Fragmentation during flight: is the Warsaw Regime for liability of air carriers compatible with International Human Rights Law?

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Abstract

This thesis analyzes the relationship between the exclusivity clauses of the *Warsaw* and the *Montreal Conventions* (Warsaw Regime), and the impossibility that these clauses posse upon States to simultaneously comply with some primary obligations under *International Human Rights Law* (IHRL). A detailed analysis of the core obligations of the IHRL regime would require a research beyond this master thesis; thus, I decided to limit the scope of this research to obligations under two key IHRL treaties: the *International Convention on the Elimination of all Forms of Racial Discrimination* (CERD) and the *Convention on the Rights of Persons with Disabilities* (CRPD). Also, I focus on two specific rights to which passengers are entitled during international air transport: i. the protection against discrimination on the grounds of disability and racial discrimination, and ii. the right to an effective legal remedy for breaches of the rights under the conventions.

I demonstrate in this thesis that these two rights apply at the same time than the temporal scope of Article 17 of both the *Warsaw* and *Montreal Conventions*, namely in the context of international air travel and on board the aircraft or in the course of any of the operations of embarking or disembarking. However, legal conflicts exist because the application of the exclusivity clauses contained in these conventions preclude States to also comply with their obligations under the CERD and the CRPD.

I argue that because these conflicts cannot be resolved by the existing collision rules and interpretative techniques in international law, these conflicts are unavoidable and engage the international responsibility of contracting States to the Warsaw Regime for breaches of their co-existing obligations under the CERD and the CRPD. These breaches go beyond the conventions because the two obligations examined constitute two core obligations under the IHRL Regime and can in the long term threaten the legitimacy and legal validity of the Warsaw Regime.

Résumé

Cette thèse a pour objectif d'analyser la relation entre les clauses d'exclusivité des *Conventions de Varsovie* et *de Montréal* (régime de Varsovie), et l'impossibilité que ces clauses imposent aux États de se conformer simultanément à certaines obligations principales du droit international des droits de l'homme (IHRL). Une analyse détaillée des obligations fondamentales du régime du IHRL nécessiterait une recherche allant au-delà de cette thèse de maîtrise. J'ai donc décidé de limiter la portée de cette recherche aux obligations découlant de deux traités clés du IHRL: la *Convention internationale sur l'élimination de toutes les formes de discrimination raciale* (CERD) et la *Convention relative aux droits des personnes handicapées* (CRPD). De plus, je me concentre sur deux droits spécifiques auxquels les passagers ont droit pendant le transport aérien international: i. la protection contre la discrimination fondée sur le handicap et la protection contre la discrimination raciale, et ii. le droit au recours legal effectif en cas de violation des droits consacrés dans les conventions.

Je démontre dans cette thèse que ces deux droits s'appliquent en même temps que le champ d'application temporaire de l'article 17 des *Conventions de Varsovie* et *de Montréal*, à savoir dans le contexte de transport aérien international et à bord de l'aéronef ou au cours de toutes opérations d'embarquement et de débarquement. Cependant, des conflits juridiques existent parce que l'application des clauses d'exclusivité contenues dans ces conventions empêche les États de respecter également les obligations qui leur incombent en vertu de la CERD et de la CRPD.

Je soutiens que ces conflits, qui ne peuvent être résolus par les règles de conflit de lois et les techniques d'interprétation existantes en droit international, sont inévitables et engagent la responsabilité internationale des États contractants du régime de Varsovie en cas de violation des obligations qui leur incombent en vertu de la CERD et la CRPD. Ces violations vont au-delà des conventions car les deux obligations examinées constituent deux obligations fondamentales au regard du régime du IHRL et peuvent menacer à long terme la légitimité et la validité juridique du régime de Varsovie.

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Introduction

> ***Some treaties make express exception for anything which conflicts with the fundamental rights protected within a member state, but the Montreal Convention does not. Whatever may be the case for private carriers, can it really be the case that a State airline is absolved from any liability in damages for violating the fundamental human rights of the passengers it carries?*** [1]
>
> Lady Hale (Supreme Court of the UK), in 2014 *Stott v Thomas Cook*

Besides being a priority for the United Nations,[2] the importance of a better understanding of fragmentation is widely recognized among legal scholars and legal practitioners.[3] Indeed, the International Law Commission (ILC) has warned that a greater disconnection between the branches of international law "would produce isolation of multilateral agreements as islands; thus, permitting no reference *inter se* in their application."[4] In this sense fragmentation continues to be a phenomenon of great relevance for the scholarship and for the legal practice, specially in circumstances of conflicts between simultaneously binding obligations from different specialized regimes.

Regardless of the detrimental effect that the exclusivity clauses of the Warsaw and Montreal Conventions[5] have on the compliance by States with human rights obligations under other international treaties,[6] no legal scholar has yet tackled this issue, nor explored in detail both the

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[1] *Stott v Thomas Cook Tour Operators*, [2014] UKSC 15 at para 67 [*Stott*].

[2] UNGA, *Adoption of the report of the International Law Commission*, 58th Sess, UN Doc A/CN 4/L.682 (2006).

[3] ILC, *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 UNGA A/CN 4/L 682 (Geneva, Agust 2006) at paras 447-449 [*ILC Report*]. See also: Mario Prost, *Unitas Multiplex Les Unités Du Droit International Et La Politique De La Fragmentation* (PhD Thesis, McGill University, 2008) [unpublished] at 12.

[4] *ILC Report*, *supra* note 3 at 237.

[5] The two main conventions for the Warsaw Regime are the Warsaw Convention and the Montreal Convention: *Convention for the Unification of certain Rules relating to International Carriage by Air* [*Warsaw Convention*] *(as amended at the Hague, 1955, and by Protocol No. 4 of Montreal, 1975)*, 12 October 1929; *Convention for the Unification of Certain Rules for International Carriage by Air done at Montreal on 28 May 1999* [*Montreal Convention*].

[6] *Stott*, *supra* note 1 at paras 65-67. (This is a case before the UK Supreme Court which holding that while the disability right to non-discrimination and reasonable accommodation of the plaintiff had been violated by an air carrier operator,

regimes of International Air Law (IAL) and International Human Rights Law (IHRL) within the context of fragmentation.[7] Lalin Kovudhikulrungsri is the only scholar who has attempted to analyze this topic. She published in 2018 a paper examining the exclusivity clauses of the Warsaw Regime and human rights.

The paper of Kovudhikulrungsri was part of her PhD dissertation at Leiden University. However, the analysis of Kovudhikulrungsri did not take into consideration the binding force of IHRL instruments. Her main question was "how courts understand and interpret the *values* of human rights when interacting with the exclusivity principle" and instead of targeting the legal nature and specific obligations applicable to States, she referred to the IHRL regime with soft-law language: "fundamental *merit* of human rights." Kovudhikulrungsri concluded than the exclusivity of the Warsaw Regime "carries a *higher value* than that of human rights law." This is not an adequate manner to analyze the regime of IHRL, as an analysis between the exclusivity of the Warsaw Regime and its interaction with equally binding international obligations must be made with the understanding that obligations under IHRL are relevant not because of their "merit" or their "value," but because they constitute legally binding obligations under international law. Hence, with my thesis I aim to fill this gap in the literature.

An essential component of the Warsaw Regime is its exclusivity.[8] My thesis targets the relationship between the exclusivity clauses of the Warsaw and the Montreal Conventions, and the impossibility that these clauses posse upon States to simultaneously comply with some primary obligations under

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the court was precluded from awarding any damages due to the exclusivity clause of *Montreal Convention*) See also: *El Al Israel Airlines, Ltd. v Tsui Yuan Tseng*, 525 (1999) SC155 [*Tseng*].

[7] See Lalin Kovudhikulrungsri, "Human rights in the sky: weighing human rights against the law on international carriage by air" (2018) 11:1 Eur J Legal Studies 39. (This one author mentions generally the issue in the context of fragmentation but does not further develops it in relation to the legal nature of IHRL).

[8] Mark Andrew, Glynn, "Montreal Convention Ousts All: Canadian Courts Rule on Exclusivity" [2013] 38 Ann Air & Sp L 543 at 545. See also: Kovudhikulrungsri, *supra* note 7 at 39.

IHRL. A detailed analysis of the core obligations of the IHRL regime would require a research beyond this master thesis; thus, I decided to limit the scope of my research to obligations under two key IHRL treaties: the *International Convention on the Elimination of all Forms of Racial Discrimination* (henceforth "CERD");[9] and the *Convention on the Rights of Persons with Disabilities* (henceforth "CRPD").[10] Also, because there are multiple obligations under these treaties, I focus on two specific rights to which passengers are entitled during international air travel: i. the protection against discrimination on the grounds of disability and racial discrimination, and ii. the right to an effective legal remedy for breaches of the rights under the conventions.

I will demonstrate that these two rights apply at the same time than the temporal scope of Article 17 of both the Warsaw and Montreal Conventions, namely in the context of international air travel and on board an aircraft and while embarking ot disembarking. However, legal conflicts exists because the application of the exclusivity clauses[11] contained in these IAL conventions preclude States to also comply with their obligations under the CERD and the CRPD. I argue that because this conflict cannot be resolved by the existing collision rules and interpretative techniques in international law, this conflict is unavoidable and engages the international responsibility of States for breaches by contracting States to the Warsaw System of their co-existing obligations under the CERD and the CRPD. These breaches go beyond the conventions because the two obligations examined constitute two core obligations under the IHRL Regime and can in the long term threaten the legitimacy and legal validity of the Warsaw Regime.

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[9] *International Convention on the Elimination of All Forms of Racial Discrimination,* 21 December 1965, 660 UNTS195 (entered into force 4 January 1969) [*CERD*].
[10] *Convention on the Rights of Persons with Disabilities, 24 January 2007, A/RES/61/106* (entered into force 3 May 2008) [*CRPD*].
[11] *Warsaw Convention*, *supra* note 5, Article 24; *Montreal Convention*, *supra* note 5, Article 29.

I use a doctrinal[12] and comparative law[13] methodology for the development of my arguments. The ILC also used this methodology in the study of fragmentation and legal conflicts by explaining that: "conflict-ascertainment and conflict-resolution are part of legal reasoning, that is, of the pragmatic process through which lawyers go about interpreting and applying formal law."[14] Thus, the focus of this thesis is an analysis of legal conflicts between legal obligations of two specialized regimes of PIL, referring to *lex lata* as opposed to *lex ferenda*.

This thesis is structured in five chapters

Chapter I sets the context for this thesis and its justification as a contribution to the wider debate on fragmentation of PIL, which will lead to the exploration of the existing techniques to solve conflicts between competing obligations from different specialized regimes in Chapter IV. The protection under PIL of air carriers was achieved by entering under PIL into a multilateral treaty which precludes the simultaneous application of any other claim. While it is not clear whether the Warsaw Regime also precludes the application of all IHRL protections generally, an answer to the effect that it does in relation to the CERD and the CRPD would provide an illustration of a the risk of fragmentation to create legal conflicts between specialized regimes.

Chapter II examines the nature of the Warsaw Regime for liability of air carriers, its exclusivity clauses, the scope of its application and how it has been interpreted by the domestic courts of contracting States. In this chapter I argue that the Warsaw Regime applies to international air travel, has been a successful response to the multiplicity of jurisdictions involved in an international air

[12] Rob van Gestel, Hans-W Micklitz & Edward L Rubin, eds, *Rethinking Legal Scholarship: A Transatlantic Dialogue* (Cambridge: Cambridge University Press, 2018) at 211-212; Mark Van Hoecke, ed, *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (Portland: Hart Publishing, 2013) at 119; Terry Hutchinson, "Doctrinal Research: Researching the Jury" in Dawn Watkins & Mandy Burton, eds, *Research Methods in Law* (London & New York: Routledge, 2013) at 7-8
[13] Van Gestel, *supra* note 12 at 181.
[14] *ILC Report, supra* note 3 at para 27.

travel, and has allowed for certainty and liability limits of air carriers. It is well recognized that an essential element of its success is its exclusivity. Exclusivity was achieved both using exclusivity clauses and by not providing for reservations, other than in relation to State aircraft. Nevertheless, I argue that the exclusivity clauses of the Warsaw Regime can also be a source of conflict between simultaneous obligations binding upon States under other international obligations.

Chapter III analyses the scope and nature of two legal obligations under the CERD and the CRPD, which are binding on several state-parties to either the Warsaw Convention or the Montreal Conventions, or both. These are discrimination on the grounds of race and disability, and the right to an effective legal remedy for breaches of the protection of non-discrimination. This Chapter further examines whether the *jus cogens* prohibiting discrimination based on race and the prohibition of torture could apply during international air travel.

Chapter IV examines whether the legal conflicts identified in Chapter III could be solved by the application of interpretation techniques and collision-rules identified by the ILC in their *Report on Fragmentation of International Law*.[15] Because it is unlikely that the conflicts can be solved, the consequence of non-compliance with an IHRL obligation will be analyzed by applying the regime of State responsibility for wrongful acts. [16]

Important considerations

It is essential to note that this thesis distinguishes between passenger rights and human rights. This distinction is necessary because abundant literature currently exists from the perspective of consumer rights, but it does not address human rights. While passenger rights derive from the

[15] *ILC Report*, *supra* note 3.
[16] *ILC, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries* (2001) UN Res 56/83, 56th Sess, Supp No 10, UN Doc A/56/10 (2001), chp IV E 1 [*ILC Articles on State Responsibility*].

contractual relationship between the air carrier and the person acquiring air transport for pay or gratuitously,[17] human rights are not granted by contract but originate in human dignity. Thus, this fundamental distinction justifies a study solely focused on the human rights of passengers.

Secondly, this thesis is developed greatly from the perspective of IHRL as opposed to the point of view of air carriers and IAL. While I acknowledge that some considerations have been taken into account in the design and development of the Warsaw Regime, including economic factors of the airline industry such as reducing burden on the commercial activities of air carriers, this new perspective is necessary facing the predominant jurisprudence privileging the Warsaw Regime over human rights claims and the absence of legal research on the IHRL implications.

Thirdly, I recognize the complexities of IHRL which in addition to being composed of multilateral conventions and soft-law instruments on specific categories of human rights holders,[18] there are regional instruments which have been interpreted by regional courts with a margin of appreciation regarding the context of each jurisdiction. Thus, it would not be possible to make a general statement in relation to the compatibility or incompatibility of the regime of IHRL as a whole and the Warsaw Regime. Hence, the arguments in my thesis apply to the specific case study between the exclusivity clause and some obligations I have identified under the CERD and the CRPD.

Fourthly, because air carriers are not legal subjects of PIL this thesis does not address the question whether IHRL in general can impose obligations on private entities, this is still controversial. [19]

[17] *In Re Mexico Air Crash of October 31, 1979*, 708 F (2d) 400, Ct App (9th Cir 1983).
[18] OHCHR, *The United Nations Declaration on the Rights of Indigenous Peoples*, UN Doc HR/PUB/13/2 (2013) [*UNDRIP*]; *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981)[*CEDAW*].
[19] *Stott, supra* note 1 at para 70 (Lady Hale wrote "The extent to which international law imposes positive obligations upon States to protect individuals against violations of their fundamental rights by non-state actors is controversial." While this is true in general, under the CERD and the CRPD there are specific obligations to this effect; however, in the absence of explicit obligations it is not possible to make a general statement).

Instead, the focus of this thesis is the responsibility of States for compliance with their international obligations under PIL in the event of a conflict between specialized regimes. It is a premise of this thesis that each IHRL obligation examined herein rests upon States, and that States are ultimately responsible for the acts of the private entities under their jurisdiction,[20] also this ultimate responsibility for compliance on States is explicitly provided under the CERD and the CRPD which will be further discussed in Chapter III.

[20] Sarah Joseph & Sam Dipnall, "Scope of Application." In: Daniel Moeckli, et al, eds, *International Human Rights Law*, 3rd ed (Oxford: Oxford University Press, 2018) at 114-116; *Velasquez-Rodriguez v Honduras*, IACtHR, Series C No 4 (29 July 1988) at para 172; HRC, CCPR General Comment 31 [30] , *The nature of the general legal obligation imposed on States Parties to the Covenant*, 26 May 2004, CCPR/C/21/Rev. 1/Add 13 at para 8.

Chapter 1 Context: Fragmentation in Public International Law

> ***Unlike national law, international law regimes are always partial in the sense that they regulate only some aspects of State behaviour while presuming the presence of a large number of other rules in order to function at all. They are always situated in a "systemic" environment.***[21]
>
> ILC, *Report on Fragmentation* [2006]

1.1 Overview

Our current system of Public International Law (PIL) comprises a complex multiplicity of highly specialized legal regimes with asymmetric levels of implementation and enforcement. The uncoordinated proliferation of simultaneously binding obligations due to the independent development of each specialized regime, as well as the diversity of enforcement mechanisms, has been referred to as fragmentation.[22]

In this Chapter I argue that the debates surrounding fragmentation have not been exhausted. Conscientious efforts that go beyond the application of collision rules and interpretation techniques are necessary to achieve coherence and coordination. Hence, this thesis contributes to the debate on fragmentation by demonstrating that it is time to lead the debate towards a quest for coherence and coordination between specialized regimes, and to leave the search for unity of PIL behind because unity will not respond to the sophisticated matters addressed under PIL. While unity could be desirable within the specialized regimes themselves, it is not to be expected in PIL more broadly.

[21] *ILC Report*, *supra* note 3 at para 179.
[22] Kerstin Blome et al, *Contested regime collisions: norm fragmentation in world society* (Cambridge: Cambridge University Press, 2016) at 3.

An analytical distinction was made by the ILC between the substantial and the institutional aspects of fragmentation. The substantial aspects relate to specialized regimes of law and the relationships *inter se* as previously referred to. This substantial aspect is the focus of my thesis, which considers one specific interaction between two specialized regimes: IHRL and IAL in the context of air carrier liability.

The second is the institutional aspect. The ILC described it as "the proliferation of implementation organs – often courts and tribunals – for specific treaty-regimes has given rise to a concern over deviating jurisprudence, and forum-shopping;"[23] in addition to the emergence of bodies of experts and academic institutions with their own institutional biases.[24] This second aspect was not addressed by the ILC study and, similarly for analytical purposes, I will not consider it in this thesis.

1.2 What is fragmentation?

1.2.1 The meaning of the term *fragmentation*

The term *fragmentation* has a predominantly negative connotation. Timo Pankakoski and Antto Vihma made a detailed analysis of fragmentation as a concept and metaphor.[25] They first referred to the Oxford English Dictionary, which defines fragmentation as "a breaking or separation into

[23] *ILC Report, supra* note 3 at para 489.
[24] Koskenniemi, Martti, "The Fate of Public International Law: Between Technique and Politics" 70:1 (2007) Modern L Rev 1.
[25] Timo Pankakoski & Antto Vihma, "Fragmentation in International Law and Global Governance" (2017) 12:1 Contributions to the History of Concepts 22.

fragments,"[26] and also defines *fragment* as "a detached, isolated, or incomplete part" and "a part remaining or still preserved when the whole is lost or destroyed."[27]

In a negative perspective of fragmentation, in 2000 Gerhard Hafner reported to the ILC a paper entitled "Risks ensuing from fragmentation of international law."[28] In this paper Hafner described international law as "erratic parts and elements which are differently structured so that one can hardly speak of a homogenous nature of international law."[29] Similarly, Margaret Young defined fragmentation as "the recognition that international law is made up of fragments of normative and institutional activity."[30]

Indeed, due to the threatening appearance of the phenomena of fragmentation, discussions and analysis took place at the ILC as approved by the General Assembly of the United Nations, leading to the adoption of the well-known 2006 report by the ILC: *Fragmentation of International Law: Difficulties arising from the Diversification and expansion of International Law*[31] (hereinafter "ILC Report").

