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## THE CONFLICTS AND STATE OBLIGATIONS UNDER THE WARSAW CONVENTION, THE HAGUE PROTOCOL AND THE GUADALAJARA CONVENTION

BY JULIAN G. GAZDIK†

THE Diplomatic Conference in Guadalajara, Mexico, in the Fall of 1961 finalized the "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,"<sup>1</sup> which was signed on September 18, 1961.

The preamble of the Convention states its object. The states signatory to the Convention, noting that the Warsaw Convention<sup>2</sup> does not contain particular rules relating to international carriage by air performed by a person who is not a party to the agreement for carriage, found it desirable to formulate rules to apply in such circumstances.

When ratified, the new Convention will operate in conjunction with the Warsaw Convention and with the Hague Protocol<sup>3</sup> amending this Convention and will have bearing on many aircraft charters and interchanges.

The Conference in Guadalajara in 1961 was not unmindful of certain conflicts that might arise after the new Convention comes into force.<sup>4</sup> Some of the apparent conflicts were eliminated in the course of the sessions. The suggestion<sup>5</sup> to insert a general provision in the new Convention to the effect that in case of conflict between the Warsaw Convention and the new Convention, the provisions of the Warsaw Convention should prevail was, however, not accepted by the Conference. Nor was an alternative suggestion adopted that the Guadalajara Convention should have precedence over the Warsaw Convention in the event of conflict. Both of these principles are recognised in international law but while the Conference realized the possibility of conflicts, in the absence of a generally acceptable solution the matter was left for the Courts to tackle when the occasion arises.

### I. THE HAGUE PROTOCOL CONFLICT

A cursory examination of the problem indicates that conflicting treaty obligations if any, are not limited to the Guadalajara Convention but could be also considered under the Hague Protocol to amend the Warsaw Convention. As it is expected that in the near future the Hague Protocol will become effective, certain states will have both the Protocol-amended Warsaw Convention, and the unamended Convention in their legal systems. It is expected that other states, at least for the time being, will only have the

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<sup>1</sup> ICAO Doc. 8181.

<sup>2</sup> Convention for the unification of certain rules relating to international carriage by air, signed at Warsaw, October 12, 1929.

<sup>3</sup> Protocol to amend the Convention for the unification of certain rules relating to international carriage by air, signed at the Hague, September 28, 1955.

<sup>4</sup> ICAO Guadalajara Doc. 12.

<sup>5</sup> *Id.* at 49.

original Warsaw Convention. One cannot help wondering what will be the position of the passenger in this dual system. What law will be the proper law determining the liability of the carrier? Will the question of jurisdiction be affected? Will there be any conflict of Treaty obligations of the states involved, and will the claimant or the defendant be able to take advantage of such conflicts, if any? What part will the private international law rules of the state play in the jurisdiction where the action is taken?

It may be presumptuous to attempt to answer these questions, but it will be convenient to examine some of the problems by envisaging hypothetical cases.

*HYPOTHETICAL CASE NO. 1.* A passenger enters into a contract with an airline registered in state A, to be carried to state C; partly by an airline registered in state A, partly by an airline registered in state B and partly by another airline registered in state C. State A and state B have both ratified the Hague Protocol but state C did not.

In principle, the unamended Warsaw Convention may apply to the carriage because Article 18 of the Protocol clearly determines its applications and provides that the Convention "as amended by this Protocol shall apply to international carriage as defined in Article 1 of the Convention, provided that the places of departure and destination referred to in that Article are situated either in the territories of two parties to this Protocol or within the territory of a single party to this Protocol with an agreed stopping place within the territory of another State."

