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Andre Kaftal

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THE PROBLEM OF LIABILITY FOR DAMAGES CAUSED BY AIRCRAFT ON THE SURFACE*

ANDRÉ KAFTAL†

THE ROME CONVENTION OF MAY 29, 1933.

Historical Summary:

The aviation laws of different countries adopt varying, and often quite contradictory, solutions in regard to liability toward third persons. These variations are not limited to those which have been outlined in the first part of this study. Each state when adopting a certain type of legislation has introduced into it certain modifications, so that consequently no two laws are ever identical.

This great number of different laws presents, as mentioned in the introduction, a great danger to the future of aviation. Some eminent jurists predicted this when aviation first began to be commercially exploited. They maintained that at first aviation problems in the field of public law should be regulated uniformly and in accordance with an international plan. To this end, the Convention of Paris was signed October 13, 1919, a few years later followed by the Ibero-American Convention of November 1, 1926, and the Pan American Convention of Havana in 1928.

However, problems of private law have not yet been solved on an international basis. This disquieting fact was signaled in March of 1922 by the Consulting and Technical Commission of Communications and Transit of the League of Nations, by the International Chamber of Commerce at its Rome Congress in 1923, and especially

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†Advocat & la Cour d'Appel de Varsovie.

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by the Second International Congress of Air Navigation, held in London in June of 1923. This latter, in studying a report presented by M. Edmond Sudre, permanent Secretary-General of the International Technical Committee of Aerial Legal Experts, entitled "Concerning the Establishment of an International Private Aerial Law," adopted the following motion:

... That, with the shortest possible delay, an International Conference be held, composed of delegates authorized by their respective Governments, to study and outline the general principles of an international private aerial law, and to submit the legal propositions necessary for ratification by the various nations which are interested.

This wish did not remain sterile. Two eminent jurists, members of the French Government, M. Poincaré, President of the Council, and M. Laurent Eynac, Under-Secretary of State for Aeronautics, decided to take the initiative in calling an International Conference for the purpose of drafting a convention on the liability of air carriers, as well as for the study of the unification of all private aeronautical law.

The Conference was called at Paris, October 25, 1925, and delegates from forty-three nations were in attendance. It concluded with the adoption of a final protocol including a draft convention on carrier liability. Furthermore, the Conference adopted the following motion, which it recommended to the favorable examination of the Governments represented:

After having drawn up, as an example, a list of questions, the study of which must immediately follow the examination of the problem of liability of air carriers, the Conference, in consideration of the importance, urgency, complexity and legal technical nature of these questions, expresses the wish that, without further delay, a special Committee of Experts be named charged with the duty of carrying on the work of the Conference. This Committee would be composed of a limited number of members. Its permanent seat would be at Paris. The Conference consequently requests the French Government to agree to communicate with the Governments invited to this Conference to determine the effect to be given to this proposal. The Conference expresses the wish that the first questions studied by this Committee may be: damages caused by aircraft to persons and property on the surface.

In January, 1926, the French Minister of Foreign Affairs asked the states represented at the Conference of October 25, 1925, if they wished to participate in the creation of the proposed Committee of Experts under consideration. At the same time, he outlined its character in the following words:
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It is of equal importance, that, regarding possible modifications of national laws, each state maintain its own sovereignty, and that, consequently, the Committee of Experts considered appear as a purely consultive and absolutely independent group, in its methods of work as well as in its functioning.

Consequently, twenty-eight states sent their delegates to Paris and on the 17th of May, 1926, the first session of the Committee was opened. They decided to name the Committee thus formed the International Technical Committee of Aerial Legal Experts, to outline the problems of private aerial law which it would examine, and to create for this purpose four commissions. The work of outlining draft conventions must be carried out first by the commission and then presented to the plenary session of the C. I. T. E. J. A. Once the drafts are accepted, they are then submitted to the Governments represented on the C. I. T. E. J. A. and discussed at diplomatic Conferences.

The problem of liability for injuries caused to third persons was assigned for first consideration by the Third Commission, of which M. Ambrosini, Italian delegate, was the reporter. We already know how complex and problematical was the problem consigned to M. Ambrosini. The first consideration was to establish the character of this liability, which was relatively simple, but following that they had to decide whether or not such liability should be limited. And it was there that the most difficult problems arose. The reporter was forced to draw up no less than eight consecutive tentative drafts.

A brief summary of the work of the C. I. T. E. J. A. in this field will be given here with a discussion of the texts of some of the tentative drafts of M. Ambrosini, in order to show the evolution, within the C. I. T. E. J. A., of the ideas regarding limitation of liability.

M. Ambrosini drew up a report urging the adoption of absolute liability. This report was discussed by the Third Commission at Brussels from November 7-10, 1927; it became subject to further examination at the meeting of the commissions, held in Paris from March 23-24, 1928. The question of the limitation of liability by the establishment of a forfeit or the adoption of the principle of relinquishment was raised, and finally, the Third Commission decided to ask the Committee to give it the authorization necessary for continuation of this work, particularly on the problem of limitation of liability.
Thus at its third session, held from May 24-29, 1928, at Madrid, the Committee dealt with this problem, the outline of which was presented by M. Cogliolo, who emphasized on the one hand the practical difficulty of limited liability, and on the other hand indicated the necessity, if the principle of unlimited liability were adopted, of studying the problem of relinquishment and of considering for adoption or rejection the matter of compulsory insurance. The late M. Pittard, Swiss delegate, was inclined to reject completely the question of relinquishment. He maintained that it was impossible to impose on third persons a limitation of liability, which he described as a "legal monstrosity." Professor Ripert, French delegate, believing that aerial risk does not surpass in importance any category of other risks—for example, risk of fire—maintained his stand for the adoption of the principle of unlimited liability. M. Babinski, Polish delegate, expressed the same opinion. The president of the session, M. Iranzo y Goizueta, believed that liability should not be limited and that relinquishment could not be considered. Lastly, Sir Alfred Dennis, the British representative, expressed himself as in favor of a limitation of liability on the theory that it would aid air navigation companies in contracting insurance for their risks. After this exchange of opinions, wherein the majority were clearly unfavorable to any limitation whatsoever of liability, the discussion was concluded.

A further meeting of the commission was set for Paris, from October 11-18, 1928. The Third Commission completed the examination of a new report presented by M. Ambrosini and declared itself in favor of the principle of unlimited liability, although applying the theory of risk.


His tentative draft was based on the following principles:

(1) Objective liability or risk forms the basis of any outline of the project. This principle was unanimously accepted by the commission.

(2) This liability is applied without distinction to any compensation for injuries which may be caused to third persons on the surface. It will be applied then to the falling of objects, even in case of necessity, or even when the injury is caused by any person (for example, a passenger) on board the aircraft.

(3) No legal limitation of liability will be admitted. This
principle was adopted by the commission after long discussion, with a bare majority of votes.

(4) The owner and operator of the aircraft will be jointly and severally liable, together with the persons causing the injury.

All the experts were united on the principle of objective liability, so that the first two principles reported by M. Ambrosini did not raise any objections. On the contrary, the extent of this liability and the determination of the persons to whom it is applicable raised serious discussions within the Committee. Regarding the fourth principle, the French delegation, for which Professor Ripert was the spokesman, believed that the aircraft operator alone should carry the burden of objective liability, because it is he who created the actual risk of flight. The British delegation echoed this opinion, but it was not shared by the majority of delegates, for fear of a possible collusion between the owner and operator.

The principle of limited or unlimited liability aroused a still more animated discussion, especially since certain delegations adopted a most determined attitude on this subject.

M. Giannini, the Italian delegate, partisan of the limitation idea, believed that equity as well as national interests require that, once objective liability is maintained, the operator be placed in a position to know his duties exactly, to be able easily to insure his risks, to organize his credit, and to determine his business future in aviation. Only a limitation of liability allows him to achieve this purpose. Thus the Italian idea was prompted above all by considerations of opportunity. The opponent of limitation, Professor Ripert, French expert, based his ideas on the ground of principle. He indicated that the rule of limitation of liability would have as its first result the destruction of the present admitted ideas in the matter of liability. If one realized it by means of relinquishment, it would really be equivalent to lack of liability; if the figure serving as a limit to liability were arbitrarily set, an injustice would be the result, because only injuries of small importance would be compensated. Furthermore, the majority of national laws, although admitting absolute liability, have not limited it. Aircraft operators enthusiastically support this state of affairs, which, however, is understandable since the risks that the transport operators run do not exceed those to which the industrialist is habitually exposed, whether he is operating an office or a factory.

This discussion was ended by a vote which gave a majority of 12 votes to 7 in favor of non-limitation. After an examination of
the tentative draft, the Committee reserved its opinion on the whole matter because of the difference in point of view shown by the vote on limited liability, which would not allow certain states to accept the draft, as submitted to the International Conference on Private Aerial Law. This project was then sent back to the commission, and the partisans of the principle of limited liability were asked to express the bases of the system of limitation which they proposed.

Thus, in spite of a vote which was unfavorable to it, the principle of limited liability was practically adopted—due to the tenacity of its partisans and because of practical reasons which militated in its favor.

From the fifth to the eighth of May of the following year, at the time of the meeting of the commissions at Paris, the Third Commission examined the possibility of a system of limited liability. A sub-commission, selected for this purpose, proposed a system on the following bases: a limit of objective liability fixed at 250,000 francs per person, with a maximum of 2,500,000 francs for a single accident to persons and 2,500,000 francs per accident to goods. This objective liability was to be completed by unlimited

132. Art. 1. Tout dommage causé par un aéronef aux personnes et aux biens qui se trouvent à la surface du sol donne droit à réparation intégrale, par cela seul qu'il est établi que le dommage existe et qu'il provient de l'aéronef.

Cette responsabilité peut être atténuée ou écartée dans le seul cas de faute de la personne lésée.

Art. 1-bis. Cette disposition ne s'applique qu'aux dommages causés au cours de la navigation aérienne. L'aéronef est en cours de navigation depuis le moment où il quitte la surface jusqu'à celui où il effectue l'arrivée. La manœuvre faite pour prendre le départ ou effectuer l'arrivée est comprise dans la navigation.

Art. 2. Doit être réparé également, dans les mêmes conditions, le dommage causé par un corps quelconque tombant dudit aéronef, même dans le cas de jet de lest réglementaire ou de jet fait en état de nécessité.

La même règle s'applique encore à tout autre dommage causé par une personne quelconque se trouvant à bord de l'aéronef.

Art. 3. Sont responsables solidairement des dommages visés par les articles précédents, le propriétaire et l'exploitant, ainsi que la personne qui a causé le dommage, si elle n'appartient pas à l'équipage.

Cette responsabilité peut être atténuée ou écartée en cas de faute de la personne lésée.

Art. 4. Pour connaître des actions en réparation des dommages, dans le sens des articles précédents, est compétente l'autorité judiciaire du domicile du défendeur, celle du lieu où a été causé le dommage et celle du siège de l'assureur, pour autant que la loi de ce siège donne à la personne lésée une action contre l'assureur.

Art. 5. Ces actions se prescrivent par deux ans à compter du jour du dommage. Si la personne lésée prouve qu'elle n'a pu avoir connaissance soit du dommage, soit de l'identité de la personne responsable, la prescription commence à compter du jour où elle a pu en avoir connaissance.

En tout cas, l'action se prescrit par quatre ans à partir du moment où le dommage a été causé. Le mode de calcul de la prescription, ainsi que les causes de suspension et d'interruption de la prescription, sont déterminés par la loi du tribunal saisit.

Art. 7. Toute action en responsabilité, à quelque titre que ce soit, ne peut s'exercer que dans les conditions prévues par la présente Convention.

Art. 8. La présente Convention est applicable toutes les fois qu'un dommage a été causé par un aéronef d'un des États Contractants dans un autre État Contractant.
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delictual liability. The reporter, M. Ambrosini, was given the task of studying this system and including in it the necessary changes.

The result of the work of M. Ambrosini was presented in the form of a tentative draft at the fifth plenary session of the C. I. T. E. J. A., held October 6-8, 1930, at Budapest. This preliminary draft, adopted after discussion by the Committee, was based on the following principles:

1. On the question of objective liability, the principles included in the proposed draft were maintained, as presented at the fourth session, and for the same reason. However, aside from this objective liability, the proposed draft provided for the co-existence of delictual liability.

2. As in the preceding proposed draft, objective liability is applied to all injuries caused on the surface by an aircraft maneuvering or in flight.

3. In opposition to the proposed draft presented at the fourth session, objective liability must only apply to the operator, to the exclusion of both the owner and the person causing the injury. This rule is explained by the fact that the new draft recommended the principle of a guaranty which the operator must furnish, and by this fact the person suffering the injury would no longer have to fear the insolvency of the operator.

4. The principal difference between the proposed drafts presented at the fourth and fifth sessions of the Committee consisted in the fact that the latter admitted the limitation of objective liability. The reasons which, according to the reporter, militate in its favor, are: (a) practical necessity; particularly, this limitation is one of the essential conditions of the existence and development of air transport companies which largely exist only because of generous subsidies from the interested Governments; (b) equity, since the application of the exceptional principle of objective liability in favor of persons injured claims as compensation the limiting of this liability in favor of the operator; (c) finally, limitation makes possible or facilitates insurance which is for the benefit of the operator as well as the person injured. Evidently, every possible system of limitation offers some imperfections. The C. I. T. E. J. A. has studied them all and lastly emphasized the two following: (a) a maximum total sum determined beforehand and unchangeable in every case, and (b) a system based on the principle of value of the aircraft. Nevertheless, neither of these two systems can be entirely accepted. A combined system must be reached, in particular: legal objective liability against the operator
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has been limited for each accident in accordance with the value which the aircraft had at the place and time it was first put into service. However, this limit can not be less than 5,000,000 francs, since 2,500,000 is assigned to compensation for injuries caused to persons and 2,500,000 francs assigned for damages caused to goods.

(5) Injured persons must have a guaranty that compensation will positively be paid them.\textsuperscript{133}

\textsuperscript{133} Art. 1. (1) Tout dommage causé par un aéronef en manœuvre ou en vol aux personnes et aux biens se trouvant à la surface donne droit à réparation par cela seul qu'il est établi que le dommage existe et qu'il provient de l'aéronef.
(2) Cette responsabilité peut être atténuée ou écartée seulement dans le cas de faute de la personne lésée et conformément aux dispositions de la loi du Tribunal saisi.

Art. 2. Doivent être réparées également dans les mêmes conditions:
(a) Le dommage causé par un corps quelconque tombant dudit aéronef, même dans le cas de jet de lest réglementaire ou de jet fait en état de nécessité;
(b) Tout dommage causé par une personne quelconque se trouvant à bord de l'aéronef, sauf le cas où il est prouvé que le dommage est causé intentionnellement par un acte étranger à l'exploitation et sans que l'exploitant ou ses préposés aient pu l'empêcher. (1)

Art. 3. (1) La responsabilité visée aux articles précédents incombe à l'exploitant de l'aéronef, sauf son recours contre l'auteur du dommage;
(2) Est qualifié exploitant de l'aéronef toute personne qui fait usage de l'aéronef pour son propre compte;
(3) Au cas où le nom de l'exploitant n'est pas inscrit au registre aéronautique ou toute autre pièce officielle, le propriétaire est réputé être l'exploitant jusqu'à preuve du contraire.