The ILC Report affirmed that the existence and importance of fragmentation in both its institutional and substantive aspects could not be doubted.[32] Yet, it also found a polarization in relation to the assessment of fragmentation in the scholarship and legal practice.[33] On the one side there was the consideration that fragmentation was a threat to general international law due to "emergence of

[26] J A Simpson & E S C Weiner, *Oxford English Dictionary* (Oxford: Oxford University Press, 1993) sub verbo "fragmentation, n".
[27] *Ibid*, sub verbo "fragment, n."
[28] *ILC Report*, *supra* note 3 at 143-150.
[29] *Ibid* at 143-144.
[30] Margaret A Young, ed, *Regime Interaction in International Law: Facing Fragmentation* (Cambridge: Cambridge University Press: 2012) at 2.
[31] *ILC Report*, *supra* note 3.
[32] *Ibid* at para 9.
[33] *Ibid* at para 9, see specially references in footnotes 8 and 11.

conflicting jurisprudence, forum-shopping and loss of legal security."[34] On the other side, some scholars believed that fragmentation was simply a natural "technical problem" that could be "controlled by the use of technical streamlining and coordination."[35] Both of these extremes saw fragmentation as a problem in itself.

In face of polarized literature and legal opinions, after having analyzed the existence of the so-called self-contained regimes, conflicts and the available collision rules to deal with legal conflicts, the ILC Report first concluded that special treaty-regimes have not "seriously undermined legal security, predictability or equality of legal subjects."[36] The second main conclusion brought a nuance to the perception of the threats of fragmentation. It stated that "no homogenous, hierarchical meta-system is realistically available to do away" with problems of coordination due to conflicting rules and legal regimes.[37] Hence, further attention to fragmentation was justified for the years following the ICJ Report.

1.2.2 The debates over fragmentation have not being exhausted

After the ILC Report several books and articles were dedicated to the analysis of fragmentation, with a general conclusion that the problems and potential detrimental effects of fragmentation over PIL have been "overstated."[38] In this regard some scholars argue today that the debate over fragmentation has been exhausted. Anne Peters suggested in 2017 that it was time to "bury the f-word." Similarly, Mads Andenæs & Eirik Bjørge proposed to give "farewell to fragmentation" and

[34] *Ibid*.
[35] *Ibid*.
[36] *Ibid* at para 492.
[37] *Ibid*.
[38] Kovudhikulrungsri, *supra* note 7 at 57. See also: Anne Peters, "The refinement of international law: From fragmentation to regime interaction and politization" (2017) 15:3 NYU Intl J Cont L 671; Martti Koskenniemi, "The case for Comparative International Law" (2009) 1 Finnish YB Int L 5; James Crawford, *International Law as an Open System: Selected Essays* (London: Cameron May, 2002).

claimed having provided "the last word on the fragmentation debate in international law."[39] Both Peters and Andenæs & Bjørge claim an end to the fragmentation debate by referring to the switch that international courts are having towards a convergence by using techniques to "coordinate the various subfields of international law."[40]

However, I believe that it is misleading to suggest an end to fragmentation. These claims are likely influenced by an understanding of fragmentation as "a process with a single direction."[41] Such claims do not reflect the growing complexity of PIL whereby more than 500 major treaties have been deposited with Secretary-General of the United Nations, 57 multilateral air law treaties deposited with the Secretariat of ICAO,[42] and 18 human rights instruments in force listed at the Office of the United Nations High Commissioner for Human Rights, including the 9 core human rights instruments and accompanying optional protocols.[43]

Although this is indeed an impressive number of existing international treaties, Pawelyn estimated that in 1995 there were already more than 1500 treaties,[44] and these do not include all the additional obligations under customary international law and general principles, which apply to all States.[45] Dinah Shelton identified in 2005 close to 100 IHRL treaties of global and regional application.[46] Facing this myriad of applicable simultaneous obligations in force, it is unlikely that solely rules

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[39] Mads Tønnesson Andenæs & Eirik Bjørge, eds, *A Farewell to Fragmentation: Reassertion and Convergence in International Law* (Cambridge: Cambridge University Press, 2015). See also: Jed Odermatt, "A Farewell to Fragmentation: Reassertion and Convergence in International Law" (2016) 14:3 Intl J Cont L 776.

[40] Peters, *supra* note 38 at 671.

[41] Timo & Antto Vihma, *supra* note 25 at 29.

[42] ICAO, "Current list of parties to mulitateral air law treaties" (29 July 2019), online: <www.icao.int/secretariat/legal/Lists/Current%20lists%20of%20parties/AllItems.aspx>

[43] HRC, "The Core International Human Rights Instruments and their monitoring bodies" (29 July 2019), online: <www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx>

[44] Joost Pauwelyn, *Conflict of Norms in Public International Law. How WTO Law Relates to Other Rules of International Law* (Cambridge: Cambridge University Press: 2003) at 18.

[45] *Fisheries Case (United Kingdom v Norway),* [1951] ICJ Rep 116 (Except for the persistent objectors for some cases of customary international law).

[46] Dinah Shelton, *Remedies in International Human Rights Law*, 2nd ed (Oxford: Oxford University Press, 2005) at 113.

of interpretation can either prevent or solve legal conflicts. Hence, we cannot forget about fragmentation.

Some of the positive features of fragmentation are its contribution to prevent a "hegemonic project" by prioritization one or only a few specialized regimes,[47] and providing awareness of potential managerialism within specialized regimes.[48] In Koskenniemi's words "the result of a conscious challenge to the unacceptable features of that general law and the powers of the institutions that apply it. Therefore, there will be no hierarchy between the various legal regimes in any near future."[49]

Further, scholars like Koskenniemi, Pawelyn[50] and Simma[51] have recognized that fragmentation is not a problem in itself, but awareness of its implications is essential. Indeed, Pankakoski and Vihma concluded that a negative perception of the phenomenon is misleading, instead: "fragmentation appears as a ubiquitous and necessary, rather than contingent, feature of modern law."[52] Hence, they advocate for a conceptual shift towards a more positive connotation of fragmentation to better reflect the nature of this phenomena in PIL. This thesis aims to contribute to this conceptual shift.

1.2.3 The fragmentation-unity debate and the nature of public international law

The inherent negative connotation of the term fragmentation has also created a misleading opposite: unity. Mario Prost has acknowledged in his D.C.L. disertation at McGill this tension between unity and fragmentation.[53] While, the expectation of unification is not foreign to domestic law, this same expectation is not inherent in PIL.[54] In fact the ILC report states:

[47] Tomer Broude, "Keep Calm and Carry On: Martti Koskenniemi and the Fragmentation of International Law" (2013) 27:2 Temp Intl & Comp LJ 279.
[48] Koskenniemi, Martti, (2007), *supra* note 24.
[49] *Ibid* at 19.
[50] Pauwelyn, *supra* note 44.
[51] Bruno Simma & Dirk Pulkowski, "Of Planets and the Universe: Self-contained Regimes in International Law" (2006) Eur J Intl L 483.
[52] Timo & Antto Vihma, *supra* note 25 at 22.
[53] Prost, *supra* note 3 at 10-11.
[54] Young, *supra*

> […] Very often new rules or regimes develop precisely in order to deviate from what was earlier provided by the general law. When such deviations or become general and frequent, the unity of the law suffers. Such deviations should not be understood as legal-technical "mistakes". They reflect the differing pursuits and preferences that actors in a pluralistic (global) society have. In conditions of social complexity, **it is pointless to insist on formal unity**. A law that would fail to articulate the experienced differences between fact-situations or between the interests or values that appear relevant in particular problem-areas **would seem altogether unacceptable, utopian and authoritarian simultaneously.**
>
> [Emphasis added].[55]

Wilfried Jenks explained in his 1953 seminal article "The Conflict of Law-Making Treaties," a significant feature of PIL that contributes to fragmentation:[56]

> In the absence of a world legislature with a general mandate, law-making treaties are tending to develop in a number of historical, functional and regional groups which are separate from each other and whose mutual relationships are in some respect analogous to those of separate systems of municipal law.[57]

It was early acknowledged in the *Lotus* case by the Permanent Court of International Justice (PCIJ), that only the non-existence of a supra-state authority allows the system of PIL to serve its primary goal to regulate relations between sovereign States. It specified that the States are the legislators:

> The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims.[58]

Similarly, in the *Nicaragua* case the International Court of Justice (ICJ) stated that "in international law there are no rules, other than such rules as may be accepted by the State concerned, by treaty or otherwise."[59] Hence, the same core characteristics of PIL are the origin of fragmentation.

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note 30 at 2 (Young argues: "there has never been a single global legislature or appellate court to mould a unified body of international law. Nor has ever been a uniform will for such a system by sovereign states. Instead, states have implicitly or explicitly conceived of particular issued and problems – often at key historical moments of transition and often strategically – and responded by agreeing to new laws and supporting international organizations").

[55] *ILC Report, supra* note 3 at paras 16-17.

[56] C Wilfried Jenks, "The Conflict of Law-Making Treaties" (1953) 30 Brit YB Intl L 401 at 403.

[57] *Ibid*.

[58] *SS Lotus (France v Turkey)* (1927), PCIJ (Ser A) No 10 at para 44.

[59] *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States)*, Merits [1986] ICJ Rep 14 at para 269 [*Nicaragua case*].

1.3 The persistent concern: legal conflicts between specialized regimes

I have argued in the previous sections that fragmentation is not necessarily negative, that it cannot be "overcome" because it is in fact the result of the core features of PIL, and that it responds to the needs of sovereign States. However, I acknowledge that fragmentation carries with it a persistent risk of conflict. This risk of conflict between simultaneously binding obligations was described by Wilfried Jenks' analysis of 1953.[60] Jenks described it as a danger of failure of simultaneous compliance when applying mutually incompatible treaties after having been ratified by States.[61]

The ILC Report concluded that conflicts among norms were "endemic to international law."[62] It further stated that the background delineating the concern about fragmentation is "the rise of specialized rules and rule-system that have no clear relationship to each other."[63] In this regard the persistent concern about fragmentation can be generally understood as its potential to create three types of conflicts legal conflicts as distinguished by the ILC:

> (a) Conflicts between general law and a particular, unorthodox interpretation of general law;
> (b) Conflicts between general law and a particular rule that claims to exist as an exception to it; and
> (c) Conflicts between two types of special law.[64]

This thesis only concerns the third type which refers to a potential conflict between obligations under specialized regimes, namely IHRL and the Warsaw Regime of liability for air carriers.

[60] Jenks, *supra* note 56.
[61] *Ibid* at 403.
[62] *Ibid* at para 486.
[63] *Ibid* at para 483.
[64] *Ibid* at para 47.

1.4 The focus of this thesis: a conflict between obligations from two specialized regimes

Specialized regimes were defined by the ILC Report in paragraph 128 as:

> Interrelated wholes of primary and secondary rules, sometimes also referred to as "systems" or "subsystems" of rules that cover some particular problem differently from the way it would be covered under general international law.

While specialized regimes are a strong form of *lex specialis,*[65] it was recognized that no specialized regime is self-contained. This includes regimes with special secondary rules on State responsibility,[66] and in a broader notion, regimes extending to primary rules.[67] The ICJ referred to the law of diplomatic relations as "self-contained regime" in the *Hostages* case.[68] The main aspect considered by the ICJ for qualifying the law of diplomatic relations as self-contained was its internal structure concerning breaches and State responsibility.[69] This logic was also applied to human rights law in the *Nicaragua* case given that countermeasures are not applicable to IHRL, but instead protections and remedies are provided for by international conventions themselves.[70]

Similarly, WTO law has been characterized as a self-contained regime in a wider sense, regarding both primary[71] and secondary rules.[72] However, several scholars have concluded that there are no

[65] *ILC Articles on State Responsibility, supra* note 16 at 358-359.
[66] *United States Diplomatic and Consular Staff in Tehran (United States of America v Iran),* [1980] ICJ Rep 3 at para 86 [*Diplomatic and Consular Staff in Tehran*].
[67] *Case of the S.S. "Wimbledon" (United Kingdom and ors v Germany) (Judgment)* (1923), PCIJ (Ser A) No 1 at 23-24.
[68] *Diplomatic and Consular Staff in Tehran, supra* note 66 at para 86.
[69] *ILC Report, supra* note 3 at para 125.
[70] *Nicaragua* case, *supra* note 59 at 267.
[71] WTO, "Legal Texts: The WTO Agreements" (29 July 2019), online: <www.wto.org/english/docs_e/legal_e/final_e.htm>
[72] *Dispute Settlement Rules: Understanding on Rules and Procedures Governing the Settlement of Disputes*, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations 354 (1999), 1869 U.N.T.S. 401, 33 I.L.M. 1226 (1994) at Articler having established that there 2 [*DSU*].

self-contained regimes in relation to general international law[73] because general international law on treaty interpretation applies to them,[74] including to WTO law. [75]

Hence, the ILC specified after having studied in detailed the so-called "self-contained" regimes[76] that specialized regimes such as human rights "should not be called self-contained,"[77] but special or specialized regimes instead. The ILC identified three types of special regimes:

a) Special sets of secondary rules of State responsibility;
b) Special sets of rules and principles on the administration of a determined problem;
c) Special branches of international law with their own principles, institutions and teleology.[78]

Two of these specialized branches are IAL and IHRL.[79]

1.5 Conclusion

The existence of specialized regimes and of conflicts between them is not in itself problematic;[80] it is a natural response to the numerous subject matters that international law regulates and to the nature of international law itself.[81] However, it does become problematic when there are conflicts between simultaneously binding obligations from different specialized regimes[82] that cannot be solved by applying interpretative techniques or collision rules. For instance, Lady Hale of the Supreme Court of the United Kingdom made reference in *Stott* to a potential impossibility to provide remedies required under human rights treaties, which could be caused by the exclusivity

[73] Simma & Pulkowski, *supra* note 51 at 483.
[74] Kovudhikulrungsri, *supra* note 7 at 57, footnote 73 referring to Martti Koskenniemi and James Crawford; *ILC Report*, *supra* note 3 at 492; Pauwelyn, *supra* note 44 at 9.
[75] Pauwelyn, *supra* note 44 at xi.
[76] *ILC Report*, *supra* note 3 at para 126 (Including a broader notion of self-contained regimes referred to in the *S.S. Wimbledon* case by the ICJ).
[77] *ILC Report*, *supra* note 3 at para 492.
[78] *Ibid* at 252.
[79] *Ibid* at paras 8, 129, and 173; Simma & Pulkowski, *supra* note 51 at paras 129, and 524.
[80] Martti Koskenniemi, "The case for Comparative International Law" (2009) 1:5 Finnish YB Int L 1, 5; Crawford, *supra* note 38.
[81] Pauwelyn, *supra* note 44 at 13-21.
[82] *ILC Report*, *supra* note 3 at para 8.

clause of the Montreal Convention.[83] Thus, the problems associated with fragmentation should not be sub-estimated. Instead, the strategy proposed by the ILC is still applicable and requires a continued attention to "to the collision of norms and regimes and the rules, methods and techniques for dealing with such collisions."[84]

[83] *Warsaw Convention & Montreal Convention*, *supra* note 5.
[84] *ILC Report*, *supra* note 3 at para 492.

Chapter 2 The Warsaw Regime for Liability of Air Carriers and its Exclusivity

2.1 International air law and the sub-regime for liability of air carriers

IAL has been defined by Pablo Mendes de Leon as "a body of rules governing the use of airspace and its benefits for aviation, the travelling public, undertakings and the nations of the world."[85] Brian Havel and Gabriel Sanchez justify the existence of IAL as a specialized branch of PIL due to its unique characteristics. To illustrate the singularity of IAL, Havel and Sanchez refer to the massive size of the industry, its international nature, the multiplicity of regulatory controls, and the fact that it is a commercial activity with private players but also "treated by States via the International Civil Aviation Organization (ICAO), a specialized UN Agency."[86]

Havel and Sanchez identify both public and private international air law and warn that the former reference is useful but also a "mildly misleading descriptor."[87] The term "private international air law" must be distinguished from the usual term of conflicts of laws, which deals with the application of domestic laws of different jurisdictions when there are foreign elements to a situation.[88] Instead, it refers to the use of international legal instruments of public nature to address transitional events involving private parties, and by which enforcement and implementation is granted by domestic courts to private parties and individuals. Examples of such instruments used

[85] Pablo Mendes de Leon, *Introduction to Air law,* 10th ed (New York: Wolters Kluwer, 2017) at 1.
[86] Havel, Brian F & Sanchez, Gabriel Sanchez, *The Principles and Practice of International Aviation Law* (New York: Cambridge University Press, 2014) at 5.
[87] *Ibid* at 13.
[88] Andreas Bucher & Andrea Bonomi, *Droit international privé,* 3rd ed (Bâle: Helbing Lichtenhahn, 2013) at Chapter I. See also generally: Adrian Briggs, *The conflict of laws,* 3rd ed (Oxford, UK: Oxford University Press, 2013).

in IAL are the Cape town Convention[89] and its Aircraft Protocol,[90] and the two instruments object of my thesis: the Warsaw and Montreal Conventions.[91] Havel and Sanchez specify:

> […] for "private" international law instruments, the contracting States delegate enforcement to those parties directly involved in the underlying event and to those national courts that can claim jurisdiction under the relevant treaty.[92]

This is the case of airline liability under the Warsaw and Montreal Conventions[93] are treaties under PIL.[94] These conventions fulfill the characteristics of a treaty under PIL as specified in Article 2(1)(a) the Vienna Convention on the Law of Treaties (VCLT).[95] Therefore, acknowledging the two-fold nature of these conventions, and the "hybridized structure" of the Warsaw Regime,[96] the present thesis is concerned only with the PIL nature of these conventions in regard to the obligations and rights it grants upon signatory States, as opposed to the interpretation of these conventions by domestic courts due to restrictions under each domestic legal systems, e.g. lack of domestic incorporation of a IHRL treaty. However, it is a well-known principle of PIL that a State cannot justify its failures to comply with its international obligations due to its domestic law or other reasons such as division of powers between the courts, the executive and the legislative.[97]

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[89] *Convention on International Interests in Mobile Equipment*, 16 November 2001, ICAO Doc 9703 (entered into force 1 March 2006) [*Cape town Convention*].
[90] *Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Aircraft Equipment*, 16 November 2001, ICAO Doc 9793 (entered into force 1 March 2006) [*Protocol to the Cape town Convention*].
[91] Havel & Sanchez, *supra* note 86 at 13.
[92] *Ibid* at 13.
[93] *Warsaw Convention* & *Montreal Convention*, *supra* note 5.
[94] Havel & Sanchez, *supra* note 86 at 13-14.
[95] *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) [*VCLT*] (This article defines "Treaty": means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation).
[96] Havel & Sanchez, *supra* note 86 at 251.
[97] *ILC Articles on State Responsibility*, *supra* note 16 (Article 3 of the Articles on State Responsibility: "The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law"); See also VCLT, *supra* note 95, Article 27: "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46." See also other Articles of the VCLT: 46, 53 and 64.

2.2 Overview of the Warsaw Regime

2.2.1 Key elements of the 1929 Warsaw Convention

After WWI States acknowledged that the risks and uncertainties associated with aviation could not be contained within each single national airspace. The cross-border nature of international civil aviation involved from the outset an undisputable vast spectrum of applicable jurisdictions.[98] Thus, international civil aviation attracted a constant risk of unlimited monetary exposure for air carriers in the event of accidents, and a jurisdictional uncertainty for both passengers and air carriers in relation to the applicable law, and multiplicity of available remedies.

The birth and development of commercial aviation could not survive facing a disjointed liability regime based on each State's territorial jurisdiction. This was indeed the case of an infant industry, mostly government-owned, and subject to frequent accidents.[99] In this regard, Havel explains that the core purpose of the Warsaw Convention was to "help the infant civil aviation industry avoid massive liability exposure due to serious accidents."[100] In *Floyd*[101] the Supreme Court of the United States examined the drafting history of the Warsaw Convention, and concluded that there was a need to "foster the growth of the fledgling commercial aviation industry", and that the purpose of the Warsaw Convention was "to achieve uniformity of rules governing claims arising from international air transport."[102] Baden also notes that it was needed for the simplification of litigation,[103] and more frequent accidents.