The nationality of the passenger or the nationality of the carrier may not matter. Nor may the fact that the action is taken in state A, state B or state C have bearing on the case, provided that the Court has jurisdiction. Article 18 of the Protocol, with its geographical test, appears to avoid the conflict itself although certain states have found it necessary to include in the enabling legislation to the Warsaw and to the Protocol express language to the effect that the provisions of the Convention are to apply irrespective of the nationality of the aircraft performing that carriage.<sup>6</sup>

The only conflicting treaty obligation that can be envisaged might be the one between state A and state B but it is surmised that state B having ratified the Hague Protocol may be estopped by its terms from claiming its application. The fact that there will be a duality of international legal systems applicable to air carriage does not necessarily cause conflict.

This is true, however, only if the unamended Convention remains in existence side by side with the Protocol. If state A or state B denounce the Warsaw Convention, under the terms of Article 24(3), the situation might completely change. Carriage from state A to state C, not being Protocol carriage, might not be under any international regime.

While this may not be intended by certain proposed legislations implementing the Hague Protocol, there is reason to believe that this could be the result, unless the validity of the Warsaw Convention, within its geographical scope, is carefully protected.

*HYPOTHETICAL CASE No. 2.* The circumstances are the same as before but state A and state C both ratified the Protocol and state B did not. Under the terms of the Protocol, the passenger having the nationality

<sup>6</sup> Forrest, *Carriage by Air: The Hague Protocol*, 10 Int'l & Comp. L.Q. 726 (1961).

of states A, B or C should in principle, all come under the regime of the Protocol-amended Convention, whatever their nationality or the nationality of the carrier performing the carriage under the contract. Naturally this principle will apply only in state A and state C which have ratified the Protocol. In these same jurisdictions it is not inconceivable however, that a claimant having the nationality of state B might raise the question of conflict of treaty obligations between state B and state A or C with which the relations of state B are governed under the Warsaw Convention. Conversely the carrier registered in State B might do the same in order that he might avail himself of the lower Warsaw limits.

The first observation is that Article 18 of the Protocol, useful as it is to determine the application of the Protocol under the applicable laws of the forum, may not necessarily help to overcome the difficulty of conflicting treaty obligations.

The second observation is that while the conflict of law rules in force in the jurisdictions (state A and C) may have bearing on the legal position of the claimant or defendant, they will not help much to resolve this question of conflicting treaty obligations.

In this hypothetical case, both states A and C are parties with state B to a treaty that conflicts with the treaty in existence between themselves, and the only question to determine is whether, under the rules of international law, state B could or could not insist upon full compliance with the pre-existing treaty obligations with either state A or C.<sup>7</sup> It is easy to answer this question in principle, in the affirmative. There may be, however, considerations that may mitigate against this strict position.

No state would knowingly give effect to a Treaty, multilateral or bilateral, that might be in conflict with a previously existing treaty obligation, but possibility of such conflict can arise. In order to avoid the conflict the state may resort to the maxim, *lex posterior derogat priori*.<sup>8</sup> It may be reasonable to apply this maxim, although it is not an accepted international law principle, to conflicting treaty obligations under the Warsaw Convention and the Protocol.

In this connection one should first bear in mind that the Warsaw Convention and the Hague Protocol are multilateral treaties. In accordance with its provisions, any state can ratify a multilateral Convention and it need not obtain consent to that effect nor acceptance from the other states who are signatories to the Convention or who might be entitled to adhere to it. The unilateral act of ratification of the individual state automatically brings the Treaty into operation with respect to the ratifying state, provided of course, that the required number of ratifications for effectiveness of the Treaty has been already achieved. Subsequently and as the result of ratifications by other states or the lack of such ratifications, the same state might find itself in conflict with its earlier treaty obligations with other states, who have signed the new Convention and are also under the regime of the old Convention but decide not to ratify the new Convention. It is submitted that this situation may provide an excuse for the state alleged to have violated its previous treaty obligation—at least as regards other states who also signed the later treaty.

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<sup>7</sup> Schwarzenberger, I *International Law* 475 (3d ed. 1957).

<sup>8</sup> *Id.* at 472.

