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THE ROME CONVENTIONS OF 1933 and 1952: DO THEY POINT A MORAL?

BY ELIZABETH GASPAR BROWN

I. INTRODUCTION

A MIDAIR collision between a United Air Lines DC-8 and a Trans World Airlines Super Constellation occurred in the airspace over New York City on December 16, 1960. All the passengers and crew were killed, a total of 128. In addition, 6 residents of Brooklyn died as a result of the collision, and there was extensive surface damage to property including the total destruction of the Pillar of Fire Church. Characterized as "civil aviation's worst disaster," those on the ground who suffered damage either to their person or property were well situated to secure some redress. They were residents of New York, the state in which the plane collision occurred. The companies which owned the planes were United States companies. Assuming that the airlines refused to make adequate out-of-court settlements, service of process and place of trial would be within the United States. Established and recognized procedures would be employed. A jury trial could be had with the jury free to assess damages. Although New York does not have a statute establishing liability for accidents arising from the operation of aircraft in the absence of fault, in practice it has been impossible for the owner of an aircraft to avoid liability for surface damage from the crash of such aircraft in any state court of the United States.

However, should an aircraft owned by a foreign carrier, KLM (Netherlands) for example, crash in the United States, causing damage to persons and/or property on the surface, problems of recovery for such damage would be multiplied. Ignoring for the moment the probable willingness of the Dutch government to work out some measure of compensation through diplomatic channels, and assuming the injured parties would have to rely on their individual efforts to secure compensation, how would they go about it? In what court could an action be brought? Assuming judgment were secured against KLM in a court located in the United States, how could it be executed? What properties of KLM in the United States could be levied upon? Would some further action in a Dutch court be required? In short, individuals on the surface who suffer

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1Aviation Week, vol. 74, Jan. 23, 1961, p. 49. See also Time LXXVI, Dec. 26, 1960, pp. 14-15. The day after the New York disaster, a United States Air Force Convair, carrying seven crewmen and thirteen passengers crashed in downtown Munich, Germany. All aboard the plane and at least 66 Germans on the surface were killed. It is perhaps worth noting that neither of the two crashes came within the scope of either of the Rome Conventions. One was in intra-national air flight and the other involved the crash of a government or state-owned aircraft.

2See Rochester Gas & Elec. Corp. v. Dunlop, 148 Misc. 849, 852, 266 N.Y. Supp. 469, 473 (Sup. Ct. 1933) where the court stated: "Such chance as there may be that a properly equipped and well handled aeroplane may still crash . . . shall be borne by him who takes the machine aloft."
injury to their person or property from an aircraft in domestic flight have a reasonable likelihood of securing, either through legal action or through an out-of-court settlement, some degree of redress—especially if the aircraft is owned and operated by an airline. This is not true where aircraft of one country cause surface damage in another.

The question of liability for surface damage caused in international air flight has been an object of concern to European jurists since the early 1920’s. The fact that third parties on the ground, injured in the course of international air carriage, had no formal assurance of any redress, caused the League of Nations in 1922 to recognize formally the need for international agreement on this, as well as on other matters of private air law.

II. CITEJA

When the Second International Congress of Air Navigation met at London in 1923, it urged that an international conference be called to consider matters of private as distinct from public air law. Such a conference, the First International Conference on Private Air Law, convened at Paris on October 27, 1925. As far as can be determined from available records, the Conference did not consider the possibility of handling private air law problems by uniform domestic legislation. Instead, after identifying a number of the areas not covered by existing international agreements, it urged the creation of a committee of experts to draft appropriate multilateral conventions. This committee held its initial meeting at Paris on May 17, 1926, and took the name of the International Technical Committee of Aerial Legal Experts (CITEJA). The Committee was then divided into four groups, known as Commissions, with specific areas of responsibility.

3 The first regular international air service was inaugurated on March 22, 1919, between Paris and Brussels.
4 The Consulting and Technical Commissions of Communications and Transit of the League of Nations recognized this need at their meetings in 1922.
5 The Convention of Paris, signed on October 13, 1919, was designed to deal with the public law aspects of international carriage by air. It defined the rights of states in the aircraft over their territory, laid down detailed rules relative to the nationality and registration of aircraft as well as providing for their fitness for flight and their flight navigation and landing, and provided a framework for the enactment of administration of international air law on matters falling within the scope of the Convention. For the text of the Convention, see League of Nations Treaty Series, No. 297, 1:23.
6 The Convention of Paris had been intended to have world-wide application. Ultimately thirty-eight states ratified it. It was superseded by the Chicago Convention of 1944, which was signed by fifty-two nations and as of March 1, 1959, ratified by seventy-five. 1958 United States and Canadian Aviation Reports (hereinafter referred to as U.S. & Can. Av. ii-iii.) For the text of this Convention see 61 Stat. 1180 (1945), 1945 U.S. Av. 244.
7 One of the major problems in this study has been the unavailability of CITEJA documents. Some years ago, it was planned to issue them on microcards, but the project fell through. Hence, it has been necessary to rely on secondary accounts and upon presumably authentic but not official reprints of the documents to a greater degree than desirable.
of responsibility allocated to each. Third party surface damage and the liability of aircraft in international flight for such damage, as well as the associated question of insurance, was one of such areas carved out for the Third Commission.

As events developed, the two areas in which CITEJA was primarily concerned and toward which it devoted its major efforts were those of liability toward persons and property carried in international air flight—which culminated in the widely adopted Warsaw Convention of 1929—and those of liability toward third parties from surface damage to persons or property arising in the course of international air flight.

The latter matter became the prime concern of the Third Commission but did not exclude the preparation of draft conventions on at least two other subjects: Assistance to the Salvage of Aircraft and Aerial Collision. The secondary place allotted to these areas may have resulted from a feeling that those travelling by air or sending freight by air did so by a freely exercised choice, while those injured on the surface were injured by forces over which they had no control.

When the Third Commission met for the first time in 1927, the discussions pointed up the fact that in the relatively short period since the invention of a practical heavier-than-air machine, two major legal patterns of liability for surface damage caused by aircraft had developed. While some domestic legislation followed the principle of absolute and unclaimed liability irrespective of fault, this was not uniformly true.

These competing philosophies persisted without reconciliation throughout the meetings not only for the Third Commission but also of CITEJA as a whole during 1927, 1928, and 1929. It was not until 1930 that CITEJA finally took cognizance of the fact that unless absolute liability irrespective of fault were coupled with limitation on the monetary amounts of such liability, countries most active in international air carriage would probably reject any convention dealing with such liability. As a result, the principle of limited although absolute liability was reluctantly adopt-

10 Of the four commissions set up by CITEJA, the Second and Third Commissions dealt with matters of liability. The work of the Second Commission relating to the liability of carriers toward consignors of goods and toward passengers culminated in the Warsaw Convention of 1929.

11 The Warsaw Convention, formally entitled Convention for the Unification of Certain Rules Relating to International Transportation by Air, was concluded at Warsaw on October 12, 1929, and as of March 1, 1959 had had ratifications and adherences deposited by 97 countries. 1948 U.S. & Can. Av. xii-xiii. For the text see U.S. Treaty Series No. 876. See also 49 Stat. 3000 (1934), 1934 U.S. Av. 259, 245. See also, Drion, Limitation of Liabilities in International Air Law (1954).

12 See 7 J. Air L. & Com. 609 (1916), 8 id. 345 (1917) for drafts of these conventions.

13 For a table showing the state of the law in twenty-one countries respecting liability for surface damage caused by aircraft, as of 1934, see Kaftal, The Problem of Liability for Damages Caused by Aircraft on the Surface, 5 J. Air L. & Com. 179, at 230-231 (1934). See also Knauth, Air Carriers' Liability in Comparative Law, 7 Air L. Rev. 259-291 (1936).

14 At the first meeting of the Third Commission, the reporter, Antonio Ambrosini of Italy, urged absolute liability be imposed on the air carrier. Despite strong support, the Commission did not recommend its adoption. Hence, the conflicting points of view were discussed at the 1928 CITEJA meetings at Madrid. At these Madrid meetings, the cleavage was apparent between countries adhering to the principle of absolute liability, such as France and Switzerland, and those employing a presumption of fault doctrine, such as Great Britain. Although the majority of delegates at Madrid were opposed to any limitation of liability, the Third Commission was told to consider the matter further. See Ide, supra note 8, at 34-13. At the 1929 meetings of CITEJA, a decision was again postponed, despite the adoption by the delegates of the principle of absolute liability, for it had become apparent that the incorporation of unlimited and absolute liability into any convention would cause its rejection by the countries most active in international civil aviation.
ed, and incorporated into a proposed draft convention. It was this convention which was submitted to the Third International Conference on Private Air Law, held at Rome in May 1933.