Art. 4. (1) L'exploitant de l'aéronef est responsable pour chaque accident jusqu'à concurrence de la valeur de l'aéronef au lieu et au moment de sa première mise en service;
(2) La moitié de cette valeur est affectée à la réparation des dommages causés aux personnes et l'autre moitié à la réparation des dommages causés aux biens;
(3) Toutefois la limite de sa responsabilité ne pourra pas être inférieure à (2,500,000) francs pour chaque catégorie de dommages;
(4) Si le montant affecté à la réparation des dommages causés aux biens n'est pas intégralement absorbé, ce qui reste est dévolu à la réparation des dommages causés aux personnes;
(5) Les sommes indiquées ci-dessus sont considérées comme se rapportant au franc français constitué par soixante-cinq demi milligrammes d'or au titre de neuf cent millièmes de fin. Elles pourront être converties dans chaque monnaie nationale en chiffres ronds.

Art. 5. S'il y a plusieurs victimes de dommages dans le même accident et si la somme globale à payer à titre de réparation dépasse les limites prévues à l'article 4, il y a lieu de procéder à la réduction proportionnelle du droit de chacun de façon à ne pas dépasser dans l'ensemble les limites susdites. (1)

Art. 6. Lorsqu'il y a plusieurs victimes de dommages dans le même accident, les intéressés doivent faire valoir ou notifier leurs réclamations dans le délai manquant à six mois à compter du jour de l'accident; ce délai écoulé, il sera valablement procédé au règlement des indemnités et lésités intéressées qui ne pourront exercer leur droit que sur le montant qui n'aurait pas été distribué. (1)

Art. 7. Si différents tiers lésés agissent, en vertu des dispositions des articles précédents et de l'article 2, devant les juridictions d'Etats différents, le défendeur peut, devant chacune d'elles, faire état de l'ensemble des réclamations et créances en vue d'éviter que la limite de sa responsabilité ne soit dépassée.

Art. 8. L'exploitant n'aura pas le droit de se prêvaloir des dispositions de la présente Convention qui limitent sa responsabilité, si le dommage provient de sa propre faute.

Art. 9. Pour connaître des actions en réparation des dommages, dans le sens des articles précédents, sont compétentes: l'autorité judiciaire du domicile du défendeur, celle du lieu où a été causé le dommage et celle du siège de l'assureur, pour autant que la loi de ce siège donne à la personne lésée une action contre l'assureur.

Art. 10 (1) Ces actions se prescrivent par deux ans à compter du jour du dommage. Si la personne lésée prouve qu'elle n'a pu avoir connaissance
Thus we see that the C. I. T. E. J. A. at its fifth session finally accepted a draft convention greatly modifying the principles which had been accepted previously. The acceptance of this draft necessitated the immediate drawing up of rules fixing the amount of guaranty which the aircraft operator would be forced to carry. In this matter, the French delegate, M. Vivent, was assigned to prepare the draft in question.

At the next meeting of the commission, which took place May 27-30, 1931, in Paris, a session of the Third Commission was then devoted to an examination of the section of the Convention on guaranties. M. Vivent explained the reasons which had led him to prepare a draft which only included the recognition of the liability of the state for injuries caused by its aircraft to a person in a foreign state, and the institution of mutual security by these states. While at the same time assuring a guaranty to third persons injured, this system had the advantage of leaving the states free to prepare, within their own countries, guaranties and legislative means allowing them to cover their liability according to their own needs. In spite of the undeniable advantages of this solution, it raised very strong objections, because the states were neither willing to admit themselves liable for private persons injured, nor willing to accept undetermined financial burdens. So this project had to be abandoned and they turned to compulsory insurance and the study of a flexible system which would leave to the states the possibility of a choice between different guaranty systems. The reporter was then charged with the duty of drawing up a new project which he had to base on three systems of guaranty: (1) security for those states which deemed it possible to have such a system, (2) bank security or security bonds held by a bank, and (3) insurance.

A new proposed draft, drawn up by M. Vivent, was submitted to the C. I. T. E. J. A. at its seventh session held July 21-23, 1932, at Stockholm. It was adopted with certain modifications, the essential one being the exclusion of a direct guaranty by a state.
It was then decided to combine the four articles composing this project with the text of the draft of this Convention adopted at Budapest in October, 1930, which would consequently alter the latter.134

134. Art. 1. (1) Tout dommage causé par un aéronef en manœuvre ou en vol aux personnes et aux biens qui se trouvent à la surface donne droit à réparation par celui seul qu'il est établi que le dommage existe et qu'il provient de l'aéronef.

(2) Cette responsabilité peut être atténuée seulement dans le cas de faute de la personne lésée conformément aux dispositions de la loi du Tribunal sasi.

Art. 2. Doivent être réparés également dans les mêmes conditions:

(a) Le dommage causé par un corps quelconque tombant dudit aéronef même dans le cas de jet de lest réglementaire ou de jet fait en état de nécessité;

(b) Tout dommage causé par une personne quelconque se trouvant à bord de l'aéronef, sauf le cas où il est prouvé que le dommage est causé intentionnellement par un acte étranger à l'exploitation et sans que l'exploitant ou ses préposés aient pu l'empêcher.

Art. 3. (1) La responsabilité visée aux articles précédents incombe à l'exploitant de l'aéronef, sauf son recours contre l'auteur du dommage;

(2) Est qualifié exploitant de l'aéronef toute personne qui fait usage de l'aéronef pour son propre compte;

(3) Au cas où le nom de l'exploitant n'est pas inscrit au registre aéronautique ou toute autre pièce officielle le propriétaire est réputé être l'exploitant jusqu'à preuve du contraire.

Art. 4. (1) L'exploitant de l'aéronef est responsable pour chaque accident jusqu'à la valeur de l'aéronef au lieu et au moment de sa première mise en service;

(2) La moitié de cette valeur est affectée à la réparation des dommages causés aux personnes et l'autre moitié à la réparation des dommages causés aux biens;

(3) Toutefois la limite de sa responsabilité ne pourra pas être inférieure à (2,500,000) francs pour chaque catégorie de dommages;

(4) Si le montant affecté à la réparation des dommages causés aux biens n'est pas intégralement absorbé, ce qui reste est dévolu à la réparation des dommages causés aux personnes;

(5) (Les sommes indiquées ci-dessus sont considérées comme se rapportant au franc français constitué par soixante-cinq et demi milligrammes d'or au titre de neuf cents millièmes de fin. Elles pourront être converties dans chaque monnaie nationale en chiffres ronds.)

Art. 5. (1) L'assurance doit être contractée auprés d'une institution publique d'assurances ou d'un assureur spécialement agréé pour ce risque par l'Etat d'immatriculation de l'aéronef. S'il y a dépôt ou garantie de banque, le versement doit être effectué dans une caisse publique ou une banque agréée à cette fin par ledit État, la garantie donnée par une banque agréée à cette fin par cet État.

Art. 6. (1) Les sûretés répondant aux conditions prévues dans la présente Convention sont reconnues comme suffisantes par tous les Etats Contractants.

(2) La nature, l'étendue et la durée des sûretés prévues à l'art. 8 de la présente Convention, seront constatées soit par un certificat officiel soit par...
The text of the draft thus prepared was submitted at the Third International Conference on Private Aerial Law which met at Rome, May 15, 1933. We shall see that this draft underwent some serious changes and caused some very heated discussions, which at the time aroused some fear that the Conference would not achieve its end. It was only due to the sincere desire for conciliation which permeated the states represented, that finally on May 29, 1933, the Convention for the Unification of Certain Rules Relative to Damages Caused by Aircraft to Third Persons on the Surface, was signed by 19 states. To achieve this, they had been forced to sacrifice some clear and concise regulations of the draft and replace them with vague texts—allowing each state the right to interpret them in its own way. Some of the questions have been knowingly omitted, several others solved in haste. There is then no doubt that, purely from the juridical point of view, the text adopted by the Conference leaves much to be desired.

ANALYSIS OF THE Convention.

The Principle of Liability:

The Convention bases liability of the operator on the principle of absolute liability. Article 2 clearly indicates "that the injury..."
grants a right to compensation by the mere fact that it is established that the injury exists and that it was caused by the aircraft." Then the person injured would only have to establish the fact of the injury and the causal relation between it and the flight of the aircraft.

What is the nature of the injury subject to compensation? In the draft of the C. I. T. E. J. A., submitted at the Third Conference, it is defined as "any injury, caused to persons and to goods." This expression was strongly criticized by the delegates to Rome. The German delegates observed that the term "goods" (biens) must only deal with material things, i.e., material things movable or immovable. Consequently, no situation would arise dealing with compensation for an injury caused, for example, as in the following case: an airplane falls near a shop and, though not injuring it, obstructs its entrance thereby preventing customers from entering for a period of time. It was also remarked that it would be contrary to the laws of many countries to demand compensation for "any injury," resulting from the death or bodily injury of a person. These questions aroused heated discussion. They remarked in general that it would be unfair to refuse compensation to the person suffering injuries to his business, even if there were no injuries to material goods. As to injuries to persons, the extent of their compensation varies according to the laws of their country. So they were forced to replace the words "any injury" by a more vague expression, that of "the injury," thus leaving to the courts of each country the task of its interpretation. To fall within the jurisdiction of the Convention, the injury must have been caused by the aircraft.

The Convention does not explain the term "aircraft" (aéronef). But we have seen in the first part of this study that this concept is variously interpreted in national laws. The reason for this lack of precision in the Convention is incomprehensible. It is true that the conventions on public air law define the word aircraft. But, as we have already seen, only the Paris Convention of October 13, 1919, and the Ibero-American Convention of November 1, 1926, have done so, whereas the Convention relative to commercial aviation, adopted at the sixth International Con-
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ference of American States, held at Havana in 1928, having no annexes, does not define it. Furthermore, the question is raised as to whether the definition given in the technical annexes of a convention of public law can be applied to a convention of private law, since the purposes of these conventions are totally different. The definition of the word aircraft is left here to national laws. The only definition given by the Rome Convention is negative and, in conformity with Article 21, states that it does not apply to military, customs and police aircraft. Evidently, this definition does not solve the question of what is meant by the term "aircraft."

An injury, to be subject to compensation, must be caused by the aircraft. This expression raises some doubts. First, at what moment does the aircraft fall within the jurisdiction of the regulation of the Convention? The C. I. T. E. J. A. draft explains it as follows: "Any injury caused by an aircraft maneuvering or in flight ..." The text of the Convention only preserves the phrase "in flight"; it discards "maneuvering" (en manoeuvre). Nevertheless, paragraph 3 of Article 2 adds that "the aircraft is considered as in flight from the beginning of the operations of departure until the end of the operations of arrival." Thus the text of the draft has been restricted. The maneuvers of the aircraft cannot cause absolute liability to fall upon its operator unless they happened in flight or are closely linked to it. Thus injury caused by an airplane returning to its hangar at the airport does not fall within the jurisdiction of the Convention. We have seen in the section devoted to French legislation that the jurisprudence of that country interprets the national law in a different and broader manner.136

Does absolute liability concern any injury caused by an aircraft or only that caused by an accident? In other words, is it a question of considering only the injury caused by an aircraft, or is it equally important to consider the manner in which it was caused? Is it necessary to pay compensation for an injury caused by an accident or likewise for one caused by a flight carried on in violation of the rules and regulations in force, or lastly, also for that which is caused by normal flight? Unfortunately, the text of the Convention does not give us an exact explanation. Article 2, outlining the rule of liability, deals with an injury caused by the flight of an aircraft without discriminating as to whether or not it is a question of accident. However, the following articles,

especially Articles 8, 9 and 10, which deal with the limitation of liability, expressly mention the accident as being the cause of the injury. The same discrepancy in drafting exists in the draft of the C. I. T. E. J. A. If we examine further into the work of the experts, we shall see that this discrepancy did not exist in the draft adopted by the Third Commission and presented to the fourth session of the C. I. T. E. J. A., May 6-8, 1929. As we have seen in the preceding section, there was no question of "accident," and the injury was subject to compensation without considering the manner in which an aircraft caused it.

The deliberations of the Third International Conference on Private Aerial Law do not furnish any more exact explanations. The German delegation, it is true, proposed to limit objective liability only in case the injury results from an accident, thus adopting the principle of the German aerial law. But this proposition was not accepted by the Conference. If we consider the reports presented by M. Ambrosini, we unfortunately do not find there any more direct answer. Nevertheless, the first report gives the following reasons to justify the adoption of the principle of absolute liability: (1) inequality of the situation between the person causing and the person receiving the injury, (2) the impossibility of the person injured to show proof of fault of the aviator, (3) the use of a machine which creates a new risk for the public, forcing upon the operator the duty of providing a special guaranty, and (4) the adoption of objective liability is correlative to freedom of flight over private property as granted to airmen. These are the same reasons which forced the French legislator, as we have seen in the first part of this study, to extend absolute liability to all injuries caused by aircraft, even in normal flights. In an examination of the articles of the proposed draft, adopted by the Third Commission in May, 1929, the reporter indicates that "any injury caused to third persons on the surface, due to any cause whatsoever, must be fully compensated."

If we turn our attention to the national laws, we shall see that they consider this problem in a different manner. Finally, some of the commentaries on the Rome Convention which have already appeared state that injuries caused not only by an accident but also by the flight of the aircraft if it is executed in a manner which is not normal, are subject to compensation. Unfortunately, the commentators do not give explanations in proof of their point of view.\footnote{137. See Oppikofer, Hans, "III Internationale Luftprivatrechtskonferenz, Rom, May 1933," 8 Archiv für Luftrecht 220, 221; Giannini, A., "La Con-}
differences in the drafting of Articles 2 and 8, 9 and 10, by interpreting in the following manner the expression "accident," as used in these last articles. In particular, we have granted that it is a question of an accident not concerning the operator but concerning the person injured. Thus the injury subject to compensation could be caused by a normal flight, on condition that it be sudden and unavoidable (for example, injury caused by horses which have run away through fear of aircraft flying over them). Then do not let us put back into the body of the Convention such injuries as depreciation of property caused by continual flight, injuries caused by the sound of the motor, and so forth. This point of view conforms with the solutions given the Conference by the German delegate, Mr. Richter. Whatever they may be, the disagreements in the text of the Convention and the lack of clear explanations in the preparatory work of the C. I. T. E. J. A. as well as in the explanations furnished the Conference by M. Ripert, will force the courts to apply to this problem the principles adopted by their own national aviation laws. This, as we have had occasion to note in the first part of this study, will create varying and discordant jurisprudence.

