

**HUMAN RIGHTS IN THE SKY:
WEIGHING HUMAN RIGHTS AGAINST THE LAW ON
INTERNATIONAL CARRIAGE BY AIR**

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In order to unify rules on the liability of air carriers, the Convention for the Unification of Certain Rules for International Carriage by Air of 1999 (Montreal Convention) and its predecessor, the Convention for the Unification of Certain Rules Relating to International Carriage by Air of 1929 (Warsaw Convention), embrace a core value known as the exclusivity principle. Under this principle, both Conventions are an exclusive cause of action and preclude other claims which fit in their scope of application. This paper questions how courts understand and interpret the values of human rights when interacting with the exclusivity principle. To answer this question, the paper examines and analyzes case law from three different jurisdictions, namely the United Kingdom, the United States, and Canada, by employing the rules of treaty interpretation under the Vienna Convention on the Law of Treaties. The paper argues that human rights are prone to being downgraded by the law on international carriage by air in these three jurisdictions. By utilizing the rules of treaty interpretation, this paper finds two common approaches which can be applied in these jurisdictions. First, the Warsaw Convention and the Montreal Convention appear to a certain extent to be self-contained because of their exclusivity principle. Second, courts construe the term 'bodily injury' so narrowly that purely emotional damage, which is usually claimed in cases concerning human rights violations, cannot be pursued. Because of these two factors, persons whose human rights were breached when they were on board an aircraft cannot receive any monetary compensation solely for moral damage. In short,

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[†] This paper was presented at the ESIL International Human Rights Law Interest Group Workshop on 6 September 2017 in Naples, Italy. It was later developed and became one part of my PhD dissertation 'The Right to Travel by Air of Persons with Disabilities' defended at Leiden University on 16 November 2017. I truly appreciate all comments from the ESIL IHRL IHG Workshop, Prof. Dr. Pablo Mendes de Leon and Prof. Dr. Aart Hendriks for their supervision. I also thank Mr. Daychathon Wiwaygo for rechecking citation styles.

it seems the exclusivity principle in private international air law carries a higher value than that of human rights law.

Keywords: Montreal Convention of 1999, exclusivity, carriage by air, persons with disabilities, human rights, fragmentation

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I. INTRODUCTION

The fundamental merit of human rights is widely accepted in international law, though their value is debated in relation to their cultural relativism in

some jurisdictions.¹ International tribunals and legal academia have questioned and construed a relationship between human rights and other branches of public international law, such as trade law and environmental law. This paper examines two different branches of international law: human rights law and private international air law, particularly the law governing international carriage by air. The latter mainly focuses on remedial measures for air passengers.

Remedial measures may fall under the Convention for the Unification of Certain Rules Relating to International Carriage by Air of 1929 (Warsaw Convention of 1929),² and the Convention for the Unification of Certain Rules for International Carriage by Air of 1999 (Montreal Convention of 1999),³ which govern the liability of air carriers.⁴ Since there is no international institute to provide a uniform interpretation of both Conventions, this paper questions how national courts understand and interpret the weight of human rights when interacting with laws on international carriage by air.

To answer this question, this paper examines and analyses case law from three different jurisdictions, namely the United Kingdom (UK), the United States (US), and Canada, by employing the rules of treaty interpretation under the Vienna Convention on the Law of Treaties (VCLT). Two selection criteria are adopted. One is based on the functional method of comparative law while proposing *lex ferenda*, that is, comparisons must be 'in the same stage of legal,

¹ See Jack Donnelly, 'Cultural Relativism and Universal Human Rights' (1984) 6 Human Rights Quarterly 400; Fernando R. Tesón, 'International Human Rights and Cultural Relativism' (1984-1985) 25 Virginia Journal of International Law 869.

² Convention for the Unification of Certain Rules Relating to International Transportation by Air (Warsaw, 12 Oct. 1929) T.S. 876 (Warsaw Convention of 1929).

³ Convention for the Unification of Certain Rules for International Carriage by Air (Montreal, 28 May 1999), ICAO Doc 9740 (Montreal Convention of 1999).

⁴ Both Conventions apply to all international carriage of persons, luggage or goods performed by aircraft for reward subject to the condition that the place of departure and the place of destination are situated in the territories of two States Parties or within the territory of a single State Party if there is an agreed stopping place within the territory of another State, even if that State is not a State Party. See Warsaw Convention of 1929 art. 1; Montreal Convention of 1999 art. 1.

political and economic development'.⁵ This functional approach is criticized because of its universal assumption that all societies face the same social problems.⁶ However, this observation provides a strong argument to apply functional comparison in this study since human rights hold universal values.⁷ The other selection criterion is the ratification status of the Convention on the Rights of Persons with Disabilities (CRPD), International Convention on the Elimination of All Forms of Racial Discrimination (CERD), the Warsaw Convention and the Montreal Convention. This is based on the survey of judgements in the selected jurisdictions. Given that most cases concerning human rights and air travel relate to the treatment of persons with disabilities and racial discrimination, these are the relevant instruments that should be analyzed. While aiming to study countries with different ratification statuses, the present author encountered difficulties in the preliminary survey because the level of development in States ratifying neither the Warsaw Convention of 1929 nor the Montreal Convention of 1999⁸ is incomparable to those of other selected jurisdictions, namely, the UK, the US, and Canada. Consequently, comparisons are made between these three countries. While the UK and Canada ratified the CRPD, the CERD and the Montreal Convention, the US has signed only the CRPD but not ratified it.⁹

⁵ Mathias Siems, *Comparative Law* (Cambridge University Press 2014) 27.

⁶ *Ibid* 37.

⁷ There are debates on the universal value of human rights. *See* Donnelly (n 1); Tesón (n 1).

⁸ According to the International Civil Aviation Organization, Antigua and Barbuda, Bhutan, Burundi, Chad, Djibouti, Eritrea, Guinea-Bissau, Haiti, Kiribati, Marshall Islands, Micronesia, Nicaragua, Palua, Saint Kitts and Nevis, San Marino, Sao Tome and Principe, Somalia, South Sudan, Tajikistan, Timor-Leste, and Tuvalu did not ratify the Warsaw Convention of 1929 nor the Montreal Convention of 1999. *See* International Civil Aviation Organization, 'Current lists of parties to multilateral air law treaties' <<http://www.icao.int/secretariat/legal/lists/current%20lists%20of%20parties/allitems.aspx>> accessed 5 September 2018.

⁹ United Nations Treaty Collection, 'Status of the Convention on the Rights of Persons with Disabilities' <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&clang=_en> accessed 25 May 2017; *See* Rochelle Jones, 'U.S. Failure to Ratify the Convention on the Rights of Persons with

The Montreal Convention of 1999 underpins this discussion, due to European Union (EU) Member States, the EU,¹⁰ the US,¹¹ and Canada¹² having ratified this particular Convention,¹³ which thus prevails over the Warsaw Convention of 1929, under the conditions laid down in Article 55 of the Montreal Convention of 1999.¹⁴ Nevertheless, references to the Warsaw

Disabilities' <<http://www.awid.org/news-and-analysis/us-failure-ratify-convention-rights-persons-disabilities>> accessed 13 January 2017.