III. THE ROME CONVENTION AND THE BRUSSELS PROTOCOL: 1933-1938

The years between 1925 and 1933 were notable for much effort and little agreement. The laborers to prepare a draft convention dealing with liability for surface damage in international air carriage had been commendable. Preliminary drafts had been prepared with careful attention to phrasing. Discussions had been held by delegates meeting in solemn conclave. But the absence of any real degree of unanimity between the nations was pitifully apparent at the Third International Conference. Unable to resolve their differences, the delegates were forced to choose between agreeing to disagree or agreeing upon provisions characterized by vagueness rather than precision. They chose the latter method.

The 1933 Rome Convention, as finally adopted by the delegates, provided for a system of absolute liability on the part of operators of aircraft in international air flight for damage to third persons on the surface. This absolute liability was coupled with a monetary limit on the amount of compensation which could be recovered in the absence of "gross negligence or wilful misconduct on the part of the operator and his agents." Under these circumstances unlimited delictual liability could arise, including the situation where the operator of the aircraft had failed

15 A translation of the text of this draft convention appears in 4 J. Air L. & Com. 97-100 (1933). For a comment, see Muller, The CITEJA and Liability Toward Third Persons on the Surface, 4 J. Air L. & Com. 235 (1933).
17 Kaftal, supra note 6, at 101-102, commented as follows:
Pour y arriver on a été force de sacrifier bien de prescriptions nettes et précises du projet en les remplaçant par des textes vagues laissant la faculté à chaque Etat de les interpréter à sa manière. Bien de questions ont été sciemment omises, d'autres tranchées à la hâte. Il n'est donc guère doux que point de vue purement juridique que le texte adopté la pa Conférence laisse à désirer.
18 For the text of the 1933 Rome Convention, see U.S. Dept. of State, Foreign Relations of the United States: 1933, 1:968-977 (1950). It might be noted that a telegram of May 27, 1933, for the Secretary of State from John C. Cooper, commenting on the Convention stated in part "Results excellent." Id. at 962.
19 The Convention provided that a right of compensation arose from (1) the existence of damage to persons or property on the surface, (2) caused by the flight of aircrafts. See Article 2(1). The damage embraced within the scope of the Convention included (1) that caused by any article falling from the aircraft and/or (2) that caused by any person on board the aircraft. See Article 2(2).
20 The amount of compensation which could be recovered for damages to persons or property was set out in considerable detail. See Articles 8 and 9. The limit of liability was based on the weight of the aircraft together with the total maximum carrying load. For any one accident, the limit was to be 240 francs per kilogram of weight. The limit of liability of the operator could not be less than 600,000 francs and could not exceed 2,000,000 francs. One-third of the liability was assigned as compensation for injuries caused to goods and two-thirds for injuries caused to persons. A maximum limit on the amount payable to any one person for personal injuries was fixed at 200,000 francs. Provision was made for proportionate reduction where the compensation payable for persons and/or for property injuries exceeded the maximum.
21 Three situations were set out in which unlimited liability could arise: (1) Where the aircraft was in the unlawful possession of a person, the unlawful possessor was liable without limitation. If the unlawful possession had been acquired because of the operator's failure to take measures necessary to avoid improper use of his aircraft, both the operator and the unlawful possessor were subject to unlimited delictual liability. See Article 5. (2) Where the operator of the aircraft had failed to provide sureties as required by the Convention. See Article 14(b). (3) Where the damage was shown to be caused by gross negligence or wilful misconduct on the part of the operator. See Article 14(a).
to provide sureties required by the Convention. Such sureties or guarantees for assuring payment of compensation adjudged due were also a part of the Convention. Jurisdiction over damage suits was given to judicial authorities of the defendant's domicile and to those of the place where the damage was caused, without, however, prejudicing the injured third party's right of direct action against the insurer where it could be exercised.

While the Convention provisions require a casual relationship between the damage and the flight of the aircraft, it did not define the precise degree of relationship required. It should have been immediately apparent that on this pivotal point the municipal law of all countries would not be in agreement. While this was a source of potential disagreement, there were at least two areas in which the delegates wrangled violently: the principles under which liability would be imposed and the problem of securing payment in the event of injury to third parties. The controversy between the proponents of absolute liability irrespective of fault and those who advocated liability with a presumption of fault, and the related controversy between the proponents of unlimited liability as against those advocating limited liability has already been noted. Despite the attempts to resolve these issues prior to the Conference itself, they were raised again in the course of the meeting. It was obvious that while compromises were effected, no fundamental accord was achieved.

A cleavage developed between those states which had little commercial aviation but whose territory was flown over by the aircraft of other nations and those states which had highly developed international civil aviation and/or had nationals active in insurance and re-insurance activities.

The question of guaranteeing payment of compensation in the event of injury was the subject of heated discussions during the Conference and the provisions finally incorporated into the Convention were subjected to major criticism. Essentially, the problem facing the Conference was to reconcile the interests of three groups of people: injured persons, operators, and insurers. To protect those injured in person or property, prompt payment of compensation adjudged due them was essential. To protect operators and to insure sound financial management, insurance rates needed to be kept at reasonable levels. To enable insurance companies to offer insurance at reasonable rates, restrictive clauses were necessary.

The British delegation made certain proposals which set out a series of defenses available to the insurer. They provoked spirited debates. In

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22 Article 14(b).
23 Articles 12 and 13. Article 12 provided for alternative means to secure payment of compensation for injuries caused by aircraft in international flight. Either the aircraft could be insured or the domestic legislation of the country of registry could provide for a guarantee against risk in the form of a cash deposit in an authorized depository or a guarantee by an authorized bank. Article 13 provided that evidence of the sureties described in Article 12 be set out "either in an official certificate or by an official notation on one of the ship's papers.
24 Article 16. The Conference went on record as against the execution of foreign judgments. See Kaftal, supra note 6, at 147-148 for sharp criticism of this decision.
25 The records of the Conference show keen concern for the problems of the "air tourist." By and large problems of the individual private owners of aircraft bulked much larger in the thinking of the delegates to the 1933 Conference than was true at a later date.
26 Kaftal supra note 6, at 120-121. Where a direct action was brought by an injured person
spite of attempts made to reconcile opposing viewpoints, it became clear that the differences were irreconcilable.\textsuperscript{27} Rather than imperil the work of the Conference, the delegates decided to exclude from the Convention any regulations relative to restrictive insurance clauses. However, the need for rectifying the omission was recognized, and the Conference expressed the wish for further examination of the question under the direction of CITEJA.\textsuperscript{28}

In addition to the actual provisions of the Convention, the delegates were also concerned with the matter of interpretation as influenced by differences in the domestic legislation of the several states. Once again, a compromise was reached between the states which wished to delegate the power of interpretation to CITEJA and those which did not. The Conference finally adopted a resolution proposing that CITEJA study the problem.

The Convention was signed on May 29, 1933, by the delegates of twenty states. Eventually, ratifications were deposited for five.\textsuperscript{29} At no time was any wide-spread enthusiasm for the Convention evident, and certain criticisms were labeled. These criticisms serve to illustrate, especially in the absence of a full report of the Conference's proceedings, something of the divergent viewpoints. As a generalization, the British and American objections arose over the insurance provisions\textsuperscript{30} and the limita-

\begin{itemize}
  \item[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;
  \item[II.] The case where, at the beginning of the flight, the aircraft is not in an air-worthy condition or is not properly equipped and supplied in conformity with the regulations applicable to this problem;
  \item[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;
  \item[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;
  \item[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;
  \item[VI.] The case where the injury arises from fraud or wilful misconduct by the operator or his employees or agents.
\end{itemize}

\textsuperscript{27} The report of the United States delegation to the 1935 meetings of the Third Commission throws light on the controversy over the insurance provisions. See 1936 U.S. Av. 540-559.
\textsuperscript{28} Kaftal, supra note 6, at 122.
\textsuperscript{29} Id. at 129-131. See also II Revue Générale de Droit Aérien 833, 841-842.
\textsuperscript{30} Ratifications were deposited for Belgium, Brazil, Guatemala, Roumania, and Spain. 1944 U.S. Av. 90.

Knauth, \textit{Air Carriers' Liability in Comparative Law}, 7 Air L. Rev. 259 at 271-277 (1936) was deeply troubled by the insurance provisions of the convention. He noted that recently enacted British and Irish Free State statutes had attempted to protect third parties against surface damage from aircraft but went on to state that these provisions will suggest the extent to which a well considered "absolute" liability statute must hedge in order to make these crash risks acceptable to the general insurance market at rates which the aviation industry can afford to pay. It is obvious that under this English system, situations will not infrequently arise where the underwriter will escape having to pay for crashes, leaving the victim with only the comfort—which is no better than his present lot—of seeing the aviator put in jail because of his breach of the statute law. The new British and Irish insurance laws thus fall definitely short of the Rome Convention's ideal of an incontestible absolute coverage for the direct benefit of injured third parties. If incontestible insurance cannot be obtained in the great free London insurance market, it would seem quite rash to expect to obtain it in any other market, unless under some government or monopoly scheme.