So, on the one hand, the Convention has not clearly defined the extent of its application, while on the other hand, it includes some examples of cases where it would be applicable, which latter seems superfluous. Particularly, injury caused by the dropping of objects (even of ballast which is permitted), or the falling of objects, and so forth (Article 2, paragraph 2), will come under the jurisdiction of absolute liability.

Evidently a causal relation must exist between the injury and the flight of the aircraft. Nevertheless, it does not appear necessary that the aircraft be the direct cause of the injury. It is true that the Convention does not exactly define this matter, but if we will examine the national legislation of the signatory states, we shall see that direct causal relation is not absolutely necessary. It is sufficient to recall the case mentioned in the first part of this study where injury was caused by a crowd interested in the occurrence, though motivated simply by curiosity, rushing to the place of the airplane accident. In spite of the lack of direct causal relation, the aircraft operator has been held liable by English,
French, German and Norwegian courts, and two aviation laws have even cited this case in the same meaning.\textsuperscript{140} In the United States, jurisprudence in this field has not been well established; particularly, compensation was refused in the case where an aircraft indirectly caused injuries to the owner of a silver fox farm,\textsuperscript{141} but, on the other hand, it was granted, under the same circumstances, to a chicken farmer.\textsuperscript{142} We see then that the problem of causal relation is left entirely to national judges.

To come within the jurisdiction of the Convention, an injury must be caused on the surface of the earth and to third persons. Injury caused by an accident to the passengers or to the operator of the injured aircraft can not be considered. On the other hand, Article 22 mentions explicitly that the regulations of the Convention are not applicable to injuries for which compensation is regulated by a transport or labor contract, entered into between the person injured and the person liable. It appears that the person injured only has to establish the fact of the injury and its causal relation with the aircraft flight.\textsuperscript{143} What defense can the operator bring? In the first place, evidently, he can oppose the allegations of the person injured in establishing either that he had not sustained any injury or that there was no causal relation between the injury and the flight of the aircraft.

The Convention allows two more excuses: (1) Article 3 mentions that liability can be lessened or obviated in case the fault of the person injured has caused the injury or contributed to it. But the text of the Convention does not give any details. Therefore, the national law shall decide whether the fault of the person injured can exempt the operator of all liability and to what extent this liability can be lessened. We know that, in this regard, different systems exist. Thus, for example, the fault of the person injured can lessen by half the compensation which the person liable is required to pay, or, furthermore, the gravity of the faults of the parties concerned is studied and liability for the injury proportionately divided, and so forth. Each nation generally has a system which it finds equitable and which it applies, so the interpretation of Article 3 will differ according to the jurisdiction which will have to apply it. In the same case the court of one state will free the operator of all liability, while that of another

\begin{footnotesize}
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\item \textsuperscript{140} See in the first part of the study the chapter devoted to Slam.
\item \textsuperscript{141} Nebraska Silver Fox Corp v. Boeing Air Transport, Inc., U. S. D. C. Neb., Feb. 24, 1931.
\item \textsuperscript{143} Conforms to the explanation given by Mr. Ambrosini to the Japanese delegation. See 2 Rev. Gén. de Droit Aérien 579.
\end{itemize}
\end{footnotesize}
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will require compensation for the injury. (2) Article 2, paragraph 2(b) frees the operator of liability in case the injury was caused by an act intentionally committed by a person not a member of the crew, and not connected with its operation, unless the operator or his employees could have prevented it. An example of this would be the case where a passenger on board an aircraft drew his revolver on a person on the ground. The excuse allowed could then only be applied if the act causing injury is entirely extraneous to the operation of the aircraft and has no connection with the actual transport passage.

The Persons Liable:

In the section devoted to the history of the Convention, the first drafts of the C. I. T. E. J. A. have been explained as dealing with not only the objective liability of the operator, but also that of the aircraft owner. This point of view was based above all on the fear of collusion between these persons. The C. I. T. E. J. A. tried to provide that the persons injured, who had a right to compensation, might not be prevented from securing it because of insolvency of the operator. They presumed that the aircraft owner would be more solvent and that his aircraft would serve to indemnify the injured persons. It is true that generally an aircraft after an accident has but little value, but insurance on the aircraft is counted on to serve in payment of compensation to the injured persons. From the time the C. I. T. E. J. A. had the idea of a compulsory guaranty against risks, furnished by the operator, the above-mentioned considerations lost their value, and this led the authors of the draft to be content with liability of the operator. This point of view was upheld by the Conference. Article 4, paragraph 1 of the Convention maintains in principle that liability is incurred by the aircraft operator.

What is meant by the term "operator" (exploitant)? The C. I. T. E. J. A. draft, as we have seen, described the aircraft operator as any person who uses the aircraft for his own benefit, that is, receiving from it a material or other profit. This definition did not satisfy the Conference. The French delegation found it insufficient, "because in case of the lease of the aircraft it may be said that the lessor and lessee both use the aircraft for their own benefit." The Italian delegation, granting that the definition of "operator" as given in the draft of the C. I. T. E. J. A. is correct in its basis, believed, however, that it was not sufficiently
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complete, because it is necessary clearly to point out that the person using the aircraft has also its control. The delegations from the United States and Great Britain found little clarity in the definition of "operator" as given by the C. I. T. E. J. A.; they believed it necessary to define exactly that the operator is the person who uses and who has the right of disposal of the aircraft.

Following the discussion, it was decided to complete the C. I. T. E. J. A.'s definition by adding a second section dealing with the control of the aircraft. Consequently, the aircraft operator, within the meaning of the Convention, is any person who has the right of disposal of the aircraft and who uses it to his own profit.144

The rule adopted by the Convention, making not the aircraft owner liable but the person who has the control of the aircraft in using it to his own profit, is in conformity to the principles or at least to the jurisprudence of many countries who took part in the Conference. It must be remarked that this is the jurisprudence of the United States. Thus in one case where it was a question of the legal liability of the "owner" of a locomotive for injuries caused, as it was discovered, by defects in the locomotive, the court held:

The word "owner" in the act does not mean the absolute owner in whom the absolute right of property is invested, but means, and was evidently intended by the draftsmen of the act to mean the owner for the time being, the corporation for the time being, operating, controlling and managing the defective road, locomotive or car.145

Thus the term "operator" is quite understandable and there is no doubt that it may be interpreted in a uniform manner by national jurisprudence.

The operator will be presumed to be the person inscribed in such capacity in the aeronautic register or in any other official document. In the absence of such registration, the owner will be presumed to be the aircraft operator.146 Nevertheless, this presumption, being only juris tantum, can be contested with any proof to the contrary.

The German delegates at the Conference raised the question of the liability of the unlawful possessor of the aircraft. They considered it insufficient to establish the liability of the person who used the aircraft without the consent of the operator; it was neces-

144. Article 4, paragraph 2.
146. Article 4, paragraph 3.
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necessary to declare further that, jointly with this person, the operator as well would be liable if he had not taken the necessary measures to avoid the improper use of his aircraft. The proposal of the German delegation was accepted and it formed the text of Article 5 of the Convention. Thus the unlawful possessor is liable instead of the operator; however this latter incurs joint liability if he has not taken the measures necessary to avoid the unlawful use of his aircraft. Both are liable under the conditions and limitations of the Convention.

Later will be shown the very unexpected results which the above-mentioned rule caused. For the time being, it will be shown that the joint and several liability of the operator can not be considered in the case above as absolute or objective liability, but solely as delictual liability. This liability is based on the fault of the operator, who, through lack of prudence, or negligence, has failed to take the necessary measures to prevent the use of his aircraft by an unauthorized person. The result is that in this case the person injured will be forced to show proof of fault of this operator, who in turn can defend himself in conformity with the droit commun by invoking, for example, force majeure. Evidently as soon as it is established that he committed a fault in neglecting to take the necessary measures to prevent the use of his aircraft by unauthorized persons, the operator will incur joint and several liability of the same kind as the person causing the injury and can invoke no other excuses than the latter, i. e., only those which are mentioned in Article 2, paragraph 2(b), and Article 3 of the Convention. However, the liability of the operator will be limited, in conformity to Article 8, unless the injured person can invoke Article 14, the contents of which will be explained subsequently.

The Convention does not consider liability of other persons. Evidently, this does not prevent it from dealing with the liability of the person causing injury, but in conformity to national law. Nevertheless, this liability can not be joint with that of the operator, because if it were otherwise, mention would have to be made in the Convention text. In the section devoted to the history of the Convention we have seen that the proposed draft submitted at the fourth session contained regulations concerning liability of the person causing injury. Article 3 of this draft regarded such liability in the same conditions and jointly and severally with that of the operator and owner. But the following proposed draft already contained a notable difference. Its Article 3 only considered
the liability of the operator, in mentioning his right of recourse against the person causing the injury. This regulation has been retained in the draft submitted to the Conference, which found it impossible to decide on the liability of the latter person. In this way, it wished to emphasize that recourse against the person causing injury is not a creation of the Convention but is found outside of it and falls under the jurisdiction of national laws. Nevertheless, this liability, as Dr. Oppikofer has very rightly remarked, can only be considered as subjective liability, based on the idea of fault.

The Extent of the Liability:

We have seen that the problem of limitation of liability of the operator aroused considerable discussion. In the first place, the C. I. T. E. J. A. believed that unlimited liability was indispensable, but thereafter it changed its opinion and the later drafts established limits to compensation. Nevertheless, the opponents of limitation were not quiescent; instead they caused the final battle at the session of the Conference. They appealed to the interests of the persons injured, and even to the aircraft operator. Thus, the Polish delegation believed that the fixing of the limitation figure—which would necessarily be considerable—would inevitably react upon the spirit of the judges, in the sense of granting to the injured person the maximum compensation. Such a result would constitute an obstacle to the development of air navigation. The Czechoslovakian delegation suggested the adoption of a system of unlimited liability, with a limitation of the minimum guaranty. This point of view was shared by the Swiss delegation. The principle of unlimited liability was also maintained by Finland, Sweden, and the U. S. S. R. Nevertheless, the majority of delegates were in favor of limited liability.

Once the principle of limitation was accepted, it was still necessary to determine its basis. The draft of the C. I. T. E. J. A. provided that the maximum liability would be fixed at the sum of the value of the aircraft at the moment of its entrance into service, but could not, under any condition whatever, be less than 5,000,000 French francs, half of which would be used in compensation for injuries caused to persons, the other half for injuries caused to goods. However, this construction presented many defects. The

147. Article 7.
149. Particularly, by 18 votes for, 6 votes against, and 3 not voting..
criterion chosen did not correspond to anything, because there was no relation between the economic value of an aircraft and the extent of injuries which it could cause to third persons. Especially was there no reason to suppose that the more expensive an aircraft is the more injury it can cause. The contrary is true, because a costly airplane—powered with several motors in good condition and equipped with many navigation instruments—certainly offers less danger to everyone than a cheaper aircraft—powered with only one motor of small value and with only the essential navigation instruments. Furthermore, the minimum limit was much too high and made the guaranty for this sum practically unattainable, especially for air tourists.\textsuperscript{150}

So the notion of the C. I. T. E. J. A. was abandoned at the Conference and many other suggestions were made. The one most comparable was that of the French delegation, which suggested the substitution of the value of insurance in the place of aircraft value. The German delegation proposed that a limit of 600,000 francs be fixed if the question pertained to injuries caused to persons, and a limit of 300,000 francs for injuries caused to goods, without consideration of the aircraft which caused these injuries. The proposition of Great Britain was finally adopted, after certain modifications had been made by the United States and others. In the case of each aircraft, the limit of liability is based on the weight of the aircraft, together with the total maximum carrying load, as shown on the air-worthiness certificate or other official document. This limit is, for any accident, 250 francs per kilogram of weight. Nevertheless, the limit of liability of the operator could not be less than 600,000 francs, and—which is an innovation—could not exceed the fixed sum of 2,000,000 French francs.

Thus the limitation of liability, as accepted by the Conference, is based on a varying scale between two fixed sums, the minimum and maximum sums of compensation. The compensation allowed will be calculated within these limits, according to the weight of the aircraft. For example, if we take a Handley Page Western 42 V airplane, with a weight of 13,400 kilograms, the limit of the liability of its operator, calculated at 250 francs per kilogram, would be 3,350,000 francs, but, since this sum exceeds the maximum limit of liability, it will be reduced to 2,000,000 francs. If

\textsuperscript{150} See the criticism of the project by Jaekel and Oppikofer, made at the Conference, 2 Rev. Gén. de Droit Aérien 623 et seq.; and Kostal, A., "Responsabilité des Aviateurs pour les Dommages Causes à la Surface du Sol," 14 Droit Aérien 611 (1930).
we consider now a De Haviland DH 60 Gypsy Moth plane, the weight of which is 793 kilograms, the liability of its operator would be limited to 198,250 francs, but, since this sum is less than the minimum limit of liability, it will be increased to 600,000 francs. Lastly, if we consider a Junkers Ju. 52 Leopard IV plane, the maximum weight of which is 7,600 kilograms, the liability of its operator is limited to 1,900,000 francs, that is, 7,600 multiplied by 250.

One-third of the sum thus calculated is assigned to compensation for injuries caused to goods, and two-thirds to compensation for injuries caused to persons. The regulations of the C. I. T. E. J. A. draft providing that, in the case where the amount calculated for compensation for injuries caused to goods has not been completely absorbed, the remainder is transferred to compensation for injuries caused to persons, have not been accepted by the Conference; the limited sum comprises two separate and distinct parts, one to be used for compensation to persons and the other to goods, without allowing any diversion.

The C. I. T. E. J. A. draft when fixing the limits of liability had in mind only the total sum of compensation due for each accident. But previous drafts of the C. I. T. E. J. A. provided for not only the limit of compensation for each accident, but also the maximum which must be paid to each person. These regulations were contained in the proposed draft of the Convention prepared by the Sub-Commission on Drafts of the Third Commission, as well as in the proposed draft prepared by the reporter. These two proposed drafts were presented at the fifth session of the C. I. T. E. J. A. at Budapest, which, at the suggestion of the French delegation, only voted on the system, adopting among others the text of paragraph (a), Article 4, as follows: "... In the case of injuries to any persons, at the maximum total sum per accident of ... with a maximum of ... per person." This Article adopted by the C. I. T. E. J. A. was referred to its drafting committee with other provisory articles. But the drafting committee, in its report, omitted to mention a maximum sum per person. This omission continued in the draft referred by the C. I. T. E. J. A. at the Conference. The United States delegation called attention to this fact and, basing its contentions on the practical necessities of its country, requested the fixing of a maximum sum of compensation per person, without which it declared that it was not authorized to sign the Convention.151 The proposal of the United

151. Declaration of Mr. Cooper, 2 Rev. Gén. de Droit Aérlen 696-698.
States was adopted and it was decided that compensation for injuries caused to persons could not exceed 200,000 per person.