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[98] Michael Milde, *International Air Law and ICAO: Essential Air and Space Law* (Hague, The Netherlands: Eleven International Publishing, 2012 at 267.
[99] Brian Havel, *Does the Warsaw Convention Still Provide the Exclusive Remedy for a passenger Injured in International Air Transportation?* (American Bar Association, 1998) at 60.
[100] *Ibid*.
[101] *Eastern Airlines Inc v Floyd*, 499 US 530 (1991) [*Floyd*].
[102] *Ibid* at 552.
[103] Naneen K Baden, "The Japanese Initiative on the Warsaw Convention" (1995) 61:2 J Air L & Com at 439.

In this context the Warsaw Convention was negotiated and signed in 1929 by 128 States. The Warsaw Convention took air carrier liability outside the realm of "conflict of laws" which in common law is the domestic law dealing with the analysis of applicable law, the jurisdiction of domestic courts to hear a dispute, and the domestic enforcement of foreign judgements, for situations having one of more foreign elements.[104]

Three core features were included in this convention: firstly, unification of the liability rules applicable to air carriage under a strict liability regime.[105] Secondly, the limitation of liability of air carriers by establishing fixed monetary liability caps and an open-ended substantive scope of compensable losses in cases of death or injury to passengers, and damage to luggage and cargo. Thirdly, the exclusivity clause guaranteed the preemption of any other regime or domestic cause of action otherwise applicable. Hence, all aspects combined contribute to the unification and limitation of liability of air carriers.[106] The first two features will be further explained below, while the exclusivity feature will be analyzed later in this Chapter under section 2.4.

a) The strict liability regime under the Warsaw Convention

The framers of the Warsaw Convention chose to unify the liability of air carriers by establishing a strict liability regime.[107] This regime is a no-fault regime by which passengers are relieved of proving a fault element and air carriers are liable to pay compensation if certain conditions defined in Articles 17, 18 and 19 are met.

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[104] Adrian Briggs, *The conflict of laws*, 3rd ed (Oxford, UK: Oxford University Press, 2013) at 66.
[105] Baden, *supra* note 103 at 438. See also: *Husserl v Swiss Air Transp Co*, 388 F Supp 1238, 1244 (SDNY 1975). (The main goal of the Warsaw Convention is to protect airlines from destructive liability in the event of an airline crash).
[106] Carlos P, Martins, "The Strong Exclusivity Consensus Interpretation of the Montreal Convention" (2015) 28:3 Air & Space Lawyer 4 at 4.
[107] Milde, *supra* note 98 at 284.

Under the Warsaw Convention passengers have a direct cause of action against air carriers before domestic courts (Article 28).[108] The convention also established four grounds of jurisdiction under Article 28, and at the option of the plaintiff: i. the carrier's place of residency, ii. place of business, or iii. establishment, or iv. the place of destination.

An opportunity to be exonerated wholly or partly was also provided under Articles 20 and 21. These articles established a reversed burden of proof on air carriers to be exonerated if they could show that they took "all reasonable measures to avoid the damage or that it was impossible to take such measures" (Article 20); or "that the damage was caused by or contributed by the negligence of the injured person" (Article 21).

b) The limitation of air carrier liability under the Warsaw Convention

Fixed monetary liability caps

As previously mentioned, the limitation of air carrier liability was achieved by imposing both fixed monetary liability caps and establishing a narrow category of compensable losses. Firstly, as long as the contract of carriage or the ticket contains notice of the application of the convention as per Article 3,[109] the Warsaw Convention limits the amount of compensation to a maximum of 125,000 francs for liability in the carriage of a passenger. While the passenger could only be compensated more than the limits of Article 22 if the passenger could show "wilfulness conduct" on the part of the air carrier or any of its agents (Article 25), this was difficult to proof.[110]

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[108] *In Re Mexico*, *supra* note 17.
[109] *Mertens v Flying Tiger Line, Inc*, 341 F (2d) 851 (2d Cir 1965); *Warren v Flying Tiger Line*, 352 (2d) 494, Ct of Apps (9th Cir 1965); *Lisi v Alitalia-Linee Aeree Italiane*, 253 F Supp 237 (SDNY 1966); *Chan v Korean Airlines*, 490 US 122 (1989).
[110] Lawrence B, Goldhirsch, *The Warsaw Convention Annotated: A Legal Handbook* (The Hague: Kluwer Law International, 2000) at 154-155.

Limited scope of compensable losses

Secondly, Articles 17, 18 and 19 establish the scope of losses and damages which are compensable under the convention. Articles 18 and 19 refer to losses related to luggage, goods and delay, these categories are not considered in this thesis. Instead, Article 17, which refers to damage suffered by passengers, is the focus of this thesis. Under Article 17 of the Warsaw Convention a passenger can only get recovery for losses if she/he proves that i. there was an accident which ii. caused either iii. death or bodily injury iv. while passenger was on board the aircraft, or during the process of embarkation or disembarkation. Article 17 reads:

> Article 17
> The carrier is liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking. [Emphasis added].

Article 17 imposes a significant limitation for recovery of passengers which have suffered injury on board of an aircraft, or while embarking or disembarking. Under Article 17 there is liability of the air carrier for death wounding or "any other bodily injury" of a passenger. The absence of any reference to mental injury in the text of Article 17 has precluded the compensation for injury to feelings or psychological trauma to the effect that courts have not allow compensation under the Warsaw Convention for purely mental injury.[111] This can be problematic for recovery for injury to feelings or dignity which is recognized under IHRL.

Similarly, the use of the word *accident* has been interpreted by domestic courts following the 1985 decision by the Supreme Court of the United States *Air France v. Saks*, to exclude any pre-existing condition or something that is internal to the passenger such as a loss of hearing due to cabin de-

[111] Havel & Sanchez, *supra* note 86 at 292.

pressurisation,[112] or any circumstance which is recognized as a known risk of air travel such as health complications related to deep vein thrombosis (DVT).[113] An additional authoritative interpretation of the word *accident* was also provided in 2004 by the Supreme Court of the United States in *Hussain* [114] where accident was also understood to a failure to act by agents of the airline when knowing the existence of a serious condition of a passenger.[115]

It has been argued that the scope of *bodily injury* and *accident* is an additional barrier to recovery for IHRL violations, as IHRL violations would need to be characterized as "accidents" and also the injury suffered would have to be bodily injury and not only a mental injury such as injury to feelings or dignity.[116] Yet, human rights are protected mainly under a human rights framework which is more appropriate to address human rights breaches than an air carrier liability convention. Thus, the real barrier to human rights claims and their redress is the exclusivity clause of the Warsaw System. In the absence of this clause human rights claims would be addressed under a human rights framework and not necessarily under the scope of Article 17.

2.2.2 The shortcomings of the Warsaw Convention and efforts to address them

As a result of an improved safety record of the airline industry and cheaper insurance premiums, the conditions and limitations of the Warsaw Convention became too burdensome for passengers and quickly became outdated. [117] Less than 20-years after its signature an attempt to update the

[112] *Air France v Saks*, 470 US 392 (1985).
[113] *Re Deep Vein Thrombosis and Air Travel Group Litigation*, [2005] UKHL 72, [2006] 1 AC 495; *Wallace v Korean Air*, 214 F (3d) 293, Ct App (2nd Cir 2000); *Rosman v Trans World Airlines Inc*, 34 NY(2d) 385, (NY Ct App 1974).
[114] *Olympic Airways v Hussain*, 540 US 644 (2004).
[115] *Ibid.*
[116] *Sidhu and Others v British Airways; Abnett (known as Sykes) v British Airways plc*, [1997] 1 ALL ER 193 [*Sidhu*] (In *Siddhu*, the taking of passengers as hostages due to the begining of the Golf War was not found to be an accident. Thus, it is likley hard to argue that human rights violations are accidents. Maybe it could be argued in the context of a failure to act by the crew like in *Hussain*). For more discussion on this see : Kovudhikulrungsri, *supra* note 7 at 50.
[117] Baden, *supra* note 103 at 442.

Warsaw Convention was made at the 1955 ICAO International Conference on Private Air Law by the Hague Protocol.[118] A series of additional legal instruments attempting to address other shortcoming of the Warsaw Convention were also created in the following decades. Although some modifications were made to the Warsaw Convention by successive instruments, these did not modify the essential features of they Warsaw Conversion which are also present in the 1999 Montreal Convention:

> a. Specific subject-matter of application: international carriage by air of passengers for reward or gratuitously (Article 1.1)
>
> b. Temporal scope: on board, embarking or disembarking (Article 17)
>
> c. Substantive scope: liability in relation to death or bodily injury of passenger (Article 17)

Instead, these instruments aimed to modify matters such as raising the monetary limits of the 1929 Warsaw Convention from 8,300 US to 16,000 US,[119] adding code-shared flights to the application of Article 1(2) of the Warsaw Convention,[120] and introducing the combined value unit of Standard Drawing Rights (SDR)[121] to target one of the main weakness of the Warsaw Convention which was the fixed liability monetary limits and its inability to keep up with inflation.[122] Only the Guatemala Protocol aimed to change the scope of Article 17 with more substantial changes

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[118] ICAO, Legal Committee, *Report on the Revision of the Warsaw Convention, ICAO International Conference on Private Air Law*, vol. 2 at 96, ICAO Doc. 7686- LC/140 (1956).

[119] *Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw on 12 October 1929*, 28 September 1955, ICAO Doc 7632 (entered into force 1 August 1963) [*The Hague Protocol 1955*].

[120] *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*, 18 September 1961, ICAO Doc 8181 (entered into force 1 May 64) [*Guadalajara Supplementary Convention 1961*].

[121] Baden, *supra* note 103 at 446 ("Standard drawing rights (SDR) and the supplemental compensation plan. A SDR is a "a monetary unit based on the exchange rates for British, French, German, Japanese, and U.S. currencies").

[122] *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 Protocols done at The Hague on 28 September 1955 and at Guatemala City on 8 March 1971*, 25 September 1975, ICAO Doc 9148 (entered into force 14 June 1998) [*Montreal Protocol N.3*]; David I Sheinfeld, "From Warsaw to Tenerife: A Chronological Analysis of the Liability Limitations Imposed Pursuant to the Warsaw Convention" (1980) 45 J Air L & Com 653 at 659-60.

including replacing the words “accident” and “bodily injury” by “event” and “personal injury.” However, this protocol is not in force and received strong opposition.

After the creation of additional instruments, the Warsaw Regime for air carrier liability became a broken web of 8 public international law instruments, with the Warsaw Convention as core convention. These instruments have not been ratified by all the parties who initially signed the 1929 Warsaw Convention. As a result, it has been argued that the Warsaw Regime is in itself “fragmented,”[123] in the sense that it is not unified and harmonization among instruments has not been achieved. This lack of harmonization among instruments also lead to the negotiation of the 1999 Montreal Convention.

2.2.3 Key elements of the 1999 Montreal Convention

Havel notes that the Montreal Convention “is not by its terms a “reset” of the Warsaw Convention. The Montreal Convention was intended to “modernize and consolidate” the Warsaw Convention and its related instruments.”[124] The Montreal Convention possesses in Article 55 a conflict clause which is in line with Article 30 of the VCLT and with the principle of *lex posterior*. Article 55 clearly specifies that the Montreal Convention “shall prevail over any rules which apply to international carriage by air.” Article 55 lists in in subparagraph (1) all the other previous 8 legal instruments: (a) the 1929 Warsaw Convention, (b) the 1955 Hague Protocol, (c) the 1961 Guadalajara Convention, (d) the 1971 Guatemala City Protocol, and (e) the additional Protocols i-iv. As a result, when both the State of destination and of departure as indicated by the contract of

[123] Aleksandra Puścińska, *A fragmented legal regime of air carrier liability in international transportation of passengers: delay cancellation and denied boarding* (LLM Thesis, McGill Institute of Air and Space law, 2016) [unpublished] at 13. See also: Kimberlee S. Cagle, “The Role of Choice of Law in Determining Damages for International Aviation Accidents” (1986) 51 J Air L & Com 953, at 961-66.
[124] Havel & Sanchez, *supra* note 86 at 292.

carriage are parties to the Montreal Convention, the Montreal Convention will be the only applicable instrument of the Warsaw Regime.

While this convention maintained the core features of the 1929 Warsaw Convention, it also introduced significant changes, including a switch from priviledging the protection of airlines towards a mentality more favourable to passengers as consumer protection.[125] Additional changes addressed by the Montreal Convention are the fixed liability caps, the need to allow for inflation and evolution of the liability caps. These changes are the introduction of special drawing rights (SDR) as the monetary unit (Article 23); a two-tiered strict liability regime for death or injury of passengers which does not allow for exoneration of liability in relation to the first 100,000 SDR (Article 21); and an escalator clause which allows for revision of the liability caps under the convention every 5 years by ICAO (Article 24).

The Montreal Convention, however, did not allow for a broader scope of compensable damages and losses under Article 17. It continued to have the words *accident* and *bodily injury*. Even though the new wording of Article 17 has been interpreted together with the consumer-friendly ethos of the Montreal Convention to extend to compensation of bodily injury accompanying by mental injury,[126] this has been found to exclude solely mental injury, including for instance injury to feelings due to discriminatory treatment by the airline.[127]

[125] See further *Warsaw Convention, supra* note 5 at Preamble and Articles 28, 33, 39-48.
[126] *Doe v Etihad Airways*, 870 F (3d) 406, Ct App (6th Cir 2017).
[127] *Stott, supra* note 1. Havel & Sanchez, *supra* note 86 at 292.

2.3 Applicability of the Warsaw Regime

The Warsaw Convention and the Montreal Convention apply only to international carriage by air of passengers, luggage or goods for reward or gratuitously.[128] Their Article 1(2) clarified that the meaning of "international carriage" is determined by the contract of carriage, and refers to carriage where both the place of departure and the place of destination, even if there is an agreed stopping place in a third State not party to the convention, are located in the territory of two different States parties to the convention. Therefore, where the contract of international carriage does not extend to include a domestic leg in the itinerary, the domestic leg is not part of the international carriage and the convention does not apply.[129]

Three different scenarios could result from this verification: i. applicability of the Warsaw Convention either modified by a protocol or not, ii. applicability of the Montreal Convention only, or iii. Absence of application of the Warsaw Regime. The consequences of any of these scenarios would be different for an analysis of potential conflicts with IHRL as I briefly explain next.

The first step in any analysis under the Warsaw Regime is to verify according to the contract of carriage whether both the State of departure and the State of destination[130] are parties to either the Warsaw or Montreal convention, or both. ii. The second step is to verify whether the two states are also parties to a related supplementary convention or protocol. In this regard Article 30 of the VCLT, *Application of successive treaties relating to the same subject-matter*, is consistently applied to the Warsaw Regime instruments. This is the application of the principle of *lex posterior*. Therefore, the original version of the Warsaw Convention 1929, or as modified by the most recent

[128] *In Re Mexico*, *supra* note 17; *Fellowes (or Herd) v Clyde helicopters* (1997), [1997] 1 ALL ER 775 (HL Eng)).
[129] *Coyle v Garuda Indonesia*, 363 F (3d) 979, Ct of Apps (9th Cir 2004); *Stratton v Trans-Canadian Airlines* (1962), 32 DLR (2d) 736, 1962 CarswellBC 28 (WL Can) (BCCA).
[130] Warsaw Convention, *supra* note 5 at Article 1.2, and Montreal Convention, *supra* note 5 at Article 1.2.

instrument, which has been ratified by both the State of destination and of departure, will be applicable.

Therefore, for the purposes of my thesis the version of the Warsaw Convention which will be analyzed is the 1929 version without modifications, considering that the conclusions will also be applicable to any modified version because, as previously explained, no substantial modification has been made to Articles 1(1), 17, or 24.

The second scenario is the application of the Montreal Convention alone, which as previously explained contains a conflict clause in Article 55(1) that makes it prevail over any other instrument of the Warsaw Regime, including the Warsaw Convention.

Lastly, the third scenario is when the two States involved do not have obligations under any common Warsaw Regime instruments. Article 34 of the VCLT specifies that a treaty "does not create either obligations or rights for a third State without its consent."

Therefore, in the event that there are no commonly ratified instruments, neither the Montreal nor the Warsaw Convention will apply. Hence there will be no issues with the application of IHRL. Provided that this situation does not posse a concern this scenario is not further explored in this thesis.

2.4 The source of potential conflicts with obligations from IHRL: the exclusivity of the Warsaw Regime

2.4.1 The exclusivity clause is the cornerstone of the Warsaw Regime

Unification and limited liability of both the Warsaw Convention and the Montreal Convention were achieved by establishing a liability regime, limiting the liability of air carrier and the essential third element of the Warsaw Regime: exclusion of any other remedy or cause of action otherwise

applicable. This element of exclusivity has been recognized as the cornerstone principle of the liability regime under the Warsaw Regime.[131] Without this essential element the efforts to limit the liability of air carrier would be meaningless because other local remedies would likely provide other sources of liability and would not be limited by the liability caps.[132]

The liability clauses of both Conventions read as follows:

Article 24 of the Warsaw Convention:

> 1. In the cases covered by Articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this Convention.
> 2. In the cases covered by Article 17 the provisions of the preceding paragraph also apply, without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights.

Article 29 of the Montreal Convention:

> 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 without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights. In any such action, punitive, exemplary or any other non-compensatory damages shall not be recoverable.

Mendez de Leon explains that a cause or a right of action is provided under the Warsaw and the Montreal Conventions as an "enforceable right under the applicable legal regime on the basis of evidence, indicating circumstances recognized by that law to create such a right for the plaintiff's benefit."[133] This is indeed a right created under the conventions for passengers based on the contract of carriage.

[131] Mark Andrew Glynn, "Montreal Convention Ousts All: Canadian Courts Rule on Exclusivity" (2013) 38 Ann Air & Sp L 543 at 545 at 545. See also *Thibodeau v Air Canada*, 2014 SCC 67 at 342 [*Thibodeau*].
[132] Glynn, *supra* note 131 at 545.
[133] Mendes de Leon, *supra* note 85 at 172; *In Re Mexico, supra* note 17.

Dempsey explains that when either the Warsaw or the Montreal Conventions apply the convention will be the exclusive remedy to the exclusion of any other remedies, "these Conventions have completely preemptive effect over all claims falling within its scope."[134] Domestic courts have interpreted the exclusivity clauses of both conventions to the effect that if either convention applies, and if the facts fall within the temporal scope of Article 17, when the injury or loss sustained does not fall within the scope of *accident* and *death or bodily injury*, there will be no compensation at all and any other remedy available will be precluded.[135]

2.4.2 Temporal scope of Article 17 under the Warsaw and Montreal Conventions

Article 17 of both the Warsaw and Montreal Conventions apply to facts that "took place on board the aircraft or in the course of any of the operations of embarking or disembarking." Determining whether events take place on board the aircraft does not pose any challenges in its application.[136] It is however in relation to embarking or disembarking that most case law has developed. Case law has used a plurality of criteria such as the location of the passenger when the injury took place, the activity of the passenger at the time, the degree of control and supervision by the air carrier on the activities of the passenger, as well as the time proximity to embarkation/disembarkation.[137] As Mendes de Leon explains, the temporal scope of Article 17 is essential because when passengers are found to be outside that temporal scope, "they may be entitled to sue the airline outside the Convention, under regimes which do not protect the airline by limitation of liability."[138] Therefore,

[134] Paul Stephen Dempsey, *Aviation Liability Law*, 2 Ed (Markham, Ontario: LexisNexis, 2013) at 278-279.
[135] Havel & Sanchez, *supra* note 86 at 300-302.
[136] *Ibid* at 292.
[137] *Ibid*; *Day v Trans World Airlines, Inc*, 528 F (2d) 31, Ct App (2nd Cir 1975) at 33–34; *Ramos v Am. Airlines, Inc.*, No 3:11-cv-207, 2011 WL 5075674 (WDNC 2011); *McCarthy v Northwest Airlines*, 56 F (3d) 313, 317 (1st Cir 1995); *Dosso v British Airways*, PLC, Not reported In F Supp. 2s (2010).
[138] Mendes de Leon, *supra* note 85 at 200.

the exclusivity of the Warsaw Regime applies in relation to Article 17 only within its temporal scope.

