



Journal of Business and Social Science Review  
Issue: Vol. 3; No.7; July 2022 (pp.21-31)  
ISSN 2690-0866(Print) 2690-0874 (Online)  
Website: www.jbssrnet.com  
E-mail: editor@jbssrnet.com  
Doi: 10.48150/jbssr.v3no7.2022.a2

## **An End to 911 Airline Attacks? Legal Consequences under the Montreal Convention**

**Larry Moore, JD**

BA Vanderbilt University  
MA University of Memphis  
JD Washington University

&

Professor of Business Law  
University of Memphis

Email: [lmoore2@memphis.edu](mailto:lmoore2@memphis.edu), lmoorel@yahoo.com  
901-336-9252

### **Abstract**

For most people in the United States the attack on the World Trade Center on September 11, 2001[911] felt much like the Pearl Harbor attack of December 7, 1941, that is, a coordinated air attack on the United States. Today it is still viewed as a single isolated attack. The reality is that this was the third in a series of ever escalating aviation attacks against the West by radical Islamic groups that initially began 31 years earlier on September 6, 1970 and continued in approximately 15 year intervals with an ever escalating degree of violence and sophistication, concluding, hopefully, with the 2001 airline attacks. It is the purpose of this paper to look at the underlying reasons going back over three centuries as to why this date was chosen, and then to show that this date was not a random attack but was actually the third episode in a pattern of systematic attacks going back over thirty years up to September 11, 2001 and looks at how this historical knowledge could effect the legal liability of an airline in the event of any future 911 kind of attack.

### **An End to 911 Airline Attacks? Legal Consequences under The Montreal Convention**

#### **1. Introductions**

It has been twenty years since the most dramatic and deadly of a series of September 11, 2001 [911] airline hijackings<sup>1</sup> which used hijacked airliners like Kamikaze fighters to destroy, not just a New York City landmark, the World Trade Center, but also the world wide symbol of both capitalism and the western world.

---

<sup>1</sup>9/11 in NYC: Families return for live reading of victims' names: [Online] Available:  
<https://abc7ny.com/moments-of-silence-on-911-times-attack-ceremony-schedule-September-11/293004/>

It is the purpose of this paper to look at the underlying reasons going back over three centuries as to why this date was chosen, and then to show that this date was not a random attack but was actually the third episode in a pattern of systematic attacks going back over thirty years up to 911.

## 2. History and Significant of September 5- September 13 Airline Hijackings

For most people in the United States on that September 11, 2001 day, it felt like the Pearl Harbor attack of December 7, 1941, that is, a coordinated unexpected air attack on the United States. To most, it is still viewed as a single isolated attack. The reality is that this was the third in a series of ever escalating aviation attacks against the West by radical Islamic groups that initially began 31 years earlier on September 6, 1970 and continued in approximately 15 year intervals with an ever escalating degree of violence and sophistication, which hopefully has concluded with the 2001 airplane attack.<sup>2</sup>

The choice of the date September 11 was neither happenstance nor random, but represented a major historical date in Islamic history. Indeed many in the Islamic world trace the beginning of the decline of Ottoman Empire and the end of its goal to ultimately conquer all of Europe in addition to the Mideast, to the battle of Vienna in 1683.<sup>3</sup>

On July 5, 1683, the Grand Vizier, Kara Mustafa, taking advantage of the feud between Protestants and Catholics, invaded Europe and had moved his army of 150,000 soldiers and about 100,000 supporters to the gates of Vienna after having defeated the German army.<sup>4</sup>

Mustafa then proceeded, through siege warfare, to tear down the walls of the city. Only days before the final collapse of the city, 26,000 Polish troops arrived in Germany on September 5, 1683, and joined with 18,000 troops from what was left of the Germany army. Over the next few days stragglers from that army found their way to this camp to create a force of 60,000. On the night of September 11, this force coming out of the night completely surprised and shocked the Turks, who confident of ultimate victory, had established no defenses nor posted any security guards whatsoever as it was assumed that there were no military units of any size within hundreds of miles. It must have sounded like an army of millions just appeared out of nowhere. By the end of September 12, the Turkish army had fled in total disarray and defeat. By September 13, the battle of Vienna was totally lost, and with it, the zenith of the Ottoman Empire and from this point began the long slow decline and final collapse of the empire.<sup>5</sup>

