000, Vernon's Ann. Mo. Stat., § 537.090 (1949); New Hampshire-\$25,000, N.H. Rev. Stat. Ann., § 556.13 (1955); Oregon-\$20,000, Ore. Rev. Stat., § 30.020 (1959); South Dakota-\$20,000, S.D. Code, § 37.2203 (1959); Virginia-\$30,000, Va. Code. Ann., § 8-636 (1950); West Virginia-\$20,000, W.Va. Code Ann., § 5475 (1955); Wisconsin-\$25,000, Wis. Stat. Ann., § 331.04 (1958); See *Oleck, Damages to Persons and Property*, § 198 A (rev. ed. 1961); *Silver, Death Damages and Conflict of Laws*, 10 Clev.-Mar. L. Rev. 461 (1961).

⁴⁴ U.S. Const. art. VI, clause 2.

⁴⁵ *Garcia v. P.A.A.*, 1945 U.S. Av. 39, 43, citing *Wyman v. P.A.A.*, 293 N.Y. 878 (1944), and *U.S. v. Pink*, 315 U.S. 203, 230; *Berner v. United Airlines*, 4 Av. Cases 17,924, 17,925 (1956), citing *Wyman v. P.A.A.*, *supra* and *Komlos v. Air France*, 209 F.2d 436 (2d Cir. 1953).

⁴⁶ *Indemnity Insurance Co. v. P.A.A.*, 18 F.R.D. 363 (S.D.N.Y. 1955).

⁴⁷ *Pierre v. Eastern Airlines*, 152 F.Supp. 486 (N.J.D. 1957), 1957 U.S. & Can. Av. 431.

Kingdom,⁴⁸ France,⁴⁹ Belgium, Luxemburg, Greece and Switzerland.⁵⁰ The principles of the Convention, including what is alleged to be "so basically bad a principle as limitation of liability,"⁵¹ have become a model for national legislation throughout the world, and were incorporated in the domestic air law of such countries as Norway, Sweden, Denmark,⁵² Austria, Germany,⁵³ the Netherlands, Italy, Argentina, Brazil, Uruguay, and Mexico.⁵⁴

Limitations of liability have been embodied in other international conventions on air law, maritime law, and nuclear energy law.⁵⁵ The only official declaration of a public policy *against* limitation of liability in international air transport comes from the so-called (East) German Democratic Republic:

[T]he principle of limitation of liability to arbitrary maximum amounts is—at least with respect to personal damages—contrary to the socialist principle that the damage actually caused must be fully compensated.⁵⁶

3. If there is such a thing as "sociological" justification of *unlimited* liability—and of its consequences in the form of higher transportation fares—it is certainly not free from objections. In the United States, the average net recovery by passengers against air carriers in cases where the Warsaw Convention was not applicable, has been estimated at \$15,000 in 1956,⁵⁷ even lower than the Hague limits. The only social group which would benefit from unlimited liability—at the expense of all other paying passengers—is the group of "above-average" travellers (higher earnings, higher life expectancy) who could best afford to obtain individual insurance for their exceptional risk.⁵⁸

⁴⁸ *Supra* note 18.

⁴⁹ Loi No. 57-259 sur la responsabilité du transporteur au cas de transport aérien, March 2, 1957; Journal Officiel (March 3, 1957).

⁵⁰ See Guinchard, *L'influence de la convention de Varsovie sur les règles de droit interne relatives à la responsabilité du transporteur aérien*, 11 Rev. Franc. Droit Aérien 189 (1957).

⁵¹ Ravage, Siff, Speiser, dissent *supra* note 11, at 268.

⁵² Cf. Nylen, *Scandinavian Cooperation in the Field of Air Legislation*, 24 J. Air L. & Com. 37 (1957).

⁵³ Luftverkehrsgesetz, 1943 Reichs-Gesetzblatt 1.69, as amended to 1959. See Rinck, *Système et limites de la responsabilité en droit aérien international et national*, Paper delivered to the 5th Int'l Conference on Comparative Law in Brussels 1958, 7 Z. Luftrecht 298 (1958), English summary at 311.

⁵⁴ See Guinchard, *supra* note 50.

⁵⁵ Rome Convention (1952) on Damages Caused by Foreign Aircraft to Third Parties on the Surface, ICAO Doc. 7364, 310 U.N.T.S. 181, 19 J. Air L. & Com. 447 (1952); Brussels Convention (1924 "Hague Rules," rev. 1957) Relating to the Limitation of the Liability of Owners of Sea-Going Ships, 59 Droit Maritime 580 (1957), 24 Rabels Z. 742 (1959); Paris Convention (1960) on Third Party Liability in the Field of Nuclear Energy; see 27 J. Air L. & Com. 376 (1960).

⁵⁶ Damm, *Hinweise zur Neufassung des Warschauer Abkommens*, (1959) Nachrichten für die zivile Luftfahrt der D.D.R. (No. 8) 88, 89 (translation supplied); Notwithstanding this declaration of principles, East Germany followed the example of the Soviet Union, and for political reasons ratified the Hague Protocol on April 3, 1959; see 1959 Gesetzblatt der D.D.R. I.521. However, see protest at the Hague Conference 1955, ICAO Doc. 7686-LC/140, I Minutes 19, 26; II 75; cf. Riese, *supra* note 6, at 6, n. 1; As to the similar Chinese case, see 1960 U.S. & Can. Av., Treaty Data xii: "The Government of the United States of America does not recognize the so-called Peoples Republic of China and considers the notification as having no legal effect." (notification on adherence to the Warsaw Convention).

⁵⁷ Letter from Whitehead, Director U.S. Aviation Underwriters, to Air Coordinating Committee (Feb. 19, 1957), see ACC Doc. *supra* note 1, at 11, n. 10. But cf. *infra* note 209.

⁵⁸ Drion, *Limitation of Liabilities in International Air Law* 23 (The Hague 1954); Reiber, *supra* note 6, at 285.

4. There remains the argument of the economic inadequacy of the limitations in the United States; i.e., that plaintiffs before an American court should be entitled to recovery adequate to the American standard of living, and uninhibited by an international average.

It must be admitted that efforts to set uniform amounts of *recovery* are in the borderland of feasible international unification.⁵⁹ Although the monetary value of 250,000 gold francs (Article 22, paragraph 5 of the Hague Protocol) may be the same in all member countries, this standard does not take into account differences in the national average income per capita which determines the standards of damage compensation.⁶⁰ Not only the so-called under-developed countries, but also Western Europe lags far behind the United States and Canada in this respect.⁶¹

C. Alternatives To Withdrawal

The economic argument seems to be the essential motif of those urging the United States to withdraw from the Warsaw Convention and to "replace it" by national legislation.⁶²

However, it is not correct to say that "the duly elected representatives of the American people can draft their own legislation which would make the [Warsaw Convention] benefits available in a constitutional manner."⁶³ Without the Convention, national legislation cannot grant to American plaintiffs a choice of jurisdiction including foreign courts. Without the Convention, it cannot protect American citizens before foreign courts, who will then apply their own laws instead of treaty provisions. On the other hand, U.S. legislation for higher limits or for no limitations at all, will attract foreign plaintiffs—not to fly on American flag airlines—but to sue in American courts.

1. As another remedy, it has been proposed to raise the limits of liability of the Hague Protocol once more, to an amount adequate to the standards of damage compensation in this country. Since there does not appear to be much chance to reach international agreement on higher limits,⁶⁴ a unilateral increase of the limitation amounts, based on Article 22, paragraph 1 of the Convention, is considered.⁶⁵

⁵⁹ "If there is any field in which unification of the law on a world wide basis would be inappropriate, it is the field of the amount of damages to be paid in case of death or injuries. For in few areas local views and circumstances of a social and economic character are of such importance." Drion, *op. cit. supra* note 58, at 42.

⁶⁰ A rule of thumb for the courts' calculation of damages for wrongful death is to multiply the victim's annual income with years of life expectancy; see *Tuller v. K.L.M.*, 292 F.2d 775 (D.C. Cir. 1961).

⁶¹ In a comparison of American and European air transport, Dutoit, *L'Aviation et L'Europe* 13 (Lausanne 1959), points out the difference between the annual per capita income in the United States (\$2,300) and in Europe (\$770).

⁶² Letter from Speiser to President Eisenhower, *supra* note 11, at 4: "In shackling our citizens to the economic and moral standards of other nations, many of them backwards, undemocratic or even totalitarian, the Warsaw Convention affords a perfect example of the evils at which the Bricker Amendment is aimed."

⁶³ *Ibid.*, at 5.

⁶⁴ At the Hague Conference, the U.S. delegation had proposed to triple the Warsaw limits, but doubling of the limits was already considered a "generous concession" by other delegations. Reiber, *supra* note 6, at 282.

⁶⁵ Relying on Art. 22 of the Convention (allowing for higher limits of liability by special agreement between carriers and passengers), Caplan, in 1961 J. Bus. L. 282, says: "If carriers voluntarily agreed to offer higher limits (or even no limits at all) or if British carriers were persuaded to do so by the Minister with the authority of Parliament, there is no need to fear chaos."

If higher limits were imposed by one state on both national and foreign carriers, other states would presumably interpret this as a violation of the Warsaw Convention.⁶⁸ On the other hand, if the increased amounts would apply to national carriers only, these carriers are likely to protest against being "penalized" in their competition with foreign carriers.

2. There is, however, an alternative way of dealing with the problem of recovery on a national scale, which has already been followed by several countries. By statutory implementation of the Convention, the bulk of passengers' compensation can be separated entirely from the issue of carriers' liability. The Convention cannot be *replaced* by national legislation—but it can be *implemented*.

II. THE CASE FOR STATUTORY IMPLEMENTATION

The Warsaw Convention is by no means perfect. Either deliberately or by omission, a number of questions were left open which, according to the background drafting documents, would presumably be resolved by national law.⁶⁷

A. Need For Legislation

Foreign states have made ample use of this privilege to enact statutes implementing the Convention.⁶⁸ Although American courts have emphasized the need for implementing legislation, too,⁶⁹ and sometimes have even wrongly assumed that it had already been passed,⁷⁰ no such steps have been taken in the United States. As a result, American plaintiffs are being denied rights under the Warsaw Convention which plaintiffs in other countries have long since obtained.⁷¹

The point, however, should be clear: *This is not the fault of the Convention, but purely and simply the failure of Congress to enact the necessary legislation.*

Among the numerous matters which could be settled by implementing legislation are the following: cause of action,⁷² persons who have a right

⁶⁸ This was the view of the majority of the delegates at the ICAO Legal Committee's 9th Session, Rio de Janeiro (1953), see ICAO Doc. 7450-LC/136, vol. I, 163-165. *But cf.* the statements by the British delegate, Sir Richard Wilberforce, *ibid.*

⁶⁷ See, e.g., Minutes of the Warsaw Conference, *supra* note 3, at 44, 91, 115, 137 ff.