- ¹⁰ In the EU, the Montreal Convention of 1999 was implemented by Regulation 2027/97, as amended by Regulation 889/2002. Regulation 889/2002 extends the scope of application of the Montreal Convention of 1999 to carriage by air within a single Member State. See Regulation (EC) No 889/2002 of the European Parliament and of the Council of 13 May 2002 amending Council Regulation (EC) No 2027/97 on air carrier liability in the event of accidents [2002] OJ L 140/2-5 art. 1.
- ¹¹ On 5 September 2003, the US was the 30th State to deposit its instrument of ratification of the Montreal Convention of 1999 so the Montreal Convention of 1999 entered into force sixty days later.
- ¹² Canada incorporated the Warsaw Convention of 1929 and the Montreal Convention of 1999 into the Carriage by Air Act. See *Carriage by Air Act*, R.S.C., 1985, c. C-26. However, the CA Agency has the authority to determine the applicability of the principles of the Montreal Convention of 1999 to a domestic tariff provision on a case-by-case basis. See Canadian Transport Agency, Decision No. 313-C-A-2010, (27 June 2010); Decision No. 309-C-A-2010, (21 July 2010); Decision No. 483-C-A-2010, (24 Nov. 2010); Letter Decision No. LET-C-A-129-2011, (2 Dec. 2011); Decision No. 249-C-A-2013, (26 June 2013).
- ¹³ International Civil Aviation Organization (n 8).
- ¹⁴ Montreal Convention of 1999 art. 55.

This Convention shall prevail over any rules which apply to international carriage by air:

1. between States Parties to this Convention by virtue of those States commonly being Party to
 - a) the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929 (hereinafter called the Warsaw Convention);
 - b) the Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929, Done at The Hague on 28 September 1955 (hereinafter called The Hague Protocol);
 - c) 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, signed at Guadalajara on 18 September 1961 (hereinafter called the Guadalajara Convention);

Convention of 1929 are inevitable when its content is relevant to the discussion.

Compensation for the carriage of passengers under the Warsaw Convention of 1929 and the Montreal Convention of 1999 can be divided into two categories: compensation for passengers and compensation for their baggage. This paper deals only with compensation for passengers, due to the relevance of the existing case law to this topic.

Section II outlines how the two Conventions deal with air law. A discussion on how the Conventions interact with human rights law is found in Section III. This interaction is then assessed in Section IV, with proposed solutions provided in Section V. Section VI presents some conclusions.

II. SPECIFIC FEATURES OF THE LAW ON INTERNATIONAL CARRIAGE BY AIR

The Warsaw Convention of 1929 and the Montreal Convention of 1999 aim to establish uniformity in the laws governing liability for air carriers, with the result that the Conventions preclude other claims which fit in the temporal scope of their application. This is known as the exclusivity principle, which will be examined in Section III.1 and Section III.2. Before analyzing the interaction between human rights and the law on international carriage by air, it is helpful to describe the basic structure of both Conventions.

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- d) the Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929 as Amended by the Protocol Done at The Hague on 28 September 1955 Signed at Guatemala City on 8 March 1971 (hereinafter called the Guatemala City Protocol);
 - e) Additional Protocol Nos. 1 to 3 and Montreal Protocol No. 4 to amend the Warsaw Convention as amended by The Hague Protocol or the Warsaw Convention as amended by both The Hague Protocol and the Guatemala City Protocol Signed at Montreal on 25 September 1975 (hereinafter called the Montreal Protocols); or
2. within the territory of any single State Party to this Convention by virtue of that State being Party to one or more of the instruments referred to in sub-paragraphs (a) to (e) above.

I. Temporal Scope

Both Conventions apply to journeys between two Contracting States or within a Contracting State if there is an agreed stopping place within the territory of another State.¹⁵ For a passenger to claim damages, the locational requirement is that an accident takes place 'on board the aircraft or in the course of any of the operations of embarking or disembarking'.¹⁶ The term 'on board the aircraft' is not as debatable as 'in the course of any of the operations of embarking or disembarking'. The US Court of Appeals for the Second Circuit adopted criteria to examine 'embarking' or 'disembarking', namely the activity of passengers at the time of the accident, the air carrier's control or restrictions of movement, the imminence of passengers' actual boarding and the physical proximity to the gate.¹⁷

In the case of persons with disabilities (PWDs), especially those requiring assistance after check-in, control over their own movements may be subject to limitations by airport or airline staff lending assistance at the airport. Case law reveals that the control aspect is not a stand-alone factor in assessing the temporal scope, but courts tend to take other aspects, such as location and type of activity, into account.¹⁸

In *Phillips v. Air New Zealand Ltd.*, the case involved personal damage to a person in a wheelchair on a moving escalator on the way to the departure gate.¹⁹ The UK Queen's Bench Division adjudicated that there might be a number of operations of embarkation and the process of embarkation did not

¹⁵ Warsaw Convention of 1929, art. 1; Montreal Convention of 1999, art. 1.

¹⁶ Warsaw Convention of 1929, art. 17; Montreal Convention of 1999, art. 17(1).

¹⁷ *Day v Trans World Airlines Inc.* 528 F.2d 31 (1975).

¹⁸ *Dick v American Airlines, Inc.* 476 F.Supp.2d 61; *Pacitti v Delta Air Lines Inc.* Not Reported in F.Supp.2d (2008), the plaintiff fell down from a wheelchair between Gates 3 and 4 approximately ninety to ninety-five yards away from Gate 9. The Court decided that the case happened in a common area of the terminal used by various airlines for both domestic and international flights, and was not engaged in an activity that was imposed by Delta as a condition of embarkation; *Fazio v Northwest Airlines Inc.* Not Reported in F.Supp.2d (2004), the defendant breached the contract by failing to provide wheelchair within an airport so the plaintiff's husband suffered a serious and significant fall and injury in the course of trying to transport himself through the terminal. The injury happened during an operation of embarking.

¹⁹ *Phillips v Air New Zealand Ltd* [2002] C.L.C. 1199 (2002) para. 1.

have to be a continuous one, so embarkation is not limited to a point close to a departure gate, but can include other points such as security checks.²⁰ The same holds true in cases of disembarkation. A passenger who falls in a corridor in the terminal while being escorted by airline staff to the customs area is in the course of disembarkation.²¹ However, it is inconclusive, since case law interprets differently whether an injury to a wheelchair user during a transfer from one gate to another gate falls within the category of embarkation.²² When an incident happens outside the temporal scope, such as a passenger being refused to check-in²³ or a passenger whose ticket has been cancelled,²⁴ passengers can claim under local laws. On this basis, in order to escape from the temporal scope, it might be argued that a violation of human rights occurring within the temporal scope can be traced back to a poorly-executed operation or miscommunication during the booking stage, check-in or any period before the applicable temporal scope. For example, a PWD whose hip broke during a transfer from a wheelchair to a seat on board by a flight attendant may argue that it resulted from a lack of training or from the management of the airline, which is not a part of the embarkation process. In my view, if a court finds this argument reasonable, then the

²⁰ Ibid.

²¹ *Lyons v American Trans Air Inc.* [1996] 647 N.Y.S. 2d 845; *Gabra v Egyptair* [2000] 27 Avi. 18, 119 cited in George N. Tompkins, Jr., 'Liability Rules Applicable to International Air Transportation as Developed by the Courts in the United States' [2010] Kluwer Law International 190.