One should also consider that these Conventions deal with civil rights—property rights of individuals and not rights and obligations of states towards each other. These Conventions are not political treaties but rather they are non-political or commercial treaties.<sup>9</sup> The difference may not be of great importance but it is sufficient to distinguish in the delicate field of state obligations and the manner in which such obligations might be enforceable. The state ratifying an international convention dealing with private rights undertakes certain obligations but the nature of these obligations is not necessarily the same as that of obligations of the states arising out of political treaties requiring an act or conduct on the part of the state.

In the former it might seem that a state has fulfilled its obligation under the international treaty once it has ratified the treaty or enacted the required legislation to make it effective in its territory. It might be difficult to believe that a state could then be effectively accused of having violated its obligations under the treaty merely because, subsequently, conflicts arise under a new multilateral treaty. And the conflict may be due only to an adherence or ratification by another state.

The most important practical consideration is, however, the fact that treaties are governed only partly by the principles of international law. To a large extent they are determined by municipal law. International law governs the relations of the states, inter se, and under English law determines the validity, the interpretation and the enforcement of treaties as between the parties. Municipal law, on the other hand, determines the effects of treaties upon persons within the allegiance of the states who are parties to such treaties.<sup>10</sup>

Some treaties may require that the domestic law of the state should be changed. In that event the Treaty is not performed until the appropriate legislation is enacted. At least in Canada the Treaty itself is not equivalent to an Imperial Act and without the sanction of Parliament, the Crown cannot alter existing law by entering into contract with a foreign power.<sup>11</sup>

In this respect the Canadian law seems to be somewhat different from United States law, where by an express provision in the Constitution, treaties duly made are the supreme law of the land "equally with Acts of Congress duly passed" and as such they are cognizable before both Federal and State Courts.<sup>12</sup>

Not every Treaty requires legislation in Canada. However, treaties do require legislation when they affect private rights or when they involve a change in the law of the land or when they involve action which is not in the ordinary scope of the discretionary power of the Executive.<sup>13</sup>

The Warsaw Convention, the Hague Protocol and the Guadalajara Convention are all subject matters that require special legislation in Canada and the right of the claimants and the defendants will be determined under the terms of the Statutes implementing such treaties.

There is no uniformity among states as to the form in which inter-

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<sup>9</sup> Matas, *Treaty Making in Canada*, 1947 Can. B. Rev. 460.

<sup>10</sup> 6 Halsbury 519 (2d ed. 1948).

<sup>11</sup> *Arrow River and Tributaries Slide and Boom Co. v. Pigeon Timber Company Limited*, [1932] S.C.R. 495, [1932] 2 D.L.R. 250.

<sup>12</sup> 63 C.J. *Treaties* § 3 (1933).

<sup>13</sup> Matas, *supra* note 9, at 458.

national treaties are to be made effective. In some states ratification is all that is required to make a treaty the law of the land; in others, as in Canada, enabling legislation is required before the treaty becomes operative. In either case it might seem that states have completed their obligations once they have made the international treaty effective in their respective jurisdictions.

It is submitted that the scope of the Courts in the various jurisdictions will be limited by the ratification or enabling legislation.<sup>14</sup> When there is conflict between the treaty and the Statute putting it into force, the provisions of the Statute will prevail. In these circumstances it is doubtful that the claimant or defendant could effectively raise before the courts the conflict in treaty obligations or the resulting breach of duty under the Warsaw Convention or the Hague Protocol. This does not mean that the conflicts between treaty obligations are absolutely without remedy. It is possible though not probable that a state may be persuaded by the interested party to insist on strict compliance with the terms of the treaty. In that event the state may, of course, avail itself of the required means of settling disputes in international law.

It is conceivable that the solution to conflicts between the Warsaw Convention and the Hague Protocol is sought by exercising the right to renounce the Warsaw Convention (Art. 24(3) of the Protocol). It is easy to show how unsatisfactory a solution this might be. It would attack the large measure of valuable uniformity that already exists in this field of private air law. Instead of avoiding conflicts it would create new ones.<sup>15</sup> Surely the avoidance of some possible technical breaches of treaty obligations will not warrant such a drastic step.