2.4.3 The effect of the exclusivity clause on IHRL

The exclusivity clause of the Warsaw and the Montreal Conventions has been consistently held by domestic courts to also preempt cases of racial discrimination[139] and of discrimination on the ground of disabilities,[140] based on statutory law of a civil rights nature and of a human rights nature.[141] This is proof that the conventions have been interpreted by the courts to also prevent any remedies available under human rights protections. In the following sections I will refer to the main cases illustrating this issue.

2.5 Effects of the exclusivity clause as applied in the jurisprudence

2.5.1 *Sidhu and Others v British Airways; Abnett (known as Sykes)* [1997] 1 ALL ER 193

Sidhu[142] and *Tseng*[143] are the main authorities cited in relation to the exclusivity of the Warsaw Regime.[144] The application of exclusivity to psychological injury as a result of the decision of agents of the air carrier to land on the upheaval of war demonstrates that even in extreme contexts the exclusivity of the Warsaw Convention is capable of preempting remedies available under any

[139] *King v American Airlines* 284 F (3d) 252, Ct App (2nd Cir 2002) [*King*]; *Gibbs v American Airlines Inc* 191 F Supp (2d) 144, (DD C 2002) [*Gibbs*]; *Turturro v Continental Airlines*, 128 F Supp (2d) 170 (SD NY 2001) [*Turturro*].
[140] *Tony Hook v British Airways Plc* [2001] EWHC 379 [QB] [*Tony Hook*]; *Stott, supra* note 1.
[141] Mendes de Leon, *supra* note 85 at 174.
[142] *Sidhu, supra* note 116.
[143] *Tseng, supra* note 6.
[144] *Stott, supra* note 1 at para 44. (See also some cases mentioned in Stott that followed *Sidhu* and *Tseng* from courts in Australia, Hong Kong, Canada, Ireland, New Zealand and Germany).

other causes of actions, including common law negligence, contract law, and the European Convention on Human Rights (ECHR).[145]

On 1 August 1990 British Airways flight BA 149 was scheduled to fly from London to Kuala Lumpur, with an agreed stopping place in Kuwait for refuelling. Around five hours before the aircraft landed in Kuwait, Iraqi forces started the invasion of Kuwait; this event was later known as the beginning of the Golf War. Yet, the aircraft landed for refuelling in Kuwait and the passengers proceeded to the airport terminal in the meantime, but they were held prisoners by the Iraqi forces which had taken over the airport. The passengers were held prisoners for almost three weeks in Kuwait City and in later in Bagdad.

The appellants before the House of Commons of the UK were three passengers of the BA flight suing under common law negligence for both physical injury resulting from psychological injury, and solely mental injury (the plaintiffs); and a passenger suing under contract law for psychological injury alleging breach on an implied condition in the contract of carriage that the air carrier "would take reasonable care of her safety"[146] (the pursuer). A single question was before the House of Lords of the United Kingdom:

> whether a passenger who has sustained damage in the course of international carriage by air due to the fault of the carrier, but who has no claim against the carrier under art 17 of the convention, is left without a remedy.[147]
> [Emphasis added].

Both the plaintiffs and the pursuer argued that because the situation in Kuwait was deteriorating during the days prior to the flight, British Airways "knew or ought to have known" of the danger and risks of landing in Kuwait. Lord Hope of Craighead wrote for all the judges of the House of

[145] It is essential to note that even though the ECHR is a regional human rights instrument, it reflects several rights also recognized in IHRL as adapted to their European context.
[146] *Sidhu, supra* note 116.
[147] *Ibid* at 201.

Lords, concluding that the plaintiffs and the pursuer were left with no remedy because the Warsaw Convention provides:

> the exclusive and sole remedy for a passenger who claimed for loss, injury and damage sustained in the course of, or arising out of, international carriage by air notwithstanding that that might leave claimants without a remedy. Accordingly, where the convention did not provide a remedy, no remedy was available.[148]
> [Emphasis added].

Lord Hope mentioned two main reasons why Article 17 could not apply to either the plaintiffs or the pursuer. First, the events did not constitute an "accident" under the Warsaw Convention and that in the case of the pursuer there was no "bodily injury." Therefore, it was common ground that they did not have a claim against the air carrier under Article 17.[149] And as a result, the exclusivity clause did not allow any other cause of action otherwise available.

Lord Hope concluded that the aim of the Warsaw Convention was to achieve "to be uniform and to be exclusive also of any resort to the rules of domestic law."[150] This strict interpretation of the exclusivity clause has been uniformly followed by domestic courts of States parties to the Warsaw and/or Montreal Conventions.

Considering the facts leading up to this case, it was no surprise that the lawyer for the plaintiffs submitted that it would be contrary to several sections of the ECHR,[151] "if a construction were to be placed on art [sic] 17 of the Warsaw Convention which excluded the claim."[152] Yet, Lord Hope wrote that there had been no hesitation by the House of Lords to reject that argument because not

[148] *Sidhu, supra* note 116 at 193-194.
[149] *Ibid* at 197 and 201.
[150] *Ibid*, at 212.
[151] *Ibid*, at 203; *Convention for the Protection of Human Rights and Fundamental Freedoms,* 4 November 1950, 213 UNTS 221 at 223 (entered into force 3 September 1953) [*ECHR*].
[152] *Sidhu, supra* note 116 at 203.

all States parties to the Warsaw Convention were also parties to the ECHR, to which he referred to as "the 1950 Convention:"

> It must also be observed that, while some parties to the Warsaw Convention are parties to the 1950 Convention, some, notably the United States of America are not. We cannot assume that the principles expressed in the 1950 Convention are common to all those countries who are parties to the Warsaw Convention. Thus, we would risk introducing an element of distortion into the debate, in conflicting with the broad aim of uniformity of interpretation between states, if we were to rely on the 1950 Convention as an aid to the Construction of the Warsaw Convention in the present case. [153]

From this landmark decision in *Sidhu* it can be concluded that the exclusivity of the Warsaw Convention, later confirmed in relation to the Montreal Convention in cases such as *Stott* and *Thibodeau*, extends to any other cause of action, which would be otherwise available, including domestic remedies that implement State obligations under international human rights conventions.

Therefore, under the argument that an analysis of the Warsaw Convention together with the 1950 Convention would not reflect principles "common to all states that are parties to the Warsaw Convention," the House of Lords rejected to even analyse under human rights grounds the implications of providing no remedy. Yet, the obligation to provide a remedy under the 1950 Convention was an obligation to which the House of Lord was simultaneously responsible under international law as explain in Chapter III.

As I argue in Chapter III, a decision by a domestic court which ignores its obligations under IHRL Treaties, more specifically the obligation to provide an effective remedy for breaches of human rights contained in an applicable IHRL treaty, constitutes a breach by the State of its international obligations. This obligation was also specifically contained in Article 13 of the ECHR which the court has no hesitation to dismiss.

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[153] *Ibid*.

2.5.2 *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, [1999] 525 US SC 15

Tsui Yuan Tseng was a passenger boarding a flight operated by El Al Israel Airlines who was subjected to an intrusive security check. Tseng sued the air carrier for personal injury resulting from assault and false imprisonment during the check. Her claim was made under state-law. The US Supreme Court concluded that she did not suffer a bodily injury and the injury did not result from an accident.[154] As a result her claim was not compensable under Article 17, and an alternative claim for personal injury damages under state-law was precluded by Article 24 of the Warsaw Convention.

In analyzing the exclusivity clause of the Warsaw Convention the court referred to its decision in *Air France v Saks* to explain that "[t]he specific words of a treaty must be given a meaning consistent with the contracting parties' shared expectations."[155] Therefore, the expectation of unification and limitation of air carrier liability, which are the two purposes of the Warsaw Convention are taken as the shared expectations of the States signatories of the convention, without regard to any other international law instrument.

2.5.3 *Thibodeau v Air Canada* [2014] 3 SCR 340

In *Thibodeau* passengers of three Air Canada flights sued the air carrier for its breach of their right to receive services in French, which in Canada is a constitutional right implemented by section 22 of the *Official Languages Act* (OLA) and a right entrenched in Section 16(1) of the *Canadian Charter of Rights and Freedoms*. While there was no dispute concerning the fact that Air Canada breached section 22 of OLA and as a result the language rights of the plaintiffs,[156] their remedy of

[154] *Tseng, supra* note 6 at 166.
[155] *Ibid* at 664.
[156] *Thibodeau, supra* note 131 at 341.

damages for the breach as provided under section 77 of OLA was precluded by the exclusivity clause of the Montreal Convention. The majority of the Supreme Court of Canada held that "This provision makes clear that the Montreal Convention provides the exclusive recourse against airlines for various types of claims arising in the course of international carriage by air."[157] The claim of the plaintiffs was outside the scope of Article 17 because it did not involve a physical injury, but only moral prejudice.

Similarly, to the US Supreme Court in *Tseng*, the SCC relied on the two purposes of the Montreal Convention: achieving uniformity and limiting the liability of air carriers. Also, in line with the decision by Judge Sotomayor in *King*, the SCC held that for the application of the Montreal Convention what matters is the factual circumstances and not the legal foundation of that alternative cause of action. The SCC finally held that "A remedy is not "appropriate and just" if awarding it would constitute a breach of Canada's international obligation under the Montreal Convention."[158]

While a breach of the OLA was found, it is possible that this breach does not constitute a violation of a human right protected under IHRL. The SCC examined a violation of OLA but found that under that law there is no requirement of provision of damages; therefore, it held that there was no conflict between the OLA and the Montreal Convention.

However, in *Thibodeau*, there would be no conflict between the exclusivity clause and other IHRL implications, which demonstrates that a domestic protection is not always connected with IHRL. For instance, Article 27 of the International Covenant on Civil and Political Rights (ICCPR) which protects the rights of linguistic minorities does not go as far as guaranteeing the provision of

[157] *Ibid* at para 37.
[158] *Ibid* at para 90.

services in the minority language by a private party. Instead, this right protects the right to speak one's language and not to be denied the exercise of this right.[159]

2.6 Conclusion

The Warsaw Regime aims to unify and harmonize the liability rules applicable to international air carriage and to limit the liability of air carriers. In relation to injuries suffered by passengers both the Warsaw and the Montreal Conventions provide under their Article 17 the scope of recoverable injuries under the convention. Injuries and losses beyond the scope of Article 17, such as solely psychological injuries or bodily injuries not caused by accidents, are outside the scope and as a result of the exclusivity clause the claimant is left without a remedy.

While the exclusivity of the Warsaw Regime is imperative for the system to achieve its goals, it nevertheless presents a challenge to the protections and redress for injuries caused by breaches of human rights protected under IHRL instruments. Domestic courts have been reluctant to consider the validity of other causes of action otherwise applicable.

[159] HRC, General Commnet No. 23(50) (art. 27), 26 April 1994, CCPR/C/21/Rev. 1/Add 5 at 5.2. ("Those rights simply are that individuals belonging to those minorities should not be denied the right, in community with members of their group, to enjoy their own culture, to practice their religion and speak their language").

Chapter 3 Core Protections under International Human Rights Law Applicable During International Air Travel

Equality and non-discrimination are among the most fundamental principles and rights of international human rights law. Because they are interconnected with human dignity, they are the cornerstones of all human rights.[160]

A state that fails to protect fully individuals against human rights violations or that denies remedial rights commits and independent, further breach of law.[161]

3.1 Overview

Several States parties to either the Warsaw or the Montreal conventions are also parties to more than one IHRL treaty. States parties to human rights treaties acquire legal obligations, which are simultaneously binding with their obligations under the Warsaw Regime. In this Chapter I analyze two core obligations under two key IHRL treaties that I argue conflict with the exclusivity clauses of the Warsaw and the Montreal conventions as currently interpreted by domestic courts. These two obligations are the protection against discrimination, and the obligation of States to provide effective legal remedies for breaches of human rights, including ordering monetary compensation when appropriate. These two obligations are also overarching elements of both the *Convention on the Elimination of all Forms of Racial Discrimination* (CERD),[162] and the *Convention on the Rights of Persons with Disabilities* (CRPD),[163] and most likely to constitute customary international law.

[160] CRPD Committee, General comment No. 6 (2018) on equality and non-discrimination, CRPD/C/GC/6 (2018) at para 4.
[161] Shelton, *supra* note 46 at 173.
[162] *CERD*, *supra* note 9.
[163] *CRPD*, *supra* note 10.

I will demonstrate in this Chapter that a legal conflict arises because these obligations under the CERD and the CRPD cannot be fulfilled by States when the exclusivity clause of the Warsaw Regime is upheld by their domestic courts in the application of Article 17, to facts occurring "on board an aircraft or in the course of any of the operations of embarking or disembarking,"[164] to the effect of i. preempting any other causes of action under domestic law which includes protections against discrimination on the grounds of race and disability, and i. denying monetary compensation for injury to feelings, dignity, or other solely non-bodily injury to the victims of violations of the protection against discrimination.

3.2 Context of IHRL obligations and main features of the regime of IHRL

3.2.1 The indivisibility and interconnectivity of human rights

The VCLT codifies the general rule of interpretation of treaties. Article 31(1) states that a treaty must be interpreted in good faith, in accordance with the ordinary meaning of the terms, and considering its object and purpose. In this regard, human rights treaties and the obligations contained therein are to be interpreted not in isolation to each other as individual agreements, but as part of the broader regime of IHRL as they often state in their preamble. Instruments of particular relevance which are often referred to in the preambles[165] are the Universal Declaration of Human Rights in 1948 (UDHR),[166] the International Covenant on Civil and Political Rights (ICCPR)[167]

[164] As it is specifid in Article 17 of both the Warsaw and the Montreal Conventions.
[165] The *CERD* recalls in its preamble the principles of the *UN Charter* and the *UDHR*; similarily, the *CRPD* recalls in its preamble the principles of the *UN Charter*, as well as the *UDHR* and the two International Covenants on Human Rights, it also recalls other instruments including the *CERD*.
[166] *Universal Declaration of Human Rights*, GA Res 217A (III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948) 71 [*UDHR*].
[167] *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) [*ICCPR*].

and the International Covenant on Economic, Social and Cultural Rights (ICESCR).[168] Together with the two optional protocols of the ICCPR, these instruments constitute the International Bill of Human Rights.[169]

The 1966 Covenants recognize in their preambles as basic premises of IHRL that the sources of the rights and freedoms, differently from the Warsaw Regime, are not the conventions themselves, but the inherent dignity of all human persons. Human rights and freedoms are entitlements belonging to all human beings, individually or in community, that everyone has without distinction of any kind. These rights are indivisible, interdependent and interrelated.[170]

3.2.2 The implementation of IHRL by States is widely done under domestic legislation and judicial interpretation

The interpretation by domestic courts to the effect that the exclusivity clause also excludes civil rights protections because those are provided under domestic law and not international law[171] is misleading in relation to IHRL. Under IHRL instruments States have the general duty to ensure an effective enjoyment of the human rights and freedoms contained therein, including by adopting domestic statutory law, judicial interpretation in line with the international obligations of the State,[172]and other necessary legislative measures to give domestic effect to the protections in international instruments.[173]

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[168] *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) [*ICESCR*].
[169] OHR, "Fact Sheet No.2 (Rev.1), The International Bill of Human Rights" (30 July 2019), online: <www.ohchr.org/Documents/Publications/FactSheet2Rev.1en.pdf>
[170] Theo Van Boven, "Categories of Rights." In: Hurst Hannum et al, *International Human Rights: Problems of Law, Policy, and Practice*, 6th ed, (New York: Wolters Kluwer, 2018) at 146.
[171] *King*, *supra* note 139; *Gibbs*, *supra* note 139; *Thibodeau*, *supra* note 131.
[172] Ole Kristian Fauchald, & André Nollkaemper, eds, *The Practice of International and National Courts and the (De-) Fragmentation of International Law* (Oxford: Hart, 2012) at 143.
[173] International Commission of Jurists, *The Right to a Remedy and Reparation for Gross Human Rights Violations: A practitioner's Guide* (Geneva, Switzerland: International Commission of Jurists, 2018) at 20.

Ramcharan explains that the implementation of the right to remedies under IHRL is found in a scattered manner under domestic law. These remedies can be found in areas including constitutional law, administrative law, torts law and criminal law.[174] For instance, the European Court of Human Rights explained in *Tomasi v France* that a right to compensation for a violation of IHRL was provided under Article 2 of the Code of Criminal Procedure.[175] Hence, domestic claims under other basis than Article 17 of the Warsaw and Montreal Conventions may in fact be implementing an international human rights obligation by the State, and courts cannot blindly assume that there is no connection between a domestic cause of action and other competing obligations under international law. Indeed, this is confirmed by the United Nations in one its compilations of international norms: "any law that can be used to promote or protect human rights may be considered part of human rights law."[176]

As an example, Canada which is a dualist country[177] has ratified seven major IHRL treaties, five accompanying optional protocols[178] and has implemented the obligations contained therein by enacting domestic legislation by various levels of government. Canada has explained this to the UN Human Rights Committee in the following manner:[179]

> Many of the international human rights instruments that Canada has ratified are directed against discrimination, or, where they are more general in nature, require that the rights guaranteed in them

[174] B G Ramcharan, *The Fundamentals of International Human Rights Treaty Law* (Leiden: Biggleswade, 2010) at 137.
[175] *Tomasi v France* (1992), ECHR (Ser A) 241-A at paras 121-122.
[176] UN, "Compulation of International Norms and Standards Relating to Disability" (30 July 2019) at para 1.5, online: <www.un.org/esa/socdev/enable/discom101.htm>; *CERD*, *supra* note 9 at Article 2(1)(d); *CRPD*, *supra* note 10 at Article 4(1)(a).
[177] Armand de Mestral & Evan Fox-Decent, "Rethinking the Relationship between International and Domestic Law" (2008) 53:4 Mcgill LJ 573.
[178] Canada ratified the following conventions: *ICCPR*; the *ICESCR*; the *ICERD*; the Convention on the Elimination of All Forms of Discrimination Against women (*CEDAW*); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (*CAT*); Convention on the Rights of the Child (*CRC*); and the *CRPD*. In: Government of Canada, "Human rights treaties" (30 July 2019), online: <www.canada.ca/en/canadian-heritage/services/canada-united-nations-system/treaties.html>
[179] UN, *International Human Rights Instruments, Core document forming part of the reports of States parties: Canada*, HRI/CORE/CAN/2013 (30 May 2013) at paras 99 – 106.

> be respected without discrimination. All governments in Canada—federal, provincial and territorial—have adopted legislation prohibiting discrimination on various grounds in regard to employment matters, the provision of goods, services and facilities customarily available to the public, and accommodation. [Emphasis added].

Also, even though the US has attached declarations to ratifications of some IHRL treaties that they "are not self-executing" in the US,[180] the Supreme Court of the United States has held that local remedies include federal statutes protecting non-discrimination,[181] and has referred to human rights instruments to determine the scope of domestic statutes.[182] Further, beyond conventional obligations, customary international law has direct incorporation in common law jurisdictions.[183]

Therefore, it is a mistake for domestic courts to argue that some causes of action are simply precluded because they are domestic law while the Warsaw Convention is international law, special consideration as to how the State is implementing domestically IHRL should be given.