⁶⁸ See British Carriage by Air Act, (1932) 22 & 23 Geo. 5, c. 36; 1939 U.S. Av. 303, 1947 U.S. Av. 649; German Durchführungs-Gesetz zum Warschauer Abkommen, Dec. 15, 1933; 1933 Reichs-Gesetzblatt I.1079; Irish Air Navigation and Transport Act, Aug. 14, 1936, No. 40 (as amended to March 18, 1959, No. 1), see Strauss, *supra* note 2, at 725, 843; Dutch Air Transport Act, Sept. 10, 1936, 1936 Staatsblad No. 523; Swedish Lag om befordran med luftfartyg, March 5, 1937, No. 73, 1937 Svensk Författningssamling 189; Canadian Carriage by Air Act, 1952 Rev. Stat. Can., c. 45; Australian Civil Aviation (Carriers' Liability) Act (1959), Royal Assent April 21, 1959; see Strauss, *supra* note 2, at 121; The Hague Protocol has been implemented by the Australian Act and by the new British Carriage by Air Act (1961), Royal Assent June 22, 1961. See Caplan, 1961 J. Bus. L. 170.

⁶⁹ Clancy, D.J., in Choy v. P.A.A., (S.D.N.Y. 1941), 1942 U.S. Av. 93, 98; Schreiber, J., in Wyman v. P.A.A., (N.Y.S. 1943), 1943 U.S. Av. 1, 4.

⁷⁰ Ross v. P.A.A., (N.Y.S. 1953), 4 Av. Cases 17,171, 17,172 ("the Warsaw Convention and the statute pursuant thereto"); Pierre v. Eastern Airlines, (N.J.D. 1957), 5 Av. Cases 17,515 ("with congressional implementation, it entered into force. . .").

⁷¹ Denying plaintiff a statutory cause of action arising from Warsaw Convention: Choy v. P.A.A., *supra* note 69; Wyman v. P.A.A., *supra* note 45; Komlos v. Air France, *supra* note 28; Noel v. Linea Aeropostal Venezolana, 247 F.2d 677 (2nd Cir. 1957), 1957 U.S. & Can. Av. 274; Fernandez v. Linea Aeropostal Venezolana, 156 F. Supp. 94 (S.D.N.Y. 1957), 1957 U.S. & Can. Av. 369. *But cf.* the British, Irish, Canadian and Australian Acts, *supra* note 68, granting the plaintiff a statutory right of action; see also *infra*, text at notes 215 through 223.

⁷² Art. 24, para. 1: ". . . any action for damages, *however founded*, . . ." (Emphasis supplied.)

to sue,⁷³ extent of damages,⁷⁴ standards of care,⁷⁵ liability for hand-baggage and personal objects,⁷⁶ and other items.⁷⁷

While it would be highly desirable to settle as many of these matters as possible, we are concerned here only with those directly affecting the passenger's right of recovery.

It is submitted that implementing legislation can provide air passenger compensation which is harmonious with both the Warsaw Convention and national economic standards. This is illustrated by a comparative study of similar compensation systems here and abroad.

B. Comparative Survey Of Passengers' Compensation Schemes

It will be useful first to enumerate the various compensation schemes for air passengers which hitherto have been outlined in theory or adopted in practice.

1. Plans for an International Air Passenger Compensation System

As early as 1922, Professor Ripert proposed an international system of compulsory accident insurance for the benefit of air passengers.⁷⁸ Similar proposals were discussed during the following years in the *Comité Juridique International de l'Aviation*, in the *Comité International Technique d'Experts Juridiques Aériens* and in the International Air Traffic Association.⁷⁹

After the Warsaw Convention was concluded in 1929, Kattal in 1931 urged addition of a provision relating to compulsory passenger accident insurance.⁸⁰ When in 1948 the issue of compulsory insurance was raised again,⁸¹ the ICAO Legal Committee decided to leave it to national regulation.⁸² New proposals for compulsory liability insurance in 1953⁸³ led to a resolution at the Hague Conference in 1955, calling for a study of such a system.⁸⁴

⁷³ Art. 24, para. 2: "... without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights." (Emphasis supplied.)

⁷⁴ Whether the "damages sustained" include "moral damages," "remote" damages, litigation expenses (cf. note 8), etc.

⁷⁵ Determination of "all necessary measures to avoid the damage" (Art. 20).

⁷⁶ Art. 18 only settles the carrier's liability for checked baggage.

⁷⁷ Some of the gaps of the Convention, such as individual liability of the carrier's servants and agents, definition of wilful misconduct, liability in case of air charter agreements, have been filled by the Hague Protocol and by the recent Convention, Supplementary to the Warsaw Convention, for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person Other than the Contracting Carrier, signed at Guadalajara on Sept. 18, 1961.

⁷⁸ 5th Meeting of the Comité Juridique International de l'Aviation in Prague 1922, see 9 *Revue Juridique Internationale de la Locomotion Aérienne* 226 (1925).

⁷⁹ E.g., see Bastaki, Report on Compulsory Passenger Insurance, IATA 21st meeting in Rome 1929, 13 *Droit Aérien* 664 (1929). See also Coquoz, *Droit Prive International Aérien* 77 (Paris 1938). Cf. Vaicoussis, *Aviation Insurance: Passengers and Third Parties on the Surface*, Thesis, McGill U. (1954); Lafleur, *Aviation Insurance*, Paper delivered to the Institute of Air and Space Law, McGill U. (1961).

⁸⁰ Proposal "designed to complete the Warsaw Convention of October 12, 1929, by a supplementary article, providing that the carrier who has contracted for an accident policy for the benefit of the passenger in the amount of 125,000 French francs with one of the insurance companies nominated for the purpose by his government, shall be discharged of all liability towards the passenger, as regulated by the said Convention, except in the case provided for in Article 25 thereof." Kaftal, *Liability and Insurance*, 5 *Air L. Rev.* 157, 274 (1954).

⁸¹ Meyer, speaking for the Int'l Law Ass'n, Geneva meeting of the ICAO Legal Committee (1948), see ICAO Doc. 6014-LC/111, at 71.

⁸² 3rd Session, Lisbon (1948), ICAO Doc. 6024-LC/121, at 239; 4th Session, Montreal (1949), ICAO Doc. 6027-LC/124, at 275.

⁸³ 9th Session, Rio de Janeiro (1953), ICAO Doc. 7450-LC/136, vol. II, 125.

⁸⁴ Resolution B, Final Act, see Minutes of the Hague Conference, *supra* note 2, II, 30: "The

2. Contractual Passenger Accident Insurance by Air Carriers

While most international airlines presently carry liability insurance,⁸⁵ there are also four carriers who voluntarily offer personal accident insurance, included in the price of the passenger ticket. These are Swiss Air,⁸⁶ Air France,⁸⁷ Union Aeromaritime de Transports (UAT), and Transports Aeriens Intercontinentaux (TAI).⁸⁸

The International Air Transport Association seems to disapprove the offer of gratuitous accident insurance to air passengers, as an indirect "under-cutting" of its price-cartel.⁸⁹ Following certain IATA-Resolutions, Swiss Air had to change the terms of its personal accident insurance into "admitted liability insurance";⁹⁰ the French carriers do not publicize their insurance policy.⁹¹

3. Statutory Air Passenger Insurance

There are two groups of states where air carriers are subject to compulsory insurance for passenger damages:

a. Brazil,⁹² Mexico⁹³ and Argentina⁹⁴ require proof of liability insurance, or similar guarantees, for all damages likely to be caused by aircraft to

Conference . . . recommends to the Council of the International Civil Aviation Organization that it instruct the Secretariat and Legal Committee (a) to make a study of a system of guarantees for the payment of compensation in the case of liability of the air carrier, in pursuance of the Warsaw Convention; and, if it is considered advisable, (b) to ask the States for information concerning the provisions of national legislations which have adopted such a system, as well as their opinion as to the possibility of extending the system to international air transport, by means of compulsory insurance, a bank guarantee or a cash deposit."

⁸⁵ Goodfellow, speaking for the International Union of Aviation Insurers at the Hague Conference (1955), Minutes *supra* note 2, vol. I, at 179: "The air carrier normally insures his liability not only up to the Convention limits, but for a considerably larger sum, to meet the possibility of adverse verdicts under Article 25."

⁸⁶ Coverage is to 36,000 Swiss Francs (approx. \$9,000) in case of death or permanent disability, and 25 Francs (approx. \$6) per day of temporary disability up to one year. See Bodenschatz, *Rechtsprobleme der obligatorischen Passagierunfallversicherung* (Opuv), 8 Z. Luftrecht 230, 236 (1959). In general, see Kubli, *Luftfahrtversicherung unter besonderer Berücksichtigung des Luftpools* (Zürich 1952); Guldemann and Vogel, *Die Luftfahrtversicherung in der Schweiz*, 2 Z. Luftrecht 237 (1953); Vogel, *Luftfahrtversicherung in der Schweiz*, 1955 Zeitschrift des Schweizer Pool für Luftfahrtversicherung 16.

⁸⁷ Coverage is to 34,800 (New) French Francs (approx. \$7,000) in case of death or permanent disability, and 72 Francs (approx. \$14) per day of temporary disability up to 200 days. See Bodenschatz, *supra* note 86, at 235. In general, see Le Goff, *L'assurance aérienne*, 8 Revue Generale de Droit Aérien 7 (1939); Lemoine, *Assurance des passagers sur les lignes commerciales aériennes*, 8 Rev. Gen. Droit Aérien 177, 196 (1939); Homburg, *Les assurances aériennes*, 9 Revue Generale de L'Air 415, 633 (1946), 11 Rev. Gen. Air 41, 310 (1948); François *L'assurance des risques aériens*, 13 Rev. Gen. Air 3 (1950); Institut Français du Transport Aérien, *L'assurance des risques aériens*, Note de Travail No. 208 (1951); Picard, *Responsabilité et assurance dans le transport aérien*, 24 Revue Generale des Assurances Terrestres 217 (1953).

⁸⁸ See Bodenschatz, *supra* note 86, at 235 ff.

⁸⁹ Similarly, in the United States, attempts at supplying free accident insurance to passengers ("guest voluntary settlement") have apparently been considered as "unlawful rebate" by other competitors. See Ehrenzweig, "Full Aid" Insurance for the Traffic Victim 56, n. 152 (1954).

⁹⁰ Vogel, *supra* note 86, at 66.

⁹¹ The Air France insurance policy is printed only in the interne Manuel de Passage, c. B 11/4.01; for a translation see Weimar, *Die obligatorische Fluggastunfallversicherung gemäss 29g LVG*, 2 Z. Luftrecht 288, n. 28 (1953).