*Hypothetical Case No. 3.* If the action is taken in state B, whether the court will apply the Protocol to the carriage between state A and state C in the above circumstances will depend on the applicable private international law rules. Conflicting treaty obligations do not arise because state B is under Warsaw Convention obligations with respect to both states A and C.

In conclusion, theoretical as it may be, it is not inconceivable that a state which has ratified the Warsaw Convention but has not ratified the Protocol may exercise its rights under the existing Warsaw Convention and object to the application of the Protocol to its national in a jurisdiction which has ratified both the Warsaw Convention and the Protocol. Such intervention presumably might only take place after all recourse before the courts of the respective jurisdictions is exhausted and then again, only if the person is able to convince its state to intervene on his behalf. The effectiveness of such intervention, in the circumstances, may well be lessened by the fact that his own state has been one of the signatories of the Hague Protocol, if that is the case.

## II. THE GUADALAJARA CONFLICT

Having considered the co-existence of the Protocol and the Warsaw Convention, we may now turn to the situation when, in addition to these two, the Guadalajara Convention will also be in effect and may come into play. It is easy to envisage the problem. The air carriage may involve

<sup>14</sup> Nettl, *The Treaty Enforcement Power in Federal Constitutions*, 1950 Can. B. Rev. 1051.

<sup>15</sup> Makiewicz, *Conflicts between the Warsaw Convention and the Hague Protocol*, 3 *Revue Générale de l'Air* 239 (1956).

points in the territories of three states, all of which have ratified the Guadalajara Convention but only the first and third have ratified the Protocol. It is obvious that the "actual carrier" performing part of the carriage between the first and second states may be under a different regime than the "contracting carrier" contracting for the entire journey.

Under Article 2 of the Guadalajara Convention, if the "actual carrier" performs the whole or part of the carriage which, according to the agreement for carriage with the passenger or shipper, is governed by the Warsaw Convention, both the "contracting carrier" and the "actual carrier" shall be subject to the rules of the Warsaw Convention. But Article 2 also provides that the "contracting carrier" shall be subject to the rules of the Warsaw Convention for the whole of the carriage contemplated in the agreement and that the "actual carrier" shall be governed by these rules solely for the carriage which he performs.

In the event that the contract of carriage provides for carriage between points in states which have ratified the Protocol and the "actual carrier" performs part of the carriage between points, one or both of which is in a state which did not ratify the Protocol, the "actual carrier" may claim the application of the Warsaw rule, whereas the passenger or shipper's interest may be to apply the Protocol rule with the much higher liability limits.

The application of the Warsaw Convention to the "actual carrier" may be justified with Article 24 of the Warsaw Convention which provides in substance that any action for damages, however founded, could only be brought subject to limitations and conditions of the Warsaw Convention. The passenger, on the other hand, could claim that he has contracted under the regime of the Protocol and that the Protocol applies automatically provided that its requirements regarding geographical scope (Article 18) are fulfilled. Hence there is a dilemma created by the Guadalajara Convention resulting in apparent duality of obligations of states which have ratified all three Conventions regarding other states which have not done so. The first state has Warsaw obligations regarding the second and Protocol obligations regarding the third. When the Guadalajara Convention applies both state obligations are activated, and as the result there may be apparent conflicts between treaty obligations due to:

- (i) the fact that there is a distinction in the Guadalajara Convention regarding the "contractual carrier" and the "actual carrier," whereas there is no such distinction in either the Protocol or the Warsaw Convention.
- (ii) the fact that under the Guadalajara Convention both the Protocol and the unamended Warsaw Convention might apply simultaneously, one being applicable to the "actual carrier" and the other to the "contracting carrier."
- (iii) the fact that in some jurisdictions the Warsaw Convention is considered to apply to contractual liability only, whereas the better view seems to be that it covers tortious and statutory liability.<sup>16 & 17</sup>

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<sup>16</sup> Calkins, *The Cause of Action under the Warsaw Convention*, 26 J. of Air L. & Com. 217 (1959).