3.3 The protection against discrimination is a core right and principle of IHRL and is customary international law

The protection against discrimination is both a principle and a right, and is also an interpretive tool of other rights protected under IHRL conventions.[184] The protection against discrimination is recognized by the UN Human Rights Committee to be a general principle relating to the protection of IHRL,[185] and it has been recognized to also constitute customary international law in relation to

[180] Hannum, *supra* note 170 at 488.
[181] *Tseng* at 622, see also *Turturro* at 180.
[182] *Roper v Simmons*, 543 US 551 (2005) (The US Supreme Court referred to the *UN Charter*, the UN Convention of the Rights of the Child, the *ICCPR*, the Regional Chartes of Human Rights, and other IHRL instruments to determine whether the death penalty was a penalty allowed for youth under 18 years old).
[183] Hannum, *supra* note 170 at 509-512; *Filagarta v Pena-Irala*, 630 F (2d) 876 (2nd Cir 1980); *Alien Tort Statute*, 28 USC 1350.
[184] OHCHR, *Equality and Non-Discrimination under Article 5 of the Convention on the Rights of Persons with Disabilitites*, UN Doc A/HRC/34/26 (9 December 2016) para 13.
[185] HRC, *CCPR General Comment No. 18: Non-discrimination*, 10 November 1989, UN Doc HRI/GEN/1/Rev. 6 at para 1.

the grounds of race, sex, and religion.[186] Moreover, the Inter-American Court of Human Rights has held in several of its judgements that this guarantee is a general principle of PIL and that it has attained the status of *jus cogens*.[187]

Indeed, it is highly probable that the protection against racial discrimination now constitutes customary international law. Indication of a widespread State practice and *opinion juris sive necessitates,*[188] can be found on all general human rights treaties and regional human rights charters,[189] international and domestic jurisprudence, and legislation. This protection against discrimination also has been identified as one main objective of IHRL[190] and the UN Charter.[191] In this regard, Patrick Thornberry states, "equality and non-discrimination are intrinsic to the architecture of human rights law."[192] Similarly others have referred to it as "the starting point of all other liberties."[193]

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[186] Dinah Shelton, *Advanced Introduction to International Human Rights Law* (Cheltenham, UK: Edward Elgar, 2014); Daniel Moeckli, *Equality and Non-Discrimination*. In: Moeckli, et al, *supra* note 20 at 152; *South-West Africa Case (Second Phase)* [1966] ICJ Rep 6, at 293 and 299-300 (Judge Tanaka, dissenting) at para 4.1.2.

[187] *Juridical Condition and Rights of Undocumented Migrants,* Advisory Opinion OC-18/03 Inter-Am Ct HR (Ser A) No 18 (17 September 2003) at para 110; *Case Yatama v Nicaragua*, Preliminary Objections, Merits, Reparations and Costs. Inter-Am Ct HR (Ser C) No 127 (23 June 2005) at para 84; *Case Indigenous Community Xákmok Kásek v Paraguay*. Merits, Reparations, and Costs. Inter-Am Ct HR (Ser C) No 214 (24 August 2010) at para 269; *Case Nadege Dorzema and others v Dominican Republic*. Merits, Reparations, and Costs. Inter-Am Ct HR (Ser C) No 251 (24 October 2012) at para 225; *Case of the Hacienda Brasil Verde Workers v Brazil*, Preliminary Objections, Merits, Reparations and Costs. Inter-Am Ct HR (Ser C) No 318 **(**20 October 2016) at para 416.

[188] *North Sea Continental Shelf cases (Federal Republic of Germany v Denmark); and (Federal Republic of Germany v Netherlands)*, Judgements [1969] ICJ Rep 3.

[189] Moeckli, *supra* note 20 at 160-164. See also *African Charter on Human and Peoples' Rights*, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) (entered into force 21 October 1986) [*Banjul Charter*] at Articles 2, 3, 18, and 28; American Convention on Human Rights, *Costa Rica*, 22 November 1969 (entered into force 18 July 1978) [*Pact of San Jose*] at Articles 1 and 24; the ECHR, *supra* note 151 at Article 14; *Arab Charter on Human Rights*, 15 September 1994 (entered into force 15 September 1994) [*Arab Charter*] at Articles 11 and 12.

[190] Patrick Thornberry, *The International Convention on the Elimination of All Forms of Racial Discrimination: A Commentary* (Oxford: Oxford University Press, 2016) at 141; *UDHR*, *supra* note 166 at Article 2 –("Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, (…) other status"); ICCPR, *supra* note 167 at Article 2 (1); *ICESCR*, *supra* note 167 at Article 2 (2).

[191] *Charter of the United Nations*, 26 June 1945, Can TS 1945 No 7 (entered into force 24 October 1945) [*UN Charter*] at Preamble, and Articles 55 and 56.

[192] Thornberry, *supra* note 190 at 97. See also Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary*, 2nd ed (Kehl: Engel, 1993) at 458; OHCHR, *supra* note 184 at para 5.

[193] Shelton, 2014, *supra* note 186 at 1.2.

Certainly, in line with the importance of this protection, the UN Human Rights Committee specified in its General Comment 24[194] and 31 that reservations to Article 2 of the ICCPR, that is the overarching framework of non-discrimination, "would be incompatible with the Covenant when considered in light of its objects and purposes."[195] Hence, on the very least this principle is a fundamental right under IHRL and customary international law in relation to race discrimination.

3.4 The duty of States to provide effective legal remedy and reparation for violations of human rights

The right to an effective legal remedy is expressly mentioned in most multilateral and regional IHRL instruments,[196] and has been held by the Inter-American Court of Human Rights to constitute customary international law.[197] Similarly, the International Commission of Jurists, and eminent scholars such as Dinah Shelton, affirm that the right to an effective remedy and reparation for all human rights violations is an undisputed fact in IHRL.[198] Hence, together with the protection

[194] HRC, *CCPR General Comment 24 : Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocol thereto, or in Relation to Declarations under Article 41 of the Covenant*, 4 November 1994, CCPR/C/21/Rev 1/Add 6 [CCPR General Comment 24].
[195] CCPR General Comment 31 [30], *supra* note 20 at para 5.
[196] See e.g. *UDHR*, *supra* note 166 at Aricle 8; *ICCPR*, *supra* note 167 at Articles 2(3), 9(5), and 14(6); *CEDAW*, *supra* note 18 at Article 2(c); *UNDRIP*, *supra* note 18 at Article 40. For regional human rights instruments: *Banjul Charter*, *supra* note 189 at Articles 7, 21, and 26; *Pact of San Jose*, *supra* note 189 at Articles 8, 10 and 25; ECHR, *supra* note 151 at Article 13; and the *Arab Charter*, *supra* note 189 at Article 12. See also in the context of international humanitarian law and international criminal law: *Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land*, 18 October 1907 (entered into force 18 October 1907) [*Hague Convention IV*] at Article 3; *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol I)*, 1125 UNTS 3 (8 June 1977, entered into force 7 December 1978) [*Additional Protocol I*] at Article 91, and *Rome Statute of the International Criminal Court* (last amended 2010), 17 July 1998, ISBN No 92-9227-227-6 (entered into force 1 July 2002) [*Rome Statute*] at Articles 68 and 75.
[197] *Loayza Tamayo Case*, Reparations. Inter-Am Ct HR (Ser C) No 42 (27 November 1998) at para 85; *Aloeboetoe et al v Suriname*, Reparations. Inter-Am Ct HR (Ser A) No 15 (10 September 1993) at para 43.
[198] The International Commission of Jurists, *The Right to a Remedy and Reparation for Gross Human Rights Violations : A practitioner's Guide* (Geneva, Switzerland: International Commission of Jurists, 2018) at 15; Shelton, *supra* note 46 at 173 (Shelton wrote, "It is clear that the obligation to provide effective remedies is an essential component of international human rights law").

against discrimination, the right to an effective remedy is "one of the most fundamental and essential rights for the effective protection of all other human rights."[199]

The right to an effective remedy is a broader right than the right to reparation. The right to a remedy involves the right to "vindicate one's rights before an independent and impartial body, with a view to obtaining recognition of the violation; cessation of the violation, if it is on-going; and adequate reparation."[200] In the General Comment 31 to the ICCPR the UN Human Rights Committee explained that although these rights are different, they are necessarily connected because the right to a remedy also concerns the right to provide reparation.[201]

Beyond IHRL, in PIL the general obligation of a State to make reparations for injuries caused by its breaches of international law is a principle of customary international law, essential for the compliance with the primary obligation.[202] In the *Chorzow Factory* case the PCIJ wrote that, "it is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation."[203] This duty was codified by the ILC in Article 31(1) of its 2001 Articles on State Responsibility (Articles on State Responsibility).[204]

In IHRL the application of the obligation under the regime of state responsibility of a State to make reparations are "without prejudice to rights 'accruing directly to a person or entity other than the State,' leaving it to primary rules to define such rights."[205] Thornberry explains that IHRL contains several primary rules indicating the rights of individuals, including the right to an effective

[199] The International Commission of Jurists, *supra* note 198 at 53.
[200] *Ibid* at 52.
[201] *General Comment No. 31, supra* note 20 at para 16.
[202] *Factory at Chorzów (Germany v Poland)* (Merits) (1928), PCIJ (Ser A) No 17.
[203] *Ibid* at 29, 27-28.
[204] *ILC Articles on State Responsibility, supra* note 16 at Article 31; *LaGrand Case (Germany v United States of America)* [2001] ICJ Rep 485 at para 48. See also an advisory opinion: *Reparations for Injuries Suffered in the Service of the United Nations,* Advisory Opinion [1949], ICJ Rep 184.
[205] Thornberry, *supra* note 190 at 397; Frédéric Mégret, "Nature of Obligations." In: Moeckli et al, *supra* note 20 at 104-106.

protection and remedies for breaches. Thus, the right to a remedy is also a primary rule of IHRL, and a key aspect of this regime,[206] even though there is no consensus as to whether it also constitutes customary international law.

Article 34 of the Articles on State Responsibility specifies four forms of reparation: restitution, compensation or satisfaction; or a combination thereof. Restitution is understood as restoring the situation to a "*status quo ante*,"[207] which in some cases concerning grave breaches of IHRL is not possible because breaches may not entail a material loss. In the same manner that the regime of State responsibility for wrongful acts, the type of remedy for human rights violations is not left at the discretion of the State but must be provided according to the circumstances of each case,[208] whereby monetary compensation must be provided when restitution is not possible. [209]

Restitution for IHRL breaches could refer to returning a property that has been unjustly expropriated, restoring liberty, or allowing someone to return to their home country.[210] However, in the context of air travel restitution would not be an adequate remedy that can be used for moral injuries such as humiliation or injury to feelings caused by discrimination. Instead, compensation would be required, and according to the Article 34 of the Articles on State Responsibility, compensation must be granted when restitution is not possible.[211]

Differently from the scope of Article 17 of the Warsaw and Montreal Conventions, in the IHRL context, and in line with the Article 31 of the Articles on State Responsibility, monetary

[206] Thornberry, *supra* note 190 at 400; Shelton, *supra* note 46.
[207] Andrew Mitchel & Jennifer Beard, *International Law in Principle* (Sydney: Lawbook, 2009) at 149.
[208] The International Commission of Jurists, *supra* note 198 at 24.
[209] UNGA, *Basic Principles and Guidelines on teh Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, adopted and proclaimed by the GA Res 60/147 of 16 December 2005 [*Basic Principles and Guidelines*].
[210] The International Commission of Jurists, *supra* note 198 at xiii.
[211] *Ibid* at 25.

compensation is not restricted to bodily injury, it exists in relation to non-material damage, including pain and suffering, injury to feelings, humiliation, shame, among other moral damages.[212] It is essential to consider that in IHRL, violations may require specific forms of reparation such as rehabilitation, public apologies, declarations and human rights training of public authorities.[213] General Comment 31 also refers to other modes of reparation besides compensation such as measures of satisfaction and reparation, when appropriate, and bringing the perpetrators to justice, but as additional measures to compensation.[214]

3.5 The Convention on the Elimination of All Forms of Racial Discrimination and international air travel

To demonstrate that the protection against racial discrimination applies to international air travel, including "on board the aircraft or in the course of any of the operations of embarking or disembarking," I argue that the protection against racial discrimination under Article 1 of the CERD applies to the temporal scope of application of Article 17 the Warsaw Regime in connection with the right of access to transportation and places and services open to the public under Article 5(f) of the CERD.

While a breach of the protection against discrimination by air carriers, either privately owned or State-owned, does not necessarily engage the responsibility of the State if redress is provided, when the right to an effective remedy for the breach is not fulfilled the domestic courts as provided for in Article 6, the contracting State to the CERD engages its international responsibility.

[212] *ILC Articles on State Responsibility, supra* note 16, see the commentaries to the ILC Articles at 101-102.
[213] *Avena and other Mexican Nationals (Mexico v United States of America),* [2004] ICJ Rep 12 at para 119.
[214] *Ibid* at para 16.

3.5.1 Legal framework defining racial discrimination during air travel

a) Article 1 – Definition of racial discrimination

Article 1 of the CERD defines racial discrimination to mean:

> any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

The existence of a discriminatory act does not necessarily amount to a violation of the Convention. In order for there to be a breach, it must have the "purpose or effect of nullifying or impairing the recognition, enjoyment or exercise" of a protected right or freedom specified in the Convention. Thus, I argue that Article 5 (f) contains expressly a right that can be engaged in the context of international air travel.

b) Article 5(f) Right of access to any place or service intended for the use of the general public

Article 5(f) provides the right of access to "any place or service intended for the use of the general public, such as transport, hotels, restaurants, cafes, theatres and parks." This Article reads:

> In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:
> […]
> (f) The right of access to any place or service intended for use by the general public, such as transport, hotels, restaurants, cafes, theatres and parks.
> [Emphasis added].

c) Application of Article 5(f) to the aircraft and the services of an air carrier

The term "transportation" in Article 5 (f) includes air transport. This term is more clearly expressed in the French version of the treaty as "means of transportation:" "tous les lieu et services destines

à l'usage du public, tels que les moyens de transport," or in Spanish "medios de transporte." Thus, in accordance with its ordinary meaning, "modes of transport" includes air, rail, road and sea.[215]

Although no case concerning specifically air transport or aircraft has been brought before the CERD Committee, it is possible to deduct that Article 5(f), in light of the object and purpose of the CERD, also applies to international air travel because aviation is a mode of transportation, and in the same manner than a restaurant or a hotel, an air carrier can be owned by non-governmental parties, but access to its services requires a payment.

Further, air travel it is intended for the use of the general public, and the physical access to the aircraft is a prerequisite for the delivery of the service. In the drafting history of the Warsaw or the Montreal Conventions and the case law there is no evidence that international carriage by air of passengers, cargo or baggage, was not intended to be a service open to the public, with one exception provided for in the Montreal Convention for carriage performed directly by a State, and for non-commercial and/or military purposes, which could be excepted via a reservation and by choice of the signatory State.[216] Therefore, Article 5 (f) of the CERD applies during the temporal scope of Article 17 of both the Warsaw and the Montreal Conventions, with one potential exception only under the Montreal Convention in relation to State carriage for non-commercial purposes.

d) Application of Article 5(f) to air carriers

The CERD Committee specified that a restriction imposed by a State to any of the listed rights under Article 5 cannot be incompatible with Article 1 of the Convention, neither in purpose or

[215] Back Law Dictionary, "Definition of Mode of Transport" (30 July 2019), online: <thelawdictionary.org/mode-of-transport/>
[216] *Montreal Convention*, *supra* note 5 at Article 57.

effect.[217] In relation to private institutions, such as private or state-owned air carriers, the CERD confirmed that "To the extent that private institutions influence the exercise of rights or the availability of opportunities, the State party must ensure that the result has neither the purpose nor the effect of creating or perpetuating racial discrimination."[218]

e) Article 6 of the CERD and the right to effective protection and remedies

Article 6 of the CERD contains the right to effective protection and remedies by national tribunals for violations, and the right to seek from those tribunals "just and adequate reparation or satisfaction:"

> States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.
> [Emphasis added].

The right under Article 6 is two-fold. It first requires domestic courts to investigate and adjudicate cases where an alleged breach of the Convention has occurred to determine whether in fact a breach took place. And second, in cases where a breach has been established, to provide reparation which in most cases requires ordering monetary compensation.

In *B.J. v. Denmark,* the Committee on the Elimination of Racial Discrimination held:

> in accordance with article 6 of the Convention, the victim's claim for compensation has to be considered in every case, including those cases where no bodily harm has been inflicted but where the victim has suffered humiliation, defamation or other attack against his/her reputation and self esteem.[219]
> [Emphasis added].

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[217] CERD Committee, *General Recommendation N. 20 on Article 5 of the Convention*, 48th sess, UN Doc A/51/18, annex VIII 124 (1996) at para 2.
[218] *Ibid* at para 5.
[219] *BJ v Denmark*, CERD Committee Communication 17/1999, UN Doc CERD/C/56/D/17/1999 (2000) at para 6.2.

It further held in relation to the right in Article 5(f):

> 6.3 Being refused access to a place of service intended for the use of the general public solely on the ground of a person's national or ethnic background is a humiliating experience which, in the opinion of the Committee, may merit economic compensation and cannot always be adequately repaired or satisfied by merely imposing a criminal sanction on the perpetrator.[220]
> [Emphasis added].

Therefore, under the CERD the scope of injuries that can be considered for monetary compensation is broader than under the Montreal and the Warsaw Conventions because it is not limited to bodily harm, and it is an obligation under Article 6 that all injuries inflicted by a breach have to be considered in any case where the facts suggest the existence of *prima facie* discrimination, as I will further explain next.

Obligation of domestic courts to consider whether a breach has taken place

In this regard the CERD Committee in *Durmic v. Serbia and Montenegro*[221] was faced with an alleged refusal to access to a public place because of racial discrimination, in breach of Article 5(f). In *Dumic* a domestic court of Serbia and Montenegro failed to set a date to consider the allegation and did not provide an opinion as to whether racial discrimination had taken place. The petitioner brought the claim six years latter to the CERD Committee, and the Committee held that even though the domestic court had established no breach, the failure to consider the allegation was in itself a breach of Article 6. The Committee explained:

> Although on a literal reading of the provision it would appear that an act of racial discrimination would have to be established before a petitioner would be entitled to protection and a remedy, the Committee notes that the State party must provide for the determination of this right through the national tribunals and other institutions**, a guarantee**

[220] *Ibid* at para 6.3
[221] *Durmic v Serbia and Montenegro*, CERD/C/68/D/29/2003 (2006).

> **which would be void** were unavailable in circumstances where a violation had not yet been established.[222] [Emphasis added].

Obligation to provide a remedy when a breach has been established

In contrast to the quote from Lord Hope often cited from *Sidhu* that "where the [Warsaw] convention did not provide a remedy, no remedy was available,"[223] under Article 6 of the CERD a contracting State is under the obligation to provide a remedy when there has been a breach of the protection against racial discrimination.[224] Further, the CERD has recommended in various occasions adequate monetary compensation as a remedy for moral injuries caused by violations of rights protected under the Convention.[225]

3.5.2 Application of the legal framework to case law on the exclusivity of the Warsaw Regime

a) King v American Airlines 284 F (3d) 252, Ct App (2nd Cir 2002)

In *King* the Court of Appeals for the Second Circuit of the United States addressed the question of whether discrimination claims are preempted by the exclusivity of the Warsaw Convention. In *King*, an African American couple, the Kings, alleged that American Airlines "bumped them from an overbooked flight because of their race."[226] They argued that they had been discriminated against on the basis of their race in breach of 49 U.S.C. §1981 and the Federal Aviation Act.[227]

The plaintiffs argued that because of the special nature of civil rights claims, such as those of racial discrimination, civil rights claims should be distinguished from claims on tort law to the effect that

[222] *Durmic, supra* note 221at para 9.
[223] *Sidhu, supra* note 116 at 193-194.
[224] *LR et al v Slovakia* CERD/C/66/D/31/2003 (2005) at para 10.10.
[225] *Er vs Denmark*, CERD/C/71/D/40/2007 (2007) at para 9; *Durmic, supra* note 221 at para 11.
[226] *King, supra* note 139 at 351-352.
[227] *Ibid* at 353.

the Warsaw Convention would not preclude discrimination cases. As I argued above, this claim would be consistent with the customary international law status of the protection against racial discrimination and the obligations under the CERD.