Since many persons could suffer injuries in the same accident and since the total sum to be paid in compensation could not exceed the limits provided by the Convention, it was decided that in a case of this sort they would proceed with a reduction in proportion to the claims of each, in such way as not to exceed by the total the limits established for the benefit of the operator. This regulation, very simple in cases where all suits of persons injured would have been made at the same time before the same court, caused great difficulties, since actions can be brought before the courts of different states and at any time in the course of a year the person injured may wish, providing he brings notification within six months from the day of the accident. We shall speak further of this problem.

Article 19 of the Convention provides that the limited sums shall be calculated in French francs, consisting of 65½ milligrams of gold, nine hundred thousandths fine. They may be converted into any national currency in round numbers.

In Article 14 of the Convention there is provision for cases in which the operator could not take advantage of the limitation of his liability and would be held to pay full compensation. These cases, in the draft as well as in the text of the Convention, are two in number.

(1) The injury is caused through the fault of the operator. The draft had in view any fault whatsoever, but many delegations made exception to this at the session of the Conference. It was feared that the courts in basing their decisions on this regulation would extend its application very far and would find a slight fault in all cases of injury. This practically would destroy the principle of limited liability and would destroy the liability system of the Convention. Two delegations, those of the United States and of Italy, suggested the entire elimination of the article dealing with unlimited liability of the operator. Furthermore, the Italian delegation proposed doubling the limited amount in case of grave fault of the operator; the United States delegation proposed the elimination of the limitation clause solely in case an aircraft at the takeoff had not been completely airworthy or its personnel did not adhere to the laws and regulations of the state of registration of the aircraft. The Conference, however, believed that this would be going too far. They believed it impossible thus to

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162. Article 9.
reject the subjective, unlimited liability principle, because all states recognized in principle the necessity of full compensation for injuries caused by a fault, especially if it is grave or intentional. So they reached a compromise. The principle of unlimited delictual liability was retained, though toned down as much as possible. Thus the operator will incur unlimited liability only in case the injury has been caused by his grave fault or wilful misconduct. He will incur the same liability in case of the grave fault or wilful misconduct of his employees. However, he will be able to take advantage of the limitation of compensation: in case he had committed an error in piloting, operation or navigation; whereas in case of fault of his employees, he can only show proof that he had taken all necessary measures to prevent the injury. Thus, for example, the operator whose grave fault has allowed a third person to possess his aircraft will be liable in an unlimited respect for all injuries which the unlawful use would cause to third persons.

(2) The operator has not furnished one of the means of guaranty as provided by the Convention and which will be discussed further here. Following the discussion at the session of the Conference, this regulation was maintained, in conformity with the draft of the Convention, but its drafting was made more detailed if not more understandable. It was particularly indicated that the operator would not have the right to take advantage of the limitation of liability, both in case he has not furnished a guaranty as provided by the Convention but also in case such guaranty furnished would not be in force or would not cover the liability within the limits of the Convention.

The purpose of this regulation consists in forcing the operator, by the threat of a punishment by fine, to furnish a guaranty. The question arises as to whether persons injured would reap large profits from such a regulation. It is enough to consider, for example, the unlawful operator who, obviously, does not provide any guaranty before he steals an aircraft. So he would be, as a general rule, liable in an unlimited way for injuries caused by the aircraft on the surface. But it is doubtful whether persons injured by the aircraft have the means of obtaining effective compensation. Also the suggestion of the German delegation to eliminate this regulation is not baseless and its reasoning seems correct. Particularly, the German delegates explained that the
penalty provided by this regulation is useless or ineffective—useless, when the operator is able to meet the obligations resulting from his objective liability; ineffective, when he is not even able to meet this obligation.

The Guaranty:

If the principle of limited liability was accepted by the C. I. T. E. J. A., it was only on condition that persons injured receive on the other hand an effective guaranty of payment of this limited compensation. It was then necessary to prepare immediately a project concerning guaranties and to include it with the draft on liability. We have seen that the C. I. T. E. J. A., not having accepted the propositions of its reporter, M. Vivent, adopted three forms of surety: (1) insurance, (2) cash deposit, or (3) bank guaranty.

At the Conference, the delegation from the U. S. S. R. suggested permitting only compulsory insurance as a guaranty, but this suggestion was not accepted: this system did not appear sufficiently flexible, and furthermore they did not wish to create a monopoly in this line for the insurance companies. The French delegation returned to the system previously drawn up by the reporter to the C. I. T. E. J. A. and asked that an addition to Article 8 of the draft provide particularly for the basis of the guaranty or other state means. This proposition has not found willing acceptance, the states not wishing to be liable for the private persons, nor to contract for the obligations the outcome of which they could not foresee. Furthermore, this kind of guaranty would place injured persons in a difficult situation, because to receive payment of compensation which would be due them, they would be forced to bring action only in the country of registration of the aircraft which caused the injuries. This is true because it is generally granted that a state can be sued only before its own courts. So compulsory insurance was adopted, with the right to choose another means which in itself has two aspects: money deposit or bank guaranty.

Insurance—This problem gave rise to the liveliest discussion of the Conference. The question was principally to reconcile the interests of persons injured, operators and insurers. And if other questions have been comparatively easy to solve, it was not so when the question of the extent of the insurance was debated. The interests of the injured persons consist in the absolute surety
of securing the limit of compensation which has been granted
them. In other words, as soon as the fact and the compensation
amount have been made known to them, they should be able, at
any time, to secure the total. It is in this way that those states
which previously required an application of the full liability have
agreed to unite on the idea of limited liability. The interests of
the operators consist in obtaining insurance at the best rate. But
to secure this the insurers demand many restrictive conditions in-
cluded in the insurance policies.

The states which are particularly occupied with the interests
of persons on the surface, i.e., those who do not possess important
civil aviation lines, but whose aerial territories serve as rights-of-
way to other nations—were in favor of complete insurance of the
liability of aviators, without granting any clause limiting the in-
demnity obligations of insurance companies. It was different for
those states who were bound more closely to the interests of air-
craft operators and especially of insurers, because of their highly
developed civil aviation on international lines, or of insurance and
aeronautic reinsurance business carried on on a large scale by
their nationals. These states found it indispensable to admit an
insurance which was accompanied by numerous restrictive clauses.

Great Britain, whose aircraft fly regularly over many states
and whose insurance companies insure a great part of the air risks
of the entire world, presented to the Conference some detailed
observations on insurance of liability of the aircraft operator.

The British delegation very clearly remarked that it is essen-
tial to have the co-operation of the interests of insurance societies
and aircraft operators. The problem then is to know up to what
point the insurer could have the right to urge restrictive regula-
tions of an insurance contract in answer to a claim made under
the jurisdiction of the Convention. In this regard, the British
delegation made the following propositions, of which the part con-
cerning the case of direct action by an injured person against the
insurer contains such important points that it seems necessary to
quote it at length:

In the case of a direct action by the person injured against the insurer,
the British delegation makes the following propositions:

It shall not be permitted to the insurer, in answer to such a claim, to
urge any regulation of an insurance contract (which would be express or
implied) other than those dealing with the following matters (having
granted, of course, that the claim is made in conformity to the terms of the
Convention and the certificate):
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I. Cases of fraud, or deceit regarding a material fact on the part of the insured, whether at the time of receiving the insurance agreement, or in making a claim through this document between the date it would have been completed and the date of the accident which resulted in the claim of the third person;

II. The case where, at the beginning of the flight, the aircraft is not in an airworthy condition or is not properly equipped and supplied in conformity with the regulations applicable to this problem;

III. The case of infringement of any legal rule whatever applicable in the matter, where this infringement has caused the injury or has contributed to it;

IV. The case where the injury is caused when the aircraft takes part in races, or is employed as a trainer for others in pace-making, or makes speed tests, or tries to break records, or is engaged in aerial acrobatic flights or irregular flights, or makes construction and repair tests;

V. The case where the injury is caused during the course of a flight taking place within one hour after sundown and during the hour before sunrise, unless it is otherwise stipulated in the insurance document;

VI. The case where the injury arises from fraud or wilful misconduct by the operator or his employees or agents.154

It is not without reason that an Italian jurist155 remarked that if this proposition of the British delegation were accepted, the basis of the Convention would be distorted by exaggerated restrictions admitted in favor of the insurer. So the British proposition raised lively discussions and protests, particularly from states whose internal legislation does not admit that the insurance clauses for risk make the situation of injured persons worse. The Swiss delegation drew attention to the fact that the English Air Navigation Company contracted during its flight over Switzerland, on its London-Paris-Basle-Zurich line, for risk insurance which did not contain any restrictions, which proves that such insurance is possible and does not entail excessive charges, even from the British point of view.156

An attempt was made to reconcile the points of view of the partisans and adversaries of restrictive insurance clauses. In this regard, the Conference charged a special commission with the duty of finding a means of conciliation which, after examination from different points on which the British delegation had demanded that insurers not be held liable towards third persons, admitted by a vote showing a very large majority, the principle that the insurer must completely cover the liability of the operator.

154. See 6 Studi di Diritto Aeronautico 105.
156. See the explanations by M. Clerc, Swiss delegate, in 2 Rev. Gén. de Droit Aérien 705.
toward third persons.\textsuperscript{157} However, the British delegation main-
tained its point of view which, if it were rejected, would
have prevented it from signing the Convention.\textsuperscript{158} Furthermore,
the Danish delegation refused to sign the Convention, if the British
proposition were accepted.\textsuperscript{159} So, for fear of compromising en-
tirely the work of the Conference, they were forced to abandon
this question and they did not introduce into the Convention the
regulation concerning the granting or refusal of these restrictive
clauses. However, they recognized perfectly the necessity of
regulating this question. So the Conference expressed the wish:
"... that the C. I. T. E. J. A., in the studies which it pursues on
insurance in air navigation, examine the question of liability in-
surance of the operator toward third persons, in order to reach in
this matter a uniform international regulation."

In the course of the discussion on insurance, another very
serious problem was raised. The problem was one of granting
to injured persons the means of taking part of the insurance con-
tracted by the aircraft operator, without running the risk that
other creditors of the latter would not let them precede them, or
at least would not divide the sum with them. The simplest and
most efficacious means was to grant to injured persons direct ac-
tion against the insurer, which is allowed by many laws. Never-
theless, this solution could not be adopted, in view of the objection
of the Dutch delegation, whose Parliament lately rejected this
principle.\textsuperscript{160} They had to seek another solution. Finally, they
studied the proposition of the Polish delegation which required
that all sureties provided by the Convention, insurance as well
as money deposit or a bank guaranty, be set aside specifically and
by preference to the payment of compensation due to such injuries
as described by the Convention.

To avoid insurance contracted with insurers not of sufficient
size or even being fraudulent in nature, the Convention requires
that it be contracted either with a public insurance company, or
with an insurer authorized for this risk in the country of regis-
tration of the aircraft.

\textit{Money deposit and bank guaranty—}The same explanations are
applicable to these two kinds of guaranty, so they will be treated
jointly. This kind of guaranty can take the place of insurance
in so far as the internal laws of the state of registration of the

\textsuperscript{157} See 2 Rev. Gén. de Droit Aérien 701.
\textsuperscript{158} Ibid. p. 704.
\textsuperscript{159} Ibid. p. 706.
\textsuperscript{160} See the objections of the Netherlands delegation to the Conference,
2 Rev. Gén. de Droit Aérien 665.
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aircraft allow. Money deposit can then be made in a public bank or a bank authorized for this purpose; the bank guaranty must be furnished also by a bank authorized for this purpose.

Basically, a bank guaranty represents a kind of self-insurance. The question is, what is the benefit to the operator in choosing one of these two guaranties? There would be no need to pay insurance premiums. However, the collection of such a large sum is often difficult and very costly for air navigation companies which do not yet have sufficient capital. Though the bank guaranty is not secured gratuitously, still it is less expensive than insurance. Furthermore, one must not forget that, in case of injury, the operator who has furnished a money deposit or bank guaranty will pay compensation from his own funds, which he would not have to do if he had contracted for insurance. Thus the risks which the operator runs will not compensate generally for the difference between the cost of insurance and that of a bank guaranty or the tying up of a money deposit. These two kinds of guaranty would have had no chance of being used unless certain aids had been introduced which make their use possible for owners of many aircraft. In particular, the amount of securities in the form of a deposit or a bank guaranty will be diminished in proportion to the number of aircraft belonging to one operator. In a case of two aircraft, the amount of a guaranty fund which would have to be furnished for these aircraft, will be lessened by a third and by half if there are three or more. Furthermore, the Convention stipulates that in any case, the insurance must not exceed 2,500,000 francs for two and 3,000,000 francs for three aircraft or more.\footnote{161}

Thus companies which operate several aircraft would benefit more by furnishing security in the form of money deposit or bank guaranty than in contracting insurance.

It is evident, and the Convention expressly mentions it, that the amount of the money deposit as well as of the bank guaranty must be replenished as soon as they are lessened by payment of indemnity.

\textit{Legal Proceedings:}

The Convention does not mention what persons may claim indemnity. Consequently, the national laws must decide in this matter.

We have already seen that in case one accident has injured several persons, the limited sum must be divided among them.

\footnote{161. \textit{Article 16.}}
proportionally. In this regard, all these persons are required to assert their rights against the operator or bring notice of their claims within a maximum period of six months from the day of the accident. Those injured persons who have not done so will not share in the division of the limited sum and can only exercise their claims on the amount which is not distributed.\textsuperscript{162}

But what will happen if the injured persons bring action before the courts of various countries? The situation appears embarrassing. The Hungarian delegation, believing it imperative to eliminate the possibility that a court may fix a sum in favor of one of the injured persons so that satisfaction of the claims of others will be made impossible, suggested the adoption of a rule which would reconcile the regulations of the various courts acting in the same case. The Dutch delegates proposed a very complicated text, but which had the advantage of making a clear solution. Particularly in case the total claims exceed the limit of the liability amount provided by the Convention, a procedure to liquidate and allocate to the various third persons injured must be entered into, before the court of the domicile of the operator. If, during the course of this procedure the claim of one of the interested parties is contested, he can, if he has not already done so previously, bring his action before one of the courts declared competent by the Convention, whose decision, if it adheres to certain previously established conditions, must be recognized by the court acting on the procedure for liquidation and allocation. Evidently, this latter court acted upon all the claims together so that the limit of liability would not be exceeded. In this way, it can proportionally lessen not only the amount of claims of the injured persons, but even of the claims which the decisions of other courts have granted.

The Conference unfortunately did not adequately study this problem and not wishing to go into the details of procedure, did not accept the Dutch proposition. It limited itself to adopting a regulation borrowed from maritime law, particularly: if several third persons injured bring action before the courts of different countries, the defendant may submit a statement, before each of them, of the total amount of the claims and monies due, to prevent the limits of his liability from being exceeded.\textsuperscript{163} We shall see in the following section that this regulation is inoperable in practice.