<sup>17</sup> Forrest, *supra* note 6.

- (iv) the fact that in some jurisdictions the Warsaw Convention applies to the "actual carrier" irrespective of the Guadalajara Convention.
- (v) the fact that the Guadalajara Convention does not have a provision similar to Article 18 of the Hague Protocol determining its scope of application by applying a geographical standard.
- (vi) the fact that the interest of the claimant and the interest of the respondent may be diagonally opposite as regards desirability of application of the Warsaw Convention or the Protocol.

It must also be remembered that there may be further conflicts between existing laws in these states, implementing the conventions and the Protocol. Moreover, not only the limits of liability may cause conflict between the Warsaw Convention and the Hague Protocol as a result of the application of the Guadalajara Convention, but also the provisions relating to traffic documents, wilful misconduct and others. Accordingly there might be many sources which could invite the consideration of possible conflicts under the three Conventions.

It is not possible in the scope of this paper to review all these possible conflicts. For the purpose of illustrating the subject, it might be convenient again to resort to a hypothetical case; this time there are three passengers, the first has the nationality of state A; the second of state B and the third of state C. All three of them have contracted with the "contracting carrier" having the nationality of state C. The journey is from state A to a point in state B via the services of the "actual carrier" registered in state B and from the point in state B to state C via the services of the "contracting carrier." The accident giving rise to the action occurs in state A. The position regarding the Warsaw Convention, Protocol and Guadalajara Convention in this hypothetical case is that all three Conventions are in effect and state A and state C have ratified them all, but state B has only ratified the Warsaw Convention.

*Actions against the "Actual Carrier" in State A.* The first, second and third passengers each may take actions in state A against the "actual carrier." The wrong having been committed in state A and the action taken there, there would be no problem of jurisdiction and it is surmised that the Court will decide that the *lex fori* is the proper law.

The question of the nationality of the claimant or the defendant might presumably not be material in the three cases above, once the question of jurisdiction is cleared.

In order to determine the proper law, the court in state A may still have the choice under its private international law rules. It may apply the Guadalajara Convention and the Protocol. Then again, it is not inconceivable that it may apply the Warsaw Convention. To a large extent the proper law will be determined, depending on the question whether the "actual carrier" may be considered already a "carrier" under the Warsaw Convention or only under the Guadalajara Convention.

If the court in state A will be called upon to decide whether the rules of the Guadalajara Convention override the Warsaw Convention or not, the maxim of "*generalia speciabilibus non derogant*" may have bearing on the case. Again it must be pointed out, however, that this maxim is not generally adopted in customary international law.<sup>18</sup>

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<sup>18</sup> Schwarzenberger, *supra* note 7 at 472.

Obviously there may be apparent conflicting treaty obligations between state A and B, or between state A and state C. Between states A, B and C there is one treaty in existence (Warsaw Convention) and between states A and C there is another treaty in existence (Hague Protocol). Accordingly state A may find itself in conflict with state B if it applies the Protocol, or with state C if it does not.

It will be incumbent upon state A to reconcile its position under two conflicting treaties. The international law rules in this respect are not as clear as they might be. There is the doctrine of non-recognition of treaties inconsistent with previous treaties but this principle is not universally applied and it is recognized that a second treaty, although inconsistent with the first one, might not be held by an international court to be invalid if it could be shown that the interests of the complaining state are not affected at all, or that the degree to which they are affected is slight when related to the general advantage accruing from the new treaty.<sup>19</sup> In order to succeed, presumably the complaining state A or C would have to show that its interest is affected to a substantial extent which in the circumstances is questionable to say the least.

There may be some question of conflict between treaty obligations of states A and C, both having ratified the two treaties and the Guadalajara Convention but the better view seems to be that on the basis of "jus aequum" any such conflict would be eliminated.<sup>20</sup>

In any case, these conflicts, if they arise are of the same nature as the conflicts referred to in the second hypothetical case and the comments made earlier regarding them apply.