Yet, the court found that accepting this argument would be against the purpose of uniformity of the Warsaw Convention,[228] and that for the application of this Convention the nature of the harm suffered was not relevant, but what mattered was the temporal scope when the events occurred. [229] This holding was in breach of Articles 1, 5(f) and 6 of the CERD as I will explain next.

Breach of Article 5(f) in connection with Article 1 of the CERD

King was decided in 2002, eight years after the United States ratified the CERD in 1994.[230] Hence, the CERD was binding on the United States[231] at the time that *King* was decided, as well as when the facts leading to the case took place.

The facts reveal a *prima facie* case on discrimination on the grounds of race [232] because as noted in the judgement "all white passengers, including those who did not have confirmed reservations, were allowed to board" and "the Kings were the only African Americans with confirmed reservations who had not relinquished their seats voluntarily."[233] As I explained above in section 3.5.1, the right of access to modes of transportation without discrimination applies to air transport and is protected under Article 5 (f) read in connection with Article 1 of the CERD. Thus, the facts

[228] *Ibid* at 361; Turturro, supra note 139.
[229] *Tseng, supra* note 6 at 171.
[230] https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-2&chapter=4&lang=en
[231] VCLT, supra note 95 at Article 14 ("Consent to be bound by a treaty expressed by ratification, acceptance or approval").
[232] *King, supra* note 139 at 355.
[233] *Ibid* at 355.

reveal a *prima facie* breach of protections provided under the CERD, and it was no relevant that the protections were provided under domestic law as I also explained in section 3.2.2 above.

Breach of Article 6 of the CERD by the court

In *King* the Court of Appeals for the Second Circuit dismissed the claim of racial discrimination holding that "discrimination claims that arise in the course of embarking on an aircraft are preempted by Article 17 of the Warsaw Convention."[234] Hence, similarly to the domestic court of Serbia and Montenegro in *Dumic*,[235] the Court of Appeals refused to determine whether there had been discrimination on the grounds of race, in breach of Article 6 of the CERD.

Specifically, through the decision of Judge Sotomayor the court failed to comply with the obligations acquired by the United States under Article 6 of the CERD. As described above, Article 6 includes i. the obligation to consider whether a breach of a right protected under the convention has taken place, as well as ii. the obligation to provide reparations when there has been a breach.

Instead Judge Sotomayor referred to other racial discrimination cases previously decided to illustrate that they had been decided in the same manner[236] and concluded:

> [Plaintiffs] suggest that, despite Article 24's plain mandate that the Warsaw Convention preempts "any cause of action, however founded," we should nonetheless carve out an exception for civil rights actions as a matter of policy. <u>This we decline to do</u>. [237]
> [Emphasis added].

Upholding the importance of achieving uniformity for the Warsaw Convention, Judge Sotomayor wrote that the Warsaw Convention requires "that passengers <u>be denied access to the profusion of</u>

[234] *Ibid* at 355.
[235] *Durmic*, *supra* note 221.
[236] See e.g. *Wolgel v Mexicana Airlines*, 821 F Supp (2d) 442 (7th Cir 1987); *Mahaney v Air France*, 474 F Supp 532 (SDNY 1979).
[237] *King*, *supra* note 139 at 362.

remedies that may exist under the laws of a particular country, so that they must bring their claims under the terms of the Convention or not at all."[238] Judge Sotomayor declined to examine the facts of the case under domestic protections against racial discrimination by explaining that the legal basis of the claim was irrelevant, only important the temporally scope of application for the Warsaw Convention: "the argument advanced unsuccessfully by the plaintiffs was that discrimination fell outside the scope of the convention because of their qualitative nature."

b) Gibbs v American Airlines Inc 191 F Supp (2d) 144, (DD C 2002).

In *Gibbs*[239] three African American passengers were removed from an aircraft of American Airlines after Dr. Gibbs mentioned that a flight attendant had discriminated against him because of his race. Mr. Gibbs based his claim before the US District Court of Columbia on Section 1981 of the 42 U.S.C., as did the plaintiffs in *King*, and argued having suffered "significant public embarrassment and humiliation, loss of self esteem, mental anguish and severe emotional trauma."[240] Yet, similarly than the decision in *King*, the court held that claim under 42 U.S.C. on the grounds of racial discrimination was precluded by the exclusivity of the Warsaw Convention.

Dr. Gibbs argued that the exclusivity of the Warsaw Convention could not extend to discrimination claims, and that his case should be distinguished from *Tseng* because *Tseng* was a case argued on the basis of common law, and instead his claim was based on a civil rights claim grounded on the constitution.[241] Nevertheless, Judge Kennedy from the District Court cited in his decision *Tseng* and stated what was important in the application of the exclusivity of the Warsaw Convention was

[238] *Ibid* at 357.
[239] *Gibbs, supra* note 139.
[240] *Ibid* at 146.
[241] *Ibid* at 148.

not the nature of the claim, but "the importance of uniformity in the treaty's liability scheme."[242] Judge Kennedy further cited *Turturro* to justify the preemption of discrimination cases by the exclusivity clause: "[a]llowing air carrier exposure to discrimination claims which do not conform to the requirements of the Convention would undercut the signatory nations' desire for uniformity."[243]

Human Rights Implications

For the same reasons explained above in relation to the decision in *King* and according to the decision of the CERD Committee in *Dumic,*[244] the court in *Gibbs* was in breach of Article 6 of the CERD, namely due a failure of the court to addresses whether there was a breach of the protection against racial discrimination, and to consider whether a remedy for such breach was required in the circumstances.

3.6 The Convention on the Rights of Persons with Disabilities and international air travel

To demonstrate that the protection against racial discrimination, including the refusal to provide reasonable accommodation, applies to international air travel "on board the aircraft or in the course of any of the operations of embarking or disembarking," I argue that the protection against discrimination on the basis of disabilities under Article 5(3) of the CRPD, as defined in Article 2 to also include the denial of reasonable accommodation, applies to the temporal scope of application of Article 17 the Warsaw Regime. This application can also be justified in connection

[242] *Ibid*.
[243] *Turturro, supra* note 139 at 180.
[244] *Durmic, supra* note 221.

with the right of access to transportation and places, and services open to the public under Article 9 (1) of the CRPD.

While a breach of the protection against discrimination by air carriers, either privately owned or State-owned, does not necessarily engage the responsibility of the State if redress is provided, when the right to an effective remedy for the breach is not fulfilled by domestic courts as provided under Article 5(2), the contracting State to the CERD engages its international responsibility.

3.6.1 Legal framework defining discrimination on disability grounds during air travel

a) Article 2 – Definition of discrimination on the basis of disability

Similarly to IHRL generally, in relation to disability grounds the CRPD Committee states that the principles of equality and non-discrimination, "is a cornerstone of the international protection guaranteed by the Convention."[245] Discrimination on the basis of disability is defined in Article 2, with almost identical language than the definition of racial discrimination under the CERD but with an additional inclusion of denial of reasonable accommodation. Article 2 provides:

> "Discrimination on the basis of disability" means any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, <u>including denial of reasonable accommodation</u>; [Emphasis added].

Article 2 defines reasonable accommodation, as:

> <u>"Reasonable accommodation" means necessary and appropriate</u> modification and adjustments <u>not imposing a disproportionate or undue burden</u>, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.

[245] OHCHR, *supra* note 184 at para 13.

Similarly to breaches of the non-discrimination protection under the CERD, in the application of non-discrimination under the CRPD a breach of the non-discrimination principle does not give rise to a claim in itself, but it must be advanced in connection with one or more substantive rights under the Convention.[246] Therefore, Article 2 must be read in conjunction with Article 5(3),[247] which provides for specific duties of States in relation to equality and non-discrimination.[248]

b) Article 5 (3) – Specific obligation to provide reasonable accommodation

Article 5 (3) of the CRPD provides:

> 3. In order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided.

Nilsson explains that the CRPD does not require that accommodation be provided in all circumstances, but only when it is reasonable. An accommodation is reasonable under the convention to the extent that it does not present an undue cost to the duty-bearer.[249] This is a test which aims to balance the right of persons with disabilities with the interests of the duty bearer such as financial constrains, productivity, efficient use of resources, and control over its enterprise.[250] In relation to air carriers this test would allow to take into account the particular economic considerations of international air travel in defining whether a duty to accommodate is owed.

Two criteria must be considered when evaluating if there a duty to accommodate. First, the accommodation must be necessary and appropriate to the case-by-case circumstances of the person

[246] *HM v Sweden*, CRPD/C/7/D/3/2011 (2012) at para 7.3.
[247] Corsi, *Article 5 : Equality and Non-Discrimination*. In: Ilias Bantekas et al, eds, *The UN Convention on the Rights of Persons with Disabilities: A Commentary* (Oxford, UK: Oxford University Press, 2018) at 164
[248] OHCHR, *supra* note 184 at para 13.
[249] Anna Nilsson, *Article 2 : Definitions*. In Ilias Bantekas et al, *supra* note 247 at 79.
[250] *Ibid* at 80.

with disabilities. Second, the accommodation must not impose a disproportionate or undue burden on the duty-bearer. For this second criterion the burden of proof to justify that the accommodation imposes an undue burden rests upon the duty-bearer, and it must be based on "objective criteria and analysis and communicated in a timely fashion"[251] to the person with disability.

An example of failure to provide reasonable accommodation was given in *H.M. v. Sweden*, the first case decided by the CRPD Committee. The CRPD Committee referred to the definition of discrimination in Article 2, which expressly includes denial of reasonable accommodation, and noted that "a law which is applied in a neutral manner may have a discriminatory effect when the particular circumstances of the individuals to whom it is applied are not taken into consideration."[252]

c) Article 4 (1)(e) – General obligations of non-discrimination of air carriers

The CRPD Committee explains that the guarantees under Article 5 are not limited to fields regulated and protected by public authorities. In its General Comment to Article 5, the CRPD Committee clearly stated that Article 5 must be read together with article 4(1)(e), for which "it is evident that it extends to the private sector."[253] Article 4(1) (e) reads:

> 1. States Parties undertake to ensure and promote the full realization of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability. To this end, States Parties undertake:
> […]
> (e) To take all appropriate measures to eliminate discrimination on the basis of disability by any person, organization or private enterprise;

[251] OHCHR, *supra* note 184 at para 28.
[252] *Ibid* at 8.3.
[253] *Ibid* at para 14.

Hence, in the context of international air travel passengers with disabilities have the right not to be discriminated against in the basis of their disability, including not to be denied of reasonable accommodation by an air carrier.

d) Article 9 (1) - Right to access to transportation and other places open to the public without discrimination

In addition to Article 5(3), Article 9 is likely to be engaged in cases with facts similar to *Stott* where access to the aircraft and provision of services on board the aircraft requires reasonable accommodation. Article 9(1) is a relevant right in the context of discrimination by air carriers:

> 1. To enable persons with disabilities to live independently and participate fully in all aspects of life, States Parties shall take appropriate measures to ensure to persons with disabilities access, on an equal basis with others, to the physical environment, to transportation, to information and communications, including information and communications technologies and systems, and to other facilities and services open or provided to the public, both in urban and in rural areas. […]
> [Emphasis added].

CRPD General Comment No. 2[254] explained the expression "open to the public" applies "regardless of whether they are owned and/or provided by a public authority or a private enterprise."[255] According to this definition and Article 4(1)(e) explained above, the CRPD applies during the temporal scope of Article 17 of both the Warsaw and Montreal Conventions.

It is important to note that accessibility under Article 9 and reasonable accommodation under Article 5(3) are closely related, but they are different concepts. Reasonable accommodation focuses on the individual needs of a person and is a *ex nunc* duty, meaning that it applies to ad-hoc cases and is a duty of immediate realization. On the other hand, accessibility focuses on a group with specific disabilities (e.g. wheelchair users), is implemented by taking measures previous to the use

[254] CRPD Committee, General Comment No 2: Article 9: Accessibility, CRPD/C/GC/2 (2014).
[255] *Ibid* at para 13.

of the service or facilities, and is a *ex ante* duty, meaning that its realization must be planned and considered in advance.[256]

Even if these two concepts are different, the CRPD committee has held that sometimes accessibility can only be fully guaranteed by the effective provision of reasonable accommodation.[257] For instance the CRPD Committee held in *Given v. Australia*[258] that Article 9 had been breached in occasions when there was a failure to provide to an individual with an electronic voting platform in breach also of Article 5(2); and in *Beasley v Australia* that there was a breach of Article 9 by a failure to provide reasonable accommodation which also resulted on denied access.[259]

Hence, access under the CRPD in relation to air travel primarily refers to "accessibility" to the aircraft and the services within it as a *ex ante* duty, including e.g. providing braille signs, providing toilets accessible to persons with reduced mobility and wheel chair users. An additional aspect of accessibility is also the provision of reasonable accommodation in individual cases such as e.g. letting an accompanied person to sit close to the persons with disability to provide assistance and allowing working dogs to fly with their owner which is needed at all times in medical conditions[260] such as epilepsy or persons with visual impairments.

e) Article 5(2) of the CRPD – Obligation to provide effective legal protections

Article 5(2) of the CRPD provides:

[256] Bantekas et al, *supra* note 247 at 102.
[257] *Fiona Given v Australia*, CRPD/C/19/D19/2014 (2018); *Gemma Beasly v Australia*, CRPD/C/15/D/11/2013 (2016); *Michael Lockrey v Australia*, CRPD/C/15/D/13/2013 (2016).
[258] *Given*, *supra* note 257 at para 8.6.
[259] *Beasly*, *supra* note 257 at para 8.6.
[260] Cases such as *Adler et al v Westjet Airlines*, Doc 37 (SD Fla 2014) (Fligth attendant was unconfortable with a working dog on board and asked the owners to disembark).

> 5.2 States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds.

The CRPD Committee explains that for contracting States to fully comply with this provision there must not only be an explicit prohibition of discrimination on the basis of disability under domestic law, but it must also be accompanied by effective legal remedies "in civil, administrative and criminal proceedings, including protection from any acts of discrimination carried out by private entities and/ or individuals."[261] The CRPD Committee further specified that: "effective protection against discrimination carried out by private parties and organization is provided by the State party."

3.6.2 Application of the legal framework to case law on the exclusivity of the Warsaw Regime

a) Stott v Thomas Cook Tour Operators [2014] UKSC 15

In *Stott*,[262] the agents of Thomas Cook breached their duty to make reasonable efforts to accommodate the disabilities of Mr. Stott causing injury to feelings, which is a compensable damage under the European Parliament and Council Regulation (EC) 1107/2006, as implemented in the UK. The Supreme Court of the UK recognized that there had been a breach and an injury to Mr. Stott, but held that no remedy for damages was available due to the exclusivity clause of the Montreal Convention.

Mr. Stott was a person with a disability who permanently used a wheelchair and required assistance from his wife to manage his incontinence and assist him during the flights.[263] Mr. Stott suffered

[261] OHCHR, *supra* note 184 at para 23.
[262] *Stott, supra* note 1.
[263] *Stott, supra* note 1 at para 5-6.

humiliation and injury to his feelings as a result of having felt off his wheelchair at the entrance of the aircraft, and due to inconveniences related to not having been accommodated to sit close to his wife during the flight.

While there was no doubt that he had suffered a compensable injury under Regulation 9(2) of the EC Regulation Disability Regulation,[264] the Supreme Court found that this remedy was preempted by the exclusivity clause of the Montreal Convention. Lord Toulson further specified in his decision that the exclusivity clause of the Montreal Convention "is the rock on which Mr. Stott's claim for damages foundered."[265]

Failure to provide reasonable accommodation by air carrier constituted a breach of Article 5(3) of the CRPD

Lord Toulson SCJ started the decision of the Supreme Court by recognizing that Thomas Cook had committed a serious failure to accommodate the disability of Mr. Stott "contrary to the requirements of the Civil Aviation Regulations 2007, which implemented in the UK the EC Council Regulation 1107/2006."[266]

Although the breach was characterised as a breach of a domestic regulation of the UK, which implemented an EC regulation, the implementation of the CRPD in the EU is in fact made through the EC Regulation 1107/2006, which also protects the non-discrimination principle on the grounds of disability.[267] Its preamble mentions that "Disabled persons and persons with reduced mobility have the same right as all other citizens to free movement, freedom of choice and non-

[264] 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.
[265] *Stott, supra* note 1 at para 32.
[266] *Ibid* at para 1.
[267] *EC Regulation, supra* note 264 at Article 1 – Purpose and scope.

discrimination. This applies to air travel as to other areas of life,"[268] the preamble further mentions that there should be no refusal of transport on grounds of disability and that disabled persons and persons with reduced mobility "should have opportunities for air travel comparable to those of other citizens."[269]

The regulation refers textually to its intent to implement human rights, in particular the Charter of Fundamental Rights of the European Union (European Charter)[270] The European Charter is an instrument reaffirming human rights contained in regional international instruments including the ECHR[271] which contains the principle of non-discrimination in Article 14. Further, the European Court of Human Rights has held that a direct connection between the prohibition of discrimination on the grounds of disability under the European Convention Protection of Human Rights and Fundamental Freedoms "must be read in light with the CRPD,"[272] including the duty to make reasonable accommodation.[273] Thus, these connections allow to conclude that non-discrimination under the CRPD is protected in the particular context of air travel by the EC Regulation 1107/2006 in the European Union.

Breach of the right to an effective remedy under Article 5(3) of the CRPD

Lord Toulson concluded the judgement by stating his regret that damages for the embarrassment and humiliation suffered by Mr. Stott were not available.[274] However, by denying a remedy for the

[268] *Ibid* at para 1.
[269] *Ibid* at paras 1-2.
[270] *Ibid* at para 20.
[271] *Ibid* at preamble.
[272] Nilsson, *supra* note 249 at 79.
[273] *Çam v Turkey*, App No 51500/08 (23 February 2016) at paras 65 and 67.
[274] *Stott* at para 65.

violation of a right protected under the CRPD the Supreme Court of the UK was in breach of Article 5(2) of the Convention.

b) Brandt v. American Airlines, WL 288393 (ND Cal 2000)

Brandt concerned a failure by agents of the air carrier to accommodate the disability of a passenger. The plaintiff suffered from a medical condition requiring him to take medication regularly with food. In one of the connecting flights, even though Mr. Brandt had explained to a flight attendant his condition, the flight attendant repeatedly refused to provide him food to take his medication by arguing that "no food was available to coach passengers."[275] The claim was dismissed on the basis of that there was no recoverable claim under Article 17 and the exclusivity clause of the Warsaw Convention preempted discrimination claims.

Failure to provide reasonable accommodation and to consider the claim for discrimination

Although the United States signed the CRPD on 30 July 2009, it has not ratified it. Therefore, the United States does not possess binding legal obligations to comply with the CRPD, other than the obligation under Article 18 (a) of the VCLT not to defeat the object and purpose of a treaty when "it has signed the treaty or has exchanged instruments constituting the subject to ratification, acceptance or approval, until it shall have made its instention clear not to become a party to the treaty." However, it is likely possible that the breach discussed below would be contrary to the object and purpose of the CRPD, and therefore in breach of Article 18(a) of the VCLT.

As argued above, under the CRPD discrimination on the basis of disability includes failure to provide reasonable accommodation (Articles 2 and 5(3)), which is applicable to air transport during

[275] *Brandt v American Airlines*, WL 288393 (ND Cal 2000) at para 24 [*Brandt*].

flight, or in the process of embarkation or disembarkation (Articles 4(1)(e) and 9). Thus, under the CRPD there would be a *prima facie* case of discrimination in the facts of *Brant*. The court failed to consider this potential breach, and to provide remedies if a breach had been found. Hence, in *Brandt* the court acted contrary to Article 5(2) of the CRPD, which constitutes the right to an effective legal remedy.