The Convention has allowed the plaintiff to choose any one

\textsuperscript{162} Article 10.
\textsuperscript{163} Article 11.
of the following tribunals: (1) that of the domicile of the defendant, or (2) of the place where the injury was caused, or (3) of the domicile of the insurer in those countries which allow the person injured to bring a direct action against him. The Polish delegation very rightly remarked that it would be necessary to add further the tribunal of the country of registration of the aircraft, which would correspond to the place where the guaranty was made and because of that would generally be the most effective. The Hungarian delegation asked for recognition of the tribunal of the place where the deposit guaranty was made or where the bank was located which made a guaranty. Unfortunately, the Conference rejected these two propositions, which, as will be explained later, will create many difficulties for injured persons.

A claim may be brought by the injured person before the courts of different states. However, in order that these decisions may benefit the person injured, they must be operable where the operator made his money deposit or where the bank which granted him a guaranty is located. But this place might be in a state other than that where the case was tried. So the Swiss delegation very wisely proposed the addition of an article expressed as follows:

When the judgments pronounced contradictorily or by default by the judge declared competent by the regulations of the present Convention, have become operable in accordance with the laws applied by this judge, they must be operable in each of the contracting states, immediately following the fulfillment of the formalities required in this state. A revision of the subject matter of the case is not admissible.

This regulation does not apply to decisions which are only provisionally operable, nor to convictions for damages which would be pronounced in addition to costs against a plaintiff because of the refusal of his claim. Unfortunately, this proposition was rejected by fourteen to six votes, because they believed it impossible to regulate a problem of a general character in a convention dealing with a very special problem. This argument does not seem entirely convincing, because the Berne Convention of October 23, 1924, which regulated railroad problems, rightly provided for and allowed under certain conditions the operation of decisions proceeding from foreign courts. It is true that of 41 states signatory to the final act of the Rome Convention of May 29, 1933, only 19 signed the Berne Convention.

164. Article 16.
165. Article 55, paragraph 1, of the Berne Convention; for details, see Travers, Maurice, Le Droit Commercial International, Vol. V, Section II, No. 6019 et seq.
The draft of the C. I. T. E. J. A. provided that the claim of injured persons must be presented within a period of two years. This term seemed too long, and it was believed that the operator should not be left uncertain so long and that, furthermore, the injured person as a general rule would not need so long a time to decide to bring legal action. It was decided to shorten the limitation to one year following the day of the injury. However, if the injured person proves that he had been unable to know either the injury or the identity of the person liable, the limitation will start from the day he had such knowledge. This period could not in any case be more than three years from the day the injury was caused. In regard to the manner of calculating the limitation, as well as the reasons for suspension and interruption of such period, the Convention refers to the national laws of the court handling the case.\textsuperscript{167}

\textit{General Rules and Motions:}

Only some of the general rules of the Convention need now be indicated. In the first place, the scope of the Convention is regulated by Article 20 which maintains that these rules only apply to an injury caused on the surface of one of the high Contracting Parties by an aircraft registered in the territory of another High Contracting Party.

Thus two conditions are necessary for the application of the Convention: (1) That the aircraft causing the injury be registered in one of the signatory states, and (2) that it had caused an injury on the surface of the territory of another signatory state. Injuries caused by an aircraft registered in a signatory state will not fall within the jurisdiction of the rules of the Convention if they are caused on the surface of its own state or on the surface of a state which did not sign the Convention. On the other hand, it is unnecessary to know whether the aircraft at the time it caused the injury was over a signatory state. The essential thing is to know whether the injury was caused on the territory of this signatory state, knowledge of the location of the aircraft being immaterial.

Article 1 of the Convention was not in the draft of the C. I. T. E. J. A. It was inserted in the Convention on the suggestion of the German delegation. It deals with the duty of the signatory states to take all necessary measures to make the rules established by the Convention effective and is explained in particular by the

\textsuperscript{167.} Article 17.
duty of the states to require operators of its aircraft flying over foreign territory to furnish surety in accordance with Article 12 of the Convention.

Article 28 provides that no sooner than two years after the entrance into force of the Convention, any one of the High Contracting Parties may call a meeting of another international conference for the purpose of studying the improvements which might be made in the Convention. The significance of this rule is double. On the one hand, it indicates that the Conference knows that the Convention contains certain imperfections and had some doubts as to the results of the application of its rules. Also the Conference already sees that some modifications must be made to it in the near future. But on the other hand, it is seen that these modifications must be made after serious thought and study of the matter, so it has been decided that the rules of the Convention should be effectively applied at least for two years, in order that their effect in practice may be noted.

The Convention will enter into force 90 days after the deposit of the fifth ratification.168 Rejection of the Convention will take effect six months after notice of the rejection has been made to the Government of Italy.169

In spite of the fact that the opinions expressed by the Conference were not included in the text of the Convention, nevertheless, it is necessary to mention some of them because they show so well the direction of the discussions of the delegates. Besides the opinion concerning the question of insurance, which has already been mentioned, there were two more expressions which were so basically sound that they raised no objection and occasioned no discussion.

The Conference expresses the wish that the Contracting States make their national laws accord with the regulations of the International Conventions on Private Aerial Law.

The Conference, appreciating the importance and utility of the preparatory work of the C. I. T. E. J. A., expresses the wish that all the Governments represented at the Conference adhere to the C. I. T. E. J. A. in the interest of the work of legal uniformity confided to this organization.170

There was a different reaction to the third opinion presented by the French delegation. Its text was the following:

The Conference, considering the benefit to all aviation operators in being able to be well-informed in any case on the texts drawn up by the Inter-

170. 2 Rev. Gén. de Droit Aérien 841.
national Conferences on Private Aerial Law; considering that the C. I. T. E. J. A. constitutes its permanent expression—confides to the C. I. T. E. J. A. the duty of giving its opinion or its interpretation on the texts of international conventions of private aerial law when it is requested by a representative of a public administration or of an international organization, without prejudice to the right of interpretation of the judicial power when the latter is handling a dispute.\(^{171}\)

This opinion aroused many protests. The German delegation expressed a doubt as to whether it was generally possible to create an international organ which would interpret the opinions set forth in the draft. The delegation from the Netherlands remarked that in its law, as well as in that of many other states, no organ existed which had the power or faculty to give official interpretations. Furthermore, it is necessary to have in mind that the C. I. T. E. J. A. is not the Conference and that the Conference is the one which adopted the conventions, making its own modifications and additions. So the C. I. T. E. J. A. is not at all qualified to interpret the regulations which are adopted by the Conference, not by the C. I. T. E. J. A. The British delegation maintained that questions of interpretation are within the jurisdiction of the Government and other authorities of the signatory states. The United States delegation explained that, being bound by specific instructions from its Government, it could not agree to vote on the opinion proposed by the French delegation.

In view of this opposition, the French delegation changed the expression of its opinion, so as to contain only a proposition of a study of this problem, addressed to the C. I. T. E. J. A., which was as follows:

\[
\ldots \text{requests the C. I. T. E. J. A. to examine, in view of the Fourth Conference on Private Aerial Law, if, in what way and manner it can give its opinion on the interpretation of the texts of the International Conventions on Private Aerial Law, when it may be requested by a public administration or international organization, without prejudice to the rights of the judicial power dealing with the claim.}^{172}\]

The Conference accepted the opinion with this modification. It is doubtful, however, whether it is admissible from the theoretical point of view as well as the practical.

A CRITIQUE OF THE CONVENTION.

It is difficult to criticize the texts of a convention which has not yet been ratified and consequently is not actually applicable,

\(^{171}\) 2 Rev. Gén. de Droit Aérien 833.
\(^{172}\) 2 Rev. Gén. de Droit Aérien 842.
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particularly since this Convention regulates a phenomenon as new as air transportation and applies legal rules quite different from those which for centuries have been the essence of the droit commun of all countries.

It is true that the principle adopted by the Convention has been applied in more or less different ways by the aviation laws of certain countries, with the results which have been set out in the first part of this study. Nevertheless, it is with the greatest caution that the writer expresses an opinion on the results of the work of the Third International Conference on Private Aerial Law. It seems impossible to sift critically all the regulations contained in the convention. This work could be usefully done only a certain time after the effective application of the Convention to air navigation. The writer is then limited to an expression of his opinion on the whole Convention—on its system and certain rules.

The purpose of the work of the C. I. T. E. J. A. as well as of the Conference was to find the best system for regulating liability toward third persons on the surface and, consequently, to draft the text of the Convention not only in such way that all states can adopt it, but also so that its application will not cause too many variations in the jurisprudence of different countries.

In considering the value of the Convention, it is necessary first to note whether the system of liability which is there introduced is just and equitable and whether the rules which it outlines are practical and lead effectively toward the unification of private air law. Further, this section is going to be divided into three parts: (1) a criticism of the system, (2) a criticism of the rules, and (3) the actual accomplishment of uniformity, by the Convention.

The System:

The Conference adopted the system of objective liability with a legal limitation on the amount of compensation, guaranteed by a security which the aircraft operator must furnish.

The principle of objective liability, which takes no account of the idea of fault, and does not permit an excuse of even force majeure, has many opponents. They believe that, based on Roman law, on equity, and even on the Constitution of some states, this principle would not have to be applied. They find this system unfair, contrary to the ideas of law which each citizen has, and they demand that, as in the past, fault should continue to be the primary ground of liability.
Let us see whether this point of view is well founded. First of all, where does this principle arise? The idea of compensation, based on liability for individual fault, is very old: it has been found in a Code of 4000 years ago. It is expressed there in a form somewhat different from that in which it has been adopted by contemporary legislation, but it is, however, very similar. This principle of liability is found in the laws pronounced by Hammurabi, earlier than 2000 B.C.\textsuperscript{179} This is the first time the principle of liability appears—in the form of penalty of retaliation.\textsuperscript{174} During that period no distinction was made between the civil law and the penal law; compensation granted the injured person was confused with public punishment. The purpose of retaliation was to reestablish the moral and ethical equilibrium upset by the fault of the person causing the injury. However, before publication of this Code, the only force was law. The person injured held the person liable at his mercy; he exercised a vengeance over him limited only by the good will of the injured party. The laws of Hammurabi limited vengeance. Their main purpose was not even the punishment of the guilty. Departing from the point of view that any injury due to fault does harm to moral stability, they attempted to reestablish it—evidently in such a way as was suited to this early period.\textsuperscript{178} In the first place, these laws introduce the idea of individual compensation: the old principle, according to which the consequences of violence or robbery fell upon the whole family of the person liable and even upon his most distant descendants, was abandoned. Compensation which is exacted from the person liable must not exceed the injury caused by him but also it must be analogous if not identical to it. This was the origin of the old saying, “an eye for an eye and a tooth for a tooth,” which seems very cruel and barbaric today, but which at that time was a very humanitarian regulation.

Thus the characteristic feature of the idea of retaliation is found in the idea that an injury was caused by the fault of the person liable, and a certain unity between the latter and the person injured was broken, which obliged the person causing the injury to reestablish it by granting compensation to the person injured. It consisted in giving him (the injured person) satisfaction, whether by making the guilty person suffer an injury such

\textsuperscript{173} Scholars are doubtful as to the exact period of his reign, which they place between 2000 and 2400 B.C.

\textsuperscript{174} Articles 196 and following of the Code of Hammurabi, translated by Schell (Paris, 1906).

\textsuperscript{175} See Mueller, Die Gesetze Hammurabis (Vienna, 1903), p. 224.
as was caused him, or by the transfer of a sum of money thought to represent the value of the injury. Thus the idea of liability for fault, involving compensation limited to the injury suffered by the injured person, appeared in its most rudimentary form.

At that time, the idea was entirely new and almost revolutionary. Since then it has gained ground. The principle of retaliation became the source of the idea of the "equality of justice" of Aristotle; on the other hand, it was introduced into the laws of the Twelve Tables of Rome. Through these two channels it was implanted in European civilization where, after having undergone some changes in detail, it appears to us (in the civil law) in the form of compensation based on liability for fault.

The question arises as to whether this principle, new and sound some 4000 years ago, has not fulfilled its span, and whether today, in a world of such different culture and economics, it is not time to abandon it. We know that the necessities of life caused the principle of liability to undergo some serious changes in meaning, by introducing on the margins of the Code some general presumptions of fault against whole categories of individuals (such as, for example, motorists), by refusing them the right to free themselves from liability by proof of the ill-founded nature of the presumptions. More and more frequently doctrine, jurisprudence, and even the legislator, are replacing in civil law the idea of fault by that of cause—not by making the person liable suffer the consequences of an injury but, rather, making liable him who caused the injury by his act, without any fault on his part. A tendency is even appearing, entirely opposed to the principle of retaliation, which consists in making the most able person economically support the consequences of an injury. It is true that even there, through a last survival of the principle of retaliation, the fault of the injured person deprives him of the right to compensation.

In some fields, quite special it is true, one goes still further in completely disregarding the idea of liability and replacing it with insurance (for example, the labor laws in certain countries). Thus appears an ever-growing movement, tending to grant compensation to the injured person for the injury suffered, regardless of the fault and even of the liability of the person causing it. Present ideas of equity and justice turn us imperiously into this path.

The field of aeronautics has rightly been one in which the old

176. Articles 196 and following of the translation by Schell.
177. In cases of less importance. Articles 271, 203, 204, etc., of the same translation.
principles of law have been most easily eliminated, because no tradition nor former ancient usage opposes it. So we have seen that the great part of aeronautic legislation has adopted the principle of objective liability for compensation for injuries caused to third persons on the surface of the earth. There is no reason for finding objective liability in opposition to legal principles, by maintaining that only the principle of liability for fault is admissible in our civilization. On the contrary, we have just seen that this latter system was the creation of a very old civilization, which still confused the civil law and the penal law, and in the conception of compensation for injuries was inspired largely by ideas of penalty. Conditions of our existence, as well as the degree of our civilization have changed entirely since the distant period of Hammurabi.

Nevertheless, if the principle of liability for fault has ceased to be a sacred thing, if we are to seek a system which is better adapted to our times, we must however question whether absolute liability is really one which we consider better. We do not wish to generalize, and therefore shall not digress from the limits of our problem; we shall remain only in the field of compensation for injuries caused by aircraft to third persons. To consider the admissibility of a legal system, it is necessary to establish whether its application to the facts which it is required to regulate will in practice achieve the results for which it has aimed.

The purpose of the rules for the regulation of injuries caused by aircraft to third persons on the surface of the earth consists in making compensation for the injuries caused to persons, while at the same time safeguarding the interests of the operators. The injured person wishes to obtain complete compensation, without having to resort to long, difficult, and hazardous procedure and without having to run the risk of the insolvency of the defendant. The operator wishes to know beforehand the maximum compensation which he can be required to pay so that he may be able to insure his risks. Unlimited objective liability will not give satisfaction to any of the parties.