²² *Dick* (n 18), a person who was injured during transfer from an arrival gate to a departure gate is not strictly involved in the physical activity of getting on the aircraft. Such a person can make a negligence claim under domestic law. See *Seidenfaden v British Airways* [1984] 83-5540 cited in *The Twentieth Annual Journal of Air Law and Commerce Air Law Symposium*, A-18. <http://smulawreview.law.smu.edu/getattachment/Symposia/Air-Law/Collected-Air-Law-Symposium-Papers/Complete_Volume_1986.pdf> accessed 13 Jan. 2017, a passenger injured while being pushed in a wheelchair by personnel employed by the carrier to another terminal for purposes of departing on a domestic flight is in the course of the operations of embarking or disembarking; *Moss v Delta Airlines Inc. et al.* [2006] No. 1-04-CV-3124-JOF, falling down from a wheelchair van was in the process of disembarkation.

²³ *Aquino v Asiana Airlines Inc* [2003] 105 Cal.App.4th 1272.

²⁴ Canadian Transport Agency [1998] Decision No. 170-AT-A-1998 Compensation is granted to a passenger who was refused to be carried on an international flight.

purpose of achieving uniformity of the two Conventions would be jeopardized. This reasoning is rightly affirmed by the Supreme Courts of the UK and Canada, both of which focus on the time when the accident occurred.²⁵ The subsequent question as to whether or not an injured person can claim compensation under local law or human rights law will be discussed in Section III.

2. Substantive Scope

Where passengers are concerned, the Warsaw Convention of 1929 and the Montreal Convention of 1999 cover an 'accident' which happened within the above-mentioned temporal scope. Neither Convention defines the term 'accident'.²⁶ In *Air France v. Saks*,²⁷ the US Supreme Court interpreted Article 17 of the Warsaw Convention of 1929 and held that injury itself cannot be an accident; rather, an accident must be 'an unexpected or unusual event or happening that is external to the passenger' and 'should be flexibly applied after assessment of all the circumstances surrounding a passenger's injuries'.²⁸ Hence, Saks, the respondent who became deaf in one ear after a normal operation of the aircraft, was unable to claim under this provision since the aircraft pressurization system had operated in a normal manner. Her loss of hearing resulted from her own internal reaction to the usual, normal and expected operation of the aircraft, which therefore could not be constituted as an accident.

The phrase 'external to the passenger' raises issues concerning human rights violations since one might imagine that human rights are 'internal to the passenger'. For example, can racial profiling be considered 'external to the passenger'? The plaintiffs in cases concerning racial discrimination on board, such as *Gibbs v. American Airlines Inc.*²⁹ and *King v. American Airline Inc. et al.*,³⁰ did not argue that having their human rights violated was 'external' to

²⁵ *Stott v Thomas Cook Tour Operators Ltd* [2014] UKSC 15 para. 60; *Thibodeau v Air Canada* [2014] SCC 67 paras 83-85.

²⁶ Warsaw Convention of 1929 art. 17; Montreal Convention of 1999 art. 17(1).

²⁷ *Air France v Saks* 470 U.S. 392 405 (1985).

²⁸ *Ibid.*

²⁹ *Gibbs v American Airlines* 191 F.Supp.2d 144 (2002).

³⁰ *King v American Airline Inc. et al* 284 F.3d 352 (2002).

themselves; rather, they argued that the whole Warsaw Convention as a whole did not apply to discrimination claims. Because they made claims under the Civil Rights Act of 1866 or Section 1981 (statutory discrimination), the US courts dismissed both cases without addressing whether 'race' can be encompassed within the definition of 'accident'.

In relation to disability rights, a combination of normal operation of an aircraft with an impairment of a PWD may trigger an injury solely to a PWD. This is the reason that special adjustments are made in order to meet PWDs' needs. However, when there is an injury to a PWD, can an air carrier argue that it is due to a PWD's impairment and thus outside the meaning of 'accident'? The issue of external factors was raised at the Montreal Conference drafting the Montreal Convention of 1999. In Article 16 of the draft text, later forming Article 17 of the Montreal Convention of 1999, the last sentence of Article 16 excludes air carrier's liability from any injury due to the passenger's health: 'the carrier is not liable if the death or injury resulted solely from the state of health of the passenger'.³¹ However, this text was opposed by delegates from Norway and Sweden because the text was detrimental to PWDs and contrary to the draft's objective to protect consumers.³² Hence, this sentence was deleted. Yet if the *Saks* interpretation were strictly adhered to, PWDs would not be able to claim for an injury.³³

Almost twenty years after *Saks*, the US Supreme Court re-interpreted the phrase 'external to the passenger' under the same Warsaw Convention of 1929. In *Olympic Airways v. Husain*, Abib Hanson, who was allergic to smoke, and his wife, Rubina Husain, asked to be seated far away from the smoking section, but a flight attendant repeatedly refused, even though there were free seats available.³⁴ Two hours into the flight, Hanson fell ill and later he passed away. The US Supreme Court expanded the meaning of 'accident' and

³¹ ICAO, 'International Conference on Air Law' (ICAO Doc 9775 Vol. II, Montreal, May 1999) 18.

³² ICAO, 'International Conference on Air Law' (ICAO Doc 9775 Vol. I, Montreal, May 1999) 86.

³³ See *Hipolito v Northwest Airlines Inc.* 15 Fed.Appx. 109 (2001). An asthma attack was not considered an accident as it was not caused by an event external to a passenger. The airline's failure to provide a full bottle of oxygen is not considered an external, unusual event.

³⁴ *Olympic Airways v Husain* [2004] 540 U.S. 644.

concluded that the inaction of a flight attendant could be considered as one of the injury-producing events that constitute an accident.³⁵ Although the causes of death in *Husain* and loss of hearing in *Saks* are both internal to the passengers, *Husain* differs from *Saks* in that a flight attendant's repeated refusal in *Husain* was considered an unexpected and unusual event. In light of industry standards, in *Husain* this was treated as an external factor, while there was no unexpected external factor in *Saks*.

The broad interpretation of 'accident' in *Husain* is not free from controversy, however. In his dissenting opinion, the late Justice Scalia relied on the uniformity of law and argued against the majority view on the basis that the reasoning that an inaction cannot be an accident deviates from the interpretation in other jurisdictions.³⁶ Similarly, Dempsey finds *Husain*'s holding troubling for airlines.³⁷ When the reasoning in *Husain* is applied to the case governed by the Montreal Convention of 1999, a strict liability regime, air carriers have to insure higher amounts for compensation to passengers.³⁸ On a positive note, the insertion of duty of care encourages air carriers to keep up with industry standards,³⁹ and invest in training cabin crews.⁴⁰

³⁵ Ibid. Other cases concerning smoking on board were not brought under the Warsaw Convention of 1929. In Australia, Qantas Airways Limited was sued under the Trade Practices Act 1974. See *Leonie Cameron v Qantas Airways Limited* [1995] FCA 1304; (1995) Atp 41-417 (1995) 55 FCR 147. In the US, the Supreme Court of Iowa decided on a State law since the dispute happened in a domestic route. See *Ravreby v. United Airlines Inc* [1980] 293 N.W.2d 260.

³⁶ *Husain*, ibid 663. See *Deep Vein Thrombosis and Air Travel Group Litigation* [2003] EWCA Civ. 1005; *Qantas Ltd. v. Povey* [2003] VSCA 227.

³⁷ Paul Stephen Dempsey, 'Olympic Airways v. Husain: The US Supreme Court Gives the Term 'Accident' a Whole New Meaning' [2003] *Annals of Air and Space Law* 333, 341.

³⁸ Andrei Ciobanu, 'Saving the Airlines: A Narrower Interpretation of the Term "Accident" in Article 17 of the Montreal Convention' [2006] *Annals of Air and Space Law* 1, 25.