This date might have been chosen by Mustafa to avenge earlier events in Turkish history. First there was September 11th, 1565 and the also unexpected defeat in the Great Siege of Malta.<sup>6</sup> Then there was the final expulsion of Muslims from Spain, announce on September 11, 1609.<sup>7</sup> To add insult to these injuries, after the Battle of Vienna, the Turks were surprised again on September 11, 1697 at the Battle of Zenda, which continued the slow breakup of the empire as here they lost all of Hungary and most of Transylvania.<sup>8</sup>

---

<sup>2</sup> *Infra*, see notes 13 through note 28.

<sup>3</sup> Will Durant & Ariel Durant, *The Age of Louis XIV* 423-24 (1963).

*Also see*. The Battle of Vienna: [Online] Available: <http://www.wien-vienna.com/vienna1683.php>

<sup>4</sup> *Id.*

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

<sup>6</sup> The Top 4 Reasons September 11th is Significant to Islam: [Online] Available: <https://onepeterfive.com/the-top-4-reasons-September-11th-is-significant-to-Islam/>

<sup>7</sup> *Id.*

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

Some modern Islamic Nationalist groups used attacks during the period of September 5 - September 13 as the beginning of a new zenith,<sup>9</sup> and since 1970, have used airline hijackings as, at first a means of bringing attention to the symbolic importance of this date, and then later as an instrument of renewing the conflict with the West so as to complete the conquest that the Grand Vizier Mustafa failed to accomplish.<sup>10</sup>

The September 2001 World Trade Center Airline disaster was both part of a process toward a new Islamic state<sup>11</sup> but with historical significance. Thus it was reasonable to expect that the process would continue and raised the question of which would be the year in which the next major airplane attack might occur after 2001. Would it be in 2015 which would represent two 15 year cycles from the 1970 attacks or would it be in 2016 which is 15 years from 2001.<sup>12</sup> Fortunately those years came and passed without incident. But it still raises the question as to what might be the legal consequences to an airline if one of their airplanes is used in any such future attack. To better understand the seriousness of the potential threats and why other attacks were feared, it is necessary to look at the previous 9/11 assaults.

### 3. Prior September 5-13 Airline Hijackings

To fully understand the full significance of the September 11, 2001 attacks and to appreciate the possibility of a future major attack, we must first look at the full panorama of previous attacks that occurred during the September 5 through September 13 period.

#### 3.1 1970 Hijackings.

[1] Date - Sunday 6 September 1970; “The aircraft, carrying 153 passengers and 17 crew members, was hijacked by two men just after leaving Amsterdam. The flight diverted to Beirut, where 7 others boarded the plane. The aircraft was then flown to Cairo. All occupants evacuated the aircraft immediately after landing. Minutes later, the aircraft was blown up.”<sup>13</sup>

[2] Date - Sunday 6 September 1970; “The El Al Boeing 707 was on a flight from Tel Aviv to New York via Amsterdam. After takeoff from Schiphol, as the plane approached the English coast, two Palestinians, Leila Khaled and her accomplice attempted to hijack the plane. Brandishing gun, they moved towards the flight deck. The pilot then put the plane in a nose dive, throwing the two off their feet. In the scuffle that followed, the male hijacker threw a hand grenade down the aisle of the plane and was shot dead by an El Al sky marshal. Fortunately the grenade failed to explode. Khaled was overpowered and the pilot carried out an emergency landing at Heathrow.”<sup>14</sup>

[3] Date - Thursday 10 September 1970; “The Egyptian plane was hijacked by three hijackers. Hijackers taken down. Duration of the hijacking: less than 1 day.”<sup>15</sup>

<sup>9</sup> ISIS hails 9/11 massacre as a 'pivotal moment for Islam': [Online] Available:

<https://torontosun.com/news/world/isis-hails-9-11-massacre-as-a-pivotal-moment-for-Islam>

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Infra*, see notes 13 through note 28.