A comparison of the Rome Convention with the British and Irish Acts of 1936 thus de-
tions on liability. While some United States criticism was directed at the maximum and minimum liability limits placed on the operator and the limitation on the maximum amount recoverable by any one person, the general consensus of opinion was that these provisions did not raise a constitutional barrier to ratification.\(^2\) The objections to the insurance provisions arose in large part from the lack of defenses available to the insurer. It was alleged the lack of defenses made "it impractical, both for the insurer and the carrier" to engage in international air flight. Moreover, "the high degree of risk on the insurer by reason of the uncertainty of the undertaking and the inability to avail himself of defenses would force the rates to prohibitive standards and would consequently discourage commercial enterprises."\(^3\)

The objections to the insurance features of the 1933 Rome Convention were responsible for the preparation by the Third Commission of a draft protocol. Such a draft was submitted to the Fourth International Conference on Private Air Law, held in Brussels, September 19-30, 1938.\(^4\) After certain modifications, it was signed by the representatives of eighteen governments. The Brussels Protocol attempted to provide insurers with certain defenses, specifically that the damage occurred after the contract had ceased to take effect but with a grace period provided, that the damage occurred outside the territorial limits imposed by the insurance contract, or that the damage resulted directly from "international armed conflict or ... civil disturbances."

Whether the Munich Crisis and World War II were responsible for the failure of more nations to ratify the protocol is, of course, uncertain. It is clear, however, that there was no great interest in or enthusiasm for the document.

IV. 1939-1947

It had been expected that the usual annual meetings of CITEJA would be held in 1939, but the international situation caused their cancellation.\(^5\) As a result of World War II, there were no further CITEJA meetings until 1946,\(^6\) when the Fourteenth Session convened at Paris.\(^7\) Another 1946 session was held in Cairo in November where the main question was the relationship of CITEJA to the Provisional International Civil Aviation Organization.\(^8\) Demonstrates that the Convention has not adequately worked out the methods of providing insurance, although the point was earnestly debated at the Rome meeting. Unfortunately the underwriters were not present at that time, and their practical views were not obtained and developed.\(^9\)


1946 U.S. Av. 71-85. See also Subject Index of CITEJA Documents (Montreal, 1952) p. 141.
tion Organization established under the Chicago Convention of 1944.  

Orderly arrangements were made for the liquidation of CITEJA which held its final meetings in conjunction with the First Assembly of the International Civil Aviation Organization (hereafter referred to as ICAO) at Montreal on May 6, 1947.

V. ICAO AND PROPOSED REVISIONS OF THE ROME CONVENTION: 1947-1952

The Legal Committee of ICAO took over the functions of CITEJA. During its first meeting at Brussels in September 1947, it set up a Sub-Committee charged with the revision of the Rome Convention and the Brussels Protocol. At the Sub-Committee's first meeting in 1948, the proposal was made to send out a questionnaire to the several nations to obtain their views on such revision. The proposal was subsequently agreed to by the ICAO Council. The questionnaire set out a number of issues on which there had been a difference of opinion. These included the imposition of absolute liability, the method of insuring the operator's security in the event of surface damage, defenses which should be available to insurers, the forum in which an action should be brought, proportional allocation of responsibility in the event of joint negligence in aerial collision, and whether or not liability should be limited where the operator's misconduct could be shown.

Nineteen states eventually submitted replies to ICAO. Although the Sub-Committee had hoped to prepare the draft of new provisions on the basis of such replies it was unable to do so... because the replies showed that the points of view of the different States were more divergent than had been expected... It would have given an appearance of false unanimity in the Sub-Committee if it had tried to reach a compromise solution for presentation to the Legal Committee... The replies and

38 See CITEJA Meetings at Cairo, November 6-17, 1946, 14 J. Air L. & Com. 80-82 (1947).
42 Legal Committee, ICAO, Second Session, 1948, Minutes and Documents (1948) pp. 51, 130-134, 163.
43 International Civil Aviation Organization, 16 J. Air L. & Com. 61, 68 (1949).
44 For the text of the questionnaire, see Legal Committee, ICAO, Third Session, 1948, Minutes and Documents (1949) pp. 243-247.
45 Legal Committee, ICAO, Fourth Session, 1949, Minutes and Documents (1949) p. xiv.
46 Id. at 12, 236-241. The report identified five particular problem areas: (1) third party liability, (2) limitation of liability, (3) compulsory insurance or other security, (4) defenses of the insurer, and (5) scope of third party liability. The majority of the states, despite strong opposition from the United States, were opposed to any modification of the rule of absolute liability. While all states were in agreement that the liability of the operator should be limited "with regard to the basis of limitation, the replies differ greatly." The requirement of compulsory insurance raised relatively little disagreement. With respect to defenses available to the insurer, the report stated that

The replies show that... some States are in favour of deleting entirely the defence that the damage occurred outside the territorial limits provided for by the insurance contract. On the other hand the U.S. has proposed that the defence should be available to the insurer regardless of what caused the flight outside those limits. In the opinion of Canada, no provision of insurance should be included in a revision of the Rome Convention... In the opinion of the Sub-Committee the need to protect damaged persons on the surface makes it necessary to restrict the defenses of the insurer as far as possible. On the other hand, it must not be overlooked that excessive restrictions may result in making insurance premiums extremely expensive.
the report prepared by the Sub-Committee were discussed at the June 1949 meetings of the Legal Committee. It became obvious that there was little likelihood of reconciliation between the divergent positions expressed by the delegates on such pivotal issues as absolute liability, the degree of and basis for any limitation of liability, compulsory insurance or other security, defenses of the insurer, and scope of third party liability. Perhaps weary with the apparently endless repetition of opposing viewpoints, John Cobb Cooper, representing the International Air Transport Association, and a veteran of the 1933 Rome Conference, warned the Legal Committee that their concern should be with what was the best arrangement which could be worked out to deal with liability for surface damage, not with expressions of "abstract legal theory."4

Then, days of doctrinaire discussions followed Cooper's speech. Finally, the Legal Committee proposed a second questionnaire, this time confined to the single issue of the limitation of liability. Answers to this second questionnaire were received from twenty-one states, with the divergent views still apparent.46 A synthesis of the replies was prepared and handed to the delegates from nineteen states and six international organizations when the Fifth Session of the Legal Committee convened at Taormina on January 5, 1950.47 The delegates met twenty-three times and finally adopted the so-called Taormina draft, which modified in certain respects the 1933 Rome Convention.48 Although subjected to further changes—at Montreal in June 1950, at Mexico City in January 1951, and at Rome in September 1952—the text of Article 15 in the Taormina draft proved highly alarming to air law experts in the United States.

This article gave sole jurisdiction over all actions arising out of a single accident, occurring in international air flight, to the court at the place where the accident occurred and also provided for execution of a judgment pronounced by such court "in each of the other Contracting States upon presentation of a copy of the judgment authenticated in accordance with the law of the State where the judgment was pronounced" with the further proviso that "The merits of the case may not be reopened." Article 15, however, was not the only provision in the Taormina draft subjected to United States criticism. Article 1, which limited the scope of third party liability was primarily concerned with the use of the term "arising from contact."

Some States find the word 'contact' too narrow because the provisions should be applied even in the case of damage caused by the airstream of the propeller, fire or explosion or extraordinary noise, which would hardly be covered by 'contact.' In the opinion of the Sub-Committee it seems desirable to add a clause which would cover damage due to fire or explosion. The Sub-Committee leaves it to the Legal Committee, to decide whether it would be advisable to include damage caused by the airstream of the propeller or extraordinary noise, such kinds of damage being rather unusual and difficult to prove.

47 Id. at 18-19.
49 Also available to the delegates was a document entitled Provisions of National Law Concerning the Liability for Damage to Third Parties on the Surface, Id. at 281-295. Covering fifty-one states, it synthesized the laws, gave the statutory references, and set out the principles of liability, the exceptions therefor, the limitation of liability, and the persons liable. Examination of this document reveals something of the problems of adjustment and compromise faced by the several delegates.
50 The text of the Taormina draft may be found at 17 J. Air L. & Com. 194-199 (1950).
of the convention to damage "caused through contact, fire or explosion, by an aircraft in flight or by any person or thing falling therefrom," was criticized on the ground that if the word "contact" meant direct contact with the aircraft or person or thing falling therefrom it was too narrow in scope but that if it meant any "contact" caused however remotely by a chain of events arising from the aircraft or person or thing falling from it it was too broad and also on the ground that there was confusion between notions of absolute liability and proximate cause.\textsuperscript{51} There was the usual charge that the maximum limits of liability were too low, and that absolute liability ran contra to accepted principles of tort law.\textsuperscript{52}

These charges, however, as well as their predecessors, had never been on strictly constitutional grounds. Article 15 in at least two respects violated United States constitutional principles: it failed to give assurances of notice to the defendants that such an action was to be brought and it provided for execution of foreign judgments by the several states of the United States. This latter was considered the more serious objection on the ground that any ratifying state must give "full faith and credit to the judicial processes of every other State then in being or thereafter created which might become a party to the convention." As a result, the United States would be faced with the question of whether by treaty it could require the several states of the Union to enforce foreign judgments, rendered valid and enforceable in the United States by the treaty, even though such enforcement would be contrary to the laws of the several states.\textsuperscript{53}

United States objections to Article 15 were primarily responsible for the changes made by the Legal Committee during the Fourth Session of the ICAO Assembly at Montreal in June 1950.\textsuperscript{54} These changes permitted the court, to which application for execution of a foreign judgment was made, to avoid issuance of execution if one of a list of specified circumstances in the pronouncement of the original judgment could be shown.