³⁹ Ann Cornett, 'Air Carrier Liability under Warsaw: The Ninth Circuit Holds that Aircraft Personnel's Failure to Act in the Face of Known Risk is an "Accident" When Determining Warsaw Liability – Husain v. Olympic Airways' [2003] *Journal of Air Law and Commerce* 163, 169.

⁴⁰ George Leloudas, *Risk and Liability in Air Law*, (1st sup, Informa law 2009) 119.

In relation to cases concerning PWDs, although the *Husain* case does not apparently involve disability,⁴¹ its reasoning of assessing an unexpected and unusual event in relation to industry standards can be applied to cases involving PWDs. As evidenced in judgments rendered by lower courts in the US and Canada, if an air carrier has the duties both to provide accessible travel and not to discriminate against PWDs, the air carrier's inaction or failure to provide accessible travel for a PWD will constitute an accident.⁴² Yet when an air carrier is not legally bound to provide accommodation for PWDs, not doing so does not constitute an accident.⁴³

III. INTERACTION BETWEEN THE LAW ON INTERNATIONAL CARRIAGE BY AIR AND HUMAN RIGHTS LAW

A question occurs when a human rights claim, which happens within the temporal scope of the Warsaw Convention of 1929 or the Montreal

⁴¹ In Canada, the Canadian Transportation Agency ruled that allergy can constitute a disability but there is no similar approach in the US. See *Canadian Transportation Agency* (File No.: U3570-15) Decision No. 4-AT-A-2010 [2010], (6 Jan. 2010); *Canadian Transportation Agency* (File No.: U3570/08-47) Decision No. 134-AT-A-2013 [2013], *Canadian Transportation Agency* (File No. U3570/01-43) Decision No. 335-AT-A-2007 [2007] paras 28-35.

⁴² See *McCaskey v Continental Airlines Inc.* 159 F. Supp. 2d 562 (S.D. Tex. 2001), in which the lack of crew training and responsiveness after the onset of a stroke was considered an accident; *Prescod v AMR* [2004] 383 F.3d 861 868 (9th Cir. 2004), in which an air carrier's failure to comply with a health-based request also constituted an accident under the Warsaw Convention of 1929; *Bunis v Israir GSA Inc.* 511 F.Supp.2d 319 (2007), in which failure to provide a wheelchair as requested was taken as an unusual or unexpected event; *Balani v Lufthansa German Airlines Corp* [2010] ONSC 3003 (CanLII) (2010), in which failure to provide a wheelchair as requested by a passenger who later fell constituted an accident.

⁴³ *Dogbe v Delta Air Lines Inc.* 969 F.Supp.2d 261 (E.D.N.Y. 2013) 272, in which an air carrier was not obligated to allow a plaintiff to sit in the empty seat even if the plaintiff's leg pain constituted a disability because no law prescribes such a duty; *Timb Thi Nguyen v Korean Air Lines Co Ltd* 807 F.3d 133 (2015), in which an air carrier did not refuse a wheelchair request and an air carrier was not required to give personalized instructions in passenger's native language. The airline's failure to identify a passenger as a wheelchair passenger did not constitute an unexpected or unusual event constituting an accident under the Warsaw Convention of 1929.

Convention of 1999, does not fall within the substantive scope of either Convention: can a plaintiff sue under a human rights law instead?

1. Law on International Carriage by Air versus Domestic Human Rights Law

The exclusivity principle is designed to take priority over any action for damage under any other law if an individual is able to establish recourse within the temporal and substantive scope of either the Warsaw Convention of 1929 or the Montreal Convention of 1999.⁴⁴

In *Stott v. Thomas Cook Tour Operators Ltd.*,⁴⁵ the plaintiff claimed damages for discomfort and injury to feelings by a breach of the UK Disability Regulations, which implemented EU Regulation (EC) No. 1107/2006 of the European Parliament and of the Council of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air, whose objective is to ensure the equal right of PWDs to free movement, freedom of choice and non-discrimination. There was no dispute that the defendant breached its obligations to accommodate a seat as requested by the plaintiff, who was a permanent wheelchair user. Since the plaintiff's alleged injury occurred on board an aircraft, the defendant argued that the exclusivity principle in the Montreal Convention of 1999 pre-empted this claim.⁴⁶ The UK Supreme Court examined cases dealing with this principle in the UK and other jurisdictions and regrettably affirmed that the plaintiff's claim under the UK Disability Regulations was barred since the case happened within a temporal scope of the Montreal Convention of 1999.⁴⁷ In short, the uniformity of liability of air carriers under international law was given greater weight than the human rights claim.

Not only are the rights of PWDs under domestic law pre-empted by the Conventions, but other rights recognized in domestic law, even if omitted from the Conventions are also precluded. These include protection against racial discrimination in *King* and *Gibbs* in the US⁴⁸ and language rights in

⁴⁴ Warsaw Convention of 1929 art. 24; Montreal Convention of 1999 art. 29.

⁴⁵ *Stott* (n 25).

⁴⁶ *Ibid* para 60.

⁴⁷ *Ibid* para 61.

⁴⁸ *Gibbs* (n 29); *King* (n 30).

Thibodeau v. Air Canada.⁴⁹ All of these assertions are based on domestic law and so should not be interpreted as conflicting with a state's obligations under international law, in this case the Warsaw Convention of 1929 or the Montreal Convention of 1999.⁵⁰ In short, a review of case law in the UK, the US, and Canada yields a negative answer to the question whether a plaintiff can make a human rights law claim for an incident which occurs within the temporal scope of the Warsaw Convention or the Montreal Convention because of the exclusivity principle.⁵¹

2. *Law on International Carriage by Air versus International Human Rights Law*

One may argue that since the plaintiffs in the cases mentioned in Section III.1 above had not invoked international human rights law before domestic courts, the cases were pre-empted by international conventions on air law. In *Sidhu v. British Airways Plc.*,⁵² the plaintiff based her argument on the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), but this was rebutted because not all parties to the Warsaw Convention of 1929 are also party to the ECHR. Despite there being no reference to the VCLT, the House of Lords ruled that the treaty capable of becoming 'relevant rules of international law' for interpretation must be applicable between all of the parties to the Warsaw Convention of 1929.

As a consequence, one might ask if the holding would have been different had the claim in *Stott* been based on the CRPD. The answer will be as same as one in *Sidhu*, since the parties to the CRPD are not the same parties to the Montreal Convention of 1999.⁵³

⁴⁹ *Thibodeau* (n 25).

⁵⁰ Vienna Convention on the Law of Treaties (Vienna, 23 May 1969) 1155 U.N.T.S. 331 (VCLT) art. 27.

⁵¹ See *Sidhu v British Airways Plc.* [1997] AC 430; *El Al Israel Airlines Ltd. v Tsui Yuan Tseng* 525 US 155 (1999); *Thibodeau* (n 25); George N. Tompkins, Jr., 'Summary of MC99 Judicial Updates 2013' [2014] Air & Space Law 91, 92.

⁵² *Sidhu* (n 51).

⁵³ For example, the US, Ireland, Tonga, Belarus, etc. signed the CRPD but ratified the Montreal Convention of 1999. Botswana and Equatorial Guinea did not sign the CRPD but ratified the Montreal Convention of 1999. United Nations Treaty Collection (n 9); International Civil Aviation Organization (n 8).