Persons injured can readily obtain a decision according them full compensation, but they will have no guaranty which will safeguard them from the insolvency of the defendant. But, since the problem is for the injured persons to obtain a sum of money and not only a decision, the purpose of the system of objective liability will not be achieved. It will be even less successful if we note its application to the operators whom it will ruin by making it com-
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pletely impossible for them to know what compensation is required and the amount they must pay. But if, to the system of absolute liability, we bring a corollary under the form of a legal limitation of compensation with a guaranty of its effective payment, it will become acceptable to the injured persons as well as to the operators and will reconcile their interests. Evidently, on the one hand, compensation granted to persons injured will be limited not only by the extent of their injury but also by a sum established by law and, on the other hand, the operators will be subjected to a new requirement, in particular, the deposit of surety, but there can be success in reconciling the interests of injured persons and operators only by use of a compromise—each of the parties being forced to make some sacrifice. All there is to add is that these sacrifices are the least in comparison to the advantages which they bring. To achieve this, it is necessary on the one hand, to provide a limit of compensation sufficiently high so that in practice any injuries may be generally entirely covered. On the other hand, it is necessary to find the means of guaranty within the means of the operators. The problem then is to draw up flexible and practical rules.

The criterion on which limitation is based must evidently deal with the injured persons as well as the operators; also it must take account of the injuries which each aircraft may cause, as well as the possibility that the operators may guarantee any compensation. Unfortunately, it is impossible to find a criterion capable of fully answering these conditions. The principle adopted by the Convention, although far from perfection, is the best that can be found. If the injuries caused by an aircraft are not necessarily in proportion to the weight, which however does not indicate the economic condition of its operator, nevertheless it can be generally stated that the heavier an aircraft is the more costly it is and the more serious are injuries caused. Furthermore, two fixed limited sums, the minimum and maximum compensation, which can never be exceeded whatever the weight of the aircraft, bring a sensible criticism to the criterion of weight. If we base our contentions on the statistics given concerning injuries caused by aircraft on the surface, we note that the limits adopted by the Convention, between 600,000 francs and 2,000,000 francs, generally cover and sometimes more than cover the injuries.

Relative to the problem of guaranties made by the operator, the Conference very wisely does not insist upon imposing any one type, good and practical though it may be, but indicates several. Evidently, the normal guaranty will be furnished in the form of
insurance contracted by the operator. But this system, which is generally the best, can present some difficulties: (1) often it deals with many aircraft operated by one person; (2) some persons dealing with large sums of money and real surety may prefer self-insurance; (3) the possibility of giving guaranties without recourse to insurance can perhaps lower the amount of the premium.

Evidently insurance will be the normal guaranty, contracted for the most part by operators of a single aircraft. But companies operating many aircraft find the Convention greatly favoring them, for, in allowing them to furnish securities in form of a money deposit or bank guaranty, for an amount less than the total limited sum for all their aircraft, it will aid them in their operation without injuring the interests of persons suffering injuries. Thus the system adopted by the Conference is not only correct from the legal point of view, but also, and this is important, it gives the only equitable and practical solution to the conflict of interests of the aircraft operators and persons injured. Unfortunately, the Conference, after having adopted a clear and definite system, did not follow it to the end but added to it some derogations inadmissible from a legal point of view and unjustifiable from a practical point of view.

At first, as we have seen, Article 14 brings a derogation of the principle of objective liability, introducing in certain cases delictual liability of the aircraft operator. Paragraph (a) of this Article grants to the injured person the right to unlimited compensation, in case the injury was caused by a grave fault or wilful misconduct of the operator. This rule contains three legal errors. (1) The first consists in the discarding of the main principle of the whole Convention, which rejected the idea of fault and was based on the system of objective liability. That a legal construction may be admissible, it is necessary that it be logical. But, as was justly remarked by the Italian delegate, M. Cogliolo, paragraph (a) of Article 14 combines objective liability with liability for fault. Thus it creates confusion, indecision and opposition between the two sources of liability. (2) The second consists in the introduction of unlimited liability, when the central purpose of the Convention is based on the idea of limited compensation which allows the operator to know in advance the maximum sum of compensation which it will be required to pay and thus allows him to furnish such surety which guarantees the injured person payment of indemnity. (3) The third consists in a confusion of...
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civil compensation with a penalty. In the field of civil liability, it is only a question of establishing a lien de droit, an obligation between two persons, making one a creditor and the other a debtor. Thus, logically, the amount of compensation granted the person injured must be entirely independent of the seriousness of the fault; whereas a penalty is measured by the gravity of the crime, civil compensation by the gravity of the injury suffered. But we see that those who drafted the Convention consider the importance of the fault to eventually increase the compensation, by discarding the limit set by Article 8. It is true that in the greater number of states the courts do not succeed in avoiding consideration of the nature of the act causing injury and grant a heavy amount of compensation when the fault which caused the injury is very serious. But, in a system based in principle upon objective liability, the admission, even in exceptional cases, of a relation between the amount of compensation and the gravity of the fault must not be allowed. If the sentiments of justice revolt at the idea that the operator who intentionally committed an injury will be in the same position as one who is in no way at fault, one can all the more consider penalties against the person causing an injury intentionally. But, evidently, these sanctions can find no place in the Rome Convention.

Unlimited compensation as established by paragraph (b), Article 14, has a double purpose: to punish the operator who has not furnished a guaranty, and, by the threat of such punishment, to keep him from operating an aircraft for which no guaranty has been contracted. Regarding the first purpose, reference is made to the explanation of paragraph (a), Article 14. As to the second purpose, the means furnished by paragraph (b) gives no satisfaction to persons injured. It only permits them to secure a judgment condemning the operator to a large sum of compensation, but in no way assists them to obtain such sum, whereas since there is no guaranty they are very likely not to receive it. It would be much more helpful to the persons injured if, instead of the rule of paragraph (b), Article 14, the signatory states instituted in their national laws a requirement that all operators must provide some guaranty, even if they operate only within their own country. They could then permit aircraft registration only after deposit of a guaranty. The means would be very effective. It is already applied, as we have seen in the first part of this study, by many states.

179. Mazeaud, Traité Théorique et Pratique de la Responsabilité Civile Delituelle et Contractuelle (Paris, 1931).
Besides the unjustified derogation brought to the system of the Convention by its Article 14, the second part of paragraph 2(b) of Article 2 is in opposition to the principle of objective liability. In introducing objective liability, the law is based solely on the actual fact of the injury, which is why it grants no exemption even with proof of force majeure. The fact that no exemption on the part of the liable person is accepted forms the focal point of objective liability as well as its distinction from liability for fault.

But, the objection will be raised, liability is always averted or lessened in case of fault of the person injured. This is evidently so, but it must not be considered as an excuse for the person liable. In fact, the situation is quite different. An aircraft in flight has caused an injury; its operator must then be made to pay a sum of compensation within the limits fixed by Article 8 of the Convention. But the injured person committed a fault which in turn injured the defendant: this injury consists in the obligation of the defendant to pay compensation, an obligation which would not exist if the injured person had not committed the fault which caused the injury. Consequently the injured person is obliged to compensate the injury. He must then repay to the defendant the compensation which the latter was going to pay him. For economy and simplicity in procedure, it is admitted that instead of ordering the operator to pay compensation to the injured person which the latter must repay to him, it would be simpler in a case of this sort not to have the defendant pay compensation and the injured person repay it. But the fault of the injured person is sometimes found to be not the only cause of injury. Then, as in case of receiving compensation where it would be necessary to return only a part, they decided simply to lessen the liability of the operator.\textsuperscript{180} Thus the fault of the injured person will not serve as an excuse for the defendant, whose liability is only averted or lessened due to the application of the system of compensation. We see then that in the system of objective liability, the defendant has no excuse whatsoever.

However, the Convention in Article 2, paragraph 2(b), exempts the operator from all liability if the injury to third persons is caused by an intentional act committed by a person on board the aircraft, not a member of the crew and connected in no way with the operation, unless the operator or his employees have been able to prevent it. Evidently, this excuse is not admissible in the outline of the system of the Convention, and the delegates—

\textsuperscript{180} Mazeaud, op. cit., Vol I, No. 1511.
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even the partisans of this regulation—are perfectly in accord. So, in order to defend it, M. Ripert has found a working basis which if not very convincing is at least ingenious. M. Ripert maintained that:

The Convention establishes an exceptional liability for the operator, outside of the droit commun. This liability only deals with risk caused in operation . . . Paragraph 2(b), Article 2, already increases liability by making the operator liable for the acts of any person whomsoever who is on board the aircraft. If, in this matter, any possibility of exemption from liability is abolished, the extraordinary consequence is that the aircraft operator becomes liable for acts of all persons on board, whatever the act, even if it has nothing whatever to do with the transport made and with the operation.181

We then see that M. Ripert tries to justify this excuse by explaining that an injury, caused by an aircraft passenger having nothing to do with the operation, is not dealt with in the text of rules of the Convention and therefore can not fall under the jurisdiction of the liability as instituted by Article 2. But this reasoning does not seem just, because the Convention in no way attaches liability to “operation” but, instead, to the “flight” of the aircraft. We have seen that the Convention considers the aircraft to be in flight from the commencement of its operations for departure until the end of its operations of arrival. Thus “operation” and “flight” are not at all synonymous. For example, when a plane, before moving over the ground in preparation for flight, is being fueled, it must be considered as in operation but not in flight. But on the contrary, if the injury, caused on the surface by a shot fired by a passenger of the aircraft, has nothing to do with the operation of the aircraft, it certainly arises from the aircraft in flight. From a practical point of view, the excuse of paragraph 2(b) of Article 2 is no longer justified.

In case the injury is caused by a person on board the aircraft, whether intentionally or not, the injured person will have the greatest difficulty in obtaining compensation from him. The only fact the injured person can know, is that the injury was caused by such and such an aircraft. He will bring action against the operator, who, during the proceeding, will prove that the injury was caused intentionally by a certain known person who was on board the aircraft. The injured person will then be non-suited, and, consequently, will have to pay the costs of the suit. He will then bring a second suit against the person causing the injury who, by

181. 2 Rev. Gén. de Droit Aérien 585.
this time, will probably be at the other ends of the earth and whose address will certainly be unknown. If the injured person succeeds, in spite of these conditions, in getting a definite judgment in his favor, he will then have great difficulty in executing it and will certainly run the risk of the insolvency of the defendant.

These difficulties only exist for the operator to a small degree. He, however, is quite capable of knowing who the person is on board his aircraft who caused an injury on the surface. Furthermore, he has the means, in conformity with the laws of many countries, to levy an execution or he may seize the baggage of the person causing injury, upon the arrival of his aircraft at the destination of this passenger. Lastly, even if the latter does not have any baggage, or if its value does not cover the amount of the injury, the operator can know much more easily than the person injured the address of the person liable and institute an action against him. Thus, once compensation is paid to the injured person, the operator can quite easily be compensated by the person causing the injury and he will not be subjected to the same difficulties as the injured person. If the injury is caused by a penal fault, the situation of the operator will be still easier, for he can cause the arrest of the person liable upon the arrival of the aircraft at its first landing.

According to the preceding explanation, it would seem that the correct, practical and equitable system, as instituted by the Convention, has been distorted by three rules, those of Article 2, paragraph 2(b), in full, and Article 14, paragraphs (a) and (b) —inadmissible from the legal point of view, and which in practice will prove useless and even harmful.

Rules:

The criticism of the individual rules is a very delicate task and presents many more difficulties than that of the system. Here there is no room for theory; practice only must be considered. But, as long as the Convention has not entered into force, as long as its rules are not applied to air navigation, it is very dangerous to discuss the value of this or that regulation. Nevertheless, certain rules are presented in such a faulty manner that even now it is already understood that in practice they can bring only negative results. Only a criticism of these rules will be undertaken and the writer will await the entrance into force of the Convention before discussing all the others.
The first question concerns the tribunal, which question will lead us to the problem of the execution of foreign judgments. Article 16 of the Convention maintains that only the tribunal of the domicile of the defendant and that of the place where the injury was caused are competent. In case a third person injured can bring a direct action against the insurer, the tribunal of the location of this latter will also be competent. The Polish delegation proposed to add further the tribunal of the country of registration because, according to the system of the Convention, the guaranty is normally contracted there. This tribunal, which will correspond to the place where the guaranty is contracted, will normally be the most effective. The suggestion seems very just, although it should perhaps be formulated in a little different manner, in particular, that instead of the tribunal of the country of registration it might be better to authorize the tribunal of the country where the guaranty had been made. However it may be, the Polish proposition was rejected.\(^{182}\)

Furthermore, the Conference pronounced itself against the execution of foreign judgments. The details of the discussion which took place on this subject will not be entered into here nor any criticism of the arguments of the partisans and adversaries of this system, which is quite perfectly known and which has been proved in the field of rail transportation.\(^{183}\) It would be useless to discuss it, since the negative vote of the Conference was based neither on juridical considerations nor on practical reasoning. In view of the rejection of the proposed draft on the execution of foreign judgments and the adoption of the text on tribunals, which is contained in Article 16 of the Convention, the question arises as to what will be the situation of the injured person.

The purpose of the injured person, in bringing an action against the operator, certainly will be the effective payment, in as quick and economic a way as possible, of compensation which is due him.

If the decisions had executory force in all signatory states, persons injured would have summoned the operator before the tribunal of the place where the injury was caused, this court being normally nearest to the plaintiff. Furthermore, its procedure would be the quickest, in view of the ease with which it could determine the amount of compensation to be awarded by hearing

\(^{182}\) See 2 Rev. Gén de Droit Aérien 739-741.
\(^{183}\) Article 55, of the Convention of Berne.
witnesses and experts. But since judgments are not executory in foreign countries, the injured person could not benefit from it, unless, as an exception, the defendant owns property (patrimoine) in the country where the accident occurred. Then the injured person, instead of taking advantage of the surety furnished by the operator, will bring judgment against the goods which the latter owns in the state where the judgment was rendered. But, normally, this would not be the case and the judgment obtained by the third person who was injured will not benefit him at all.

The objection will perhaps be raised that the injured person can, in conformity to Article 16 of the Convention, bring suit before the tribunal of the domicile of the operator, which generally corresponds to the place of registration of the aircraft, and lastly to the place where the guaranty was made. But, unfortunately, this is not very convincing, because quite often citizens of a country are domiciled abroad. In conformity to the laws of most states, they must register their aircraft in the state of which they are citizens. Thus their domicile will be in a different country than that where they furnished security. There are two logical results: (1) if the tribunal of the place where the guaranty was made is rejected, it is absolutely necessary to allow the execution of foreign judgments; (2) if this latter principle is rejected, the injured person must be allowed the right of action before the tribunal of the place where the guaranty had been made.

The Conference unfortunately did not adopt either of these two alternatives, which is one of the greatest errors it committed. This will be forcibly felt when the Convention enters into force for it will have to be modified on this point. It is evident that the proposition of the Polish delegation concerning tribunals is not the best solution, but, in view of the rejection of the principle of execution of foreign judgments, this was the only solution at all possible to suggest.