⁹² Code of the Air, June 8, 1938, No. 483, Diario Oficial (June 27, 1938), art. 109 ff. Translation see Strauss, *op. cit. supra* note 2, at 268, 281. In general see François and Saporta, *Les risques aériens et leur assurance: Brésil*, 15 Rev. Gen. Air 203 (1952), 16 Rev. Gen. Air 3 (1953).

⁹³ Decree Amending Book IV of the Law of General Means of Communication, Diario Oficial 6 (Jan. 23, 1950), art. 343. Translation see Strauss, *op. cit. supra* note 2, at 941, 952.

⁹⁴ Código Aeronáutico, July 15, 1954, No. 14,307, Boletín Oficial (August 18, 1954), art. 171. Translation see Strauss, *op. cit. supra* note 2, at 5, 24.

passengers, persons or property on the ground.⁹⁵ In addition, Brazil and Argentina require proof of personal accident insurance for the benefit of flying personnel.⁹⁶

b. Whereas most European countries also require liability insurance or similar guarantees for third-party damages, four countries have imposed by statute "group accident insurance" for the benefit of air passengers. These are Italy,⁹⁷ Germany,⁹⁸ Austria,⁹⁹ and Spain.¹⁰⁰

4. *Proposals for Air Passenger Insurance in the United States*

a. Uniform state legislation on aviation liability, including passenger accident insurance, was first proposed in 1934 by a study group for the Uniform Law Commissioners, consisting of Dean Wigmore, Professor Goodrich, Professor Knauth, and other scholars;¹⁰¹ but the plan

⁹⁵ Compulsory liability insurance was also stipulated in § 29 of the pre-war German Aviation Act (Luftverkehrs-Gesetz); see 1922 Reichs-Gesetzblatt I. 681, 1936 R. G. Bl. I. 653, 1938 R. G. Bl. I. 1246. It has since been replaced—with respect to passengers—by group accident insurance (*infra* note 98). Cf. Bodenschatz, *supra* note 86, at 242.

⁹⁶ Brazilian Code, art. 115; Argentinian Code, art. 170. In October 1926, the Air Transport Committee of the International Chamber of Commerce had proposed an international convention on compulsory accident insurance for all flying personnel. See 1 Zeitschrift für das Gesamte Luftrecht, Supp. 127 (1928).

⁹⁷ "The Operator of regular airlines must insure each passenger against the flight accidents for the sum of 160,000 Lire. In default, the Operator is bound for the indemnities and amounts which would be due by the Underwriter, within the limits foreseen by the provisions on the obligatory insurance of passengers." Codice della Navigazione, March 30, 1942, No. 327, Gazzetta Ufficiale No. 93, (April 18, 1942), art. 941. Translation, Manca, *The Italian Code of Navigation* 358 (Milan 1958). Today, coverage is up to 5,200,000 Lire; see Bodenschatz, *supra* note 86, at 234. In addition, the insurance covers costs of passenger salvage and rescue up to 2,000,000 Lire (Art. 999). In general see Ferrarini, *Le assicurazioni nel codice della navigazione*, 8 Assicurazioni I. 268 (1941); Giannini, *Sulle assicurazioni aeronautiche*, 19 Assicurazioni I. 210 (1952); Fiorentino, *Le assicurazioni aeronautiche obbligatorie*, 19 Assicurazioni I. 303 (1952); Donati, *Le assicurazioni per la responsabilità dell'esercente aereo*, 21 Rivista del Diritto della Navigazione I. 112 (1955); Marino, *Aspetti e problemi delle assicurazioni aeronautiche italiane*, 24 Assicurazioni I. 168, 262 (1957), in Study in Onore D'Antonio Ambrosini (Milan 1957); Longoni, *Rassegna di dottrina e giurisprudenza in tema di assicurazioni sul trasporto marittimo, aereo e terrestre di merci*, 27 Assicurazioni I. 417, 446 (1960).

⁹⁸ "Air carriers shall be under a duty to insure passengers against accidents (Article 44). The minimum amount of such insurance shall be thirty-five thousand German Marks for death or permanent total disability. Any claim for damages shall be considered satisfied to the extent that it is paid by such accident insurance." Federal Aviation Act (Luftverkehrs-Gesetz), Jan. 10, 1959, 1959 Bundes-Gesetzblatt I. 9, § 50. Translation Strauss, *supra* note 2, at 450, 467. The "obligatory passenger accident insurance" was first introduced in 1943; see 1943 Reichs-Gesetzblatt I. 69, § 29(g). In general see Döring, *Die Luftversicherung: Entwicklung, Recht und Technik*, 42 Veröffentlichungen des Deutschen Vereins für Versicherungswissenschaft (Berlin 1928); Wussow, *Insassenunfallversicherung und Sozialversicherungsträger*, 1944 Deutsches Recht 564; Wimmer, *Haftung und Versicherung im Passagierluftverkehr*, 7 Versicherungswirtschaft No. 11 (1952); *id.*, *Die deutsche Luftfahrtversicherung und ihre Probleme in der Nachkriegszeit*, 2 Z. Luftrecht 213 (1953); *id.*, *Deutsches Luftversicherungsrecht, zugleich in internationaler Betrachtung*, in Beiträge zum Internationalen Luftrecht (Festschrift für Alex Meyer) 144 (Düsseldorf 1954); Schmetzke, *Luftfahrt und Versicherung*, (Berlin 1954); Weimar, *supra* note 91; Bodenschatz, *supra* note 86.

⁹⁹ Pursuant to the Austrian Federal Aviation Act (Luftfahrt-Gesetz), of Dec. 2, 1957, 1957 Bundes-Gesetzblatt 1403, § 151, para. 1, the relevant provisions of the 1943 German Aviation Act (*supra* note 98) apply, with the insurance coverage raised to 120,000 Austrian Schillings. Translation see Strauss, *supra* note 2, at 218, 256.

¹⁰⁰ Ley de Navegación Aérea, Boletín Oficial (July 21, 1960), c. 14, provides for coverage to 200,000 Pesetas in case of death, and from 50,000 to 200,000 Pesetas in case of bodily injury. See Tapia Salinas, *La Ley Española de Navegación Aérea*, 6 Ciencia Aeronáutica 6 (1960). The Spanish railroads' obligatory passenger accident insurance of 1929 was first extended to road and air transport in 1941, implemented in 1942 by regulations of the Treasury Dept. (Ministerio de Hacienda). In general, see François and Saporta, *Les assurances aériennes en Espagne*, 13 Rev. Gen. Air 855 (1950).

¹⁰¹ The proposed Uniform Aviation Liability Act was based on strict liability, limited "to a fixed schedule like a personal accident policy if the carrier provided such insurance for direct benefit of the passenger." See Knauth, *Aviation Law and Maritime Law*, 35 Chicago B. Record

was put off "until after the war."¹⁰² After a new proposal by Kuehn1 in 1948,¹⁰³ the National Conference of Commissioners on Uniform State Laws in 1953 drafted a "Uniform Aircraft Financial Responsibility Act,"¹⁰⁴ which was similar to statutes enacted in Illinois¹⁰⁵ and Indiana.¹⁰⁶

b. Federal legislation on this subject was urged by Bukler in 1940.¹⁰⁷ The Sweeney Report to the Civil Aeronautics Board in 1941¹⁰⁸ concluded that a system of limited liability coupled with compulsory insurance, established by federal legislation, would be the most feasible and desirable solution of the aviation liability problem, and its adoption would be in the best interests of aviation and of the general public. As an alternate program, it proposed to vest a federal agency with regulatory power to require aircraft operators to carry "admitted liability insurance" with respect to revenue passengers, persons and property on the ground.¹⁰⁹ From 1943 to 1951, several unsuccessful bills were introduced in congress to this effect.¹¹⁰ In 1952, the Civil Aeronautics Board issued draft "Insurance Requirements for Air Carriers and Foreign Air Carriers";¹¹¹ but after strong opposition from the air transport industry¹¹² the draft was withdrawn.¹¹³ Among proposals from legal writers were Abramson's plan for a "Federal Aircraft Financial Responsibility Act" in 1953,¹¹⁴ Ehrenzweig's "Full Aid Insurance" plan in 1954,¹¹⁵ and Hardman's plan for compulsory

199, 207 (1954); see also 1938 National Conference Uniform Aviation Liability Act, 11 J. Air L. 726 (1940).

¹⁰² Knauth, *supra* note 101, at 207.

¹⁰³ Kuehn1, *Uniform State Aviation Liability Legislation*, 1948 Wis. L. Rev. 356.

¹⁰⁴ See Abramson, *Aircraft Liability Insurance—Voluntary or Compulsory?*, 1953 Proceedings of A.B.A. Section of Insurance Law 53, 62.

¹⁰⁵ Ill. Rev. Stat. (1951).

¹⁰⁶ Acts of 1951, c. 267, as amended by Acts of 1953, c. 58.

¹⁰⁷ Bukler, *Limitation of Air Carrier Tort Liability and Related Insurance Coverage—A Proposed Federal Air Passenger Liability Act*, 11 Air L. Rev. 262, 291 (1940).

¹⁰⁸ "Study of the Proposed Aviation Liability Legislation"; see Sweeney, *Is Special Aviation Liability Legislation Essential?*, 19 J. Air L. & Com. 166, 317 (1952). Cf. discussion of the plan by Ryan, 1942-43 Proceedings of A.B.A. Section of Ins. L. 202; Gambrell, *Air Transport Insurance* 1943-44 Proceedings of A.B.A. Section of Ins. L. 244.

¹⁰⁹ "This insurance would be payable directly to the injured party or his representative upon proof that his injury was directly due to the operation of the particular aircraft in question, regardless of the circumstances of impact, upon condition that such recipient execute a valid release of all claims against the insured and against all persons acting on his behalf. Under such a statute, the injured party, or his representative, would have the option of rejecting the accident insurance and of suing at common law for an unlimited amount of damages." Sweeney, *supra* note 108, at 325.

¹¹⁰ H. R. 1012, 3420, 3491, 5020 (78th Cong.); H.R. 532 (79th Cong.); H. R. 8126 (81st Cong.); H. R. 7270 (82nd Cong.). See Shaddle, *Aviation Insurance in Light of Pending Legislation*, 1943-44 Proceedings of A.B.A. Section of Ins. L. 249; Smith, *Pending Federal Aviation Insurance Legislation*, 1946 Proceedings of A.B.A. Section of Ins. L. 137; Nicholson, *Trends in Aviation Insurance*, 25 Mich. St. B.J. 52 (1946).

¹¹¹ Draft Release No. 51, (April 30, 1952), 17 Fed. Reg. 4220; Draft Release No. 58 (Dec. 16, 1952), 17 Fed. Reg. 11,700. The draft provided, *inter alia*, for compulsory liability insurance or similar guarantees up to \$25,000 per passenger (§ 271.9).