If a claim were to be based on a peremptory norm would it produce a different result because all states would be bound by this obligation? No case has ever challenged the exclusivity principle by raising a peremptory norm as another competing value. However, Lady Hale noted in *Stott* that protection against racial discrimination, as a peremptory norm, voids any conflicting provision in any treaty.⁵⁴ Even though a central basis of the claim in *King* was racial discrimination, the plaintiff's argument was based on domestic law, despite protection from racial discrimination being a peremptory norm.⁵⁵

This obligation binds a state as an actor under international law⁵⁶ so Lady Hale extended it only to State airlines.⁵⁷ While her *obiter dictum* provides a solution to racial discrimination on the part of State airlines, it creates different results for other types of discrimination, as well as for alleged racial discrimination on the part of private airlines.⁵⁸

In relation to transport, the Committee on the Rights of the Child (CRC Committee) expressly affirms States' obligations even when transport services are privatized.⁵⁹ Lady Hale's *obiter dictum* also contradicts the views rendered by all UN human rights treaty bodies concerning private-sector

⁵⁴ *Stott* (n 25) para 68.

⁵⁵ *King* (n 30); see also *Gibbs* (n 25). Both cases happened after the International Court of Justice ruled in 1970 that protection from racial discrimination is an obligation *erga omnes*.

⁵⁶ *Barcelona Traction, Light and Power Company Limited (New Application: 1962) (Belgium v. Spain)*, Judgment, I.C.J. Rep. 1970 (5 Feb. 1970) paras 33-34.

⁵⁷ *Stott* (n 25) para 70.

⁵⁸ Mark Andrew Glynn, 'Case Comment *Stott v. Thomas Cook Tour Operators Ltd* [2014] UKSC 15 & *Thibodeau v. Air Canada* [2014] SCC 67' [2014] *Air & Space Law* 683 at 692.

⁵⁹ Committee on the Rights of the Child, General Comment 16, State obligations regarding the impact of the business sector on children's rights (Sixty-second session, 2013), U.N. Doc. CRC/C/GC/16 paras 15, 33. For the argument on human rights obligation of States when a public function is privatized in the case of the UK, Palmer gives examples of cases in the UK arguing that governments should not contract out human rights obligations by privatization. See Stephanie Palmer, *Privatization and Human Rights in the United Kingdom* in Tsvi Kahana and Anat Scolnicov (eds) *Boundaries of State, Boundaries of Rights: Human Rights, Private Actors, and Positive Obligations* (Cambridge University Press 2016) 233.

discrimination.⁶⁰ The opinion of the Committee on the Elimination of Racial Discrimination (CERD Committee) is that the protection from racially discriminatory practices obliges States to adopt measures to inhibit such acts by private entities.⁶¹ Thus, applying the CERD Committee's viewpoint to Lady Hale's *dictum*, a state must prevent private entities, in this case, air carriers and their agents, from carrying out actions that result in racial discrimination. However, no other instances are known of cases decided by a national court where the fundamental value of human rights in relation to air transport was upheld.

3. Monetary Compensation

Both the Warsaw Convention of 1929 and the Montreal Convention of 1999 allow for compensation for 'bodily injury'.⁶² In light of the term 'bodily', it needs to be established whether purely emotional distress is compensable when not connected to a strict interpretation of bodily injury.

Mental injury may have been excluded in the early days of the commercial airline industry in order to protect the new industry from being sued without any liability limit.⁶³ The Chairman of the First Meeting of the Montreal Conference acknowledged that pure psychological injury had not been contemplated during the drafting history of the Warsaw Convention of 1929.⁶⁴

The courts in the UK and the US follow the interpretation of this term under the Warsaw Convention of 1929, meaning that a passenger is unable to claim compensation for purely emotional distress resulting from a violation of their

⁶⁰ Wouter Vandenhoe, *Non-discrimination and Equality in the View of the UN Human Rights Treaty Bodies* (1st sup, Intersentia 2005) 85, 213, 230, 246; Committee on the Rights of Persons with Disabilities, *Nyusti and Takács v. Hungary* (Communication no.1/2010) CRPD/C/9/D/1/2010.

⁶¹ Committee; 'the Elimination of Racial Discrimination, General Recommendation XXVII, Discrimination against Roma' (Fifty-seventh session, 2000) U.N. Doc. A/55/18 Annex V paras 12-16.

⁶² Warsaw Convention of 1929, art. 17; Montreal Convention of 1999, art. 17.

⁶³ Andrew Field, *Air Travel, Accidents and Injuries: Why the New Montreal Convention is Already Outdated*, 28 Dalhousie Law Journal 69, 96 (2005).

⁶⁴ ICAO (n 32) 110.

human rights.⁶⁵ In other words, even though courts interpret 'accident' as covering an air carrier's failure to comply with human rights law, 'stand-alone' mental anguish is non-compensable.

The Montreal Conference charged with drafting the Montreal Convention of 1999 differed from the drafting process of the Warsaw Convention of 1929 because the delegates at the former acknowledged the possible exclusion of purely emotional injury by use of the expression 'bodily injury'. Concerns about mental injury, and possible claims arising from discrimination, were raised by the delegate of Namibia, who relied on constitutional guarantees of non-discrimination on the basis *inter alia* of status, asking whether this exclusion would be constitutionally permissible in a number of jurisdictions.⁶⁶ In the end, the Montreal Conference conceded that, under certain circumstances, some States included damages for mental injuries under the 'bodily injury' umbrella, and that 'jurisprudence in this area is developing'.⁶⁷

The courts in *Stott* and *Thibodeau* followed the reasoning emanating from *King*, which was decided under the Warsaw Convention of 1929, and all concurred that there are other possible means of enforcement.⁶⁸ In *Stott*, Thomas Cook avoided prosecution but the firm was guilty of an offence carrying a fine not exceeding 5,000 pounds sterling (approx. 5,525 Euros).⁶⁹ Similarly, in *Thibodeau*, Air Canada failed to provide on-board services in

⁶⁵ See *Morris v KLM Royal Dutch Airlines* [2002] UKHL 7; *Eastern Airlines Inc. v Floyd* 499 U.S. 530 (1991); George N. Tompkins, Jr., 'Summary of MC99 Judicial Decisions 2012' [2013] Air & Space Law 123, 133; George N. Tompkins, Jr., '2015 Summary of MC99 Court Decisions' [2016] Air & Space Law 129, 134.

The Advocate General in *Simone Leitner v TUI Deutschland GmbH & Co KG*, reviewed the term 'damage' in the Warsaw Convention of 1929 including other international conventions on transport to support the claim on compensation for non-material damage from the Package Travel Directive and opined that the Warsaw Convention of 1929 does not preclude non-material damage. It is uncertain whether the Advocate General intended to cover purely emotional distress or not since the plaintiff in the case suffered physical injury too. See Case C-168/00 *Simone Leitner v TUI Deutschland GmbH & Co KG* [2001] ECR, I-2631, Opinion of Advocate General Tizzano para 39.

⁶⁶ ICAO (n 32) 72.

⁶⁷ *Ibid* 243.

⁶⁸ *Stott* (n 25) para 64; *Thibodeau* (n 25) paras 110, 132; *King* (n 30) para 38.

⁶⁹ *Stott* (n 25) para 12.