However, in cases where the State had not ratified the CRPD but only signed it, and argument it will be difficult to make a strong case that the obligation not to act contrary to the object and purpose of the CRPD is as legally binding as the obligation to comply with the exclusivity clause of the Warsaw Regime.

3.7 Protections under *jus cogens* norms during international air travel

Lady Hale commented on hypothetical circumstances where the exclusivity clause could conflict with IHRL in her concurrent decision in *Stott*.[276] She explained that the protection against racial discrimination could be precluded by the exclusivity clause,[277] and also referred as examples to potential cases of torture, arguably related circumstances of "cruel, inhuman and degrading treatment."[278] Lady Hale went on to mention two peremptory norms of international law (*jus cogens*) which could be engaged during international air travel, these are racial discrimination and the prohibition against torture.[279]

[276] *Stott*, *supra* note 1 at paras 67-70.
[277] *Ibid*, at para 68.
[278] *Ibid.*
[279] *Ibid*, at paras 67-68.

To address the suggestion by Lady Hale, I target in this thesis two specific norms of *jus cogens,* these are the prohibition against racial discrimination,[280] and whether certain treatment could constitute a degrading treatment in such a way that it could amount to torture in the context of disability discrimination. However, there is a high threshold for an IHRL violation to constitute a breach of *jus cogens* as I will argue next. Thus, it is unlikely that such breaches can occur in the context of the normal commercial activities of an air carrier.

3.7.1 The prohibition against racial discrimination

The prohibition against racial discrimination is a peremptory norm of general international law.[281] However, the content of this prohibition does not cover any form of racial discrimination, but instead it covers widespread or systematic racial discrimination in circumstances such as apartheid.[282] In addition to be a violation of the principle of non-discrimination under IHRL, apartheid can also be a crime against humanity under Article 7(1)(j) of the Statute of the International Criminal Court (Rome Statute),[283] or a war crime according to the Protocol Additional I to the 1949 Geneva Conventions.[284]

Racial discrimination in general, such as the discrimination allegedly suffered by the plaintiffs in *King* and *Gibbs*, would not meet the high standard of systemic racial discrimination to be protected under the *jus cogens* norm prohibiting racial discrimination. For instance, under Article 7(1)(j) of

[280] *ILC Articles on State Responsibility*, *supra* note 16 at 112. See also *Barcelona traction case (Belgium vs. Spain)* (2nd Phase), [1970] ICJ Rep 3 para 34; See *East Timor (Portugal v Australia)*, Judgment [1995] ICJ Rep 90 at 102, para 29; *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion [1996] ICJ Rep 226 at 258, para 83; and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Preliminary Objections [1996] ICJ Rep 595 at paras 31–32.
[281] *Ibid*.
[282] Thomas Weatherall, *Jus Cogens: International Law and Social Contract* (Cambridge: Cambridge University Press, 2015) at 240-241.
[283] *Rome Statute*, *supra* note 196.
[284] *Additional Protocol I*, *supra* note 196; Weatherall, *supra* note 282 at 240-241.

the Rome Statute both substantive and objective elements of an act of discrimination would need to be met to constitute a breach. Further, Cassese explains that to constitute an international crime, acts such as murder, torture, or racial discrimination will reach the threshold only is they are of a large or massive nature.[285] Cassese also clarified that "Isolated inhumane acts of this nature may constitute grave infringements of human rights or, depending the circumstances, war crimes, but fall short of the stigma attaching to crimes against humanity."[286]

3.7.2 The prohibition against torture and degrading treatment and international air travel

The prohibition of torture and degrading treatment is *jus cogens*.[287] Indeed, Thomas Weatherall refers to the shared interest of humanity in this prohibition as demonstrated by the convergence of this prohibition in three branches of PIL: international humanitarian law, international criminal law, and IHRL. Cassese explains that the definition of torture under Article 1(1) of the UN Torture Convention (CAT)[288] is widely accepted by the international community.[289] Article 1(1) has three elements that must be meet in order for an act to constitute torture. These are as specified in Article 1(1) as follows.

[285] Cassese, Antonio et al, *Cassese's International Criminal Law*, 3rd ed (Oxford: Oxford University Press, 2013) at 92-93.
[286] *Ibid* at 93.
[287] *ILC Articles on State Responsibility*, *supra* note 16, see the commentaries at 112. *Filagarta v Pena-Irala*, 630 F (2d) 876 (2nd Cir 1980); Weatherall, *supra* note 282 at 233; *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, Judgement, [2012] ICJ Rep 422, Separate Opinion of judge Cançao Trindade, at 487, paras 84, 182.
[288] *Convention against Torture and Other Cruel, Inhumain or Degrading Treatment or Punishment*, 10 December 1984, UNTS 85 (entry into force 26 June 1987) [*CAT*].
[289] Cassese, *supra* note 285 at 132.

Objective element

The objective element of torture as deified in the CAT requires the existence of "any act by which severe pain or suffering, either physical or mental is […] inflicted on a person." While it is possible that the captivity of the passengers in *Sidhu* could have inflicted upon them severe pain and suffering, both physically and mentally, it is not so clear that the injury to feelings suffered by Mr. Stott in *Stott* constitutes "severe pain or suffering." In any case, even if passengers suffered severe pain or suffering, the subjective element must also be met to constitute torture. I will consider this next.

Subjective element (means rea)

The subjective element of torture has two requirements. First, the infliction of pain or suffering must be intentional, which requires clear intent, but other subjective state such as culpable negligence, willful blindness or recklessness are not sufficient.[290] Thus, in *Sidhu*, the alleged negligence by British Airways would not be enough to constitute torture. Similarly, in *Stott* the treatment of Mr. Stott by the agents of Thomas Cook seem more likely to constitute negligence instead of a clear intention to inflict humiliation on Mr. Stott.

Second, under the CAT the infliction of pain or suffering must be connected with an instrumental purpose to either i. obtain information or a confession from the victim or a third parson, ii. punish the victim or a third person, iii. intimidate or coerce the victim or a third person, or iv. any other reason based on any kind of discrimination. While in relation to *Stott* one could argue that there

[290] *Ibid* at 133.

was a purpose to discriminate on the basis of disability, there was no instrumental purpose in relation to *Sidhu*.

Instigation, consent, or acquiescence of the public authorities

The third element for an act to constitute torture under the CAT is that the act must be done "at the instigation, with the consent, or the acquiescence of a public official or other person acting in an official capacity."[291] Only when this third element is also met torture constitutes a breach of a norm of *jus cogens*, a breach of IHRL, and would also be considered an international crime. If the act does not meet all three elements, it must be distinguished from the prohibition of torture as a *just cogens* and would instead constitute torture as a "an ordinary crime."[292]

This third element is absent from both facts in *Sidhu* and *Stott*. Thus, although Lady Hale mentioned that it could be argued that "what happened to Mr. Stott on board the plane amounted to inhuman or degrading treatment within the meaning of Article 3 of the European Convention on Human Rights," this allegedly inhuman or degrading treatment would not constitute torture as an international crime also covered by IHRL and with its prohibition under the status of *jus cogens.*

On the other extreme, when an act meets the definition of torture under the CAT and is committed as part of a systematic attack to civilian population, it constitutes not only a breach of IHRL but a crime against humanity as specified in Article 7 (1) (f) of the Rome Statute of the International Criminal Court.[293] In this context and under the Rome Statute the involvement of a state official is not a necessary element, but the context must be a widespread or systematic practice such as a

[291] *Ibid*.
[292] *Ibid*.
[293] *Rome Statute*, *supra* note 196.

governmental policy.[294] Although in theory this could happen with the involvement of air carriers, either privately or state owned, very specific facts would be required. This is very unlikely as Cassese explains that crimes against humanity are of "a large-scale or massive nature" as opposed to "isolated or sporadic events.[295]"

3.8 Conclusion

I argued in this Chapter that the protection against discrimination and the right to an effective legal remedy for IHRL breaches are essential and fundamental rights of the IHRL regime. Both are also treaty obligations under the CERD and the CRPD, thereby contracting States have acquired the obligations to respect, protect and fulfill these two rights under their respective jurisdictions. I also identified the legal framework under each convention that protects passengers within the temporal scope of Article 17 of both the Warsaw and Montreal Conventions.

Despite the existence of binding obligation under treaty law on contracting States to comply with the CERD and the CRPD, domestic courts have upheld the exclusivity clause of the Warsaw Regime to preclude causes of action under domestic law that fulfill the protection against discrimination on the basis of race or disabilities, and denied to provide remedies for breaches beyond the scope of Article 17.

This situation reveals legal conflicts that better fit the definition of basic incompatibility of Jenks: "conflict exists if it is possible for a party to two treaties to comply with one rule only by thereby failing to comply with another rule."[296] Further, an additional conflict between the exclusivity of the Warsaw Regime and customary international law was identified. The protection against racial

[294] Cassesse, *supra* note 285 at 135, see also 90-97.
[295] *Ibid* at 90-91.
[296] Jenks, *supra* note 56 at para 24.

discrimination is binding on States beyond treaty law because it constitutes customary international law, and probably the right to an effective remedy for IHRL breaches when read in connection with the application of the regime of state responsibility for wrongful acts.

Lastly, I analyzed the compatibility of the exclusivity clause and two *jus cogens* norms identified by Lady Hale in *Stott*: the prohibition against torture and racial discrimination. I concluded that potential conflicts between the exclusivity of the Warsaw Regime and rules of peremptory norms of international law is unlikely, but there are conflicts with treaty norms and norms of customary international law. In the next Chapter I will address these conflicts in light of collision rules identified by the ILC Report and codified under the VCLT.

Chapter 4 Exploring interpretative avenues to solve conflicts between the Warsaw Regime and the obligations under the CERD and the CRPD

> ***Conflicts between treaties, treaty regimes and treaties and other legal sources will inevitably emerge also in the future, perhaps increasingly. In the absence fixed [sic] hierarchies, such conflicts can only be resolved by "collision rules" that take account both the needs of coherence and contextual sensitivity.***[297]

4.1 Overview

I demonstrated in the previous Chapter the existence of legal conflicts between the protection against discrimination and the right to an effective remedy under two key IHRL treaties, and the exclusivity clauses of the Warsaw and Montreal Conventions under IAL. In this Chapter I explore whether the existing collision rules and interpretation techniques identified by the ILC can solve these conflicts. In cases where conflicts are not solved the regime of State responsibility for wrongful acts can be applied to determine the legal consequences of a material breach of IHRL obligations.

In 2000 the Special Rapporteurs on *Globalization and Its Impact on the Full Enjoyment of Human Rights* wrote that, "the primacy of human rights law over all other regimes of international law is a basic and fundamental principle that should not be departed from."[298] Although this premise would look hopeful to many, it is not widely accepted.[299] Instead, the primacy of human rights law must be casefuly analyzed in relation to the content of each right and according to the specific context.

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[297] *ILC Report*, *supra* note 1 at 250.
[298] *Globalization and Its Impact on the Full Enjoyment of Human Rights*, Preliminary Report of the Special Rapporteurs, J. Oloka-Onyango and Deepika Udagama, UN Doc E/CN 4/Sub 2/2000/13 (2000) at para 63.
[299] Hannum, *supra* note 170 at 123.

In addition to the special nature of IHRL as referred to by Frédéric Mégret which distinguishes IHRL obligations from other obligations under PIL,[300] other relevant aspects must be taken into consideration including the customary law or general principles status of some norms that go beyond treaty law because not all human rights have the same status.[301]

4.2 Collision rules to solve legal conflicts

James Crawford and Penelope Nevill argue that there is no codification of rules applicable by international courts in the event of "regime interaction," and there is no agreed hierarchy of courts or regimes.[302] Only two rules can be clearly identified: Article 103 of the UN Charter in relation to other obligations, and the special status of peremptory norms of international law (*jus cogens*) over any other rule of international law.[303] Facing the lack of consensus and the absence of complete codification under the VCLT, three categories of relationships to solve conflicts were examined in the ILC Report. These relationships have been used in interpretation to avoiding conflicts or overlaps between obligations of PIL but must be considered contextually and on a *case-by-case* basis:

a) Speciality and Temporality: *lex specialis, lex posterior.*

b) Status: *lex superior, jus cogens, erga omnes* and Article 103 of the United Nations Charter.*[304]*

c) Relation to the normative environment: *Systematic integration.[305]*

[300] Mégret, *supra* note 205 at 88.
[301] Theo Van Boven, "Categories of Rights." In: Moeckli, Shah & Sivakumaran, *supra* note 170 at 142.
[302] James Crawford & Penelope Nevill, *Chapter 8: Relations between International Courts and Tribunals: 'The Regime Problem',* In: Young, *supra* note 30 at 235; *Statute of the International Court of Justice*, 26 June 1945, 1 UNTS XVI (entered into force 24 October 1945) [*ICJ Statute*]; Malcom N Shaw, *International Law*, 8th ed (Cambridge: Cambridge University Press, 2017) at 70 (Malcom Shaw is of the opinion that it is more difficult to find a hierarchy among treaties, custom and general principles).
[303] Crawford & Nevill, *supra* note 302 at 235, footnote 3; Zdzislaw Galicki, *Chapter 4 – Hierarchy in International Law within the Context of Fragmentation*. In: Isabelle Buffard et al, eds, *International Law between Universalism and Fragmentation: Festschrift in Honour of Gerhard Hafner* (Leiden: BRILL, 2009).
[304] *ILC Report, supra* note 3 at paras 410-412.
[305] *ILC Report, supra* note 3 at para 18.

These relationships and the application of a rule will depend on the specific case and will have different effects depending on which one can be applied. While a rule that conflicts with a *jus cogens* will be void to the extent of its incompatibility,[306] if either *lex specialis* or *lex posterior* apply one rule would be set aside temporality only in that specific scenario. On the other hand, when application of the principle of systematic integration is possible, no law is given priority, instead they are interpreted in harmony.[307] These rules are useful but do not always solve conflicts when they are irreconcilable.

4.2.1 Speciality and temporality: *lex specialis* and *lex posterior*

The principles of *lex specialis* and *lex posterior* focus on how two or more obligations relate to each other in terms of specificity and the moment when the obligations became binding. First, under the principle of *lex specialis* a more specific law takes precedence over a general law.[308] Second, the principle of *lex posterior* deals with priority of successive treaties of the same subject matter, as codified under Article 30 of the VCTL, but while a more recent treaty might be given priory in most cases, there is no automatic preference.[309] Both principles are widely recognized in legal interpretation of international law and as techniques used to address conflicts between simultaneously applicable obligations.[310]

The principles of *lex specialis* and *lex posterior* primarily target situations where there are *prima facie* conflicts between obligations contained in successive treaties that are i. concluded among the same contracting parties, and ii. concerning the same subject matter.[311] The ILC indicates that when States are not the same parties "*lex specialis* appears largely irrelevant"[312] and that there seems to

[306] VCLT, *supra* note 95 at Articles 53 and 64.
[307] *ILC Report*, *supra* note 3 at para 19.
[308] *Ibid* at para 56.
[309] *Ibid* at para 320.
[310] *Ibid* at paras 56 and 243.
[311] *Ibid* at para 113 (These situations are dealt with under article 30 of the VCLT).
[312] *Ibid* at para 115.

be no role left to *lex posterior* when parties to the later treaty are not the same than to the earlier treaty.[313] Further, the requirement of same subject matter is essential, for instance as required by Article 55 of the Articles on State Responsibility that the relevant *lex specialis* must concern the same subject matter.[314]

Indeed, the ILC identified as a "hard case" the situation when a State acquired conflicting obligations in relation to two or more different States, because the State is obliged to comply with both obligations as a result of the principle of *pacta sunt servanda*, even if they appear to be in conflict with each other. In the case of the Montreal or the Warsaw Conventions, the State parties to either are not completely the same than the States parties to the CERD or the CRPD and the subject matters they regulate primarily are not the same. Therefore, these principles cannot solve the conflict identified.

4.2.2 Status: *jus cogens*, Article 103 of the Charter of the United Nations, and obligations *erga omnes*

a) Peremptory norms of international law (jus cogens)

The exclusivity clause of the Warsaw Regime cannot preempt the application of *jus cogens*. In this regard Article 53 of the VCLT provides that a treaty "is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law." Also, Article 64 provides that an existing treaty will be void and terminate if it is in conflict with a new norm of *jus cogens*.

I examined in Chapter III the two rules of *jus cogens* identified by Lady Hale in *Stott*.[315] These are the prohibition against systematic racial discrimination and the prohibition of torture as defined

[313] *Ibid* at para 243.
[314] *Ibid* at paras 115.
[315] *Stott, supra* note 1 at paras 68 – 69.

under the CAT. However, I concluded that it is unlikely that these rules are breached during the normal operation of international air carriage, and as an example I explained that in scenarios such as the facts in *Sidhu* and *Stott* they did not apply. Hence, because neither the principle of non-discrimination nor the right to an effective remedy under the CERD and the CRPD, have the status of *jus cogens,* they do not have the effect of invalidating any instrument of the Warsaw Regime.

b) Article 103 of the Charter of the United Nations

Article 103 of the UN Charter gives priority to the obligations under the Charter over obligations under any other treaty. This priority is also codified in Article 30(1) of the VCLT. Article 103 provides:

> In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.
> [Emphasis added].

The principle of non-discrimnation seems to be one of the obligations of States under the UN Charter. The principle of non-discrimination is a core purpose and an obligation of the United Nations and all signatory States to promote its universal respect and protection. Article 1, paragraph 3 provides:

> To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion;
> [Emphasis added].

Further, the protection against discrimination is also mentioned in Articles 55 as an obligation on the United Nations, and in Article 56 as an obligation on contracting States to achieve the objectives of Article 55. Thus, it is likely that the protection against discrimination is part of the obligations

under the UN Charter that could benefit from the Article 103 and prevail over conflicting obligations from the Warsaw Regime.

Under this logic, Articles 1 and 5(1)(f) of the CERD relating to the protection against racial discrimination, in the context of access to transportation and of access to places and services open to the public, would prevail over the exclusivity clause of the Warsaw Regime. It is also possible that the obligation under Article 6 of the CERD would also be part of the "respect for human rights and for fundamental freedoms" under the UN Charter, because as explained in Chapter III, the right to an effective legal remedy is an essential component for the fulfilment of rights and freedoms as has been held to constitute customary international law.[316]

This logic would also be applicable to the rights discussed in relation to the CRPD, which although was not a ground of discrimination expressly mentioned in the UN Charter, the UN Charter did not intent to provide an exhaustive list, other grounds have been recognized to include disabilities, gender identity and age, in connection with the evolving nature of the regime of IHRL.[317] Thus, Article 103 of the UN Charter could be applied to solve the legal conflicts between the obligations under IHRL discussed in Chapter III and the exclusivity clause of the Warsaw Regime.