¹¹² See Tipton and Bernhard, *Compulsory Insurance for Air Carriers*, 20 J. Air L. & Com. 58 (1953).

¹¹³ CAB Release No. 53-31 (June 10, 1953): "[B]ecause of possible statutory limitation, and because the facts indicate that air carriers in general now have adequate coverage for insurance, [the Board] will not issue a regulation requiring all carriers to show financial responsibility with respect to adequate insurance coverage to cover possible claims arising out of injury or damage to passengers and to persons on the ground." See Abramson, *supra* note 104, at 53.

¹¹⁴ Abramson, *supra* note 104.

¹¹⁵ Ehrenzweig, *op. cit. supra* note 89. Although primarily designed for road traffic, the plan contained a comparative study of foreign air laws (at 26). It proposed "full aid" insurance under a fixed schedule, keyed to minimum needs of low income groups, accompanied by legislation relieving properly insured drivers from all tort liability. See also Ehrenzweig, "Full Aid" Insurance

liability insurance and absolute limited liability of air carriers, in 1961.¹¹⁶

c. Among comments on ratification of the Hague Protocol, received by the President's Air Coordinating Committee in 1956-1957, were suggestions for passenger accident insurance by Calkins¹¹⁷ and by the New Jersey State Bar Association.¹¹⁸

C. Compensation And Liability

The various compensation systems for air passengers may be grouped in a few broad categories, according to whether they are based on, a basis for, a substitute for, or independent of, the air carrier's liability.

1. Liability Insurance and Financial Responsibility

In order to avoid the "shock effect" of individual judgments,¹¹⁹ air carriers may either build a special claims' fund (self-insurance),¹²⁰ or "contract out" of the liability imposed on them under national laws and under international conventions, by taking liability insurance.¹²¹ The costs of this insurance or funding—compensation based on liability—are part of an airline's ordinary business costs and, as such, are always spread on to the users.

The idea of making this kind of insurance compulsory ("financial responsibility") was inspired by automobile accident law,¹²² and has been widely accepted in the field of aircraft liability for damages to third parties on the surface.¹²³ The same system has been extended to the field of passenger damages in three Latin-American countries,¹²⁴ in some international proposals,¹²⁵ and in some unsuccessful legislative and administrative attempts in the United States.¹²⁶

for the Traffic Victim, 43 Calif. L. Rev. 1 (1955); *id.*, *Ersatzrecht-Versicherung*, in *Internationales Versicherungsrecht* (Festschrift für Albert Ehrenzweig, Sr.) 9 (Möller ed. 1955).

¹¹⁶ Hardman, *supra* note 16.

¹¹⁷ See ACC Doc., *supra* note 1, Attachment 3, at 3: "Conceivably there could be a system with no exclusions [from risk], and the additional cost of insurance coverage passed on to the users. (Switzerland has such a system, and that country is neither "socialistic" nor anti-insurance!)"

¹¹⁸ See ACC Doc., *supra* note 1, Attachment 2: Urging that legislation be passed "requiring every air carrier who claims coverage of the Convention on tickets sold and delivered in the United States to offer for sale with such tickets a policy of insurance extending coverage for liability for injury or death to full indemnity or to the face value stated in excess of the coverage provided under the amended Convention, unless the passenger waives, in writing his right to purchase such additional coverage."

¹¹⁹ James, *Accident Liability Reconsidered: The Impact of Liability Insurance*, 57 Yale L.J. 549, 550 (1948).

¹²⁰ E.g., Trans Canada Airlines has such a fund.

¹²¹ Most certificated carriers in the United States carry such insurance, see Tipton and Bernhard, *supra* note 112, at 75; CAB Release, *supra* note 113.

¹²² Cf. Abramson, *supra* note 104, at 62. Nearly all countries have now introduced compulsory automobile liability insurance; see Ehrenzweig, *op. cit. supra* note 89, at 46. The question posed by Kuvin, *A Critique of Plans for Auto Accident Compensation*, 1961 Ins. L.J. 334, 348, whether the European states still "keep the compensation system," would appear to be answered by the European Convention Relating to Compulsory Liability Insurance of Automobiles, signed at Strasbourg (1959); see 26 *Assicurazioni* II. 15 (1959). In Massachusetts, New York, and North Carolina, there exist similar statutes; other North-American states have so-called "Financial" or "Safety Responsibility" Laws (Highway Victims Indemnity Acts), which however offer a lesser degree of protection to victims of the driver's first accident. See, e.g., Grad, *Recent Developments in Automobile Accident Compensation*, 50 Col. L. Rev. 300, 305 (1950).

¹²³ Cf. Rome Convention (1952), *supra* note 55, and national air laws in Western Europe (e.g., German Federal Aviation Act of 1959, *supra* note 98, § 43) and Latin-America (e.g., Brazilian, Mexican, Argentinian laws, *supra* notes 92, 93, 94).

¹²⁴ See *supra* notes 92, 93, 94.

¹²⁵ See Brazilian and Argentinian proposals at the Hague Conference; Minutes, *supra* note 2, vol. I, at 258; vol. II, at 145, 217.

¹²⁶ See text at notes 104, 111, 114, 116.

2. Passenger Accident Insurance

Instead of insuring its own liability risk, an air carrier may take group insurance for the accident risk of its passengers. This type of "passenger accident insurance," also called "automatic accident insurance" or "admitted liability insurance,"¹²⁷ was first introduced more than 30 years ago by German, French, and Swiss airlines,¹²⁸ and subsequently became mandatory in a number of European countries.¹²⁹ After World War II, the United States government reportedly also imposed passenger accident insurance on British carriers using U.S. military airports in Britain.¹³⁰

Mandatory passenger accident insurance is similar in principal to Workmen's Compensation.¹³¹ In both fields, however, various compensation systems are conceivable, which differ particularly when it comes to the question of liability:

a. Passenger accident insurance may be coupled with strict liability (liability regardless of fault, enterprise liability, liability for risk, absolute liability),¹³² as in the new Spanish Air Law of 1960,¹³³ or as proposed elsewhere.¹³⁴

b. Another group of proposals¹³⁵ would *a priori* replace the carrier's

¹²⁷ Sweeney, *supra* note 108, at 325; Swiss Air policy, text *supra* at note 90.

¹²⁸ See Döring, *supra* note 98, at 121 (Lufthansa, in 1926); Kaftal, *supra* note 80, at 275 fn. (CIDNA, France); Lemoine, *supra* note 87, at 196 (Air France); Arndt, Die Haftung des Luftfahrzeughalters aus Transportvertrag unter besonderer Berücksichtigung ihrer Ablösung durch die obligatorische Unfallversicherung 39, n. 138, Thesis, Zürich (1932) (Swiss Air).

¹²⁹ See the statutes of Italy, West-Germany, Austria, and Spain, *supra* notes 97 through 100. Although Swiss Air is not required by law to carry passenger accident insurance, it does so on "governmental request"; for this information I am indebted to Dr. Schweickhardt, Legal Adviser of Swiss Air (letter of Dec. 13, 1961). Air France, which also offers passenger accident insurance, is a government corporation itself; cf. Gourrier, Le régime administratif de la compagnie nationale Air France, Thesis, Paris (1953).

¹³⁰ See Ehrenzweig, *op. cit. supra* note 89, at 22.

¹³¹ The analogy to Workmen's Compensation has been pointed out by Sweeney, *supra* note 108, at 179 ff.

¹³² See Ehrenzweig, Negligence Without Fault 12 ff. (1951); Rinck, Gefährdungshaftung (Göttingen 1960); But cf. Orr, *Fault as the Basis of Liability*, Paper delivered to the 4th Int'l Conference on Comparative Law in Paris 1954, see 21 J. Air L. & Com. 399 (1954). The philosophy underlying the concept of liability without fault has been discussed at great length by Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 Yale L.J. 499 (1961), who finds three—though sometimes inconsistent—justifications for absolute liability: (a) allocation of resources, (b) spreading of losses, (c) the "deep pocket" reasoning (shifting the burden of accident losses to the wealthiest class of litigants).

¹³³ *Supra* note 100. Art. 120: "The right to compensation has its objective basis in the accident or damage, and is actionable—up to the limits of liability established by this chapter—in any case including fortuitous event, and even when the carrier, operator, or their servants and agents, prove that they acted with due care." (Translation supplied.)

¹³⁴ E.g., the Uniform Aviation Liability Act proposed by Wigmore, Goodrich, and Knauth, *supra* note 101. Wessels, *Das neue spanische Luftverkehrsgesetz*, 10 Z. Luftrecht 22 (1961), quotes the Spanish liability rule with full approval.

¹³⁵ Arndt, *supra* note 128; Kaftal, *supra* note 80; Ehrenzweig, *op. cit. supra* note 89, at 16 ("Tort law may well have reached the end of its usefulness in this field"); *id.*, *Towards an Automobile Compensation Plan*, 11 Fed. Ins. Counsel Quar. 5, 8 (1961) ("Tort liability, the villain of the play, must be removed together with liability insurance, its accomplice"). See also Strahl, *Tort Liability and Insurance*, in 3 Scandinavian Studies in Law 199 (1959). Art. 116 of the Brazilian Code of the Air, *supra* note 92, has been interpreted as substituting insurance for liability; François and Saporta, *supra* note 92, at 8 ("une disposition curieuse"). However, this does not seem to be borne out by the terms of the article: "The carrier may provide, for additional charges, insurance on persons or property being transported, provided he proves that he has obtained general insurance coverage with a company licensed by the state in an amount equal to twice the maximum limit of liability required by an aircraft of greater capacity in service" (translation Strauss, *supra* note 2, at 282). Also, Ehrenzweig, *Towards an Automobile Compensation Plan*, *supra*, at 9, interprets the German Air Law as "relieving the air carrier of his liability to those passengers for whom it has taken insurance." However, the German "obligatory passenger

liability entirely by an accident insurance system under which the passenger could recover regardless of the carrier's fault.¹³⁶

c. A third group of compensation schemes grants the passenger a right of choice *a posteriori*: After the damage occurred, he is given an option either to accept payment of accident insurance, or to sue the carrier under ordinary liability rules.¹³⁷ By accepting the insurance compensation, the passenger or his legal representative exercises a release, and loses all further claims against the carrier.¹³⁸

d. Finally, the carrier's liability may be preserved, even when the insurance payment has been accepted; but the amounts paid under the insurance will be deducted *pro tanto* from further claims against the carrier.¹³⁹ This type of insurance is neither based on,¹⁴⁰ nor a basis for,¹⁴¹ nor a complete substitute for,¹⁴² the carrier's liability. In other words, it is "haftungsneutral"; i.e., neutral with respect to liability.

accident insurance" is rather deductible from, not a complete substitute for, liability claims against the carrier; see *infra*, text at notes 139 through 142.