The only complete solution in the field of procedure, capable of giving satisfaction to injured persons without injuring the interests of operators, would have been to admit that all judgments rendered in accordance with the texts of the Convention would be executory in all signatory states. Let us illustrate this point of view with an example. Suppose that an aircraft registered in State A (for further simplicity, we shall grant that it was also the country of the domicile of its operator) causes an injury to a third person on the territory of State B, several thousand kilometers distant. The injured person would not benefit from bring-
ing his suit before the tribunal of the place where the injury was caused, because, that judgment not being executory in the country where the guaranty was furnished, he would still be forced to bring a second suit in the latter country. The injured person must then sue the liable person before the courts of State A. But these tribunals would have great difficulty in pronouncing judgment. Even though the operator does not invoke the fault of the injured person to free himself from blame, the extent of the injury must be established, which fact is determined after hearing witnesses and examining the place where the injury was caused. All these acts can be carried out only by the tribunals of State B, on whose territory the accident occurred. The tribunals of State A must then at this point communicate with the tribunals of State B, which procedure will necessitate much expense and delay in the proceedings. Thus we see that the only means of effectively allowing the injured person in all cases to take advantage of the rules of the Convention is to allow execution of foreign judgments. The injured person can then bring an action before the tribunal of the place where the injury was caused and the judgment granted can be executed in the state within whose territory the guaranty was furnished.

In order that the limit of compensation may not be exceeded, Article 11 maintains that in case several third persons are injured in the same accident and bring action before courts located in different countries, the defendant may submit a statement, before each of them, of the total claims and moneys due. The principle of this rule is just, but what will happen in actual practice? In what way can the operator act—from a final or a provisory judgment or from a summons brought by one of the injured persons? The tribunal chosen by the injured person A is presented with one of the above documents by the defendant. Evidently, in conformity with Article 11, it must consider a final judgment of a foreign court granting to B, a victim of the same accident, a certain sum of compensation. If the claim of A exceeds the difference between the sum granted B and the limit of compensation, the tribunal will be forced to cut the amount of compensation for A. But what will the judge do if the defendant only presents him with a provisory judgment or simply a summons or claim from B, addressed to another tribunal? If he considers this, he can easily commit an error and injustice toward A, because it is very possible that the sum of compensation finally granted to B will be less than the assignation or the provisory judgment. Thus then only
final judgments can be considered. But even in this case, an injustice is feared. In particular, the first judge, whom B addresses, before A has brought his claim before a second judge, can not consider injuries caused to any other persons. So that if the compensation due B does not exceed the legal limit of compensation, the judge may grant it all to him, to the loss of other persons injured who would present their claims later before other judges.

We see therefore that Article 11 in practice will be useless. In the case of several persons injured, whose total claims exceed the limit of compensation, the injured person who is first to bring action will benefit at the expense of the other persons. Evidently, this state of affairs is not admissible. To obviate it, it would be necessary to institute a special tribunal charged with the duty of allocating and liquidating compensation, such as was proposed by the Netherlands delegation. Unfortunately, the Convention rejected it without even deciding to discuss its details.

Realization of Unification:

In the first part of this study, we saw the great differences in legal regulations, applied throughout the world to liability for injuries caused to third persons by aircraft. This undesirable state of affairs has necessitated the urgent unification of these different regulations. The Rome Convention realized this purpose theoretically at least. But to realize effective unification, it is not enough to put various texts into force, agreed to by a group of states; it is further necessary that the jurisdictions of all countries apply them in the same fashion and achieve uniformity of an enduring law. We know, however, that courts and tribunals, even within the territory of a single state, tend to interpret the same text in different ways. But each country has a supreme court which takes care of uniformity in interpretation of the laws.

Unfortunately, there is no international supreme court, called upon to take care of the uniformity of application of the texts of conventions, to which individuals can have recourse to judge their cases as a court of last resort.

Two reasons oppose the creation of such an international jurisdiction: (1) It is maintained first that international law does not grant to individuals the legal status of subjects of law; only states possess this status. Thus private relations between individuals are excluded from the field of international law. Even if individuals belong to different states and if their reciprocal relations necessitate the application of rules of private international
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law, these relations do not exist outside the field of national law. Nevertheless, this idea, the result of the development of the idea of absolute and uncontrollable sovereignty, is in disagreement with actual conditions, and many exceptions were made to this doctrine. The regulations of the Peace Treaties (of Versailles, St. Germain, Trianon, Neuilly and Lausanne) established arbitrary mixed courts and invested individuals with the right of independent action, when it was a question of claims determined by the regulations of the respective treaties. So also the German-Polish Convention, relative to Upper Silesia, concluded at Geneva, May 15, 1922. However, it must be mentioned that some other attempts to grant to individuals direct legal action before international courts have not succeeded. Consequently, the Central-American Court of Justice, which recognized the right of individual action, ceased to exist. Also the proposition, made at the drafting of the statute of the Permanent Court of International Justice, to grant to individuals the right of direct recourse, encountered quite a general hostility at the session of the Committee of Jurists at the Hague and was not considered. One of the jurists, whose authority in the theoretical field as well as in the practical field of international law is generally recognized, M. Politis, believes that the reform of international law concerning the right of direct action of individuals will certainly be realized, because it answers a real need in international affairs. For example, M. Politis cites that even today individuals almost by instinct lay their claims before the Permanent Court of International Justice, which is prevented by its statute from taking cognizance of them. The two reports of the Court for the years 1922-25 and 1925-26 give an impressive list of such requests.\(^{184}\)

(2) The second and more serious objection consists in the inadmissibility of the institution of an international court, placed above national jurisdictions to decide, as a court of last resort, upon cases determined by national tribunals. However, an attempt has already been made in this matter. Attention is particularly drawn to Convention XII, adopted October 18, 1907, by the Second Peace Conference, instituting an international prize court. This Convention permitted recourse from the decisions of national prize courts. The right of recourse belongs to a neutral power as well as to individuals.\(^{185}\) Thus the purpose of the Convention


was to create international control over decisions rendered by national courts in matters of seizures. Unfortunately, this attempt has not been followed, since the interested Powers objected to its application. Furthermore, the doctrine believes in the admissibility of an international jurisdiction of this sort. M. S. Rundstein, in his course at the Academy of International Law at the Hague in 1928, concluded that "... uniformity of law would be ephemeral without international jurisdiction."  


In each state there is a tendency to assure uniformity of jurisprudence by means of a Supreme Court which upholds the interpretations it has once given and which thus assures a general and lasting application of the laws within their original meaning. But in the case of an international law, there is one text which is frequently applied in many states. . . Consequently an effort is made to avoid the formation of conflicting opinions. . . To remedy these conflicts arising from laws based on a uniform text . . . the creation of a civil international jurisdiction (is imposed).  

Returning to the field of private air law, the idea of an international court, charged with the duty of examining, as a last resort, cases arising from the application of the convention of private aerial law, and of establishing in this field uniform jurisprudence, was raised at the Fifth International Congress on Air Navigation, September 1-6, 1930, at the Hague, following the writer's study on "Compulsory Insurance for Air Transport Passengers." After some long and lively discussions, the Congress expressed the following opinion:

The Fifth International Congress on Air Navigation, whereas the progress of air navigation demands uniformity of private aerial law, according to the international demands of air traffic; whereas the greatest efforts have been made in this field, concluding in, on the one hand, the creation of an international organization known as the C. I. T. E. J. A., and on the other hand, the drafting of proposed conventions such as the Warsaw Convention of October 12, 1929; whereas, however, the adoption, even by the states, of the uniform regulations of private aerial law would effectively serve the cause of uniformity only on condition that as soon as possible there may be uniformity in interpretation of the conventions of private aerial law—expresses the wish that international legal organizations study the problem of the creation of an international jurisdiction accessible to private persons and corporations, for the purpose of judging, as a last resort,
We must believe that the necessity to make uniform the jurisprudence of countries signatory to the conventions on private air law has since then been presented to the consideration of jurists. So the opinion expressed by the French delegation to the Conference, proposing that the interpretation of the texts of the conventions be put in the hands of the C. I. T. E. J. A., surprised no one. This opinion, explained extensively in the preceding section, was evidently drawn up differently than that of the Fifth International Congress on Air Navigation, because the problem lay in submitting it not to a scientific conference but to a diplomatic one. It was impossible then to propose the creation of an international tribunal, and, under pretence of the need to clarify the convention texts for those using them, they were limited to placing the duty of interpretation of these texts on the C. I. T. E. J. A., only, however, upon the request of a public administration or international organization and without prejudice to juridical powers.

Nevertheless, this text caused such strong protests that it had to be changed so as to contain only a commission to the C. I. T. E. J. A. to examine the contents of the opinions therein, in view of the next conference. Evidently, this new draft constitutes a courteous refusal of the French propositions. However, there is nothing to regret, because, from the theoretical as well as the practical point of view, this opinion was of little value and, basically, was not acceptable.

The idea of turning over to the C. I. T. E. J. A. the matter of interpretation of the texts of the conventions is entirely contrary to contemporary legal principles. Generally, the necessary interpretation of texts of laws falls solely under judicial power and not to an organization whose activity is limited to the preparation of drafts for submission to conferences. Besides, what would be the value of interpretations as given by the C. I. T. E. J. A.? If its drafts were accepted without change by the conferences, it might well be said that the C. I. T. E. J. A. is in the best position to explain its reasons and the meaning of the rules of the conventions. But we know that these conditions are not true. For example, the Rome Conference modified the greater part of the rules contained in the draft of the C. I. T. E. J. A. Besides, of what use is an interpretation which is not compulsory

on national jurisdictions? Lastly, the C. I. T. E. J. A., instituted especially to draft projects of conventions, can not without serious reorganization assume an entirely different duty.

So the fate of the French proposition would have left us quite indifferent, if the objections in the Conference session were only based on the reasons which have been just stated. Unfortunately, the true reason which penetrates the discussions of the delegates is the fear of creating an international organization which, by giving opinions regarding the interpretation of the conventions, might perhaps bind the national jurisdictions.

It evidently is impossible to foresee in what way the propositions made on this subject by the C. I. T. E. J. A. will be considered by the Fourth Conference. But it is to provide that the French proposition will result solely in limiting the C. I. T. E. J. A. to being a center of information where all doctrinal studies would be collected as well as jurisprudence concerning the conventions on private air law. That is, therefore, what the C. I. T. E. J. A. understood when at its eighth session at London in October, 1933, it decided to centralize under its Secretary-General the documents relative to the only Convention ratified at the present time—the Warsaw Convention. This initial attempt to concentrate all documents relative to the Convention is certainly to be applauded. But we are far from the idea adopted by the Second Peace Conference of creating an international tribunal as a court of last resort for judgments of national tribunals.

Unfortunately, it must be confessed that, in spite of the efforts of doctrine, which is more and more favorable to the idea of an international jurisdiction, this idea since 1907 has made no headway, but has visibly retrogressed. Since there is in the near future little hope of the institution of an international supreme court to unify interpretation, it is necessary to work out the conventions whose texts have a clearly established position and which contain no deficiencies. Otherwise, conflicting solutions would appear and be preserved in the jurisprudence of the states.

Let us see then whether the texts of the Rome Convention answer these conditions. In the preceding section, in analysing the text of the Convention, we had occasion to indicate that the Conference left to national laws the solution of a certain number of problems: these are problems of the influence which the fault of the injured person would have on the necessity of the operator to pay compensation, of recourse against the person causing the

189. Article 2.
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injury, of the manner of calculating compensation, of the reasons for suspension and interruption of the period of limitation, and so forth.

On the other hand, the Convention omitted to regulate many questions and consequently contains some important deficiencies. In the first place, it gave no definition of what it meant by the word "aircraft." Does it mean only airplanes and dirigibles powered by motor, or also balloons and gliders which do not have their own propelling force? Does it have in mind only aircraft capable of circulating, i. e., in transit from one place to another, or does the Convention include also captive balloons and kites? Lastly, does it deal with injuries caused by sounding balloons, flares and parachutes? It is useless to seek an answer, because not the work of the C. I. T. E. J. A., the Conference discussions, nor the text of the Convention have any answers.

Many deficiencies of this sort can be found in the Convention, but one of them is of such seriousness that it threatens complete misinterpretation of the rules of the Convention in their application to tourist aviation. This is in connection with the guaranty in the form of insurance as required by Article 12.

We have seen that insurance is not the only form of security which the operator may furnish. But the other kinds of guaranties are only of benefit to the operators of several aircraft and are only available to persons handling considerable sums of money. These latter would be used by the air transport companies, but tourists and sportsmen as a group must consider insurance. The drafters of the Convention were then correct in maintaining that insurance will be the normal guaranty, and in allowing money deposit or bank guaranty only for exceptional reasons. Since insurance plays such a large part in the system of the Convention, it evidently is necessary carefully to regulate this means and to draw up regulations which will lead toward uniformity of insurance contracts in the contracting states.

Unfortunately, neither the C. I. T. E. J. A. nor the Conference have completed this task. The C. I. T. E. J. A. did not want to enter into the details of insurance questions. It is difficult to say whether this was due to lack of time or the thought that problems arising in this field are regulated in detail by a Conference specifically dealing with this. The Conference was prevented from regulating the insurance problem by the fact that some observations

190. Article 7.
191. Article 17.
were presented in the last minute by the British delegation dealing with the imposition of restrictive clauses in the policies.

In the Conference session, the propositions of the partisans and opponents of these clauses could not be reconciled; they could not even reach a compromise. They were then limited to suggest a guaranty in the form of insurance, though they did not go into any details, and, by requesting the C. I. T. E. J. A. to examine the studies made on insurance in air navigation, this problem was left for a succeeding Conference. If the problem concerning insurance policies could find no solution at the Third Conference, the cause was not only in the tardy presentation of objections by the English insurers, but principally in that the arguments of the partisans and opponents of the restrictive insurance clauses lacked conviction and could not stand up against careful examination. The British propositions had two important faults: the first was that they consisted of an explanation of the objections and opinions of the English insurers alone, who, although the most important in the world in the field of aeronautics, do not constitute the entire group of aviation insurers of all the contracting countries. Furthermore, the British propositions completely lacked any figures in support of their contentions. The British delegation merely maintained that there would be no practical possibility of obtaining insurance if restrictive clauses were not included in the policies. This impossibility evidently means a very high amount of premiums. Unfortunately, the Conference was not informed of this amount for different types of aircraft, which thereby prevented it from determining the reasonableness of the British objections.