The application of this logic presents no difficulties in relation to the Warsaw Convention because all contracting States are also members of the United Nations. However, the same situation is not available for the Montreal Convention, which has Cook Islands[318] as a signatory State but a non-member of the United Nations. However, the ILC explains that doctrine and international practice leans towards having the UN Charter as a type of constitution,[319] which states the basic law of the

[316] See case law from the Inter-American Court of Human Rights in footnote 187 above.
[317] Thornberry, *supra* note 190 at 98.
[318] Cook Islands adhered to the Montreal Convention on 22/05/07. See ICAO, "Treaty Collection" (31 July 2019), online: <www.icao.int/secretariat/legal/List%20of%20Parties/Mtl99_EN.pdf>
[319] *ILC Report, supra* note 3 at para 341, see footnote 468.

international community,[320] so that there is likely an "absolute primacy of Charter obligations over conflicting obligations with non-United Nations members," and members cannot excuse themselves from compliance with the UN Charter.[321]

Article 103 states that the obligations under the Charter "shall prevail." The ILC explained that the word "prevail" does not imply that the incompatible obligation would be null or void; instead the effect of Article 103 is that a State would be "prohibited from fulfilling an obligation arising under that other norm" when it is not compatible with the Chapter.[322]

Hence, the result of the application of Article 103 of the UN Charter, would be contrary to the interpretation that domestic courts have been given to the exclusivity clause, because IHRL obligations would be given priority and States would be prohibited from applying it to preempt IHRL obligations. Yet, it seems that this scenario, States would not be engaging their international responsibility for breaches of the exclusivity clause of the Warsaw Regime because Article 103 of the Articles on State Responsibility mentions that the Articles are without prejudice with the Charter and that the Articles should be interpreted "in conformity with the Charter."[323]

c) Erga omnes obligations

Obligations under multilateral treaties can be classified in two main categories: first obligations of a bilateral nature from a treaty in a classical sense, and second, obligations *erga omnes*. Classical treaty obligations resemble a contract between parties whose intent relates to the preservation of individual advantages and balancing exchange of concessions, and compliance is owed by each State to each State. A breach of an obligation of this kind only entitles individually the State that

[320] *Ibid*, at para 342, see footnote 469.
[321] *Ibid* at para 343, see footnote 472.
[322] *Ibid* at para 334.
[323] *ILC Articles on State Responsibility*, *supra* note 16 at 143, para 2.

has been affected by it to invoke the international responsibility of the breaching State.[324] Examples are the obligations under WTO agreements,[325] the International Air Services Transit Agreement[326] and the agreements of the Warsaw Regime.

Erga omnes obligations are obligations that cannot be "meaningfully reduced into reciprocal State-to-State relationships,"[327] instead *erga omnes* obligations are owed to the international community as a whole, and do not protect individual interests but interests shared by all States.[328] Examples are the obligations under the *Genocide Convention*,[329] obligations under humanitarian conventions, international human rights treaties,[330] and *jus cogens* norms. One could compare private contracts in domestic law with the obligations under the Warsaw Regime, and public policy obligations with obligations under human rights treaties.[331] Public policy obligations are the check and balances for agreements between private individuals within the State, with the effect that private agreements can be freely entered into by individuals but these agreements must respect the limits imposed by public policy.

However, the effect a *erga onmes* obligation is not hierarchy, but the entitlement of legal standing of any state in relation to breaches and not only the individual beneficiary.[332] Obligations *erga omnes* are a category of international obligations, which although have a significant role in PIL,

[324] *Ibid* at para 382.
[325] *DSU*, *supra* note 72 at Article 3(3). See examples of disputes: *EC—Measures Affecting the Approval and Marketing of Biotech Products (Complaint by the United States)*, (2006) *WTO* Doc WT/DS291/R, WT/DS292/R, WT/DS293/R (Panel Report), [*EC-Biotech*]; *United States—Standards for Reformulated and Conventional Gasoline (Complained by Bolivarian Republic of Venezuela)* (1996), *WTO* Doc WT/DS2/AB/R (Appellate Body Report), [*US-Gasoline*].
[326] *International Air Services Transit Agreement*, 7 December 1944, ICAO Doc 7500 (entered into force on 30 January 1945) [IASTA].
[327] *ILC Report*, *supra* note 3 at para 385.
[328] *Barcelona traction*, *supra* note 280 at para 33.
[329] *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, 78 UNTS 277 (entered into force on 12 January 1951) [*Genocide Convention*]; *ILC Report*, *supra* note 3 at para 386.
[330] *ILC Articles on State Responsibility*, *supra* note 16 at 111; *ILC Report*, *supra* note 3 at para 391.
[331] *ILC Report*, *supra* note 3 at para 394.
[332] *Ibid* at para 389.

differently from *jus cogens* and Article 103, they do not provide any indication of priority or hierarchy in relation to other obligations of PIL. Instead obligations *erga omnes* have effects of a procedural nature in the event of breaches because they allow for legal standing to any State concerned with upholding of the obligations even though that State might not have directly suffered harm.

Therefore, the principle of non-discrimination and the right to an effective remedy are *erga onmes* obligations. While this classification is not so useful in determining priority over the exclusivity clause of the Warsaw Regime, it is nevertheless useful to argue that States cannot use the exclusivity clause to derogate from them by justifying under the principle of *lex specialis* or *lex posterior*. The ILC explained that among the special considerations that must be considered when creating a specialized regime (*lex specialis*):

> (1) The regime may not deviate from the law benefiting third parties, including individuals and non-State entities;
>
> (2) The regime may not deviate from general law if the obligations of general law are of "integral" or "interdependent" nature, have *erga omnes* character or practice has created a legitimate expectation of non-derogation;[333]
>
> (3) The regime may not deviate from treaties that have a public law nature […].

According to these indications by the ILC Report it would seem that a specialized regime such as the Warsaw Regime cannot deviate from the protections discussed in Chapter 3, due to the fact that they benefit individuals, have an *erga omnes* character, and have a public law nature.

4.2.3 Systemic integration: Article 31(3)(c) of the VCLT

An additional technique is that of the principle of systemic integration illustrated in Article 31 (3)(c) of the VCLT:[334]

[333] *ILC Report, supra* note 3 at para 154
[334] *Ibid* at para 413. See also more generally: Campbell McLachan, "The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention" (2005) 54:2 ICLQ 279; *King, supra* note 139.

> There shall be taken into account, together with the context:
> c) any relevant rules of international law applicable in the relations between the parties.

This principle follows the existing presumption against normative conflict in PIL,[335] and highlights that international law exists in a systemic environment and the application of a particular obligation cannot "take place without situating the relevant jurisdiction-endowing instrument in its normative environment."[336] However , this principle has relevant limitations. The ILC Report recognized that while this principle "may resolve apparent conflicts; it cannot resolve genuine conflicts."[337] Similarly, Campbell Mclachlan explains that:

> The principle of systemic integration in treaty interpretation operates before an irreconcilable conflict of norms has arisen. Indeed, it seeks to avert apparent conflicts of norms, and to achieve instead, through interpretation, the harmonisation of rules of international law.[338]
> [Emphasis added].

Ragnar Nordeide explains that the application of this principle to multilateral treaties of different specialized regimes raises several challenges, mostly in relation to two questions; first, which would be the relevant rules of international law? and second, what is the meaning of the rules applicable in the relations between the parties?.[339] As I explain next, systemic integration is most likely unable to solve the legal conflicts identified in Chapter 3.

Firstly, it is a common understating that relevant customary law or general principles would be binding upon all States concerned, but it is not so in relation to treaty law.[340] Similarly, it is not clear how useful the principle of systematic integration would be in relation to treaty obligations

[335] *ILC Report, supra* note 3 at para 37.
[336] *Ibid* at para 423; Pauwelyn, *supra* note 44 at 460-463.
[337] *ILC Report, supra* note 3 at para 42.
[338] Mclachlan, *supra* note 334.
[339] Ragnar Nordeide, *The ECHR and its Normative Environment*. In: Fauchald & Nollkaemper, *supra* note 172; *ILC Report, supra* note 2 at paras 461-472.
[340] Nordeide, *supra* note 339; *ILC Report, supra* note 2 at paras 461-472; Oliver Dörr & Kirsten Schmalenbach, eds, *Vienna Convention on the Law of Treaties: A Commentary,* 2nd (Berlin: Springer, 2018) at 608.

that are in a clear relationship of incompatibility and which derive from two specialized regimes applicable to groups of States that are not exactly the same ones.[341]

In defining whether other conventional law must be taken into consideration there has been a strong opposition in using treaties to which not all States are also parties. For instance, the Appellate Body of the WTO held in *EC-Biotech*:

> Indeed, it is not apparent why a sovereign State would agree to a mandatory rule of treaty interpretation which could have as a consequence that the interpretation of a treaty to which that State is a party is affected by others of international law which that State has decided not to accept.[342]

Secondly, following the principle that only binding rules are applicable,[343] the analysis would be different if the principle of non-discrimination and the right to an effective legal remedy under the CERD, as discussed in Chapter 3, are recognized to constitute customary international law. So far only the principle of non-discrimination on the grounds of race has attained the status of customary international law, and possibly the right to an effective remedy for its violations.

In principle, with the existence of a relevant rule of customary international law systemic integration could help to interpret the exclusivity clause in harmony with the protection against racial discrimination and the provision of remedies for these breaches by domestic courts. Nevertheless, because no interpretation to this effect has been given there would be a significant change to the interpretation of the exclusivity clause of the Warsaw Regime. Article 31 (3)(c) can be used to assist the meaning of the treaty in consideration but not change or override its original meaning.

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[341] *EC-Biotech*, *supra* note 325.
[342] *Ibid* at para 7.68.
[343] MR Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Leiden Martinus Nijhoff Publishers, 2009) 433; A Orakhelashvili, *The interpretation of Acts and Rules in Public International Law* (Oxford, Oxford University Press, 2008) at 366.

Thus, in face of the abundant jurisprudence upholding a strict application of the exclusivity clause of the Warsaw Regime, supported by the object and purpose of the conventions and the core goals of uniformity and harmonization, it seems unlikely that the principle of systematic integration can justify an interpretation consistent with the Warsaw Regime and at the same time avoid that human rights claims be preempted by the exclusivity clause.

4.3 Consequences of conflicts between the exclusivity clause and IHRL: State responsibility for breaches of *erga omes* obligations

Hafner warned in his 2000 Report to the ILC that conflict is a major risk of fragmentation in its substantial aspect:

> the risk of generating frictions and contradictions between the various legal regulations and creates the risk that States even have to comply with mutually exclusive obligations. Since they cannot respect all such obligations, they inevitably incur State responsibility.[344]

A material breach of a treaty obligation by a State engages the international responsibility of the breaching State under the regime of state responsibility for wrongful acts (Article 12) which is customary international law codified under the Articles on State Responsibility (Article 1, 2, and 28).[345] In relation to human rights obligations, these are obligations of an *erga omnes* nature as previously explained.

Further, the legal consequences of international responsibility of a State[346] also apply to breaches of *erga onmes* obligations.[347] In this sense article 33 of the Articles on State Responsibility specifies: "The obligations of the responsible State set out in this part may be owed to another

[344] *Report of the International Law Commission*, ILC, 52nd Sess, UN Doc A/55/10 (2000) at 144.
[345] *ILC Articles on State Responsibility*, *supra* note 16.
[346] *Ibid* at Articles 29, 30 and 34.
[347] Mégret, *supra* note 205 at 89.

State, to several States, or to the international community as a whole, depending in particular on the character and content of the international obligation and on the circumstances of the breach."

Lastly, it is not a justification or a circumstance precluding wrongfulness for breaches of IHRL obligations[348] that the courts of a State could not consider IHRL obligations because, e.g., they had not been incorporated into domestic law[349] or protections are provided by domestic statutory law, which would be precluded under the exclusivity clause of the Warsaw Regime.[350] First, a domestic court is part of the State and can engage the international responsibility of the State;[351] and second, if due to the absence of domestic incorporation of an IHRL treaty the court does not take into consideration such obligations, a breach nevertheless exists because it is determined by international law and not by domestic law.[352]

4.4 Conclusion

This analysis revealed an absence of legal justifications from the perspective of PIL to privilege the application of an exclusivity clause from a specialized regime aimed at the limitation of air carrier liability, over IHRL protection and remedies when facts occur "on board the aircraft or in the course of any of the operations of embarking or disembarking." Instead, in some circumstances IHRL protections could take precedence over the exclusivity clause to the extent that they are

[348] *ILC Articles on State Responsibility*, *supra* note 16 (Part V of the Articles on State Responsibility enumerate the circunstances to preclude wrongfulness to be only Consent (Article 20); Self-Defence (Article 21); Countermreasures (Article 22); Force majeure (Article 23); Distress (Article 24); and Necessity (Article 25)).
[349] *Baker v Canada (Minister of Citizenship and Immigration)*, [1999]1 SCR 817 at paras 9, 79 -80 [*Baker*].
[350] *Sidhu*, *supra* note 116; Tseng, *supra* note 6.
[351] *ILC Articles on State Responsibility*, *supra* note 16. (Article 4 of the Articles on State Responsibility states: "The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, excecutive, juricial or any other functions […]").
[352] *Ibid*. (Article 3 states: "The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law"); see also VCLT, *supra* note 95 at Article 27 ("A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46"); See also other Articles of the VCLT: 46, 53 and 64; *VS v Slovakia*, CEDR/C/88/D/56/2014 (6 January 2016) at para 7.2.

covered by Article 103 of the UN Charter, or at least require that the exclusivity clause be interpreted in light of IHRL protections when they are customary international law. In no circumstance the Warsaw Regime in terms of *lex specialis* can justify deviations from the protections discussed in Chapter 3 due to the *erga omnes* and public law nature of IHRL.

This absence of legal justifications can also be concluded from the exceptional circumstances when derogations from IHRL are permitted, namely public or national emergencies officially proclaimed;[353] the fact that IHRL continues to apply even during war,[354] the essential character of the obligations considered as core elements of the IHRL regime; its connection with Article 103 of the UN Charter; the *erga onmes* character of IHRL obligations; and the status as customary international law of the protection against racial discrimination under the CERD.

It is clear that in the event of a conflict between the exclusivity clause and a norm of *jus cogens* the Warsaw Regime would risk being void according to Articles 53 and 64 of the VCLT. Yet, it is very unlikely that a breach of *jus cogens* takes place during the normal operation of an air carrier. Therefore, the Warsaw Regime cannot be held to be invalid for the sole fact that it has a potential to conflict with some IHRL obligations. In consequence, in occasions when the exclusivity clause is applied to preempt protections of non-discrimination on the grounds of race or disability, and/or when an effective legal remedy under these protections is preempted, the international responsibility of the State is engaged.

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[353] ICCPR, *supra* note 167 at Article 4 (1) of the ICCPR (Article 4(1) estates that derogations are only permitted "In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed"); OHCHR, "Fact Sheet No.2 (Rev.1), The International Bill of Human Rights" (31 July 2019) online: <www.ohchr.org/Documents/Publications/FactSheet2Rev.1en.pdf>; Mégret, *supra* note 205 at 103; HRC, *General Comment No. 29 on Derogations During a State of Emergency*, UN Doc CCPR/C/21/Rev.1/Add 11 (2001), at paras 3 and 14.

[354] *Case Concerning Oil Platforms (Islamic Republic of Iran v United States of America)*, [2003] ICJ Rep 161 [*Oil Platforms case*].

CONCLUSION

> ***Because already the ascertainment of the presence of a conflict requires interpretation, it may often be possible to deal with potential conflicts by simply ignoring them, especially if none of the parties have raised the question. But when a party raises a point about conflict and about the precedence of one obligation over another, then a stand must be taken.*** [355]
>
> ILC, *Report on Fragmentation* [2006]

This thesis demonstrated the existence of legal conflicts between the exclusivity clause of the Warsaw Regime and some obligations under two treaties of the IHRL regime. I characterized these conflicts as "unavoidable" because they cannot be solved by the application of the rules of interpretation or collision rules identified in the ILC Report. However, States have successfully dealt with these conflicts by ignoring them. This avenue is not viable in the long-term because of three main reasons. First, some essential obligations under IHRL are likely to take precedence over the Warsaw Regime; second, there is an absence of legal justification under PIL to give precedence of the exclusivity clause over IHRL obligations; and third, States are risking engaging their international responsibility for breaches of IHRL when they uphold the exclusivity of the Warsaw System.

Indeed, the persistent application of the exclusivity of a specialized sub-regime of IAL to the exclusion of essential protections under IHRL, including the protection against racial discrimination, is evidence that today the fragmentation of PIL can lead to a legal conflict incapable of being solved solely through interpretation and collision techniques. Instead, awareness of the risk to create conflicts must be present from the moment when a treaty is drafted, during

[355] *ILC Report, supra* note 3 at para 43.

interpretation, and during implementation by the contracting States, which includes their domestic courts.

Jenks explained that "in many cases the most appropriate and convenient method of resolving conflicts and, indeed, the only one likely to give practically satisfactory results, is that of negotiation between the parties, organizations or interests concerned."[356] These are procedural precautions made at the moment of drafting the instrument,[357] for instance drafting negotiations among the specialized agencies of the UN which will allow for a systemic integration from the beginning. An example would be the negotiation of an amendment to the Montreal Convention lead by ICAO, with participation from the UN Office of the High Commissioner of Human Rights, also allowing for comments from the regional human rights courts in order to provide awareness of human rights obligations in the development of IAL.

The input and unilateral actions of air carriers is also essential for the continuity and renewal of the Warsaw Regime. Unilateral action by airlines already took place in the past to address limitations of the Warsaw Convention. These are the 1966 Montreal Agreement among air carriers to include the Warsaw liability limits, and the 1992 Japanese Initiative.[358] A similar private agreement could be made by air carriers to uphold the liability limits but not exclude causes of action relating to obligations under IHRL.

It is important that a modernization of the Warsaw Regime is made to allow for the recognition of causes of action based on IHRL protections. While currently there is no pressing interest on contracting States to amend the Warsaw Regime due to the conflicts identified in this thesis, it

[356] Jenks, *supra* note 56 at para 434.
[357] *Ibid* at para 429.
[358] Baden, *supra* note 103 at 453-458.

would be in the interest of passengers to challenge the exclusivity of the Warsaw Regime. Certainly, the Warsaw Regime could be undermined by its potential to conflict with IHRL and lose legitimacy within contracting States if passengers start questioning the application of this regime to the benefit of air carriers and in detriment of their human rights. There are multiple international fora where these claims could be brought. For instance, the monitoring bodies to the CERD and the CRPD allow individuals to bring cases before them once local remedies have been exhausted. Similarly, the Inter-American Commission of Human Rights would allow claims as long as the claim is structured under the American Convention of Human Rights.[359]

Further, as Mégret explains, due to the *erga omnes* nature of IHRL obligations a third State "can bring a case against a violating state even if none of its nationals were affected."[360] Also, according to Article 65(1) of the Statute of the ICJ also a UN body could be authorized to bring an advisory opinion in regard to the question of compatibility between the exclusivity clause and the Warsaw Regime.

Lastly, in addition to the opinion of Lady Hale in *Stott* judges in other jurisdictions have started to question the application of the exclusivity clause to fundamental human rights. For instance, Judges Abella and Wagner from the Supreme Court of Canada stated in *Thibodeau*:

> [170] … although it is not determinative, we cannot ignore the fact that we are dealing with a commercial treaty. This Court has often said that domestic law should be generously interpreted in alignment with international law and its human rights values. It has never said that international law should be interpreted in a way that diminishes human rights protected by domestic law.

[359] *Pact of San Jose, supra* note 189 at Article 44.
[360] Mégret, *supra* note 205 at 106.

> [171] Just as Parliament is not presumed to legislate in breach of a treaty, it should not be **presumed to implement treaties that extinguish fundamental rights protected by domestic legislation.** [Emphasis added].

Also, the Supreme Court of Israel interpreted in *Air France v. Teichner*[361] the term "bodily injury" of Article 17 of the Montreal Convention to also allow for compensation for purely emotional distress and psychic injury unaccompanied by physical injury. The Court looked beyond the Warsaw Regime to other PIL in its decision.[362]

Therefore, it is just a matter of time before a challenge to the exclusivity clause of the Warsaw Regime is made in relation to its application to protections under IHRL. We must now start thinking about how the Warsaw Regime can be amended and reconciled with obligations under IHRL, while also continuing to be an effective international regime for the liability of air carriers.

[361] *Air France v Teichner*, S & B Av R VII/141.
[362] D Yoran, "Recovery for emotional distress damages under Article 17 of the Warsaw Convention: The American versus the Israeli approach" (1992) Brookly J of Int L 811, at 819-820.

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