¹³⁶ American Workmen's Compensation statutes contain provisions to the effect that the remedy under the act shall be exclusive of and a substitute for the employer's tort liability unless otherwise provided. See Riesenfeld and Maxwell, *Modern Social Legislation* 395 (1950); Riesenfeld, *Contemporary Trends in Compensation for Industrial Accidents Here and Abroad*, Paper delivered to the 4th Int'l Conference on Comparative Law in Paris 1954, see 42 Calif. L. Rev. 531, 559 (1954). But cf. Riesenfeld and Maxwell, *supra* at 148, n. 21; and see British Law Reform (Personal Injuries) Act (1948), 11 & 12 Geo. 6, c. 41; see also Lenhoff, *Social Insurance Replacing Workmen's Compensation in England*, 5 NACCA L.J. 49, 53 (1950).

¹³⁷ Air France passenger insurance policy, see *supra* notes 87, 91; pre-war Swiss Air policy, see Arndt, *supra* note 128, at 39, n. 138; Sweeney, *supra* note 108, at 325. The insurance required of British air carriers using U.S. airports in Britain (note 130) provided for a release by the passenger of his claims against the U.S. Government; see Ehrenzweig, *supra* note 130. In practice, many American carriers use a similar device: it is not unusual that claims by passengers, up to \$500, are settled regardless of liability, provided the claimant signs a release of all further claims.

¹³⁸ Caisse Régionale de Sécurité Sociale du Sud-Est v. Air France, Court of Appeals of Aix-en-Provence (7th Civ. Chamber), March 13, 1959, 22 Rev. Gen. Air 194 (1959), with a note by Borricand at 197; 1959 U.S. & Can. Av. 427.

¹³⁹ "Pro tanto" extinction of liability: present Swiss Air passenger accident insurance policy, see Bodenschatz, *supra* note 86, at 237; German Aviation Act, *supra* note 98, § 50. Cf. U.S. Public Law 97-212 (1961) on Property Loss, Personal Injury or Death Incident to Aircraft or Missile Operations, H. R. 7934 (87th Cong.), 75 Stat. 488, § 2736(b): "Any amount paid under subsection (a) shall be deducted from any amount that may be allowed under any other provision of law to the person, or his legal representative, for injury, death, damage or loss attributable to the accident concerned." According to Paterson, in 38 Can. B. Rev. 635 ff. (1960), accident insurance payments reducing the pecuniary loss of the victim's family must be taken into account in calculating damages under the Warsaw Convention as enacted in the Canadian Carriage by Air Act, *supra* note 68, art. 17: "Unless there is to be found any statutory provisions which would require the court to exclude insurance monies from the calculation of . . . 'damage sustained' . . . , I believe that the court must take them into account." While this result seems objectionable as far as personal accident insurance taken and paid by the deceased himself is concerned, it would appear justified in the case of an automatic passenger accident insurance provided by the carrier.

¹⁴⁰ Cf. Bodenschatz, *supra* note 86, at 242; *contra* Weimar, *supra* note 91, at 221, and Abraham, *Der Luftbeförderungsvertrag* 77 (Stuttgart 1955).

¹⁴¹ For the treatment of liability insurance as an independent basis of liability, see Ehrenzweig, *Assurance Oblige*, 15 Law Contemp. Prob. 445 (1950); Gregory and Kalven, *Cases and Materials on Torts* 620 (1959). In the field of accident insurance, this could be avoided by a stipulation along the lines of U.S. Public Law 87-212, *supra* note 139, subsection (d): "Payment of any amount under subsection (a) is not an admission by the United States of liability for the accident occurred."

¹⁴² Thus preserving the "preventive effect" of liability on flight safety; see Monaco, *Les assurances en droit international*, 101 Recueil des Cours de L'Académie de Droit International de la Haye 381, 401 (1960). The carrier remains liable for damages in excess of the insurance coverage in the case of his or his agents' wilful misconduct (Art. 25). The action may be exercised by the passenger or by the underwriter, see art. 998 of the Italian Code; cf. also art. 1000: "The underwriter has action in recourse against the Carrier for the indemnity paid to the passenger when the damage is derived from fraud or grave fault of the Carrier or his servants

D. Mandatory Passenger Accident Insurance And International Law

There can be little doubt that any one of the compensation systems listed above can be imposed by legislation on domestic carriage as well as on the international operations of a state's own national carriers.¹⁴³ In fact, the statutory passenger accident insurance of Spain, West Germany, and Italy, applies to both domestic and international flights of all airlines carrying the flag of these countries.¹⁴⁴

The problem of compliance with international law arises, where these insurance requirements are applied to foreign flag carriers. In practice, compulsory liability insurance,¹⁴⁵ but not passenger accident insurance,¹⁴⁶ has been imposed on foreign carriers so far.

Theoretically, a state may subject every foreign aircraft to its national laws, provided that this is done in a non-discriminatory manner.¹⁴⁷ Aviation insurance, having been left to national regulation,¹⁴⁸ is not an exception to this rule—unless the insurance requirement has the effect of changing the liability régime guaranteed by the Warsaw Convention. The relevant articles of the Convention are Articles 20, 23 and 32.

and agents" (translation Manca, *supra* note 97, at 370). *But cf.* the 25th meeting of the Int'l Air Traffic Ass'n in Paris 1931, where the aviation insurers voluntarily agreed not to exercise their right of recourse against IATA airlines; see 15 *Droit Aérien* 282, 284 (1931). Significantly, those writers who proposed to substitute insurance for tort liability entirely, either preserved liability for wilful misconduct (Kaftal, *supra* note 80) or reintroduced a so-called "liability for criminal negligence" (Ehrenzweig, *op. cit. supra* note 89, at 33); in the air laws of Brazil and Argentina even the taking of insurance for the carrier's liability for intentional acts is prohibited (Brazilian Code, *supra* note 92, art. 109; Argentinian Code, *supra* note 94, art. 169). *Cf.* also the exceptional assertion of tort liability for intentional injury, in the Workmen's Compensation statutes of Arizona, Kentucky, Maryland, Oregon, Utah, West Virginia and Washington. Riesenfeld and Maxwell, *supra* note 136, at 395.

¹⁴³ Bodenschatz, *supra* note 86, at 246; Möller, Paper delivered to the 4th Int'l Conference on Comparative Law in Paris 1954, see 4 *Z. Luftrecht* 267 (1955); Meyer, Comment, 2 *Z. Luftrecht* 229 (1953); *contra* Weimar, *supra* note 91, at 221.

¹⁴⁴ See Bodenschatz, *supra* note 86, at 233, n. 1, 247; Marino, *supra* note 97, at 263. Since art. 996 of the Italian Code covers passengers in "every aircraft operated on the carrier's routes," even foreign charter aircraft would appear to be included; Bodenschatz, *supra* note 86, at 235.

¹⁴⁵ Brazilian Code, *supra* note 92, art. 107: "There shall be required of aircraft registered in a foreign country, as indemnification for damages that they may cause to persons or property on Brazilian territory, the furnishing of security at least equal or considered equivalent to those of Brazilian aircraft." (Translation Strauss, *supra* note 2, at 281). However, according to ICAO Doc. LC-87/16-2-48, foreign operators only had to show insurance for damages caused to third parties on the ground, up to 1,000,000 Cruzeiros per accident; see François and Saporta, *supra* note 92, at 9. The 1952 CAB draft, *supra* note 111, § 271.14, also contemplated insurance requirements for foreign air carriers.

¹⁴⁶ Foreign airlines are not subject to the Spanish obligatory passenger insurance; see François and Saporta, *supra* note 100, at 892. According to Marino, *supra* note 97, at 263, the passenger accident insurance requirements of the Italian Code would also apply to foreign airlines engaged in international carriage to or from Italy; apparently, however, this is not done in practice. It has been suggested to extend the German passenger accident insurance requirements to foreign carriers serving the Federal Republic of Germany; see Möller, 10 *Versicherungswirtschaft* 124 (1955). In practice, this has not been done for policy reasons (fear of impairing the bargaining position of national carriers in commercial negotiations with the foreign countries concerned), see Bodenschatz, *supra* note 86, at 249.

¹⁴⁷ Chicago Convention (1944), ICAO Doc. 7300/2 (2d ed. 1959), 15 U.N.T.S. 295, art. 11: "Subject to the provisions of this Convention, the laws and regulations of a contracting State relating to the admission to or departure from its territory of aircraft engaged in international air navigation, or to the operation and navigation of such aircraft while within its territory, shall be applied to the aircraft of all contracting States without distinction as to nationality, and shall be complied with by such aircraft upon entering or departing from or while within the territory of that State." *Cf.* reference made to this article by Cooper, during the discussion of insurance requirements at the ICAO Legal Committee meeting in Rio de Janeiro 1953, *supra* note 66, at 164.

¹⁴⁸ *Supra* note 82.

1. Article 20 exonerates the carrier of his liability, if he proves that he acted with the necessary care.¹⁴⁹ Compulsory insurance coupled with "strict" liability (liability without fault) is therefore contrary to the Convention, even when it is only imposed as an enforcement sanction on carriers who fail to take insurance.¹⁵⁰

2. Article 23 invalidates any provision tending to relieve the carrier of his liability.¹⁵¹ An insurance system, which has the effect of replacing *a priori* the carrier's liability, is therefore contrary to the Convention, too.

3. There remain three compensation schemes that are not in violation of the Warsaw Convention:

a. Liability insurance, because it only purports to guarantee payment in the case of the carrier's liability;¹⁵²

b. Accident insurance providing for a release of liability claims executed *after* the damage occurred, because such an *a posteriori* agreement is permissible under Article 32 of the Convention;¹⁵³

c. Accident insurance providing for deduction of insurance payments from further claims, because this type of insurance is neutral with respect to liability.¹⁵⁴

E. Evaluation

Having eliminated the compensation schemes not in accordance with the Convention, the remaining ones can now be evaluated on their practical merits. The aim is to find the compensation system best suited to implement the Convention, so as to grant recovery to air passengers, adequate to national economic standards.

1. Passenger liability insurance, besides relying on a questionable analogy,¹⁵⁵ is necessarily based on the carrier's liability for negligence (Articles 17 and 20), and thereby keyed to the limitation of liability (Article 22). The only additional advantage it would provide for passengers is guarantee of payment ("financial responsibility"); i.e., protection against an airline's insolvency. The improvement thus achieved would be negligible for

¹⁴⁹ "The carrier is not liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures."

¹⁵⁰ Art. 941, 2d sentence, of the Italian Code, *supra* note 97, has this effect, and consequently application of this provision to foreign air carriers would violate the Convention; *contra* Marino, *supra* note 146.