\textsuperscript{51} See Calkins, \textit{Principles and Extent of Liability under the Revision of the Rome Convention Proposed by the ICAO Legal Committee}, 17 J. Air L. & Com. 151 (1950). Calkins was particularly concerned over the provision that based recovery for damages on "contact." He felt that undoubtedly this was not intended to be restricted to direct physical contact with the aircraft itself, but noted if the word 'contact' is construed as meaning only that the damage must be caused by the impact of some object, whether connected with the aircraft or not, to long as the impact is in fact brought about by an aircraft in flight, the scope of the Convention becomes far too broad. . . . [T]he Taormina draft substitutes a conventional rule for the common law test of foreseeability. The general rule for determining negligence is that a 'defendant must have acted or failed to act in such a way that an ordinary reasonable man would have realized that certain interests of certain persons were unreasonably subjected to a general but definite class of risk.' The conventional rule, on the other hand, ignores foreseeability and substitutes 'through contact, fire, or explosion.' The net result appears to be that the doctrine of remoteness has no application to damage under the convention and that the aircraft operator will be liable for all harms for which his conduct is the cause in fact. Id. at 160-163.

\textsuperscript{52} See also Knauth, \textit{Comments on Taormina Revision of the Rome Convention on Damage Done by Foreign Aircraft to Persons and Property on the Surface}, 17 J. Air L. & Com. 200, 201-203 (1950). While the Warsaw Convention set specific monetary limits on the amount recoverable by any one passenger in an aircraft in international air flight—i.e., 125,000 francs or about $8,000—it has been pointed out that a passenger knows he is about to embark in an aircraft in such a flight and is free to take out additional insurance. A person on the ground is not able to foresee the possibility of an air disaster in the same manner.


\textsuperscript{54} Draft Convention of Damage Caused by Aircraft to Third Parties on the Surface as Revised by Legal Commission of Fourth Session ICAO Assembly, 17 J. Air L. & Com. 328-332 (1950).
During the Seventh Session of the Legal Committee, held at Mexico City in 1951, which prepared the so-called Mexico City draft,25 these exemptions to execution of a foreign judgment were substantially incorporated into Article 20.26 At the conclusion of the Mexico City meetings, the chairman of the Legal Committee, E. T. Nunneley (U.S.), submitted a report. It was not encouraging. Nunneley noted that inability of the delegates to reach acceptable compromises forced the selection of particular solutions and pointed out the likelihood "to an important degree" that such selection might well have made the Convention "unacceptable to those holding the opposing view." Moreover, he had no reason to suppose that further time or effort in the Legal Committee will substantially reduce the areas of difference or produce acceptable compromise solutions.27

He went on to set out the major area of disagreement: (1) the extent of the limits of liability with particular reference to their economic impact on the operators, (2) the security for the operator's liability, and (3) the matter of jurisdiction and execution of judgments.

The Mexico City draft provided that a state overflow by an aircraft is required to accept as satisfactory evidence of adequate insurance coverage a certificate issued by the state of registry of the aircraft showing either that the aircraft is covered by insurance or that provision has been made for alternative methods of security—i.e., cash deposit or guarantee given by a bank.

While the maximum limits of liability imposed on the operators, both for injuries to a single person or his property and for the total amount

25 For the text of the Mexico City draft, see 18 J. Air L. & Com. 98-108 (1951). Included in the documents attached to the minutes of the Seventh Session of the Legal Committee at Mexico City is a concordance of provisions appearing in the following international agreements and draft conventions dealing with liability for surface damage; Rome Convention, May 1933; Brussels Protocol, 1938; Professor Iuul's draft, September 1949; Taormina Draft, January 1950; Montreal draft, June 1950; Mexico City drafts, January 1951. Legal Committee, ICAO, Seventh Session, 1951, Minutes and Documents (1951) pp. 379-384. A similar concordance, including the provisions agreed upon at Rome in 1952 appears in the documents attached to the minutes of the Rome Conference. ICAO, Conference on Private International Air Law, Rome, September-October 1952 (1953) II:241-246.

26 The text of Article 20(6), Mexico City draft of 1951 provided that a court applied to for execution was not required to issue execution if it was satisfied that one of the following situations had occurred:

(a) the judgment was given by default and that the defendant did not acquire knowledge of the proceedings in sufficient time to act upon it;
(b) the defendant was not given a fair and adequate opportunity to defend his interests;
(c) the judgment is in respect of a cause of action which has already, as between the same parties, formed the subject of another judgment which is recognized under the law of that court as final and conclusive;
(d) the judgment has been obtained by fraud of any of the parties;
(e) the right to enforce the judgment is not vested in the person by whom the application for execution is made;
(f) the judgment is one which is contrary to the public policy of the State in which that court is located.

In this connection the comments made on Article 20(6)(f) by Leander I. Shelley, General Counsel of the Airport Operators' Council, in The Draft Rome Convention from the Standpoint of Residents and Other Persons in this Country, 19 J. Air L. & Com. 289-299 (1952), are of particular interest. Shelley was concerned that this provision would be used for foreign courts, in countries where airlines were government-owned, to avoid the payment of judgments on no more solid ground than a mere declaration that public policy was contrary to the payment of the judgment.

recoverable for a single accident, had been revised upward, no one was satisfied. Some delegates claimed the limits were too high, some too low. Nunneley recommended the collection of statistics, to at least make some facts available. To provide for an orderly presentation of claims arising from a single accident and to allocate compensation for injuries caused within the limits of liability imposed for a single accident, the Mexico City draft included the so-called "single forum" requirement—that is, all claims were to be brought before one court, the court of the place where the damage occurred—on the ground that this was the most equitable solution for everyone. One exception was provided: where all involved were in accord, the courts of another state could be chosen.

As to the security to be offered for the operator's liability, the comment noted two conflicting needs: the right of the state flown over to satisfy itself concerning adequate insurance for over-flying aircraft and the concern by aircraft operators that if the states were given an absolutely free hand to determine how each state was to be so satisfied, the proofs might be so diverse and burdensome as to make international air flight economically unsound. Tentatively, and seemingly without much hope of widespread acceptability, the suggestion was made that the states might agree to accept "a certificate from the insurer of an over-flying aircraft that the aircraft is insured according to the Convention, together with a certificate from the State of domicile of the insurer as to his status and financial responsibility."

Examining the minutes of the sessions of the Legal Committee of ICAO, it is impossible not to recognize how deeply rooted were the delegates' opinions. The "Synthesis of Comments and Proposals Received From States and International Organizations in Respect of the Montreal Draft Convention on Damage Caused by Aircraft to Third Parties on the Surface," compiled in 1951, as well as the questionnaires circulated in 1948 and 1949, confirm this. The extent of the difficulties encountered during the preliminary discussions foreshadowed the even greater difficulties largely to arise in the course of the final drafting of an international agreement. The delegates may have struggled patiently with their honest differences, but they lacked the imagination to discard their preconceived ideas and consider whether there might be some alternative means of reaching agreement on a subject all apparently considered important enough to discuss.

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<thead>
<tr>
<th>Aircraft of 2001 kg to 9999 kg</th>
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<tr>
<td>6000 kg or more</td>
<td>2000 kg or less</td>
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<tr>
<th></th>
<th>6000 kg or more</th>
<th>Aircraft of 2001 kg to 9999 kg</th>
<th>2000 kg or less</th>
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<tr>
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<tr>
<td>Accidents involving personal injury</td>
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<td>3</td>
</tr>
<tr>
<td>Accidents involving property damage</td>
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<td>3</td>
<td>3</td>
</tr>
<tr>
<td>Total of claims paid and outstanding in excess of Mexico City limits</td>
<td>2</td>
<td>3</td>
<td>3</td>
</tr>
</tbody>
</table>

It is to be noted that the two accidents where the total of the claims paid and outstanding exceeded the Mexico City draft limits occurred in the United States.