<sup>13</sup> *Id.* [Online] Available:

<https://aviation-safety.net/database/record.php?id=19700906-0>

<sup>14</sup> *Id.* [Online] Available:

<http://aviation-safety.net/database/record.php?id=19700906-1>

<sup>15</sup> *Id.* [Online] Available:

<http://aviation-safety.net/database/record.php?id=19700910-0>

[4] Date - Saturday 12 September 1970; “BOAC Flight 775 was hijacked after leaving Bahrain International Airport (BAH) for Beirut International Airport (BEY), Lebanon on September 9, 1970. The aircraft landed at Beirut and was then flown to an abandoned former RAF station at Zerqa, some 20 miles North of Amman. Hijackers from the Popular Front for the Liberation of Palestine released the hostages and blew up the plane September 12. They wanted to influence the British government to free Leila Khaled, the female hijacker who was overpowered during the attempted hijacking on September 6.”<sup>16</sup>

[5] Date - Saturday 12 September 1970; “The Egyptian plane was hijacked by one hijacker. Hijacker taken down. Duration of the hijacking: less than 1 day.”<sup>17</sup>

[6] Date - Sunday 13 September 1970; “The Boeing 707 carrying 141 passengers and 10 crew members was hijacked after leaving Frankfurt September 6. The plane was then flown to Zerqa, a military airfield 20 miles N of Amman. Hijackers from the Popular Front for the Liberation of Palestine released the hostages and blew up the plane September 13.”<sup>18</sup>

[7] Date - Sunday 13 September 1970; “The DC-8 carrying 143 passengers and 12 crew members was hijacked after leaving Zürich on September 6. The plane was then flown to Zerqa, a military airfield 20 miles North of Amman. Hijackers from the Popular Front for the Liberation of Palestine released the hostages and blew up the plane September 13.”<sup>19</sup>

### 3.2. 1986 Hijackings

[8] Date - Friday 5 September 1986; “PanAm flight PA73 was a scheduled service between Bombay, India and New York-JFK Airport, USA, with intermediate stop at Karachi, Pakistan and Frankfurt, West Germany.”<sup>20</sup>

During the stopover at Karachi, as passengers boarded the aircraft for the flight, a van that had been modified to look like an airport security vehicle, drove through a security checkpoint up to one of the boarding stairways of the aircraft. Four hijackers stormed up the stairways into the plane, fired shots from an automatic weapon and seized control of the aircraft. Flight attendants were able to alert the cockpit crew using intercom, allowing the pilot, co-pilot and flight engineer to escape through a hatch in the cockpit. During the following 16 hours, Zayd Hassan Safarini, the Jordanian leader of the hijackers, demanded the return of the flight crew to fly the aircraft to Larnaca, Cyprus, where he wanted to secure the release of Palestinian prisoners being detained in Cyprus. During negotiations between Safarini and

---

<sup>16</sup> *Id.* [Online] Available:

<http://aviation-safety.net/database/record.php?id=19700912-0>

<sup>17</sup> *Id.* [Online] Available:

<http://aviation-safety.net/database/record.php?id=19700912-1>

<sup>18</sup> *Id.* [Online] Available:

<http://aviation-safety.net/database/record.php?id=19700913-0>

*Also see* Herman v. Trans World Airlines, Inc., 337 N.Y.S.2d 827, 829 (N.Y. App. Div. 1970)

<sup>19</sup> *Id.* [Online] Available:

<http://aviation-safety.net/database/record.php?id=19700913-1>

*Also see* Hussel v. Swiss Air Transp. Co., 388 F. Supp. 1238, 1242 (S.D.N.Y. 1975).

<sup>20</sup> *Id.* [Online] Available:

<http://aviation-safety.net/database/record.php?id=19860905-0>

*Also see* In re Hijacking of Pan Am. World Aircraft at Karachi Int'l Airport, 729 F. Supp. 17 (S.D.N.Y. 1990).

Pakistani authorities, Safarini threatened to kill all passengers. Four hours into the hijacking, one of the passengers was shot and pushed out the door onto the tarmac below.