*Actions Against the "Contracting Carrier" in State A.* In actions taken against the "contracting carrier" by the same three passengers in state A, the matter is somewhat simplified by the fact that all passengers have contracts with the defendant carrier and that it has the nationality of state C, which has ratified all three Conventions. These actions, whether based on contract or tort are taken in the state which is the "locus delicti" and the defendant carrier might have no basis whatsoever to seek application of other rules than the Protocol-amended Convention.

One must not overlook, however, the possibility that the second passenger might wish to take advantage of Article 25 of the Warsaw Convention, instead of the amended Article 25 of the Hague Protocol. In this case then, irrespective of the fact that the jurisdiction of the court and the applicable law is clearly determined, the possibility of conflicting state obligations may arise. The foregoing comments regarding conflicts in connection with the actions against the "actual carrier" would again apply.

*Actions Against the "Actual Carrier" in State C.* Whilst such actions may not be frequent, one cannot overlook the possibility.

The question of jurisdiction of state C in such case is not without difficulty. Article 28 of the Warsaw Convention provides that "an action for damages must be brought, at the option of the plaintiff, in the territory of one of the High Contracting Parties, either before the court having jurisdiction where the carrier is ordinarily resident, or has his principal place of business, or has an establishment by which the con-

<sup>19</sup> Oppenheim, I International Law 652 (3d ed. 1920).

<sup>20</sup> Schwarzenberger, *supra* note 7 at 474.

tract has been made, or before the court having jurisdiction at the place of destination."

Article 8 of the Guadalajara Convention extends the jurisdiction at the option of the plaintiff, in addition to the four jurisdictions mentioned above, to the jurisdiction of the place where the "actual carrier" is ordinarily resident or has his principal place of business.

If the "actual carrier" is under the Warsaw Convention and not under the Guadalajara Convention, then under Article 28 he can be sued in the jurisdictions where he is ordinarily resident or has his principal place of business. Presumably, the place where the contract was made or the place of destination will not give jurisdiction to the plaintiff against the "actual carrier." If he is sued under the Guadalajara Convention, the jurisdictions are not limited to the jurisdictions where he can be sued under the Warsaw Convention but extended to all jurisdictions where the "contracting carrier" may be sued.

Not only the question of forum but also the choice of law in this situation may be more involved. It will be remembered that there are various theories under which rights created in a foreign country might be enforced in the jurisdiction of the forum.

In the United States, for instance, under the "obligatio" theory, tort liability is governed by the law of the "place of wrong," i.e., the law of the country where the alleged tort was committed.<sup>21</sup>&<sup>22</sup> The plaintiff owns something and he is helped to get it. This is done unless some sound reason of public policy makes it unwise to do so.<sup>23</sup>

In the United Kingdom a right of action, whether it arise from a contract governed by the law of the place or wrong, is equally the creature of the law of the place and subordinate thereto. The terms of the contract or the character of the subject-matter may show that the parties intended their bargain to be governed by some other law; but prima facie, it falls under the law of the place where it was made. And in like manner the civil liability arising out of a wrong derives its birth from the law of the place, and its character is determined by that law.

As a general rule, in order to found a suit in England for a wrong alleged to have been committed abroad, two conditions must be fulfilled. First, the wrong must be of such a character that it would have been actionable if committed in England . . . Secondly, the act must not have been justifiable by the law of the place where it was done.<sup>24</sup>

With the foregoing in mind it is surmised that the Court in state C

<sup>21</sup> Falconbridge, *Conflict of Laws* 12 (1st ed. 1947).