¹⁵¹ "Any provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in the Convention shall be null and void, but the nullity of any such provision does not involve the nullity of the whole contract, which shall remain subject to the provisions of this Convention."

¹⁵² E.g., see Resolution B of the Hague Conference, *supra* note 84: "a system of guarantees for the payment of compensation in the case of liability of the air carrier . . ." (Emphasis supplied.)

¹⁵³ Art. 32 invalidates clauses and special agreements infringing the rules of the Convention, if they were "entered into before the damage occurred . . ." (Emphasis supplied.) Cf. Caisse Régionale de Sécurité Sociale du Sud-Est. v. Air France, *supra* note 138, upholding the release coupled with the Air France passenger insurance policy.

¹⁵⁴ See text *supra* at notes 139 through 142. Passenger accident insurance creates liabilities not for the carrier, but only for the underwriter. Meyer, 2 Z. Luftrecht 229 (1953); *accord*, Achtnich, 1 Z. Luftrecht 342 (1952); Möller, *supra* note 143, at 251, 267; Bodenschatz, *supra* note 86, at 246; *Contra*: Weimar, *supra* note 91, at 226; Abraham, *supra* note 140, at 77; Rinck, *Recent Developments in German Air Law*, 23 J. Air L. & Com. 479, 488 (1956), who all seem to associate accident insurance with carrier liability.

¹⁵⁵ See text *supra* at notes 122 and 123 (motor vehicle insurance, and aircraft insurance for surface damage). Unlike "third parties" on the road or on the surface, the air passenger directly contributes to the costs of the carrier's insurance, through his transportation fare: Cf. text *supra* at note 121.

American air passengers,¹⁵⁶ and would not seem to justify introduction of a system against which serious practical objections have been raised.¹⁵⁷

What is needed is more than "financial responsibility." At a time when air travel has ceased to be the privilege of high-income groups, it is no longer sufficient to protect those passengers who are lucky or wealthy enough to win a law suit against an airline. What is more urgently needed is social responsibility for all the other accident victims of our air transport industry.

2. Passenger accident insurance coupled with a total *release* at the moment of payment, would give the accident victim an option of either accepting the insurance compensation (limited recovery regardless of liability), or rejecting it and suing under the Warsaw Convention (possibly unlimited recovery based on liability).

Whether this leaves the victim a fair choice is open to argument. A passenger—or his legal representative—who rejects the insurance payment, has three chances: (a) his suit against the carrier is successful, and he recovers damages in excess of the insurance amount (Article 3, paragraph 2; Article 25); (b) His suit is successful, but he recovers only within the limits of liability (Article 22); (c) His suit is unsuccessful, and he recovers nothing at all (Article 20). Only the first alternative; i.e., a successful suit for wilful misconduct, would make rejection of the insurance compensation advisable. Such a rejection will, in any event, deprive the victim of the "first aid" advantage of the insurance. However, for a passenger to decide at the moment of the insurance offer whether the carrier might be guilty of wilful misconduct is ordinarily impossible,¹⁵⁸ and to reject the insurance compensation on the ground of such a guess is bad gambling. Considering all these factors, the "accept-or-sue" option gives the accident victim what is commonly called "Hobson's choice,"¹⁵⁹ and in practice will have the effect of excluding liability claims against carriers *a priori*.

3. Passenger accident insurance, *pro tanto* deductible from further claims, would appear as the most advantageous compensation scheme for air passengers. It grants quick relief in all cases, regardless of the carrier's liability, without litigation, and without attorney's fees. It does not, however, deprive the accident victim of the possibility of suing the carrier under Article 25 of the Convention within two years (Article 29).

Although in practice the coverage amounts of passenger accident insurance are usually set at the same level as the Warsaw or Hague limits,¹⁶⁰ they are theoretically independent of liability limitations. At the ICAO Legal Committee meeting of 1953, most delegates expressed opposition

¹⁵⁶ "In the entire history of civil aviation in the United States, no certificated air carrier has ever been known to default in payment of a personal injury or property damage judgment against it arising out of an accident." Tipton and Bernhard, *supra* note 112, at 75.

¹⁵⁷ Tipton and Bernhard, *supra* note 112.

¹⁵⁸ Public investigations into the causes of air accidents last months and often wind up without a result. See Orr, *Accident Investigations of the U.S. Civil Aeronautics Authority*, 1954 Ins. Counsel J. 123; Whitehead, *Civil Aeronautics Board Accident Investigation Hearings—Boon or Bane*, 1961 Ins. Counsel J. 258. Incidentally, the airlines take "a most active role in the CAB investigation, the defense of charges of alleged negligence," etc.; see Lucas, *Who May Be at Fault for an Airline Crash*, 1961 Ins. L.J. 621, 624.

¹⁵⁹ Following the expression used in *National Foam System Inc. v. Urquhart*, 202 F.2d 659, 664 (3rd Cir. 1953).

¹⁶⁰ Cf. coverage amounts in Switzerland, France, Italy, West-Germany, Austria, *supra* notes 86, 87, 97, 98, 99.

to possible national insurance requirements, as well as liability requirements, in excess of the Warsaw limits.¹⁶¹ However, a Spanish proposal to enjoin member states from imposing either higher limits of liability, or higher insurance coverage, was not adopted.¹⁶²

It is submitted that mandatory accident insurance of a "neutral" type, which would not prejudice the carrier's liability position, is permissible even if the coverage required exceeds the limits of liability set at Warsaw and at The Hague. If applied to all carriers on a non-discriminatory basis, it is within the national jurisdiction recognized by Article 11 of the Chicago Convention,¹⁶³ no less than air safety requirements, airport taxes, or the mandatory approval of passenger tariffs.

III. BLUEPRINT FOR AN AIR PASSENGER COMPENSATION PLAN

For an outline of a passenger accident compensation system, valuable experience may be drawn from similar schemes set up abroad, and from the well-established system of Workmen's Compensation in this country.

A. Organization

There are essentially three ways of setting up an accident compensation scheme (although, certainly, many combinations are conceivable).

1. Carriers may be required by statute to take group accident insurance with an insurance company. This is the method employed by those European countries where mandatory passenger accident insurance is in existence.¹⁶⁴ It should be noted, however, that these countries have either nationalized insurance corporations,¹⁶⁵ or have a more or less cartelized aviation insurance industry¹⁶⁶ subject to nation-wide public control of policy terms and premium rates.¹⁶⁷ Adopting a similar system in the United States would create problems for several reasons.

a. Although insurance is within the realm of federal jurisdiction,¹⁶⁸ the Civil Aeronautics Board is not equipped to assume the functions of a "super insurance commission" controlling aviation insurance policies and rates;¹⁶⁹

b. Bureaucratic intervention in private insurance operations, such as standardization of rates and policies, would presumably result in a financial

¹⁶¹ 9th Session, Rio de Janeiro (1953), ICAO Doc. 7450-LC/136, vol. I, at 163-165.

¹⁶² *Ibid.*

¹⁶³ *Supra* note 147.

¹⁶⁴ Italy, West-Germany, Austria, Spain, see *supra* notes 97 through 100. In the field of Workmen's Compensation, Texas has a statute imposing insurance with private underwriters on employers. See Riesenfeld, *Efficacy and Costs of Workmen's Compensation*, 49 Calif. L. Rev. 631, 655 (1961).

¹⁶⁵ In Spain, the "Comisaria" for Obligatory Passenger Insurance, supervised by the "Direccion General" of Bankings, Stock Exchange and Investments, as well as by the Ministry of Public Works (1942 Regulation, art. 13). See François and Saporta, *supra* note 100, at 888 ff.; Bodenschatz, *supra* note 86, at 233.

¹⁶⁶ In Switzerland, the Swiss Pool for Aviation Insurance (1947), see Kubli, *supra* note 86; Guldemann and Vogel, *supra* note 86, at 244. In Germany, the "Deutscher Luftpool" (1924), see Wimmer, 2 Z. Luftrecht 213 (1953).

¹⁶⁷ E.g., the German Federal Insurance Agency ("Bundesaufsichtsamt für das Versicherungs- und Bausparwesen"); the Federal Ministry of Transport can influence aviation insurance coverage through this agency, see Bodenschatz, *supra* note 86, at 243.

¹⁶⁸ See *U.S. v. South-Eastern Underwriters Association*, 322 U.S. 533 (1944); cf. Sawyer, *Insurance as Interstate Commerce* 40 (1945).

¹⁶⁹ Tipton and Bernhard, *supra* note 112, at 78.

overhead that might well become a needless and socially wasteful burden on the industry;¹⁷⁰

c. A substantial part of the new business generated would probably go to foreign insurance companies, who already underwrite part of the present liability insurance of American air carriers,¹⁷¹ and whose operations are beyond U.S. control.

2. Carriers may be required to contribute to a public compensation fund, from which all accident claims are then to be satisfied. This is the solution adopted for Workmen's Compensation by 19 states in this country.¹⁷² In six of them, participation in the state fund is mandatory,¹⁷³ and contributions to the fund have the nature of an excise tax.¹⁷⁴ Two states accept self-insurance alternatively,¹⁷⁵ and in the other eleven jurisdictions the state fund competes with both private insurance companies and self-insurance.¹⁷⁶

Considering the fundamental reforms through public intervention which a similar system for aviation accident compensation would require,¹⁷⁷ it would not easily be adopted in the United States.

3. The third method can be described as "collective self-insurance" by the air transport industry. There could be a special mutual liability association of air carriers, similar to the employers' insurance association for writing compensation insurance, which existed in Massachusetts¹⁷⁸ and in Texas,¹⁷⁹ and which were encouraged by other jurisdictions¹⁸⁰ in the field of Workmen's Compensation.¹⁸¹ American international air carriers could set up a joint compensation fund financed by contributions from member airlines. The fund would handle all claims from air passengers arising out of accidents which occurred on international carriage to and from the United States. Whether participation in the fund were to be mandatory for both American and foreign flag carriers serving this country is a question of policy.

It is interesting to note that similar plans have been put forward on an international scale. In 1928 the International Air Traffic Association discussed proposals for a "coopérative d'assurances" among member air-

¹⁷⁰ Cf. the situation in American Workmen's Compensation, where the National Council on Compensation Insurance in its Annual Report for 1960, at 5, suggests an expense loading factor of 37.7% of the net premium dollar. See Riesenfeld, *Basic Problems in the Administration of Workmen's Compensation*, 36 Minn. L. Rev. 119, 138 (1952); Riesenfeld, *supra* note 164, at 656.

¹⁷¹ See Tipton and Bernhard, *supra* note 112, at 78.

¹⁷² Riesenfeld and Maxwell, *supra* note 136, at 147. This type of fund is comparable to the "Caisses régionales de sécurité sociale" in France; cf. Riesenfeld, *supra* note 136, at 557, n. 167.