French, but the majority ruling granted no financial compensation for moral damage under the quasi-constitutional Official Language Act. In this five-to-two decision, the majority observed that overlapping remedial provisions between the Official Language Act and the Montreal Convention of 1999 did not conflict, since they had different purposes and aspects.⁷⁰ Moreover, the majority were of the opinion that an appropriate and just remedy must not violate Canada's international obligations, i.e. the Montreal Convention of 1999, to the effect that the declaration, apology, and cost of the application without monetary compensation must be commensurate with appropriate and just remedies.⁷¹ In sum, the US, the UK, and Canada do not view the lack of monetary compensation as unfair towards passengers whose human rights are breached by air carriers and where the violation results in mental injury only.

According to the CERD's reasoning in *L.A. et al. v. Slovakia.*, a case concerning whether a letter of apology alone, without monetary compensation for diminution of human dignity, constituted an effective remedy, determination of remedial measures is a matter of national law, unless the national decision is manifestly arbitrary or amounts to a denial of justice.⁷² The *Thibodeau* judgment follows to the letter the line of reasoning in *L.A.* in respect of awarding other remedial measures. However, it appears that both *Stott* and *Thibodeau* follow the judgments under the Warsaw Convention of 1929 and disregard the conclusion at the Montreal Conference that the term 'bodily injury' is open to development.

⁷⁰ *Thibodeau* (n 25) paras 98-100.

⁷¹ *Ibid* paras 110, 132.

⁷² Committee on the Elimination of Racial Discrimination, *L.A. et al. v. Slovakia* (Communication no. 49/2011) U.N. Doc. CERD/C/85/D/49/2011 para 7.1.

IV. ASSESSMENT

It is accepted by distinguished legal scholars⁷³ and practitioners⁷⁴ that the problem of fragmentation in international law is overstated. No regime is self-contained, since general international law is applicable for treaty interpretation.⁷⁵ Moreover, the method used in treaty interpretation is not fragmented, at least as far as international tribunals are concerned.⁷⁶ Nevertheless, from Section III above, it appears that the Warsaw Convention of 1929 and the Montreal Convention of 1999 are likely to an extent to be self-contained as a result of their exclusivity principle. Moreover, since courts are known to narrowly construe the term 'bodily injury', claims for purely emotional damage cannot be pursued, given that they are mostly argued within cases alleging human rights violations.

Remarkably, international conventions and legislation for other modes of transportation adopt the expression 'personal injury' instead of 'bodily injury', so their scope is broader than that of air transport.⁷⁷ Attempts to

⁷³ Martti Koskenniemi, 'The case for Comparative International Law' [2009] Finnish Yearbook of International Law 1, 5; James Crawford, *International Law as an Open System: Selected Essays* (Cameron 2002).

⁷⁴ Bruno Simma, 'Universality of International Law from the Perspective of a Practitioner, [2009] European Journal of International Law 265, 289; Declaration of Judge Greenwood, *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Compensation, Judgment, I.C.J. Rep. 2012 394, para 8.

⁷⁵ International Law Commission, *Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission, Finalized by Martti Koskenniemi*, A/CN.4/L.682 (13 Apr. 2006) para. 192; Bruno Simma and Dirk Pulkowski, 'Of Planets and the Universe: Self-contained Regimes in International Law' [2006] European Journal of International Law 483.

⁷⁶ Eirik Bjorge, *The Convergence of the Methods of Treaty Interpretation: Different Regimes, Different Method of Interpretation?*, 533 in Mads Andenas (ed), *A Farewell to Fragmentation Reassertion and Convergence in International Law* (Cambridge University Press 2015).

⁷⁷ See Athens Convention relating to the Carriage of Passengers and Their Luggage by Sea, (Athens, 13 Dec. 1974) (Athens Convention); Protocol of 2002 to the Athens Convention Relating to the Carriage of Passengers and Their Luggage by Sea, 1974 (1 Nov. 2002), art. 3; Convention concerning International Carriage by Rail, (3 June 1999), Uniform Rules concerning the Contract of International Carriage of

modify the term to 'personal injury' in order to encompass mental injury, such as the Guatemala City Protocol of 1971, were not successful.⁷⁸ The account of the Rapporteur on the Modernization and Consolidation of the Warsaw System supports the notion that claims for discrimination would be allowed under 'personal injury' and that states are reluctant to adopt this term because of its implications:

The expression 'personal injury' would open the door to non-physical personal injuries such as slander, libel, *discrimination*, fear, fright and apprehension and this would clearly be neither desirable nor acceptable.⁷⁹

The argument is that States can exercise their margin of appreciation on remedial measures in order to exercise their discretion. The first condition is that there should be several measures available from which to choose. Though measures to prohibit discrimination and measures to ensure enforcement or an effective remedy may overlap, they are not identical. Penalties can consist of a remedial measure and an enforcement mechanism. On the other hand, raising awareness prevents discrimination but does not deal with remedies directly. Invariably, exclusion of purely emotional damage under the Montreal Convention of 1999 also means that States, courts or other competent bodies cannot exercise discretion in selecting financial

Passengers by Rail, Appendix A, art. 26 (COTIF); Regulation (EU) No 181/2011 of the European Parliament and of the Council of 16 February 2011 concerning the rights of passengers in bus and coach transport and amending Regulation (EC) No 2006/2004 OJ L 55, 28.02.2011 1–12, art. 7. The House of Lords in *King v Bristow Helicopters Ltd.* compared this term in the Warsaw Convention of 1929 and in the COTIF. See *King v Bristow Helicopters Ltd.* [2002] UKHL 7 para. 17.

⁷⁸ Bin Cheng, 'A New Era in the Law of International Carriage by Air: From Warsaw (1929) to Montreal (1999)' [2004] *International and Comparative Law Quarterly* 833, 850; Michael Milde, 'The Warsaw System of Liability in International Carriage by Air: History, Merits and Flaws... and the New "non-Warsaw" Convention of 28 May 1999' (1999) 24 *Annals of Air and Space Law* 155, 177; Thomas J. Whalen, 'The New Warsaw Convention: The Montreal Convention' (2000) 25 *Air & Space Law* 12, 17; Pablo Mendes De Leon & Werner Eyskens, 'The Montreal Convention: Analysis of Some Aspects of the Attempted Modernization and Consolidation of the Warsaw System' (2000–2001) 66 *Journal of Air Law and Commerce* 1155, 1167.

⁷⁹ ICAO, '*International Conference on Air Law*' (ICAO Doc 9775 Vol. III Montreal, May 1999) 65. Emphasis added.

compensation for moral damage, regardless of the level of damage, distress or discrimination suffered by PWDs.

Monetary compensation for moral damage is lacking because other possible remedies for victims of human rights violations can be found under administrative mechanisms and, therefore, no monetary compensation is provided. Moreover, even though the preclusion of compensation for moral damage neutrally applies to all passengers, damage stemming from failure to reach accessibility standards, or arguing for non-discrimination on the basis of disability, may be the cause of emotional distress without any bodily injury.⁸⁰ Accordingly, it is legitimate to question whether a law lacking compensation for moral damage, and a preclusion of claims under other laws, is capable of ensuring effective remedy and whether this *status quo* equals discrimination or denial of justice.

The objective of the Montreal Convention of 1999 shifts from the Warsaw Convention of 1929 to protecting consumer and ensuring equitable compensation based on the principle of restitution.⁸¹ An indication in the *travaux préparatoires* that an interpretation of the term 'bodily injury' is open for further development means that courts can take subsequent technical, economic or legal developments into account and that it is a state obligation to develop a meaning.⁸² Thus, it appears that the exclusion of moral damage from human rights violation claims is an issue of treaty interpretation rather than of the treaty drafting itself.