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58 ICAO, Conference on Private International Air Law, Rome, September-October 1952 (1953) II:178-202. See also, a partial reprint in Comments by ICAO Council on the Liability Limits in Article II of the Mexico City Draft of the Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface, 19 J. Air L. & Com. 211-218 (1952). Included in this report, under the heading of "Analysis of Claims in Respect of Damage To Third Parties Reported by States," was the following table:

59 Legal Committee, ICAO, Seventh Session, 1951, Minutes and Documents (1951) pp. 265-291.
VI. THE INTERNATIONAL CONFERENCE AT ROME: 1952

It was with this background of "deep and apparently irreconcilable divergences of views," together with tentative solutions offered without much hope of acceptance, that the delegates of thirty nations and seven international organizations convened at Rome on September 9, 1952, to consider the drafting of a convention covering liability for third party damage caused in international airflight. Behind them were almost thirty years of international gatherings for this particular purpose. With no major ideological conflict separating the countries into two groups of powers, with a basic interest in securing some degree of protection for injuries to third persons caused in international air flight, this series of meetings had been unable to accomplish more than a ratified but not widely accepted Rome Convention of 1933 and the unratified Brussels Protocol of 1939. Beyond this were a series of draft conventions, the latest of which—the Mexico City draft—lay before the delegates.

Although this last effort was a far more complicated and sophisticated document than the earlier ones, it still did not provide a solution for the same problems which had plagued all the preceding meetings. Conflicting views on liability still existed.60 The Anglo-American nations inclined toward some linkage between negligence and liability. The other nations stood firmly by their position of absolute liability irrespective of the total absence of fault or negligence. Some progress had been made in setting up limits on sums recoverable under a system of absolute liability, which might possibly be acceptable as a compromise between the desire to protect third parties on the surface and also to protect the aircraft operators' financial well-being. Yet the United States continued to protest that these limits did not give sufficient financial protection to injured parties. While there was agreement that some means had to be provided to insure the operator would be able to fulfill his financial obligations, disagreements persisted as to the means to be adopted.

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60 According to a Summary of Systems of Liability in Force in Various States with Respect to Damage Caused by Aircraft, ICAO, Conference on Private International Air Law, Rome, September-October 1952, Minutes and Documents (1953) 11:27, the following systems of liability were then in effect:

<table>
<thead>
<tr>
<th>Absolute Liability</th>
<th>Fault or Presumption of Fault</th>
<th>Presumption of Fault</th>
<th>Fault</th>
<th>No Indication of System</th>
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<tr>
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<td>Dominican Republic</td>
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<td>Bolivia</td>
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<td></td>
<td>Germany</td>
<td>Italy</td>
<td>Union of South Africa</td>
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<td></td>
<td>Guatemala</td>
<td>Lebanon</td>
<td>United Kingdom</td>
</tr>
<tr>
<td>Ceylon</td>
<td></td>
<td>Hungary</td>
<td>Mexico</td>
<td>*United States</td>
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<tr>
<td>Chile</td>
<td></td>
<td>Iceland</td>
<td>New Zealand</td>
<td>Uruguay</td>
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<tr>
<td>Costa Rica</td>
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<td>Norway</td>
<td>U.S.S.R.</td>
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<tr>
<td>Czechoslovakia</td>
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<td>Rumania</td>
<td>Yugoslavia</td>
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<tr>
<td>Denmark</td>
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<td>Spain</td>
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<td>Argentina</td>
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<td>*United States</td>
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<td>Canada</td>
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<td>Venezuela</td>
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<tr>
<td>No Indication of System</td>
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<tr>
<td>Colombia</td>
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* Some, but not all, states of the United States.
And granted that all these conflicting problems could have been resolved, one of paramount importance still remained—that of the techniques to be employed in enforcing a judgment secured in another nation, a problem rendered doubly difficult because of the Anglo-American concepts relating to the enforceability of foreign judgments. The provision for a single forum—that all actions stemming out of a single incident must be brought in one court—created further complications for Canada and the United States.

The delegates did have available the statistical data accumulated by the Secretary-General of ICAO in 1951 and placed in their hands. Commenting on the incidence of aircraft accidents involving third parties on the surface as revealed by these figures, Wilberforce of the United Kingdom noted:

... for the sake of quite a small matter from an administrative point of view, that is to say, for the sake of perhaps two or three accidents in the course of one year, Governments were invited to set up a very substantial administrative apparatus. ... 61

Conscientiously, if unimaginatively, the delegates addressed themselves to the task of preparing a convention. After forty-three sessions a text was produced, based on the Mexico City draft, but incorporating certain changes.

The delegates devoted their attention to three major areas: (1) the imposition of liability with the setting out of limitations thereon, (2) the security to be provided for the operator's liability, and (3) provision for the control of procedure to insure execution of foreign judgments.

Despite objections from the United States, absolute liability of the aircraft operator was retained as a basic principle. 63 The limits of the financial liability imposed under this principle of absolute liability were raised to a maximum of 500,000 francs—$33,000—for each person killed or injured, with other limitations on the total amount of liability which could be incurred by aircraft of different weights in the event of a so-called "catastrophic accident." 64 These limits were in the nature of compromises; as such they were criticized as affording inadequate protection to those injured and at the same time imposing undue burdens on the operators. 65

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63 For the minutes of some of the pertinent discussion, see ICAO, Conference on Private International Air Law, Rome, September-October 1952, Minutes and Documents (1953) 1:19-20. In this connection see Drion, Limitation of Liabilities in International Air Law (1954) p. 118.

64 ICAO, Conference on Private International Air Law, Rome, September-October 1952, Minutes and Documents (1953) 1:168, Article 11.

65 Nunneley of the United States had noted:

The Conference was dealing both with a limit for death and a limit for personal injury. It could therefore happen that a person might survive the injury, but in such a mutilated state, that he was wholly incapable of earning his own living. In those circumstances, the amount per person to 300,000 francs or $20,000 was wholly unwarranted. If this proposal were maintained, the victim who had actually suffered damage to the extent of $50,000, for example, would be denied compensation...
Although in most instances the operator's absolute liability was tempered by the financial limitations thereon, the Mexico City draft placed unlimited liability upon the aircraft operator in certain situations, such as wilful misconduct by either the operator or his agents. Objection was raised, both to the imposition of liability under such circumstances and to the definition of the circumstances under which it would arise. Ambrosini of Italy argued for the use of the term "dol" rather than "wilful misconduct." Both these terms were objected to by Goodfellow, representing the International Union of Aviation Insurers, who felt they lacked sufficient precision to protect the operators. Eventually, the final text imposed unlimited liability in the event of "a deliberate act or omission of the operator, his servants or agents, done with intent to cause damage. . . ."

Methods of providing security for the operator's liability had been a problem at Rome in 1933; it was no less of a problem in 1952. The 1933 Convention had set out a system of compulsory insurance with provision for alternative methods—cash deposits or bank guarantees—but contained no provision as to the rights and obligations of insurers. The 1938 Brussels Protocol had fixed the rights of insurers and limited their defenses, but this protocol had never been ratified. Permissive insurance with alternative methods of security was retained in the Mexico City draft, but when the 1952 conference considered this problem again, the United States argued for granting the state overflown the right to satisfy itself on the insurer's financial responsibility. This approach was rejected, and the final draft provided that any contracting state had the power to require that "the operator of an aircraft registered in another Contracting State shall be insured. . . ." Insurance was to be accepted as satisfactory if effected by an insurer authorized to effect insurance under the laws of the state of the aircraft's registry or of the state where the insurer "has his residence or principal place of business." There was a further requirement that the financial responsibility of the insurer be "verified by either of those States." The state overflown was given the further power to "refuse to accept as satisfactory insurance effected by an insurer who is not . . . above $20,000. In these circumstances, in view of the interest in recovery by the victim, wherever that could be provided without imposing an undue and unwarranted burden on aviation, the Delegates would be well advised to consider carefully whether they wanted to deny the injured person recovery, when that recovery did not exceed the catastrophic limits which the Conference had adopted on the previous day. In his opinion, those limits were low enough; but, to go further and deny recovery to an injured person in circumstances where it was wholly within the ability of the operator to insure his risk and where such insurance would not impose an undue economic burden on him, would be an unwarrantable action by the Conference. Id., 1:142.

Id., 1:83.

Id., 1:87. Goodfellow stated in part:

[1] If aircraft operators were to know where they stood and what liabilities they ought to insure, it was essential to find some wording which would not enable a jury to award unlimited damages on a presumption of intention drawn by them from the facts. So long as a jury was in a position to do this there was always the risk that an operator might be held liable without limit on what was really simple negligence on the part of himself, or even of his servants or agents. He cited the case of an action brought under the Warsaw Convention in which the operator had been held liable without limits because one of his mechanics had committed an error in the adjustment of a sensitive altimeter.

Article 12.
authorized for that purpose in a Contracting State.”