<sup>22</sup> *Slater v. Mexican Nat'l R.R.* 194 U.S. 120, 126 (1904), Holmes, J. stated:

"But when such a liability is enforced in a jurisdiction foreign to the place of the wrongful act, obviously it does not mean that the act in any degree is subject to the *lex fori*, with regard to either its quality or its consequences. On the other hand, it equally little means that the law of the place of the act is operative outside its own territory. The theory of the foreign suit is that although the act complained of was subject to no law having force in the forum, it gave rise to an obligation, an obligation, which, like other obligations, follows the person, and may be enforced wherever the person may be found . . . But as the only source of this obligation is the law of the place of the act, it follows that that law determines not merely the existence of the obligation . . . but equally determines its extent. It seems to us unjust to allow a plaintiff to come here absolutely depending on the foreign law for the foundation of his case, and yet to deny the defendant the benefit of whatever limitations on his liability that law would impose."

<sup>23</sup> *Cardozo J.*, in *Loucks v. Standard Oil Co. of New York*, 224 N.Y. 99 (1918).

<sup>24</sup> *Philips v. Eyre*, [1879] 6 Q.B. 1.

might apply the law of state A in view of the fact that the contract was made there and the accident occurred there.

It must be remembered that the "actual carrier" carried the passenger between a Protocol state and a Warsaw state, hence by the terms of the Protocol, it would not apply to such carriage. Whether or not the claimant could, on the strength of his contract with the "contracting carrier," bring about the application of the Protocol, would depend on the law of the forum. This is a simple question of conflict between existing laws in the jurisdiction. Only in the event that state C would decide to apply the Protocol would the question of conflicting treaty obligation arise between state B and state C.

*Actions Against The Contracting Carrier in State C.* These actions again have a truly international element in that the tort that is giving rise to the actions is committed in a foreign country (in state A).

First, again the question of jurisdiction would have to be decided and secondly the law applicable to the tort. It may well be that the Court might decide that the proper law is not the law of the forum but the law of another jurisdiction, such as state A, where the contract was made; where the act was committed which has given rise to the action, or the country in which the claimant is or was domiciled. Should this last point be considered by the Court in order to determine the proper law, the nationality of the three passengers might also have a bearing on the issue.

Should the Court decide that the proper law is its own law, then presumably the Guadalajara Convention and the Protocol would apply in view of the fact that the Guadalajara Convention is in force and that the conditions of Article 18 of the Protocol have been met. The same may be the case if the Court should decide that the proper law is the law of state A which also ratified both Conventions. Conflicting treaty obligations could only arise in respect to the second passenger, a citizen of state B, which in this example has not ratified nor adhered to the Hague Protocol and the Guadalajara Convention.

*Actions Against the Actual Carrier in State B.* The fact that these actions are against the carrier which did not enter into contract with the passenger might have a bearing on the outcome of the conflict regarding jurisdiction. The action would presumably be based on tort or delict and not on contract. The *lex loci delicti* might well apply. Otherwise the position of the "Contracting Carrier" and the "Actual Carrier" in state B would be much the same as before the Courts of state B.

The different nationalities of the passengers could not produce a conflict of state obligations since state B, regarding states A and C, has only treaty obligations under the Warsaw Convention.

If there is any conflict, the conflict exists only between various systems of laws within the same jurisdiction and the Courts in state B would be well equipped to deal with such conflict for the purpose of their proper law.

*Actions Against the Contracting Carrier in State B.* If the Court of state B assumes jurisdiction, it might have to determine the proper law. On the basis of its conflicts of law rules it may select the law of state A or B or state C as the proper law. In the first and third instances the Hague Protocol and the Guadalajara Convention might be applicable.

Some theoretical conflicts between state obligations might again be

encountered as soon as the Guadalajara Convention applies, but might be discarded in view of the fact that the Guadalajara Convention will in these circumstances apply only on the basis of the law of the *loci delicti* and not on the basis of the law of the Forum.

If, under its private international law rules, state B should decide that the proper law is its own law, then the difficulties would be more obvious. The carriage in accordance with the contract is a Protocol carriage but in the legal system of state B the only convention that is applicable in the circumstances is the Warsaw Convention.