¹⁷³ "Monopolistic" or "exclusive" state funds: Nevada, North Dakota, Oregon, Puerto Rico, Washington, and Wyoming.

¹⁷⁴ See *State Industrial Accident Commission v. Aebi*, 117 Ore. 361, 162 P.2d 513, 161 A.L.R. 211 (1945).

¹⁷⁵ Ohio and West Virginia.

¹⁷⁶ "Competitive" state funds: Arizona, California, Colorado, Idaho, Maryland, Michigan, Montana, New York, Oklahoma, Pennsylvania and Utah.

¹⁷⁷ There is also the argument that such a reform should not discriminate against, or "penalize," the air transport industry as compared with other industries.

¹⁷⁸ Mass. Acts and Res., c. 751 (1911). The Ass'n was placed *pari passu* with other mutual companies by an act of 1916, now Mass. Ann. Laws, c. 152, § 53 (1942).

¹⁷⁹ Texas Gen. Laws, c. 179 (1913).

¹⁸⁰ Indiana, Iowa, Minnesota, Nebraska. See Riesenfeld and Maxwell, *supra* note 136, at 148, n. 23.

¹⁸¹ These associations are comparable to, and were partly inspired by, the German "Berufsgenossenschaften." See Riesenfeld, *supra* note 136, at 557, n. 167.

lines.¹⁸² Establishment of a national compensation scheme in this form might well become a nucleus for a wider fund including all air carriers engaged in international carriage.¹⁸³

B. Enforcement

Either of two methods may be used to require air carriers to obtain accident insurance—increased liability as a penalty in case of non-compliance, or administrative sanctions.

The imposition of strict liability on carriers who fail to take insurance¹⁸⁴ may be the most effective way of enforcement with domestic air carriers;¹⁸⁵ but it would appear to be contrary to the liability régime of the Warsaw Convention.¹⁸⁶ In administrative enforcement civil aviation authorities usually require proof of insurance as a condition for granting airworthiness certificates¹⁸⁷ or operating licenses.¹⁸⁸

C. Costs

Passenger accident insurance would partly replace the airlines' liability insurance or self-insurance,¹⁸⁹ for insofar as the carriage is covered by accident insurance, no liability claims against the carrier will arise.¹⁹⁰ The need for liability insurance or funding would remain only for claims exceeding the accident insurance coverage.¹⁹¹

A cost calculation for the passenger accident insurance scheme will therefore have to take into account a sizeable reduction of business costs incurred through purchasing liability insurance and funding self-insurance plans.

Group insurance by the airline¹⁹² would also put to an end most of the

¹⁸² 19th Session of IATA, Warsaw 1928; see 12 *Revue Juridique Internationale de la Locomotion Aérienne* 367 (1928).

¹⁸³ A proper forum for such an international plan would be the Int'l Air Transport Ass'n which has as its active members the majority of the world's airlines, and which already operates a highly successful international financial institution, the IATA Clearing House in London, (annual turn-over \$2 billion). See Capdeville, *La Chambre de Compensation de l'I.A.T.A.*, 10 *Rev. Franc. Droit Aérien* 349 (1956).

¹⁸⁴ Italian Code of Navigation, art. 941, 2d sentence, *supra* note 97. In most American Workmen's Compensation statutes the non-insurer is deprived of the so-called common-law defenses (*i.e.*, contributory negligence, assumption of risk, negligence of fellow-servant). In California the non-insurer is subject to a statutory presumption of negligence; see Calif. Labor Code, § 3708; *cf.* Chakmakjian v. Lowe, 33 Cal.2d 308, 201 P.2d 801 (1949). In Massachusetts, he is subject to strict liability; see Mass. Ann. Laws (1950 and 1953 Supp.), c. 152, §§ 66, 67; *cf.* Zarba v. Lane, 322 Mass. 132, 76 N.E.2d 318 (1947). Failure to take insurance has also been construed as a basis for strict liability in other countries, *e.g.*, see a Norwegian case, 1940 *Norsk Rettstidende* 16, quoted by Strahl, *Förberedande Utredning Angående Lagstiftning på Skadestandsrättens Område* 138 n. 80 (1951).

¹⁸⁵ Another method, proposed by the "Uniform Aircraft Financial Responsibility Act" of 1953, *supra* note 104, is to impose an obligation to deposit security on un-insured carriers who encounter an accident. *But cf.* the critique by Grad, *supra* note 122, at 305, and by Ehrenzweig, *supra* note 135, at 7, of similar devices in automobile accident law.

¹⁸⁶ See text *supra* at note 150.

¹⁸⁷ Brazilian Code of the Air, *supra* note 92, art. 105, 106.

¹⁸⁸ The German Federal Ministry of Transport, pursuant to § 32, para. 12 of the Aviation Act, decreed that no approval of operating certificates will be granted unless the carrier shows insurance taken with a nationally licensed underwriter. Letter from Fed. Minister of Transport to Land Ministers of Transport (Dec. 29, 1955), see 1956 *Verkehrsblatt* (No. 1) 7; 1956 *Nachrichten für Luftfahrer* (No. 1) B.

¹⁸⁹ See text *supra* at notes 120, 121.

¹⁹⁰ "Pro tanto" extinction, see note 139.

¹⁹¹ As a result, airlines will carry a combined accident/liability insurance. For Germany, see Achnich, 1 *Z. Luftrecht* 342 (1952); for Italy, Bodenschatz, *supra* note 86, at 235.

¹⁹² Insurance costs could be reduced, or even "minimized, if its burden were shifted to the

"multiple-insurance" loss which the traditional system generated. No longer would the passenger insure, by his (optional) personal accident insurance, the same risk which is already partly covered by the carrier's liability insurance.¹⁹³

A rough comparison of the price of personal accident insurance presently available at United States airports,¹⁹⁴ and of the costs of airline group accident insurance in Switzerland,¹⁹⁵ France¹⁹⁶ and Germany,¹⁹⁷ shows that introduction of a passenger accident insurance would not have to be followed by a fare increase.¹⁹⁸

The relatively low additional costs of group accident insurance would also appear to make unnecessary the "double-fare" solution which was suggested in 1956,¹⁹⁹ not to mention the complications in fare-structures which are likely to ensue from such a system.²⁰⁰

D. Coverage

Calculation of the necessary minimum insurance coverage is based upon the expected measure of risk, and in this respect is similar to the calculation of limitations of liability such as the Warsaw and Hague limits. There are three methods of translating this "generalized measure of risk" into monetary amounts of insurance coverage:

1. The amount can be fixed by the statute, either as a flat sum,²⁰¹ or as

carrier, since all passenger liability would then be insured in one transaction." New York City Bar Ass'n Rep. *supra* note 6, at 258.

¹⁹³ This reduction of social costs by group accident insurance was pointed out by Loniewski, *Assurance et Responsabilite en Matiere de Transport* (Paris 1926); see Weimar, *supra* note 91, at 222.

¹⁹⁴ According to Tipton, *Current Trends in Aviation Insurance, 1946-47* Proceedings of ABA Section of Ins. L. 214, 217, insurance was then available at a rate of 20 cents per \$5,000 coverage. Reiber, *supra* note 6, at 286, indicates the same rate for 1956, for domestic carriage and for certain international flights. Whitehead, *supra* note 6, at 36, indicates that personal accident insurance for international carriage is available at air terminals at a rate of \$10 per \$125,000 coverage.

¹⁹⁵ The premium for Swiss Air's passenger accident insurance is approximately 1 Swiss Franc (25 cents) for 1000 passenger/kilometers, at a coverage up to 36,000 Francs (approx. \$9,000, *supra* note 86). Information by courtesy of Dr. Schweickhardt, Legal Adviser Swiss Air (letter of Dec. 13, 1961).

¹⁹⁶ The premium for the Air France passenger accident insurance is approximately 0.85 New French Francs (17 cents) for 1000 passenger/kilometers, at a coverage up to 34,800 Francs (approx. \$7,000, *supra* note 87). Information courtesy of M. Lemoine, Associate Director General Air France (letter of Dec. 15, 1961).

¹⁹⁷ The premium for the West-German statutory passenger accident insurance is calculated on an annual basis per available passenger-seat. It is presently 273 Deutsche Mark (\$68) plus 5% Federal Tax, for death and disability at a coverage up to 35,000 Marks (approx. \$8,700, *supra* note 98). Information courtesy of Dr. Wimmer, Deutscher Luftpool and Vice-President, Int'l Union of Aviation Insurers (letter of Oct. 31, 1961).

¹⁹⁸ When German and French carriers first introduced their insurance plans—more than 30 years ago—they did not raise fares. Swiss Air, in reply to a survey concluded in 1952 by the Air Law Research Institute of Cologne University, indicated that the introduction of its passenger accident insurance had a negligible effect on insurance costs, which neither resulted in increased fares nor interfered with the airline's competitive position. See Achtnich, *supra* note 91.

¹⁹⁹ New Jersey State Bar Ass'n, *supra* note 118. This proposal would necessarily result in two parallel air transport fares, one including insurance, the other excluding it. In practice, the air carrier would become a sales agent of the underwriter.

²⁰⁰ A similar system was considered when Lufthansa introduced its insurance plan in 1926, but it was rejected for practical reasons ("two-fare" complications). See Döring, *supra* note 98, at 121. Although the Spanish Regulation of 1942, in art. 19 (mentioned in note 100), imposed the price of group accident insurance as a separate and additional charge on the passenger, information from Iberia Spanish Airlines indicates that in practice it was included in the price of the ticket. See Bodenschatz, *supra* note 86, at 233, n. 1.

²⁰¹ As in the Italian and Spanish Aviation Acts, *supra* notes 97, 100. See also Workmen's Compensation statutes, in U.S. Bureau of Labor Standards, Dep't of Labor Bull. No. 161;

a minimum.²⁰² However, this will require frequent legislative amendments in the future,²⁰³ as costs of living and monetary values change.²⁰⁴

2. The authority to set insurance requirements can be delegated to an administrative body, which could fix insurance coverage amounts on an annual basis, thus allowing for more flexibility. However, such discretionary powers would involve the risk of arbitrary decisions, based upon extra-economic factors.

3. Finally, there is the intermediate choice of a "sliding scale," whereby the statutory coverage amounts are geared to the most relevant economic index.²⁰⁵ To determine this index is an actuarial task,²⁰⁶ and well beyond the scope and capacity of this writer. Data from a number of past events, such as national income per capita,²⁰⁷ national average life expectancy,²⁰⁸ average compensation settlements,²⁰⁹ accident statistics, etc., will have to be projected into the future²¹⁰ in order to establish the measure of risk from which concrete monetary amounts may be deduced. Any such analysis is based on assumptions, "but perhaps progress toward a more sensible allocation of accident losses cannot wait for better knowledge on which to build an ideal system."²¹¹

E. Right Of Action

Since passenger accident insurance is taken for the benefit of the passenger or his legal representative, it would seem logical to grant the beneficiary a direct right of action against the underwriter,²¹² and to determine

State Workmen's Compensation Laws, table 7 at 20, (rev. May 1960); cf. Riesenfeld, 49 Calif. L. Rev. 631, 634.