This last provision was a tacit acknowledgment by the delegates that there was a real possibility certain governments might not accept the convention and that these governments were of the nations where the aviation insurance market was largely centered.

Basically, the solution reached gave each state ultimate control over the acceptance of insurance companies for aircraft flying over its territory. Substantially, the same principle was employed in solving the closely-related problem—verification of the financial responsibility of the insurer and by whom that verification should be made. The delegates were aware that a state might wish to question the financial responsibility, not only of an insurer but also of the guarantor under the alternative means of affording security—i.e., cash deposit, bank guarantee, guarantee by the state of registry coupled with an undertaking not to claim immunity from suit. The problem of effecting this verification, however, proved troublesome. The delegates rejected the French proposal that ICAO be given the responsibility of certifying insurers.

The proposal that a certificate of verification of the insurer’s financial responsibility be issued by a “state” was recognized as creating problems because of the federal structure of the United States. One United States delegate stated that since the several states in the Union regulated insurance, the authorities in these states would have to issue the required certificates. He wondered if these certificates would be acceptable under the terms of the convention. He stated that probably the only alternative to such acceptance would be for the United States to set up a federal system of regulation and he doubted if this was practical.

The Conference ultimately adopted certain provisions which attempted to satisfy the major United States objections. The final text provided that the phrase “appropriate authority in a State” would be considered to include “the appropriate authority the highest political subdivision thereof which regulates the conduct of business by the insurer.”

The question of whether or not the person suffering damage should be able to bring a direct action against the guarantor had been raised at Rome in 1933 and at Brussels in 1938. Proposals for the inclusion of such a right had been defeated. However, the Mexico City draft did provide for a limited right of direct action, and this was accepted by the 1952 delegates. It

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68 Article 15.
69 The minutes of the Conference, supra note 64, at 309-313, show an interchange of views illustrated by the following extracts:

Mr. Ambrosini (Italy) was convinced that it was possible to admit that insurance could be taken out with an insurer who was not a national of a State party to the Convention or of a State which was a member of ICAO. What was necessary to render the insurance valid was that it be in conformity with the provisions of the Convention. If it were in conformity with the provisions of the Convention, it should be considered as valid although taken out in any country.

Mr. Cooper (International Air Transport Association) asked if the legal problems which had been raised were more important than the effectiveness of the entire Convention. He agreed that the Convention would be a dead letter if it provided that only insurers domiciled in States parties to the Convention could be used for insurance purposes, particularly if two or three of the States that had been named should not accept the Convention.

70 Id. at 303-305.
71 Id. at 312-322.
72 Article 15(0).
was restricted to situations where the operator was bankrupt or where
there had been a change in operator or where a flight outside the limits
of insurance coverage was caused by "force majeure, assistance justified by
the circumstances, or an error in piloting, operation or navigation." Defenses available to the insurer were specified substantially the same
as those provided in the 1938 Brussels Protocol."

The final area of major controversy related to the rules of procedure
to be employed and the means to be utilized for the enforcement of foreign
judgments. The Mexico City draft, as noted earlier, had provided that
actions could be brought only before the courts of the place where the
damage occurred except where all persons having claims and all persons
from whom payment of compensation was claimed agreed to have the
action brought before the courts of another Contracting State." This
draft had also provided that the judgments of the single forum must be
recognized and enforced in other countries as well as in the country of
the single forum. These provisions were ultimately incorporated into the
final text of the Rome Convention of 1952, but only after serious objections
had been levelled." Sidenbladh of Sweden argued that as a general
principle any claimant should have the right to choose the court he pre-
ferred. Nadeau of Canada noted the division of powers in Canada between
the central and the provincial governments. Since compulsory recognition
and execution of judgments fell within the competency of the provincial
governments, "his government would be reluctant [to assume] . . . an
obligation to enforce the judgments of foreign courts, since this matter
was not within its competency." Colclaser of the United States echoed
Nadeau of Canada and observed that "she found it disturbing when States
which did not have a federal system of government failed to see the
difficulties that arose in a federal system of government."

Attempts to reach a compromise were futile. Iuul of Denmark warned
that the failure to reach a compromise showed "a most regrettable aban-
donment" of the heretofore prevailing spirit of conciliation. He pointed out
that the only important argument for the single forum was that it would
facilitate the maintaining of the limits of liability by preventing a series
of courts from handing down a variety of judgments based on the same
accident. He pointed out that the single forum provisions would be un-
acceptable to many states, the very states where "the greater part of inter-
national air transport was centralized. We would be foolish to produce an
elaborate treaty if it stood no chance of ratification." Booth of Canada

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"Article 16(5)(a).

"Article 16.

*Three other solutions, in addition to the single forum with its limited exceptions, were con-
sidered and rejected by the delegates. These were (1) multiple forums, with a provision for conso-
lidation of claims in the court of the place where the damage occurred, if the operator elected to de-
posit a security or establish that he had assets or insurance or other guarantee sufficient to satisfy the
claims within the jurisdiction of the court, (2) multiple forums, with similar provision for con-
solidation if the defendant submits to the jurisdiction of the court of the place where the damage
occurred, coupled with compulsory execution of judgments in certain cases, (3) an international
tribunal, to constitute ad hoc tribunals with jurisdiction to review the decisions of national courts
in certain circumstances. See ICAO, Conference on Private International Air Law, Rome, Septem-
ber-October 1952, Minutes and Documents (1953) II:49.

"Id., 1:178-183.

"Ibid.

"Id., 1:198.
supported Iuul of Denmark. He remarked that on the single forum provision the delegates had divided 14 to 8 and that:

The attitude of the majority seemed to indicate a lack of perspective and a willingness to sacrifice the opportunity of achieving a convention that would work, in order to make it a model of theoretical perfection.78

The delegates from Italy, France and Mexico answered these Danish and Canadian observations. They were sensitive to the implied criticism of lack of cooperation and obviously resented it. Suhumomkhon of Thailand then spoke and made it clear he read into the Canadian and Danish comments "a distrust of the courts of the Far East" and that he feared a resurrection of "extraterritoriality."78

While proposals to amend the single-forum provisions of Article 20 were rejected, the final draft of this paragraph did contain certain changes from the Mexico City draft.78 It provided as alternatives to the single forum the right of the parties to submit disputes to arbitration and to take "action before the courts of any other Contracting State" dependent upon "agreement between any one or more claimants and any one or more defendants" with the further proviso that "no such proceedings shall have the effect of prejudicing in any way the rights of persons who bring actions in the State where the damage occurred."

Another paragraph of Article 20, as finally adopted, dealt with the giving of notice to the defendant and other interested parties. It declared that the state "shall take all necessary measures . . ."but it did not contain any clause to make the provision effective.79 As noted above, the Mexico City draft had listed certain situations in which a court might

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78 Id., 1:199. In the course of his remarks, Booth of Canada asked the Conference to look for a moment at some of the practical aspects of this problem. The majority, representing less than 25% of the Member States of ICAO and a relatively small proportion of world aviation, had rejected one proposal and was about to reject another of a modest and reasonable character, which was supported by a minority . . . representing States responsible for far in excess of 10% and probably more than two-thirds of the international civil aviation in the world. . . . It must be obvious to everyone that, unless the States that were responsible for the greater portion of the flying in the world found the Convention acceptable, it could never become an effective convention in the interest of international civil aviation.

79 Id., 1:200.

80 Id., 1:481-485, 537.


No particular clause has been provided to make this provision effective. It is up to the Contracting States to see that notice is given to every party in accordance with the national procedural law. There is no doubt that the various national laws in this matter are different and the whole question is far from being well established. One can argue that the mere submission of a state to the Convention by ratification is worthless in this particular respect, unless there is introduced some arrangement for communication between the Contracting States. However, it must not be forgotten that there exists a so-called international standard in these matters for all civilized states; and if there is given, in accordance with this standard, firstly notice of any proceedings and secondly a fair and adequate opportunity for defense, it seems to us that no more need be required. It follows from the wording of Art. 20(2) and (1) (a), that this notification is not to be understood as formal legal notification; the defendant must get factual knowledge of the proceedings. Another point is this: if a state did not provide possibilities for adequate notification and adequate opportunity for defense, this attitude would be against justice and therefore contrary to "public policy." Moreover, it could provoke a dispute between the Contracting States themselves on the ground of a violation of the Convention.
refuse to issue execution. Only one situation—that where a court of a state might refuse execution because contrary to the public policy of such state—produced any considerable discussion.