Even though the delict giving rise to the action was committed in another state, the right of action might be established in accordance with the rules of its own law and the appropriate remedies ensue.<sup>25</sup>

The measure of damages and the liability would be determined as if the act had occurred in state B. If the Warsaw Convention was the law of the land and if the carriage was a Warsaw carriage in accordance with the law of the forum when the Warsaw Rules might apply notwithstanding the fact that state A and state C are both parties to the Protocol and the Guadalajara Convention.

The conflicting treaty obligations presumably could not be invoked by the passengers whose state ratified or adhered to the Protocol and the Guadalajara since the state which has assumed jurisdiction has no other treaty obligations than those under the Warsaw Convention.

In all these cases the difficulties would increase immensely if state A or C, when ratifying the Protocol, had renounced the Warsaw Convention. In the actions taken in states A and C then the question would have to be determined whether or not the Warsaw Convention has any application to the international carriage. The "actual carrier" might find itself without any limitation of liability and the passenger wanting to take advantage of a more convenient jurisdiction might have to establish fault or negligence on the part of the carrier in order to succeed with his claim. The certainty and uniformity heretofore achieved would be lost.

The hypothetical cases reviewed have indicated the theoretical possibilities of:

- (i) Conflicts between the national laws implementing the Warsaw Convention, the Hague Protocol and the Guadalajara Convention, notwithstanding the fact that the first two determine their geographical applications.
- (ii) Conflicting obligations of states arising out of these multilateral treaties to which states have subsequently become parties.

It must be observed, however, that Article 18 of the Protocol will probably avoid the ordinary conflict of law problems between the majority of cases, but the cases of conflicts arising if a state should renounce the Warsaw Convention when ratifying the Protocol, theoretical as they may sound, cannot be overlooked in view of the fact that at least two states<sup>26</sup> are planning to introduce legislation which, in effect, would limit the application of the implementing legislation to Hague Protocol carriage. In other words, the Warsaw Convention, as far as these countries are concerned, might not be in existence. This position, if carried out, will

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<sup>25</sup> *Machado v. Fontes* [1897] 2 Q.B. 231.

<sup>26</sup> Canada and the United Kingdom.

no doubt simplify some conflicts to which reference has been made earlier but will introduce new and more difficult situations.<sup>27</sup>

While, theoretically, conflicting treaty obligations may arise under the Protocol and the Warsaw Convention under the terms of the Guadalajara Convention, it is submitted that they should have little or no practical significance for the following reasons:

- (i) These conflicts are theoretical rather than real.
- (ii) It would be difficult to convince a state to insist that another state should do more under a multilateral international treaty affecting civil rights, than to make it effective in the jurisdiction.
- (iii) It would be equally difficult to seek remedy from a state which ratified a multilateral treaty affecting the civil rights of individuals and created thereby conflict under its own laws.
- (iv) It would be difficult for a state, signatory to a later convention which it has not yet ratified, to insist that another state, which already ratified the convention, is in breach of a previous convention which the parties intended to amend with the subsequent convention.
- (v) It might not be easy to exercise any right under existing treaty obligations because the scope of the courts in the various jurisdictions may not be broad enough to entertain such rights.
- (vi) The applicable private international law rules would satisfactorily resolve any conflicts in most jurisdictions.

In view of the foregoing it is hoped that no state will find it necessary to resort to the renunciation of the Warsaw Convention in connection with the ratification of the Protocol for the purpose of avoiding the theoretical conflicts of state obligations.

International law rules, vague as they are, may explain the lack of precision in this paper. It is hoped that the foregoing casual excursions, notwithstanding the lack of experience of the writer in the complex field of the law of conflicts and international obligations of states regarding private law treaties, will stimulate the thoughts of those who are presently considering the problem of ratification of the Guadalajara Convention or the Hague Protocol and who are troubled by the thoughts of conflicts between treaty obligations and the practical significance of such conflicts.

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<sup>27</sup> Makiewicz, *supra* note 15.