V. POSSIBLE SOLUTIONS TO PROVIDE AN EFFECTIVE REMEDY

In *Turturro v. Continental Airlines*, concerning the exclusion of a private claim under the Air Carrier Access Act, a US domestic law to prohibit discrimination on the basis of disability in air travel, by the Warsaw Convention of 1929, the US Southern District of New York Court opined that

⁸⁰ See *Stott* (n 25).

⁸¹ Montreal Convention of 1999, Preamble; Whalen (n 78) 14.

⁸² International Law Commission, *Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission. A/CN.4/L.702 (18 July 2006) para 23.

The Convention massively curtails damage awards for victims of horrible acts such as terrorism; the fact that the Convention also abridges recovery for the lesser offense of discrimination should not surprise anyone.⁸³

This Section presents and appraises several possible solutions applicable for moral damage caused to PWDs proposed by states, judges, scholars, and different stakeholders, in addition to the present author.

1. Confining the Exclusivity Principle

As the exclusivity principle aims to provide uniform rules on the liability of air carriers, it is necessary to maintain this provision in the self-contained Montreal Convention of 1999. Nonetheless, the issues of consumer protection and human rights protection raise the question of how to properly interpret Article 29 of the Montreal Convention, given that both *Sidhu* and *Tseng* were decided under the earlier Warsaw Convention and their reasoning was followed by the courts in *Stott* and *Thibodeau*.

One proposal is to weaken the exclusivity and permit a co-occurrence of claims within the scope of the Montreal Convention.⁸⁴ This proposal is in line with an interpretation of the Montreal Convention by the Court of Justice of the European Union⁸⁵ and certain lower courts in the US.⁸⁶ The latter

⁸³ *Turturro v. Continental Airlines*, 128 F. Supp. 2d 170 (S.D.N.Y. 2001).

⁸⁴ Ingrid Koning, 'The Disabling of the EC Disability Regulation: *Stott v. Thomas Cook Tour Operators Ltd in the Light of the Exclusivity Doctrine*' (2014) 22 *European Review of Private Law* 769, 785-786.

⁸⁵ The then ECJ in *IATA and ELFAA v. Department of Transport* concluded that remedial measures for flight delay in Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91 (Regulation 261) were not precluded by the Montreal Convention of 1999. According to a line of cases, there are two types of damage: standardized damage and individual damage in case of flight delay. The former was common to all passengers and mentioned in Regulation 261, while the latter was governed by the Montreal Convention of 1999.

⁸⁶ See *Constantino v Continental Airlines, Inc.*, Not Reported in F.Supp.2d (2014); *Summary of MC99 Judicial Decisions 2012* (n 65) 137; *Summary of MC99 Judicial Updates 2013* (n 51) 91-92, 96; George N. Tompkins, Jr., '2014 Summary of MC99 Court Decisions' (2015) 40 *Air & Space Law* 147, 158-160.

distinguish Article 29 of the Montreal Convention from Article 24 of the Warsaw Convention because the former contains the following clause:

In the carriage of passengers, baggage and cargo, *any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise*, can only be brought subject to the conditions and such limits of liability as are set out in this Convention...⁸⁷

These US lower courts differentiate the Montreal Convention from the Warsaw Convention by interpreting the clause 'any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise' to mean 'partial preemption'. They allow a plaintiff to claim under any state law subject to the Convention's limitations on liability if a plaintiff successfully establishes liability set forth by the Convention.⁸⁸

This reasoning is followed in *Adler et al v. WestJet Airlines, Ltd.*, decided only four months after *Stott*. The US District Court for the Southern District of Florida found that the Adlers, who were removed from a plane because a flight attendant felt uncomfortable with their service animal, could file a state-law claim for humiliation provided their claim fell within the scope of the Montreal Convention.⁸⁹ In this case, the US District Court referred neither to the CRPD, owing to non-ratification of the CRPD by the US, nor to any human rights norms.

Clearly, the criticism that the total preemption is too broad⁹⁰ can be reduced by this partial preemption. In *Tseng*, Justice Ginsburg argued that if there were no preemption, it would be unfair for a person who sustained a physical injury to be entitled to a limited amount of compensation under the Warsaw Convention while a person who sustained mental anguish alone is entitled to

⁸⁷ Montreal Convention, 1999, art. 29, emphasis added; See Whalen (n 78) 20; George N. Tompkins, Jr., 'Are the Objectives of the 1999 Montreal Convention in Danger of Failure?' (2014) 39 Air & Space Law 203, 207.

⁸⁸ See Constantino (n 86); *Summary of MC99 Judicial Decisions 2012* (n 65) 137; *Summary of MC99 Judicial Updates 2013* (n 51) 91-92, 96; *2014 Summary of MC99 Court Decisions* (n 86) 158-160.

⁸⁹ *Adler et al v WestJet Airlines, Ltd.* No. 0:2013cv62824 - Document 37 (S.D. Fla. 2014).

⁹⁰ Ingrid Koning, 'Liability in Air Carriage. Carriage of Cargo Under the Warsaw and Montreal Conventions' (2008) 33 Air & Space Law 318, 341.

an unlimited liability scheme under local law.⁹¹ This could be overcome by defining a compensable amount within the scope of the Montreal Convention so all injured persons are subject to the same limit as decided in *Adler*. However, the interpretation in *Adler* contradicts the *travaux préparatoires*.⁹²

2. Re-interpreting 'Accident' while Confining the Exclusivity Principle

The dissenting opinion in *Thibodeau* also advances an alternative way to interpret Article 29 of the Montreal Convention. Justice Abella, who wrote the dissenting opinion, observed that while courts typically interpret domestic rules in light of international human rights law, in the *Thibodeau* case a commercial treaty was interpreted as diminishing human rights protected by domestic law.⁹³ She applied the rules of treaty interpretation under the VCLT to interpret the shift in language of Article 29 of the Montreal Convention and the shift of objective to consumer-centered to argue against a restriction to passenger protection.⁹⁴ Under this interpretation, she reached a conclusion that the phrase 'in the carriage of passengers, baggage and cargo' under Article 29 restricts the type of action to be brought under the Montreal Convention only to claims for damage incurred in this context.⁹⁵

This dissenting opinion differs from *Adler* regarding the interpretation of 'accident'. Instead of applying *Husain's* flexible interpretation to the term 'accident', Justice Abella proposed that Article 17(1) of the Montreal Convention required (1) an accident, (2) which caused, (3) death or bodily injury, and (4) while the passenger was within the temporal scope of the Convention.⁹⁶ She further considered that failure to provide services in French was not an accident at all and therefore did not discuss the meaning

⁹¹ *Tseng* (n 51) 171.

⁹² *Tompkins, Jr.* (n 21) 51.

⁹³ *Thibodeau* (n 25) paras 134, 170. See Separate opinion of Judge Cançado Trindade, *Abmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Merits, Judgment, I.C.J. Rep. 2010 (30 Nov. 2010) 758 para 89.

⁹⁴ *Thibodeau* (n 25) paras 150, 161.

⁹⁵ *Thibodeau* paras 141-142, 165.

⁹⁶ *Thibodeau* para 175.

of bodily injury.⁹⁷ The Montreal Convention was thus not applicable because there was no 'accident', even though the breach happened on board.⁹⁸ Under this interpretation, courts can recognize the moral damage caused by violating accessibility standards.