While the areas discussed were those where major controversies appeared in the minutes, there were other, less significant, points of friction. Reading the minutes of the meetings which led up to the 1952 Conference and of the Conference itself, it appears that the delegates of some Western European countries were unable to appreciate the constitutional and procedural problems the Convention provisions posed for the United States and Canada. In addition, they appeared unwilling to comprehend the needs of aviation insurers. Not infrequently, countries representing a great proportion of the commercial aviation interests of the world found themselves an out-voted minority with the opposition arising from countries which were flown over which participated but meagerly in international air transportation. Not that Canada and the United States were conspicuous for their willingness to compromise, but the impression persists that they were prepared to compromise wherever they could within the framework of existing constitutional and legal systems. The United Kingdom and Scandinavian countries appear to have striven honestly to achieve workable compromises wherever possible, but were realistic enough to recognize for the most part that an unworkable or unacceptable compromise is worth little. The comments of the Asian delegates, phrased in flawless English, were irrelevant and showed a failure to understand the rationale behind the several positions expressed.

Representatives of different nations, lacking an overpowering sense of urgency, rarely can overcome divergent viewpoints. This sense of urgency was not present at Rome in 1952. At times the discussions seemed to have little sense of reality and be primarily concerned with theory not substance. Were the delegates unconcerned because of the small number of third-party surface injuries? Did they realize that, while they adhered tenaciously to prepared positions, there was little likelihood of ratification and so no need to compromise? Did they ever question if, assuming the need to deal with this particular international problem, they were pursuing the most practical approach?

Initially fifteen states signed the Convention on October 7, 1952. Ten more eventually signed. As of March 1, 1959, seven states had ratified

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84 Five such situations were listed. The first covered the possibility the judgment might have been given by default and the "defendant did not acquire knowledge of the proceedings in sufficient time to act upon it." The second clause covered another aspect of the same problem—the court was entitled to refuse execution if "the defendant was not given a fair and adequate opportunity to defend his interests." The third situation was where a judgment had already been given in the same cause of action. The fourth was where the judgment had been obtained by fraud. The fifth restricted the right to request execution to the person in whom the claim was vested. The sixth, and final, situation was where a judgment was considered to be "contrary to the public policy of the State in which that court [i.e., the court applied to for execution] is located."

85 There was considerable argument over the sixth "public policy" exception, with Miss Colclaser of the United States supporting it. See ICAO, Conference on Private International Air Law, Rome, September-October 1952, Minutes and Documents (1953) 1:242-244.

The Convention was signed on October 7, 1952, by plenipotentiaries of the following fifteen states:

- Argentina
- France
- Philippines
- Belgium
- Israel
- Portugal
- Brazil
- Italy
- Spain
- Denmark
- Liberia
- Switzerland
- Egypt
- Mexico
- Thailand

It was signed on October 16 by Luxembourg, on October 17 by the Netherlands, and on November
the Convention which went into effect on February 4, 1958 when five states—Canada, Egypt, Luxembourg, Pakistan, and Spain—had effected ratification. The United States refused to sign the Convention and set out the reasons for the refusal in the State Department Bulletin. Six reasons for this refusal were given: (1) the inclusion of the principle of absolute liability, (2) the low limits of total liability provided for any one accident, (3) the limitation of liability for any individual injury of $33,000, (4) the principle of absolute and unlimited liability in the absence of criminal intent, (5) the inability of a nation overflown to satisfy itself of the financial responsibility of the insurer of the overflying aircraft, and (6) the inability of the injured party to have any choice of the forum in which an action must be brought.

VII. SPECULATIONS AND SUGGESTIONS

The United States was not the only nation which had sent delegates to the 1952 conference yet failed to ratify the resulting convention. It was, however, the only nation to spell out officially the reasons for its refusal. Two questions in particular arise out of the listed reasons: (1) was there an insurmountable constitutional obstacle to United States ratification and (2) were the limits of liability actually unacceptable?

On the whole, the constitutional issues posed by the Convention were probably the major deterrent to United States ratification. While the limits of liability were unquestionably low in terms of jury awards in personal injury cases, they were not unreasonably low when looked at from the viewpoint of workmen's compensation. Moreover, the principle of absolute liability, irrespective of fault, had been accepted in certain extra-hazardous occupations and as the basis of workmen's compensation statutes. From the standpoint of United States aircraft operators, it was, of course, possible that the courts of other nations might find wilful negligence and impose unlimited liability, but as a practical matter the fact that the courts of the United States would have to execute the judgment—since the bulk of the aircraft operators' property lay in the United States—would protect the operators.

The liability questions, together with the security requirements for aircraft operators, might have been worked out, absent two other factors: the constitutional question and the relatively low incidence of surface injuries.

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88 U.S., Department of State Bulletin (1953) 28:221-222. For a criticism of the State Department's position, see Davis, Surface Damage by Foreign Aircraft: The United States and the New Rome Convention, 38 Cornell L.Q. 570-579 (1953). For a discussion of the constitutional aspects posed by the provisions relative to the execution of foreign judgments see Reese, The Status in this Country of Judgments Rendered Abroad, 30 Colum. L. Rev. 783-800 (1950). See also, Nussbaum, Jurisdiction and Foreign Judgments, 41 Colum. L. Rev. 221-238 (1941); Nadelmann, Non-Recognition of American Money Judgments Abroad and What To Do About It, 42 Iowa L. Rev. 236 (1957); Nadelmann, Reprisals Against American Judgments, 65 Harv. L. Rev. 1184-1191 (1952); Goodrich, Conflict of Laws (2d ed., 1951) pp. 600-642. For an account of the attempt to include provisions in multilateral treaties dealing with the execution of foreign judgments, see Smirnoff, L'Execution des Jugements des tribunaux étrangers en droit aérien, 19 (N.S.) Revue Générale de l'Air 17-21 (1959).
The Senate's power to advise and consent to the President's ratification of the 1952 Rome Convention was not in issue. It was, rather, the post-adoption problems aggravated by the then widespread agitation in the United States over the proposed Bricker Amendment. There were too many potential hornets' nests in the convention itself, to render it politically attractive or even innocuous.

Assuming for the moment approval by the Senate of the Convention, this would have immediately raised three distinct though related constitutional issues: (1) the absence of any adequate assurance that defendants would be notified of pending proceedings, (2) the "single forum" requirement which denied a plaintiff domiciled in the United States the right to bring an action in the United States and forced him to bring an action in the courts of the country where the accident occurred, and (3) the provision requiring the courts of one country to enforce judgments rendered by the courts of another.

Over and beyond the possibility that the convention would violate constitutional guarantees of due process, the requirement for the enforcement of foreign judgments ran contra (1) to accepted United States concepts concerning the status of foreign judgments in United States courts and (2) to the dual system of state and federal courts existing in the United States. Had the convention been adopted as a treaty, made the "law of the land," potential constitutional problems of substantial importance would have emerged. It is difficult to visualize how these provisions of the convention could have been reconciled with the American constitutional framework.\(^8\)

Laying aside the constitutional questions, another basic query arises: Is there a need for some kind of international agreement to deal with injuries to third parties arising from international air carriage? Despite the shortage of statistical data,\(^9\) what information is available confirms

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\(^8\) Cooper, Recognition of Foreign Judgments Under Article 15 of Proposed Revision of Rome Convention, 15 J. Air L. & Com. 212-220 (1950). Although Cooper's comments were directed toward the Taormina draft, they are highly relevant to the text actually adopted at Rome in 1952.

\(^9\) There is a marked shortage of available statistics. One of the best sources of information dealing with passenger fatalities in aircraft accidents of all kinds is Edward C. Sweeney's Report to the Civil Aeronautics Board of a Study of Proposed Aviation Liability Legislation (1941). Although restricted to 1934-1938, the years immediately preceding World War II, it showed that the safety record of United States air carriers improved dramatically throughout the decade ending in 1938. Comparisons with overseas airlines operations shows that United States aircraft had a substantially and consistently better safety record than did European aircraft. See in particular, id. at 27-38, Exhibits 9 through 29.

This same study showed a total of 380 accidents, only 27.1% of which involved some degree of injury to passengers, third parties, or property. Out of the total 380 accidents, 13.68% were accidents which would have fallen within the Rome Convention. Id. at Exhibit 7.

This study also shows that out of a total of 141 fatal casualties and 52 property casualties suffered in the period covered, the average fatal casualties had a voluntary settlement of $11,877. Forty-four serious injuries had an average settlement of $8,780. Seventy-five minor injuries had an average settlement of $300. There were three instances of satisfied judgments for plaintiffs, two for fatal claims with an average of $47,825, and one for a serious injury of $30,000. The property casualties showed an average settlement of $229.

The two major sources for post-World War II data, The Aircraft Accident Digest, issued annually by ICAO, and the Resume of United States Civil Air Carrier and General Aviation Aircraft Accidents, issued annually by the Civil Aeronautics Board, are not particularly informative. The ICAO publication sets out the total number of air accidents reported to ICAO. Concerned primarily with passenger fatalities, it does not say how many of the reported air accidents caused surface injuries or to what extent thereof. The CAB resume does contain one report of some value. Statistics were compiled for the 1946-1959 period showing the number of surface injuries to persons resulting from crashes of air carriers (excluding non-carrier aircraft) in the United
the following statement: there was no demonstrable pressing need for such an agreement. Probably the most useful conclusion to be derived from all available sources of information is that the absence of any clear-cut statistics concerning the number and extent of surface damage incidents points up the fact that the problem is not—from the over-all viewpoint—one of serious concern either to administrative agencies or to the airlines. Otherwise more attention would have been devoted to developing more definitive and complete statistics.