As nightfall arrived, the hijackers herded the passengers and crew members into the center section of the aircraft. The four hijackers opened fire on the passengers and crew, and threw grenades among them, killing almost 20. Most of the survivors escaped through two doors of the plane which were opened when the firing began.<sup>21</sup>

Pakistani special forces commando's then stormed the plane and arrested the hijackers..”<sup>22</sup> It should be noted that this was the first incident in which hostages were killed.

### 3.3 2001 Hijackings

[9] Date - Tuesday 11 September 2001; “In a massive coordinated terrorist attack 19 men hijacked 4 jetliners on the morning of September 11. The hijackers were on a suicide mission and had received orders to take over control of the aircraft and to fly the planes into specified targets. American Airlines Flight 11 departed Boston-Logan for Los Angeles at 07:59. The aircraft was hijacked by five terrorists. The hijackers took over control, reportedly switched off the transponder and changed course to New York. At 08:46 the aircraft was flown into the North side of the 110-story New York WTC North tower in a slightly left wing down attitude, crashed and exploded into the 93rd through 98th floors. According to an FAA study, N334AA struck the WTC at a speed of 494mph; an MIT study however determined the plane was probably traveling at 429 mph.<sup>23</sup>

The massive fire weakened the tower structure on these floors and the tower collapsed at 10:28. Most of the office workers below the 93th floor were able to evacuate the tower on time before the collapse. Seventeen minutes after Flight 11 crashed into the North Tower, the WTC South Tower was struck by a United Airlines Boeing 767, N612UA.<sup>24</sup>

A total of 2,606 people were killed in the World Trade Center buildings, including about 292 on the ground. A precise breakdown of the number casualties relating to Flight 11 (North Tower) and Flight 175 (South Tower) is impossible. It has been estimated that about 1600 people were killed on the North Tower, and about 900 on the South Tower.”<sup>25</sup>

[10] Date - Tuesday 11 September 2001; “United Airlines Flight 175 departed Boston-Logan for Los Angeles at 08:14. The aircraft was hijacked by five terrorists. The hijackers took over control, reportedly switched off the transponder and changed course to New York. At 09:03 the aircraft was flown into the Southeast side of the 110-story New York WTC South tower in a sharp left wing low attitude, crashed and exploded into the 78th through 84th floors. According to an FAA study, N612UA struck the WTC at a speed of 586mph; an MIT study however determined the plane was probably traveling at 537mph.

The massive fire weakened the tower structure on these floors and the tower collapsed at 09:59. Most of the office workers below the 78th floor were able to evacuate the tower on time before the collapse. Seventeen minutes before Flight 175 crashed into the South Tower, the WTC North Tower had been hit by an American Airlines Boeing 767, N334AA.<sup>26</sup>

---

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* [Online] Available:

<http://aviation-safety.net/database/record.php?id=20010911-1>

<sup>26</sup> *Id.*

[11] Date - Tuesday 11 September 2001; “Flight 93 departed New York-Newark (EWR) for San Francisco (SFO) at 08:47. The aircraft was hijacked by four terrorists. The hijackers took over control, reportedly switched off the transponder and changed course to, probably, Washington. At 09:35, near Cleveland, the aircraft changed course to the South and later (09:45) Southwest at FL350. At 10:03 the aircraft crashed out of control in a field near Somerset, PA. The hijackers possibly had the intention to crash the plane into Air Force One, Camp David or perhaps Washington. The aircraft crashed following passengers attempt to take down the hijackers.”<sup>27</sup>

[12] Date - Tuesday 11 September 2001; “Flight 77 departed Washington-Dulles at 08:10 for Los Angeles. The aircraft was hijacked by five terrorists. The hijackers took over control, reportedly switched off the transponder and changed course to Washington. Last reported data (08:56) show the aircraft flying at FL350 at 458 knots. Course was changed back to Washington and the aircraft descended for the city, approaching from the North. The Boeing reportedly passed overhead the White House and entered a tight 270deg turn, heading for the US Department of Defense building (the Pentagon). It clipped trees and light posts before slamming into the Southwest face of the Pentagon. An explosion occurred and the building caught fire.”<sup>28</sup>

#### 4. Potential Future Hijackings

Given an established connection between the period of September 5 - September 13 and the utilization of aircraft in making strong symbolic points for the rise of a new Islamic state since 1970, it was reasonable to anticipate that as the 45<sup>th</sup> year approached on the horizon, we would see another such episode. Also given that these episodes appear to occur on a 15 year cycle, the projected year might have been either in 2015 if we count from 1970 or 2016 if we count from 2001.