The arguments of the opponents of the restrictive clauses can be reduced to three considerations: (1) It is desirable that the injured person find as complete security in insurance as in a money deposit or bank guaranty. To permit restrictive clauses is to refuse protection to the injured person in just the cases where he most needs it. This argument unfortunately confuses two different groups of ideas. It is not only a question of knowing what is desirable, but also of considering what is possible. No one will deny that it is highly desirable to grant to injured persons the greatest possible protection, but it must not be forgotten that the extent of this protection finds limits in practical possibilities. What purpose will be served by the institution of a rule prohibiting restrictive clauses in policies if that will tend to increase the amount of premiums so that insurance becomes insupportable for aircraft operators?
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(2) Automobile legislation of certain states has for many years imposed the obligation to insure liability toward third persons. This insurance covers all liability without restriction. This kind of insurance has operated for several years to the satisfaction of all parties and the premium amount is not high. Consequently the same kind of insurance could easily be applied to aviation. The error consists in that automobile insurance is compared to aviation insurance. The risk is based on different considerations. It is sufficient, in noting the contents of the restrictive clauses proposed by the British delegation, to observe that, though very important in the field of aviation, they are generally valueless in automobile law, for example, Clause II which provides for the case where an aircraft at the beginning of flight is not sufficiently supplied with fuel or provisions. The danger is very obvious, because if the aircraft has a defective motor or equipment or has not enough fuel, there is a strong chance that it will crash or will at least have to make a forced landing on an unauthorized place and will cause injuries on the surface. But, an automobile whose motor is defective or which has not enough gasoline will stop on the road and can cause no injury to third persons. It will be the same with Clause IV, prohibiting races, speed tests, record-breaking flights, acrobatic flights and any other unusual flights. This restriction is intelligible regarding aircraft, because not all such flights are conducted over airports, but outside, and in view of their special character, they certainly involve much more danger from a crash or forced landing than ordinary flights. But this is not true for automobiles, because races and speed contests are carried out on special courses, or at least within specially guarded territories and roadways. As to endurance tests made on ordinary roads, automobiles taking part present no more danger to third persons than automobiles traveling along in their normal and ordinary course. Likewise with Clause V regarding night flights.

(3) The Swiss delegation presented an argument which at first glance seemed very impressive. In particular, it cited the case of the English air navigation company, Imperial Airways, which, over the Swiss section of the line, London-Paris-Basle-Zurich, is obliged to contract liability insurance in conformity with the requirements of Swiss authorities, i. e., without any restricting clause. But Imperial Airways is insured by English companies, which, then, when required, apply an insurance system without restriction. The argument of the Swiss delegation would have weight if it dealt with an English line which only operated the Swiss branch.
But the line mentioned constitutes only a small section of all the lines operated by Imperial Airways. It can then afford to pay very high premiums for the insurance of risks incurred in flight over Switzerland. Furthermore, it is probable that the English insurance company, with whom Imperial Airways insures all its risks agreed to grant to its client, as an exception, insurance on the Swiss line under conditions which it may make without adding an extra premium to the policy.

So it is not at all astonishing that the Third Conference could not regulate the problem of insurance. To succeed in this, it would be necessary for insurers in all contracting states to prepare a precise and detailed report on this matter, by adding to it figures in support of their thesis. This report would have to be forwarded to the delegates well in advance of the opening of the Conference so that they could study it at leisure, outline their opinions and prepare arguments in its support. It is regretted that a question of such importance and so complicated has been treated in such a hurried manner.

What is particularly regretted in this case is not the fact that the principle of complete and unrestricted insurance has not been adopted. If the insurance contract does not entirely cover the risk, the injured persons still would not have a great deal to complain of, because they would find many advantages in the Convention and their position would be much better than it is at present in most states, particularly in those which do not require an operator to deposit some form of surety to guarantee against his insolvency. Even if all the restrictions of the English insurers were accepted, nevertheless the most frequent types of injury would be covered by insurance.

The most deplorable deficiency is the lack of any international regulation of insurance made by the Convention. The result will be that the texts of policies vary between states and, whereas in one country many restrictive clauses are allowed in the policy, in another country there are only a few, and none in a third. It is therefore reasonable that the French delegates remarked thus "... that a guaranty may be agreed to by all contracting states, it is necessary that there be only one formula."

The care of drawing up insurance policy conditions can not be left to any one operator, nor even to any one country." It is insupportable that the chances of the injured person to secure compensation de-

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pend on the nationality of the aircraft which caused the injury. Thus the essential thing is not to exclude many more or less long, restrictive clauses from the insurance policies, but to achieve uniformity in the insurance policies in all countries.

Fortunately this can be achieved quite easily but solely due to private initiative, without making it necessary to refer either to national legislation nor to diplomatic conferences. The main principles of this thesis will be explained at the conclusion of this study.

The best and surest means of achieving uniform application of the conventions is to create a single superior tribunal for all contracting states. In its absence it is necessary to see that the text of the conventions does not result in many conflicting rather than brief, clear and precise interpretations. It is particularly necessary to guard against deficiencies.

We have seen that the creation of an international jurisdiction for claims arising from the Conventions of Private Aerial Law can not be considered. Furthermore, the text of the Rome Convention lacks clarity and precision, refers frequently to the national law, and contains many deficiencies.

There is left only one last means of remediying to some extent the development of conflicts in national jurisprudence, based on a single international text. That is the frequent revision of the texts of the Convention. Such revision will mean completion of the texts and the filling in of deficiencies, the addition of modifications in the details, and on the other hand, it will correct national jurisprudence and will eliminate the varying interpretations which will be formed. It is then extremely fortunate that Article 28 provides that, no more than two years after the entrance into force of the Convention, each of the contracting states will have the right to call a meeting of another international conference with the purpose of suggesting improvements which might be made in the Convention. Let us hope that this Article will not become a dead letter and let us also hope that the first modification made to the Convention will be the adoption of a rule providing for the revision of the texts of the Convention within short and determined intervals.

CONCLUSION.

We have seen in the second part of this study that certain rules of the Convention were subject to close scrutiny, but on the
other hand the many deficiencies and references to national laws would make one fear that its text would cause much conflicting, if not opposing national jurisprudence.

In view of this state of affairs, with what interest is the Rome Convention going to be ratified? Will it realize the purpose for which it was created, i. e., will it effectively lead, in the international field, to uniformity in the regulations concerning liability toward third persons?

In the first place, it must be considered that whatever the value of the Rome Convention, it nevertheless is one of the first attempts at uniformity in private air law. After the Warsaw Convention of October 12, 1929, it constitutes the second step made in this direction. But the first attempts are always timid and often not very reassuring. Any lack of success at this critical period can easily lead to an abandonment of the whole idea of uniformity of private air law. That is why the first attempts made in this field of uniformity must be surrounded with particular care. For fear of seeing the whole work of uniformity of private air law abandoned, some conventions concluded in this field must be accepted even if they are faulty. In doing so, we must consider the main purpose which lies not in the international regulation of one of many problems of private air law but in the uniformity of this law in its entirety. Thus, although certain problems are inadequately dealt with, nevertheless the disadvantages which result will be largely compensated by the fact that private air law will be made completely uniform.

But if the Convention is defective, can we not, before its ratification, call a new conference which will modify it? I believe this is almost impossible from the legal point of view and will bring practically no results. The delegates to Rome, most of whom are among the finest jurists in their countries, could do nothing with the weak points of the Convention. If they have left them so, it is because they could not do otherwise. Too many varied and often conflicting interests met at the session of the Conference, the conciliation of which interests was not possible for the delegates. To secure their signatures to the Convention, it was necessary to appease the states whose legal systems were divergent; it was also necessary to consider the interest of the powerful groups of insurers and aircraft operators, besides the interests of injured persons. We have seen that there were many points on which no agreement or compromise was possible, since no one could derogate from the principle which it was his duty to defend.
That is the source of the imperfect regulations, deficiencies and references to national laws. To succeed in having the Convention signed, they were forced to throw over some ballast in the form of certain clear and precise texts.

If a new Conference is called, it will find itself in the same situation as the Rome Conference and will be hindered from making some of the necessary changes in the Convention of May 29, 1933. This does not mean to say, however, that the Rome Convention must be applied as it is at present and that it could not be improved in the future. On the one hand, whatever a diplomatic conference is not in a position to do can be accomplished by private initiative; on the other hand, what is impossible at present may become possible in the future, when the experience to be had by the application of the rules of the Convention to aeronautics can be used to good profit. A Conference called two years after the entrance into force of the Convention will be better able to modify its texts than if such a Conference were called now, i.e., before ratification.

Let us see then what can be done to further uniformity of the rules of the Convention, without making it necessary to call a new diplomatic conference.

The greatest danger in applying the texts of the Rome Convention is from lack of uniformity in the clauses of insurance policies which the aircraft operators are required to contract. To effectively guarantee injured persons, to allow operators to know insurance costs in advance and to aid insurers, it is necessary to create a uniform policy for all contracting states. It may be advantageous to go even farther, by concentrating within one single organization the insurance of air risks throughout the entire world. It is up to private initiative to achieve this end.

But in the first place, the problem of restrictive clauses in the policies must be decided. At first glance, it would appear that this problem belongs to the legislator, because any clause accepted by the operator, if detrimental to the victim, can, in certain states, be forbidden by law. Nevertheless, in the great majority of countries, it may be concluded that the government leaves this matter to the persons interested.

In solving this problem of restrictive clauses, it is necessary that the insurers in all the states signatory to the Convention carefully study this problem and approximately fix the amount of premiums in policies for complete insurance as well as those containing restrictive clauses. It would be desirable if the premium
scale corresponding to the restrictive clauses could be established. These studies should be exchanged between all aviation insurers in all countries, who will compare them and report upon the conclusions which they wish to draw. After this, a world conference of aviation insurers should be called. In order to determine whether these premium amounts are acceptable to the insured parties, it may be advisable to invite to this conference not only representatives of the I. A. T. A. but also of tourist aviators from all countries.

Following the discussions of this conference, they would conclude in establishing what restrictive clauses of the policy it is absolutely imperative to adopt. Once these results are reached, they must necessarily be accepted by the insurers, and, if need be, by the laws of all states. This must be because the decisions of this conference have the highest authorities in the world to uphold them: possibility and necessity. If any state whatsoever decided to forbid the restrictive clauses permitted by the Conference, it would only succeed in forcing its insurers to demand prohibitive premiums, which would make it impossible for its aircraft operators to benefit from a guaranty in the form of insurance. This condition would be equal to forbidding private aviation, since the other forms of guaranty are not available to most individuals. Also there is no doubt that the decisions of an international conference of insurance companies, conducted under conditions which I have just mentioned, would possess sufficient authority so as not to encounter resistance on the part of governments.

Once a uniform type of policy is established, the problem is to create an international insurance organization. In most countries, there is an insurance company for aerial risks. These would be isolated insurance companies, associations or insurance pools. All these national insurers must form a large international group, which alone would have authority to insure aerial risks. It would have a central headquarters and agencies situated in all states signatory to the Rome Convention. The national agencies would be entrusted to the national insurers of their country. Insurance would be contracted in each country by the national agency, which would act in the name of the international group, would deliver the policies in the name of this latter and would transmit to it the premiums collected. In case insurance compensation must be paid either directly to the injured person or through the insured party, payment will be made in the name of the international association by the agency in the country where the injury was caused. This
agency will evidently debit the international group for the amount of this payment. The central organization of the international association will carry out the normal functions or the siège social of an insurance company; it will have to divide the risks between the members of the association, collect all documents concerning the risks insured, draw up statistics and prepare the drafting of modifications of the policy texts and premium amounts, all of which it will present periodically to meetings of members of the association, and so forth. Evidently no re-insurance can be contracted, the risks will be divided between the members of the group in proportion to the part which they had taken, or in any other manner.

This is only a very elementary outline which is being given of this system. It would be impossible to go into details, without diverging from the main purposes of the study. Nevertheless, it can be concluded that the system of the international association is very advantageous to all interested parties.

The interests of the insurers lie in the fact that, having centralized all insurance for air risks in one single organization: (1) they will have all necessary statistics, (2) uniform rules and policies will apply to all insurance, (3) they will secure an extremely important amount of aerial insurance, and (4) they will sensibly lessen the administrative costs. This will allow them to lower the amounts of their premiums and, eventually, through experience, to modify the policies proportionately, by making them more and more advantageous to aircraft operators who, in this way, will be benefited by the creation of an international association.

This group will enormously aid injured persons in securing compensation. They will only have to bring action against the aircraft operator before the tribunal of the place where the injury occurred. Once a decision is rendered, they will only have to apply for payment of compensation to the agency of the international association in the country where the decision was rendered. Thus the serious question of tribunal, so ineffectually solved by the Convention, as well as the delicate problem of the execution of foreign judgments, will be entirely eliminated, to the complete satisfaction of all interested parties.

So the most serious faults in the Rome Convention can quite easily be eliminated, without necessity of recourse to a diplomatic conference. The danger still exists that national jurisprudence may be able to apply certain regulations of the Convention in differing and even conflicting ways. As already mentioned, a remedy is provided for this evil in the same Convention, in the form of
the possibility of calling a new international conference charged with the duty of modifying the texts of the Rome Convention. It would make this Convention more practical if, instead of Article 28, a text were inserted providing that such conferences may be regularly and automatically called which will modify the Convention texts and lessen the errors created by conflicting jurisprudence in the signatory states. At the same time it is necessary to eliminate Article 14, as well as the excuse of the operator provided in Article 2, paragraph 2(b).

Since the system of liability adopted by the Rome Conference, outlined at length in the second part of this study, is the most correct, just and practical which can be applied at the present time, the Rome Convention, made complete by the addition of an international insurance organization and, due to frequent modification, being protected from national jurisprudence, will be not only a fine instrument in making uniform the problem of liability toward third persons on the surface of the earth, but will also contribute in great measure to the progress of air navigation.

To complete the efforts of the Convention, national laws should be made uniform with international rules, so that national laws and the Rome Convention may contain identical regulations.

In conclusion, it is found necessary:

(1) to ratify the Rome Convention as soon as possible;
(2) to call a conference of all aviation insurers within the states signatory to the Rome Convention, to establish a uniform text for an insurance policy which aircraft operators must contract, in conformity with Article 12 of the said Convention;
(3) to organize an international association of aviation insurers;
(4) to call, two years after the entrance into force of the Rome Convention, a new conference which will be required to make the following modifications:

(a) to change the text of Article 28 so as to provide for automatic convocation at regular intervals of conferences for the purpose of modifying the texts of the Convention and to provide for any other necessary measure in eliminating the conflicts in national jurisprudence,
(b) to eliminate Articles 14 and 2, paragraph 2(b), in full,
(c) to change, if necessary, any other text of the Convention;
(5) to introduce into national laws regulations identical with those of the Rome Convention, completing them with regulations reserved by this Convention to national laws, but attempting to make these latter as uniform as possible in all countries.
LIABILITY FOR DAMAGES

Errata
(See 5 JOURNAL OF AIR LAW 179-232.)

2. Omit by in line 30 of page 183.
4. Substitute or makes a for for instance in the form of in line 11 of page 189.
5. Substitute or for and in line 11 of page 192.
6. Substitute have been already for will be in line 24 of page 198.
8. Substitute only Articles 1382 and 1383 of the Civil Code could be applied for text in lines 3 and 4 of page 211.
10. Substitute the text of the law for their discussion in note 80 on page 214.
11. Substitute none for some in line 3 of page 215.
12. Substitute the prohibition for a barrier in line 5 of page 215.
13. Substitute ordered for authorized in lines 14 and 6 of pages 222 and 223, respectively.
15. Substitute Sept. 8, 1930 for Sept. 23, 1925 in the table on page 230, relative to the Austrian Ordinance.
16. Substitute or makes for either by making in line 1 of page 232.