²⁰² As in the German and Austrian Acts, *supra* notes 98, 99.

²⁰³ In West Germany, the coverage amounts had to be raised from 20,000 to 35,000 Marks in 1957. Italy: (1942) 160,000 Lire, (1959) 5,200,000 Lire. Spain: (1941) 30,000 Pesetas, (1950) 40,000 Pesetas, (1959) 80,000 Pesetas, (1960) 200,000 Pesetas.

²⁰⁴ The equivalency of the Warsaw limits (125,000 gold francs) in terms of U.S. Dollars increased from \$4,898 in 1929, to \$8,292 in January 1953. Thus, the gold value in currency was increased 169% of the 1929 level, while the cost of living index in the same period went up to 156% of its earlier level, resulting in an 8% increase in the buying power of the gold franc within the United States. See ACC Economic Division Report, ACC Doc. 51/22, 14(A), as quoted by Orr, *The Rio Revision of the Warsaw Convention*, 21 J. Air L. & Com. 39, 48 (1954). But cf. Tuller v. KLM, *supra* note 21, at 778, evaluating 125,000 gold francs at \$12,500 in 1929, and at \$8,300 in 1961.

²⁰⁵ E.g., in most Workmen's Compensation statutes, payments are geared to the previous earning scale of the accident victim. See U.S. Bureau of Labor Standards, *supra* note 201, tables 7-11.

²⁰⁶ Morris, C. Robert, *Enterprise Liability and the Actuarial Process—The Insignificance of Foresight*, 70 Yale L.J. 554, 600 (1961), points out that many tests which appear to rest upon economic considerations prove faulty, and prefers a test of fairness to the entrepreneur "not to treat him contrary to his reasonable [actuary] expectations."

²⁰⁷ Cf. text *supra* at notes 60, 61.

²⁰⁸ Put in an over-simplified mathematic formula, following the "rule of thumb" quoted in note 60 *supra*, the proposed insurance coverage would have to be a.(b-c); "a" being the national annual per capita income, "b" the national average life expectancy, and "c" the average age of air passengers.

²⁰⁹ According to information obtained from counsel for a large North-American air carrier, who prefers not to be quoted, the average settlement for passenger death claims in North America was \$8,000 in 1941; \$14,000 in 1946; \$22,000 in 1953; and \$26,000 in 1958.

²¹⁰ The first assumption of the "actuarial process," as formulated by Morris *supra* note 206, at 560 ff., is "that the immediate future will be much like the recent past."

²¹¹ Morris, Clarence, *Hazardous Enterprise and Risk Bearing Capacity*, 61 Yale L.J. 1172, 1179 (1952).

²¹² Under both the Italian and the German Aviation Acts, the passenger himself may exercise the claim against the underwriter. See Revised Insurance Conditions, as approved by the German Federal Insurance Agency in 1957, "Special conditions for the obligatory air passenger accident insurance (OPUV)," LuU6; cf. Handbuch für die Luftfahrtversicherung (interne manual,

the persons who have a right to sue, either by specific enumeration²¹³ or by reference to the general law of maintenance.²¹⁴

Alternatively, if this is not acceptable for any reason,²¹⁵ the victim should at least be granted a statutory right of action against the carrier himself. This would eliminate from the pleading of the Warsaw Convention before American courts a conflict-of-laws dogma which is wholly inappropriate to international air transport in the jet age—namely the “*lex loci delicti*” doctrine, as applied to passenger damages.

In order to give the victim a cause of action, courts used to characterize the aircraft accident either as a tort²¹⁶ or as a breach of contract.²¹⁷ In either case, a specific local law “governing” the delict or the contract had to be pleaded—the law of the place where the wrong occurred, where the force was “impinged,” where the death occurred, or where the contract was concluded, performed, broken, etc. In most cases, that specific local law, e.g., of Portugal,²¹⁸ had neither a reason for nor any interest in governing the legal relations between an American air carrier and his American passenger, who happened to overfly a piece of Portuguese territory when the accident occurred.²¹⁹ The dogma that the “provisions of the Warsaw Convention attach to the right of action created by the *lex*

Deutscher Luftpool) 87. In Italy, the carrier may exercise the right of action on behalf of the passenger (art. 998, *cf.* note 97).

²¹³ The British Carriage by Air Act implementing the Warsaw Convention names the members of the passenger's family for the benefit of whom the liability provisions are enforceable, granting them one action for the benefit of all. The amount of damages is to be divided between them by the Court. *Cf.* also the Irish, Canadian and Australian Acts, *supra* note 68.

²¹⁴ E.g., the German statute implementing the Warsaw Convention, *supra* note 68, § 1, refers to § 21 of the Aviation Act (now § 35 ff. of the 1959 Act, *supra* note 98), which speaks generally of “persons to whom the deceased owed a duty of maintenance.” The Swiss statute makes a similar reference to the general law of obligations. *Cf.* Riese, *Luftrecht* 398, 469, 487 (Stuttgart 1949).

²¹⁵ Although “direct action” statutes are now spreading in the United States—see Ehrenzweig, *Conflict of Laws* 32, 116, 132, 140 (1959)—there still seem to be many who consider the direct action by the victim against the underwriter as “conceptually impossible”; *cf.* Ehrenzweig, *Towards an Automobile Compensation Plan*, 11 *Fed. Ins. Counsel Quar.* 5, 8 (1961).

²¹⁶ Characterization generally applied by courts of common law countries, *cf.* cases cited *supra* notes 27 through 38. At the 11th Session of the ICAO Legal Committee in Tokyo (1957) the British delegate said that “he had been brought up in English law and had thought of the Warsaw Convention primarily as regulating liability in tort or delict of the carrier”; see Kean, *Tokyo Minutes ICAO LC I*, 14. *But cf.* Prosser, *The Borderland of Tort and Contract*, *Selected Topics on the Law of Torts* 380 ff. (1953).

²¹⁷ Characterization generally applied by courts of civil law countries, see, e.g., *G. & L. Berufsgenossenschaft v. Deruluf* German-Russian Airlines, (German Reichsgericht 1939), 161 *R.G.Z.* 76 (1939); *Calcio Torino v. Aviolinee Italiane*, (Italian Corte di Cassazione 1953), 20 *Rivista del Diritto della Navigazione* II. 201 (1954); see 22 *J. Air L. & Com.* 99 (1955); *Hennessy v. Air France*, (Paris Cour d'appel 1954), 8 *Rev. Franc. Droit Aérien* 45 (1954), see 21 *J. Air L. & Com.* 367 (1954); *Jacquet v. Club Neuchâtelois d'Aviation*, (Swiss Bundesgericht 1957), 83 *B.G.E.* II. 231 (1957), see 25 *J. Air L. & Com.* 344 (1958). “We do not see how one could pretend that a text so clear and precise as is art. 1 of the Warsaw Convention could allow a characterization, and justify a liability of the carrier, other than contractual.” Georgiades, *Quelques réflexions sur l'affrètement des aéronefs et le projet de convention de Tokyo*, 13 *Rev. Franc. Droit Aérien* 120 (1959). *But cf.* Litvine, *Precis Elementaire de Droit Aérien* 131 (Brussels 1953), who maintains that the carrier's liability is neither contractual nor quasi-delictual, but “legal.”

²¹⁸ See cases cited in note 28 *supra*.

²¹⁹ This conceptualism has gone so far that in *Pignataro v. United States*, (E.D.N.Y. 1961), 1961 *U.S. & Can. Av.* 121, 123, the complaint for bodily injury of an infant during a flight from Dhahran (Saudi-Arabia) to Asmera (Eritrea) was dismissed “on the ground that it fails to set forth the local law upon which the claim is grounded.” The case did not come under the Warsaw Convention, since it involved government aircraft (see reservation in the additional protocol to the Warsaw Convention; also Art. XXVI of the Hague Protocol), and because Saudi-Arabia has not adhered to the Convention.

loci delicti"²²⁰ becomes still more absurd when an aircraft on a "Warsaw" flight happens to crash in a state which is not a member of the Convention.²²¹ The court will have to proceed to a "fictitious ratification" and decide the case on the ground of what would be the law of that country if it had ratified the Convention!

A statutory right of action would do away with the conflicts problem and with the conceptualist quarrel about contractual or delictual cause of action;²²² this has long been accomplished by the British, Irish, Canadian and Australian statutes implementing the Warsaw Convention.²²³

IV. CONCLUSION

As one distinguished European scholar and judge stated in 1949, "the United States have taken the leadership in the field of international air law, which formerly had been the prerogative of the European states with France predominant."²²⁴ This leadership is not only a privilege, but also a responsibility.

It is superfluous to emphasize here the effect on world public opinion which a withdrawal of the United States from the most widely accepted international treaty on commercial law would have. The Warsaw Convention has protected the interests of both American air carriers and American air passengers, and so will the Hague Protocol. The United States could maximize the benefits of these treaties for her citizens, by enacting appropriate implementing legislation.²²⁵

²²⁰ *Komlos v. Air France*, *supra* note 28, 1952 U.S. & Can. Av. 310, at 317.

²²¹ At the time of the Lisbon air crash (1943), out of which the Garcia, Indemnity, and Ross/Froman cases arose (*supra* note 28), Portugal was not a member of the Warsaw Convention. Portuguese adherence came in 1947, so that the legal situation was different in the air crash at the Portuguese Azores (1949), which gave rise to the Komlos, Royal Indemnity, Supine and Hennessy cases (*supra* notes 28, 217).

²²² Cf. Calkins, *The Cause of Action under the Warsaw Convention*, 26 J. Air L. & Com. 217, 323 (1959); Clancy, *Fatalities in Aircraft Crashes—A Contractual Basis of Recovery?*, 27 J. Air L. & Com. 262 (1960).

²²³ *Supra* note 68.

²²⁴ Riese (now Justice, Supreme Court of the European Common Market Communities, in Luxembourg), *supra* note 214, at 109.

²²⁵ Hardman, *supra* note 16, at 700, concludes: "The inadequacy of the common law rules of liability to cope with perplexing problems presented by aviation must be brought to the attention of our federal legislators. Subsequent legislative studies, stemming from this awareness and the encouragement of the legal profession, should conclude with the realization that the industry has reached a stage of development at which it is regarded as feasible to afford a system of social insurance and result in the enactment of a federal statute embodying such principles."