Were these factors in themselves not enough to make such a probability a possibility, we also had the added factors of ISIS which declared that they were establishing a new caliphate which made it the direct heir to the old Ottoman Empire<sup>29</sup> but also the fact that 11 airliners had been captured by militants from the airport in Tunisia during the fall of Libya,<sup>30</sup> and based upon the escalating level of violence during each previous September 11 period attacks, the world and especially the West was now facing actions that are indeed frightening as potential terrorist now no longer needed to hijack an airliner as they now had airplanes of their own.

The first hijackings in 1970 occurred with only one casualty in seven different hijackings incidents, and that fatality was one of the attempted hijackers.<sup>31</sup> Indeed the 1970 hijackings were far more symbolic than menacing. However all of this changed with the 1986 hijacking where the violence and homicide was apparent from the beginning of the episode and where 20 people were killed.<sup>32</sup> All of this paled in comparison to the 2001 incident when the fatalities approached 3000.<sup>33</sup>

<sup>27</sup> *Id.* [Online] Available:

<http://aviation-safety.net/database/record.php?id=20010911-2>

<sup>28</sup> *Id.* [Online] Available:

<http://aviation-safety.net/database/record.php?id=20010911-3>

<sup>29</sup> *Islamic State (ISIS):* [Online] Available:

<http://www.democratchub.com/islamic-state.aspx?o=pv&gclid=CLTkgtbE5sACFbRzMgod7gYAhw>

<sup>30</sup> *Reports of Missing Libyan Planes Raise 9/11 Terror Fears*, USA TODAY [Online] Available:

<http://www.usatoday.com/story/news/world/2014/09/04/libya-missing-planes-sept-11/15059169/>

<sup>31</sup> *Supra*, note 14.

<sup>32</sup> *Supra*, note 20.

<sup>33</sup> *Supra*, notes 22-28.

Also there was an escalation in the sophistication of the attacks. In 1970, the hijackers, commandeered the airplanes and forced the pilots to take them where they wanted to go. However, in the 1986 incident, the pilots escaped, and the hijackers were left trapped on the ground. Apparently learning from this, they trained their own pilots and thus after taking over the airplanes, did not need the airline's pilots. Now, with the capture of almost a dozen airplanes to use as their own, they will not need to hijack or commandeer an airplane to carry out the next September 11 attack or attacks, and militants with 11 airliners in the sky potentially armed with dirty nuclear bombs could make the horror and tragedy of 2001 look insignificant and the next attack could appear to be like something out of an apocalyptic horror movie.

## 5. Legal Consequences under the Montreal Liability Convention of a Future Aviation Attack

International Aviation is governed by two International Treaties. The oldest is the 1929 International Convention for the Unification of Certain Rules Relating to International Carriage by Air and its subsequent modifications, additions, protocols, and private agreements, is known as the Warsaw Convention or the Warsaw System.<sup>34</sup> This had long been the multinational treaty governing all liability for international air flight.<sup>35</sup> Governing for more than seventy years, the Warsaw System was enacted to protect the new at that time, commercial aviation industry from disastrously large judgments from what were, then frequent air accidents.<sup>36</sup> The Warsaw System also provided for international consistency in the response to claims arising from an accident<sup>37</sup> as well as uniformity among countries on the content of tickets,<sup>38</sup> baggage claim checks,<sup>39</sup> and airbills.<sup>40</sup>

---

<sup>34</sup> The "Warsaw System" collectively refers to the following instruments: Convention for the Unification of Certain Rules Relating to International Carriage by Air, Oct. 12, 1929, 49 Stat. 3000, 137 L.N.T.S. 11 [hereinafter Warsaw Convention]; Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929, Sept. 28, 1955, ICAO Doc. 7632; 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, Sept. 18, 1961, ICAO Doc.8181; 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, Mar. 8, 1971, 10 I.L.M. 613; Additional Protocol No. 1 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, Signed at Warsaw on 12 October 1929, Sept. 25, 1975, ICAO Doc. 9145; Additional Protocol No. 2 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, Signed at Warsaw on 12 October 1929 as Amended by the Protocol Done at the Hague on 28 September 1955, Sept. 25, 1975, ICAO Doc. 9146; Additional Protocol No. 3 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, Signed at Warsaw on 12 October 1929 as Amended by the Protocol Done at the Hague on 28 September 1955 and at Guatemala City on 8 March 1971, Sept. 25, 1975, ICAO Doc. 9147; Montreal Protocol No. 4 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, Sept. 25, 1975, ICAO Doc. 9148.