Both *Adler* and *Thibodeau's* dissenting opinions present flaws. Despite creating the possibility of compensating PWDs, both interpretations offer no convincing explanation as to why they deviate from the *stare decisis* in the UK, the US, and Canada, as well as other jurisdictions,⁹⁹ and circumvent the uniformity purpose of the Montreal Convention. The dissenting opinion in *Thibodeau* is persuasive because of linkages with human rights and the rules on treaty interpretation. However, the sole cause of action has been acknowledged in the Warsaw Convention and followed by the Montreal Convention. As per the reasoning in *Sidhu* concerning the different state parties to the ECHR and to the Warsaw Convention¹⁰⁰ it is questionable whether language rights trump a treaty agreed by more than a hundred States without breaching Article 27 of the VCLT. Unfortunately, the proper way to interpret the Montreal Convention is neither to rewrite the law nor to contradict from the intentions of state parties, even though the result renders the injured person without compensation because the authority to amend the Convention is a matter for the contracting parties.¹⁰¹

3. *Re-interpreting 'Bodily Injury'*

Another possibility is to interpret the expression 'bodily injury' to cover non-material damage. This interpretation is permissible under the rules of treaty interpretation since, according to the drafting history, this term is subject to evolutive interpretation. Supporting reasons can be deduced from the consumer-oriented policy in the Montreal Convention as well as from the comments of the French delegate on the meaning of the term 'bodily injury'

⁹⁷ Ibid para 176.

⁹⁸ Ibid para 177.

⁹⁹ See *Sidhu* (n 51); *Tseng* (n 51); *Thibodeau* para 177; *Summary of MC99 Judicial Updates 2013* (n 50) 92.

¹⁰⁰ *Sidhu* (n 51).

¹⁰¹ See *Stott* (n 25) paras 63, 70; *King* (n 30).

in French text in the preparatory draft and support from several States.¹⁰² One author relied on the reasoning in *Walz* because the ECJ, despite not directly ruling on bodily injury, interpreted that 'damage' in the whole of Chapter III of the Montreal Convention must be construed as including both types of damage.¹⁰³

One possible argument against this view is that this interpretation will open the floodgates of litigation for moral damage. In reality, this fear can be prevented because courts can exercise their margin of appreciation, as affirmed by the CERD in *L.A.*. Moreover, the present author agrees with the statement made by the delegate of Denmark at the Montreal Conference that a passenger always has to prove that he or she has been mentally injured by an accident.¹⁰⁴

4. *A Solution for Moral Damage under Discrimination Claims*

In Sections V.1 to V.3 above, this paper presented three alternatives. The first two involve confining the exclusivity principle (see Sections V.1 and V.2), while the last one deals with the expression 'bodily injury' (see Section V.3). The options to confine the exclusivity principle and allow a recourse to local law, as Judge Ginsburg reasoned in *Tseng*, would undermine the uniform regulation of the Warsaw Convention.¹⁰⁵ This objective is anchored in the Montreal Convention, along with the consumer protection objective.¹⁰⁶ With the general rules of interpretation as a backdrop, both objectives should be taken into account and construed in a conformable manner.¹⁰⁷ Thus, the first two options are not viable.

¹⁰² McKay Cunningham, 'The Montreal Convention: Can Passengers Finally Recover for Mental Injuries?' (2008) 41 *Vanderbilt Journal of Transnational Law* 1043, 1073, 1081.

¹⁰³ Case C-63/09 *Walz v Clickair SA* [2010] para 29. See Marc McDonald, 'The Montreal Convention and the Preemption of Air Passenger Harm Claims' (2010) 44 *The Irish Jurist* 203, 237.

¹⁰⁴ ICAO (n 32) 68.

¹⁰⁵ *El Al Israel Airlines, Ltd. v Tsui Yuan Tseng*, 525 US 155, 161 (1999).

¹⁰⁶ Montreal Convention, 1999, preamble.

¹⁰⁷ See WTO, 'US – Import Prohibition of Certain Shrimp and Shrimp Products' WT/DS58/AB/R 12 Oct. 1998 paras 17, 153.

The Montreal Conference concluded that the term 'bodily injury' is evolving.¹⁰⁸ The rules of treaty interpretation endorse states to construe this term in a non-static manner.¹⁰⁹ This approach to interpretation was endorsed by the ECJ in *Walz v. Clickair* in the case of compensation for non-material damage caused to baggage on the basis that the Montreal Convention aims to protect the interests of consumers.¹¹⁰ In my view, this option is not against the spirit of the Convention and is in line with the principle of harmonization: the exclusivity principle is still adhered to and the national courts do not, and are not entitled to, create new laws. Moreover, the proposal to include purely moral injury under the expression 'bodily injury' is comparable to the liability regime for carriage by sea, which allows compensation for personal injury and, at the same time, recognizes the exclusivity principle.¹¹¹ In its concluding observation to the EU, the CRPD Committee also supported the idea that the rights of maritime passengers can be a model.¹¹²

Air carriers may be afraid of being bombarded with legal actions. However, passengers have to prove their damage and courts can exercise their discretion on a case-by-case basis. What is more essential is that the option does not automatically suppress recourse for moral damage. Compared to the stretched interpretation of the term 'accident' in *Husain*, a floodgate is not

¹⁰⁸ ICAO (n 32) 243.

¹⁰⁹ International Law Commission (n 78) para 22.

¹¹⁰ *Walz* (n 103) para 31. The Brazilian court also gives the plaintiff compensation for moral damage to delayed baggage but the reasoning is established in its Constitution, not the Montreal Convention, 1999.

¹¹¹ Athens Convention relating to the Carriage of Passengers and Their Luggage by Sea, (Athens, 13 Dec. 1974) (Athens Convention); Protocol of 2002 to the Athens Convention Relating to the Carriage of Passengers and Their Luggage by Sea, 1974 (1 Nov. 2002), arts 3, 14.

The exclusivity principle in the Athens Convention is narrower than that of the Montreal Convention, 1999 because the former governs only 'the death of or personal injury to a passenger or for the loss of or damage to luggage'. See Don Green, 'Re-examining the Exclusivity Principle Following *Stott v Thomas Cook Tour Operator Ltd*' (2014) 6 Travel Law Quarterly 114, 116.

¹¹² Committee on the Rights of Persons with Disabilities, 'Concluding Observations on the Report Submitted by the European Union' U.N. Doc. CRPD/C/EU/CO/1 (Fourteenth session, 2015) para 53.

broken. The argument that insurance premiums will be increased when moral damage is compensable is unconvincing. If this surcharge reflects the actual market, it should be accepted by all involved.

VI. CONCLUSIONS

This paper has questioned the weight accorded to human rights norms when they interact with the law on international carriage by air. A review of case law in the UK, the US, and Canada yields an unsatisfactory result from a human rights perspective, whereby human rights can be trumped by the law on international carriage by air in these three jurisdictions. This is based on two common approaches in these jurisdictions. Firstly, the Warsaw Convention of 1929 and the Montreal Convention of 1999 appear to an extent to be self-contained because of their exclusivity principle. Secondly, courts are known to narrowly construe the term 'bodily injury' to deter people from claiming purely on grounds of emotional damage when their human rights are breached. The objective of the Montreal Convention specifically to protect consumers differs from that of the Warsaw Convention. Moreover, the drafting history of the former affords states a degree of latitude in the interpretation of the term 'bodily injury'. Hence, in this author's opinion, the above-mentioned twin problems on the interaction between the two branches of law can be eased by the evolutive treaty interpretation method.