<sup>35</sup> *Id.*

<sup>36</sup> Andreas F. Lowenfeld & Allan I. Mendelsohn, The United States and the Warsaw Convention, 80 Harv. L. Rev. 497, 498-501 (1967).

<sup>37</sup> *Id.*

<sup>38</sup> Warsaw Convention, supra note 34, art. 3.

<sup>39</sup> *Id.* art. 4.

<sup>40</sup> *Id.* arts. 5-8.

The practical effects of the Warsaw Convention allowed an airline to (1) immediately determine its maximum loss from an international air crash, (2) limit the airline's own legal cost in defending against liability, and (3) provide rapid compensation to the injured.<sup>41</sup> The need for liability limits during the early years (from 1925 to 1929) of the commercial airline industry became painfully obvious, as travel by air during that time was demonstrably dangerous.<sup>42</sup> During these years, both domestic and international flights combined to log only four hundred million passenger miles, but the fatality rate during this period was forty-five per one hundred million passenger miles. Fatality rates for U.S. airlines from 2010-2012 was a total of 2 fatalities for all commercial flights combined.<sup>43</sup>

Near the end of the twentieth century, the sixty-year-old International Air Transportation Association (IATA), in conjunction with the International Civil Aviation Organization (ICAO), sought to address U.S. concerns over the liability limitations of the Warsaw System.<sup>44</sup> On October 31, 1995, members of the international business and academic organizations met at Kuala Lumpur and adopted the *International Agreement Relating to Liability Limitations of the Warsaw Convention*.<sup>45</sup> This agreement became the basis for the new international treaty. After several years of negotiations regarding the final terms of this treaty, it was ratified and became operational in principle on May 28, 1999, as the *Convention for the Unification of Certain Rules for International Carriage by Air*, known as the Montreal Liability Convention.<sup>46</sup>

---

<sup>41</sup> GEORGETTE MILLER, LIABILITY IN INTERNATIONAL AIR TRANSPORT 2 (Kluwer, Deventer (1977)).

<sup>42</sup> Minutes from the Second International Conference on Private Aeronautical Law (Oct. 12, 1929), in SECOND INTERNATIONAL CONFERENCE ON PRIVATE AERONAUTICAL LAW, at 18 (Robert C. Horner & Didier Legrez eds., 1975).

<sup>43</sup> Insurance Information Institute [Online] Available:  
<http://www.iii.org/table-archive/21290>

<sup>44</sup> To see the number of ways the United States plaintiffs attempted to avoid Warsaw limits see Larry Moore, *Chan v. Korean Air Lines: The United States Supreme Court Eliminates the American Rule to the Warsaw Convention*, 13 HASTINGS INT'L & COMP. L. REV. 229, 240 (1990) Also see Larry Moore, *Mental Injury and Lesion Corporelle in International Aviation Under the Warsaw Convention: Eastern Airlines Inc. v. Floyd*, 22 ACAD. LEGAL STUD. BUS. NAT'L PROC. 504, 505 (1993) Larry Moore, *The Lockerbie Air Disaster: Punitive Damages in International Aviation Under the Warsaw Convention*, 15 HOUS. J. INT'L L. 67 (1993) (discussing a Second Circuit ruling, which brought the court of appeals into uniformity when it held that punitive damages could not be allowed under the treaty and where the court ruled that the Convention was the sole cause of action for international air accidents); see also Larry Moore, *Air Disasters; Cause of Actions in International Aviation Under the Warsaw Convention; Burying the Ghost of Komlos*, 2 SOUTHEASTERN J. LEGAL STUD. BUS. 57 (1993) (discussing the Eleventh Circuit's reaffirmation of the rule that the treaty provides the only cause of action in international air accidents); see also LAWRENCE B. GOLDBIRSCHE, THE WARSAW CONVENTION ANNOTATED: A LEGAL HANDBOOK (Martinus Nijhoff Publishers) (1988). Moore, Rubin, and Joy, *The World Trade Center Disaster: How Terrorist Airline Attacks Can Affect the Legal, Economic, and Financial Conditions of Airlines Under the Montreal Liability Agreement*, 4 BYU Int'l L. & Mgmt. Rev. 1 (2007).

<sup>45</sup> Ludwig Weber & Arie Jakob, *Current Developments Concerning the Reform of the Warsaw System*, 21 ANNALS AIR & SPACE L. 301, 304 (1996).

<sup>46</sup> For a comparison between the new Montreal Liability Agreement and the old Montreal Agreement and Warsaw Convention, see Larry Moore, *The New Montreal Liability Convention, Major Changes in International Air Law: An End To the Warsaw Convention*, 9 TUL. J. INT'L & COMP. L. 223, 227 (2001). For the full text of this agreement, see *Montreal Liability Convention*, 24 ANNALS AIR & SPACE L. 25



## 6. Application of the Montreal Liability Convention

The provisions of the new Montreal Convention apply only to ratifying nations. After ratification, the new provisions replace the Warsaw Convention for that nation.<sup>47</sup> Note that this new treaty or convention did not replace Warsaw for many countries as they continued to operate under the Warsaw Convention while others would be operating under the Montreal Convention.<sup>48</sup> The United Nations civil aviation agency has adopted the Montreal Liability Convention as a replacement of the Warsaw Convention.<sup>49</sup> The United States Senate ratified the Convention in 2003.<sup>50</sup>

The Montreal Liability Convention establishes a two-tiered recovery system for death or injuries arising from an international air accident.<sup>51</sup> The first tier of recovery raises the limit from its Warsaw System/Montreal Agreement limits of \$ 75,000 for developed nations who signed the Montreal Agreement, and approximately \$ 8700 for many of the other nations, to approximately \$ 135,000 (or 100,000 Special Drawing Rights or SDRs) for all member states.<sup>52</sup> The air carrier is subject to strict liability for this first tiered amount.<sup>53</sup> The second tier of recovery is activated if the damages sought are above the initial amount of 100,000 SDRs.<sup>54</sup> If a plaintiff alleges that the air carrier was negligent, higher amounts may be awarded unless the carrier can prove it was not negligent.<sup>55</sup> This effectively means that there will be no limit to damage recovery for actual damages.<sup>56</sup>

The liability terms of article 21, dealing with compensation in case of death or injury of passengers, of Montreal Liability Agreement provides:<sup>57</sup>

---

(1999).

<sup>47</sup> See Larry Moore, *The World Trade Center--Terrorist Airline Destruction: Will this Be the First Test of the War Between the Montreal Liability Convention's Article 21(2)(A) and 21(2)(B)?*, 68 J. AIR L. & COM. 699, 703-08 (2003)

<sup>48</sup> *Finley vs. ALASKA AIR GROUP, INC*, 2011 U.S. Dist. LEXIS 75384 (2011).

<sup>49</sup> Christopher J. Chipello & Anna Wilde Mathews, *Accord is Reached to Increase Liability, Remove Low Caps for Plane Accidents*, WALL ST. J., June 1, 1999, at B8.

<sup>50</sup> Treaty Documents: [Online] Available:

<https://www.congress.gov/treaty-document/106th-congress/45>

<sup>51</sup> See Christopher Chipello & Anna Wilde Mathews, *Accord Is Reached to Increase Liability, Remove Low Caps for Plane Accidents*, Wall St. J., June 1, 1999, at B8.

<sup>52</sup> *Id.*

<sup>53</sup> See *Id.*; see also Ludwig Weber, *ICAO's Initiative to Reform the Legal Framework for Air Carrier Liability*, 22 *Annals Air & Space L.* 59, 62 (1997).

<sup>54</sup> SDRs is the value of a breadbasket of international currencies of nations party to the treaty. This replaces gold, or dollars alone as the value of settlement. See Chipello & Mathews, *supra* note 42, at B8.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> Montreal Liability Convention, 28 May 1999, 24 *Annals Air & Space L.* 25 (1999). See Sung Hwan Shin, *Warsaw System - Liability as the Common Interest*, 22 *Annals Air & Space L.* 261, 263 (1996); see also 22 *Annals Air & Space L.* 295 (1996) (giving the text of this antecedent agreement to the Montreal Liability Convention). After much consultation, the United States became an official party to this new agreement in 1997. For the text of the IAIA Intercarrier Agreement, see 21 *Annals Air & Space L.* 292 (1996). The United States is a party to this Agreement, pursuant to Department of Transportation Order 97-1-2 (Jan. 8, 1997), [Online] Available:

<http://dms.dot.gov/general/orders/19971qtr/970102.pdf>.

1. For damages arising under Paragraph 1 of Article 17 not exceeding 100,000 Special Drawing Rights for each passenger, the carrier shall not be able to exclude or limit its liability.<sup>58</sup>

2. The carrier shall not be liable for damages arising under Paragraph 1 of Article 17 to the extent that they exceed for each passenger 100,000 Special Drawing Rights if the carrier proves that:

(a) such damage was not due to the negligence or other wrongful act or omission of the carrier or its servants or agents; or<sup>59</sup>

(b) such damage was solely due to the negligence or other wrongful act or omission of a third party.<sup>60</sup>

In essence, when article 21, sections 1 and 2 above are taken together, the result is that there is no liability limit at all if the injury is a result of negligence.<sup>61</sup> Section 2 shifts the burden of proof onto the airline to show that it was not negligent.<sup>62</sup> Additionally, the section seems to imply that negligence will be presumed and that higher damage awards would follow automatically. That is, an unrefuted negligence claim under the Montreal Convention would yield unlimited liability.

The issue now becomes, should airlines subject to the Montreal Liability Convention be on a heightened alert for potential hijacking of their air stock during a future September 11, as was done in earlier incidents. Should this happen and passengers traveling internationally are injured or killed, can this be proven to be negligence on the part of the airlines, especially if a hijacking could have been reasonably foreseeable during this period. If negligence is proven, then the airline would be subject to unlimited liability pursuant to the Montreal Convention Section 2(a) to the injured air travelers.<sup>63</sup>

However the airlines could counter that they are dealing with a very sophisticated and well financed adversary that has the resources of a nation state, and thus have more than enough resources to override even the best precautions of a private company, and thus would be exempt from unlimited liability as the damage was the results of a third party as provide in the Montreal Convention Section 2(b).<sup>64</sup>

In either case, the airline would be liable for at least the guaranteed minimum damage award pursuant to the Montreal Convention Section 1 with or without negligence or the actions of third parties.<sup>65</sup>

However, a new element has been inserted into this area, and that is the possession of passenger jet airliners by potential terrorist who are also trained pilots. In such a case, it would be extremely difficult to hold any airline liable under either Warsaw or Montreal for damages as this event was never contemplated by either, even if the stolen airplanes is shown to be owned by a company.

## 6. Conclusions

This paper is a cautionary warning to the aviation industry and to national governments to exercised the highest level of caution during the period of September 5 - September 13 in the future and to take additional steps to avert catastrophic aviation attacks. It would be a mistake to assume that the

---

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* art. 21(a)(2).

<sup>62</sup> The Montreal Convention Section 2(a) *supra* note 34.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at Section 1.

United States will be the only target of such attacks as the history of these attacks have shown a wide variety of nations that have been the targets for both the hijacking of airliners and as destinations for planes that have been hijacked.

It would also be a mistake to assume that the attack will occur only on September 11. Most people are only familiar with the last attack on New York and assume that this is the magic date. While September 11 was the date that the Battle of Vienna was lost, history shows that this entire period played some role in the story of the defeat, and that airlines have been hijacked on various dates during this entire September 5-13 period and thus we should not be locked into September 11 as the sole target date.

There are numerous and old treaties and conventions regulating the operation of international air travel, but the history of September 5 - September 13 show that there are forces in the world that will not honor and will ignore them all.