Recognizing that the total number of aircraft accidents causing surface damage have been relatively few, what about the rarely-occurring catastrophic accident which is devastating in its impact? Should provision be made to deal with such accident occurring in the course of international air carriage? The available statistics do not make this imperative, though it is possible more refined data would demonstrate such a need. However, assuming *arguendo* that such a need does exist, the pivotal question moves forward: Is a multilateral convention the only way to protect third parties suffering surface injuries?

Recalling the discussions held under CITEJA auspices, it is obvious that almost from the beginning, two opposing viewpoints emerged: a doctrinaire approach by certain European nations and a more pragmatic realistic approach of the Anglo-American countries. The question persists: Had some delegates or nations become so committed to the idea of an international convention in this area that they were unable to consider objectively (1) whether there were sufficient injuries of this kind to warrant special treatment and (2) if the facts indicated a need, was a convention or other form of international agreement the most practical solution. Granted the obvious appeal of a neatly drafted international agreement, such an agreement is worthless if not sufficiently acceptable to secure the ratifications required to bring it into operation.

To many people, the simplest solution to any problem is to “pass a law.” The lawyers in civil law countries is much happier when all his answers are set out in a code, and he does not have to handle a plethora of cases. A multilateral treaty which spells out all the details is superficially attractive, but sometimes a less sweeping method of dealing with a problem may produce more realistic and usable results.

To secure assurance of compensation to surface damage victims of international air carriage, three alternative methods to a multilateral convention are submitted for consideration.

**Bilateral agreements.** If it be conceded nations should make definite arrangements to assure compensation to surface victims of aircraft accidents occurring in international air flight, bilateral agreements offer a relatively simple method. Their use would permit adjustments to handle the admitted problem of differing levels of compensation prevailing in different countries. If the two contracting states had markedly different price levels and standards of living, a range of maximum and minimum payments could be set up, with domestic legislation on the part of the higher-cost-level country making up deficiencies in accordance with a

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States. There were 16 such accidents in this period, responsible for a total of 89 injuries to persons, with 32 classed as fatal, 26 as serious, and 31 as minor.

* For an informal account of the scene of the New York aircraft collision, four months after it occurred, with some suggestions as to the settlements made by the airlines, see *New York Times*, April 17, 1961, p. 31.
previously determined plan. The right to fly over another nation could be conditioned on the giving of adequate assurances to the overflown nation that surface damage would be covered up to specified limits, whether that assurance took the form of certification as to the insurer's responsibility or some other device. Procedural safeguards relative to the giving of due notice, providing adequate opportunity to the defendant to protect his interests, defining the courts in which actions would be brought—all these would be easier to work out in terms of only two nations than when twenty or more were trying to achieve similar ends.

Moreover, if such a bilateral agreement were considered as part of a package plan to permit flights of the aircraft of one nation over the territory of another, and vice versa, an overall agreement might be worked out containing a number of bilateral agreements. If such a grouping of bilateral agreements were worked out, there would, and should, be differences in the several agreements. Illustratively, country X might have an agreement with country Y and another with country Z, each of which would deal with the same problems but contain somewhat different provisions. Then too, a nation such as the United States which flies its aircraft over countries which do not fly their aircraft over the United States, might prefer a markedly different type of agreement with these states than with, for example, France or Great Britain.

Bilateral agreements would make it possible to take account of the financial status of the airlines of different nations and of their insurers, thus reducing the complexity attendant on certification of the insurer's financial responsibility.

Bilateral agreements would not solve the problem of the execution of foreign judgments, but they might make it somewhat more manageable. However, one major potential, though not unresolvable, difficulty with such bilateral agreements might arise through the lack of coverage as to nationals of countries other than the two contracting parties. For example, an agreement between France and the United States would amply cover individuals in France injured on the ground by a United States aircraft and vice versa. Such an agreement, however, would not cover a Belgian national standing on a French airport or riding along a French highway who was injured from the surface crash of an American aircraft, unless the agreement contained provisions giving such individuals certain causes of action because of their location at the time of the crash.

Domestic legislation. Pending adoption of any type of international agreement, the United States and/or any other interested countries might make legislative provision for individuals injured within their borders by non-domestic aircraft. This provision should be limited to providing certain minimal bases for recovery, analogous to workmen's compensation, but should be sufficient to care for the catastrophic type of air accident where a foreign operator does not have sufficient assets in the United States or carry sufficient insurance to cover such an accident. This device could provide a definite assurance for recovery. If prepared in anticipation of the event itself, it could be drafted carefully, absent the pressure which maimed or killed persons and extensive property destruction can always exert upon legislators. Whatever the bases for recovery, there should be limits upon the total amount recoverable and upon recovery by individuals for injury to their persons or property.
From the point of view of the United States, it might be an advantage to have a uniform system for the recovery of claims for ground-surface injury which would apply alike to United States citizens injured by United States aircraft as well as to United States citizens injured by foreign aircraft. From an internationally oriented viewpoint, this approach has definite limitations, for it does not move in the direction of international cooperation. It would, however, provide minimal standards of recovery for United States nationals and might secure uniform liability domestic legislation for aircraft.

A "Model Act" or "Model Convention." Should two or more states achieve even a limited agreement in the area of liability for surface damage, this would have the positive advantage of providing a desirable uniformity or treatment.

If a simple form of international convention could be devised under the sponsorship of ICAO, setting out a system of liability with specified limitations thereon but specifically providing for its implementation by bilateral or multilateral agreements, then countries or groups of countries at their discretion could adopt this basic agreement, with full freedom to implement the convention in one or more of the following ways:

1. Increase the minimum limits of liability.
2. Increase the total maximum which could be recovered in the case of a catastrophic accident.
3. Specify financial guarantees required for flight over another country.
4. Provide that the financing of the catastrophic type of accident was the function of the government. A possible device to achieve this would be to set up a deductible type system whereby the aircraft operators (and their insurers) would be responsible for the non-catastrophic accident and for certain portions of the claims arising out of catastrophic accidents, with the government making up the difference. In some nations, of course, this would simply be a division between two sides of the same pocketbook, for many airlines are government-owned.
5. Set up procedural devices for recovery which would take account of the particular constitutional or policy problems faced by the several nations.

A "model act" convention could provide certain basic minima. The additions, made at the discretion of the several states involved, would provide flexibility and also the opportunity to experiment with a variety of local adjustments. Regional groups of states might emerge. It is at least
possible that out of such experiences could eventually come a multilateral agreement, but the simpler arrangement might well prove fully satisfactory in practice.

VIII. IN CONCLUSION

Any effort to achieve order from disorder is, in itself, commendable. The recognition in the early 1920's that the growing air transportation industry had an obligation to the innocent person injured on the ground through no fault of his own fostered the adoption of a variety of systems of liability. The belief that aviation was an ultra-hazardous undertaking is understandable, and the imposition of liability without fault during its early years was the logical consequence of such a conviction. Yet viewpoints sometimes survive the situations which caused them to arise, and this may have been the case with the principle of absolute liability, however modified by the imposition of certain financial limitations.

It is always easier to criticize the efforts of the past than to build for the future. When, however, the representatives of sovereign states cannot agree on some means of dealing with a relatively noncontroversial problem—whatever disagreement there may have been over the mechanics of solving it—hope for international agreements on a broader scale dealing with essentially controversial problems does not seem bright. For example, if liability for surface damage could not be provided for by international agreement, is there much possibility of providing for liability in the area of peaceful uses of atomic energy, let alone the control of nuclear weapons?

Perhaps in the last analysis, no one in 1952 was honestly concerned with the problem of surface damage in international air flights. Matters seemed to be getting along without a treaty. The several governments may have sent delegates to the Rome Conference with the feeling that if a treaty were drafted in which they could concur conveniently, they would have no objection to signing it, but unless they were prepared to concur in it completely the status quo was acceptable if not ideal. Perhaps the drafters set for themselves too high goals of inclusiveness and uniformity. Or it may be that the allegation of a lack of conciliation and cooperation was valid. Or was it a general apathy toward the whole idea? The relatively sparse comment on the 1952 Rome Convention, the lack of analysis of the failure of the several governments to ratify it, the absence of any pressure for its adoption—these all indicate an apathy not only on the part of the governments but on the part of the governed. There may be need for international agreements or domestic legislation to deal with the subject, or it may be desirable (if not necessary) that there be such agreements or legislation. At least at present there seems little likelihood of the adoption of a conventional multilateral agreement which will secure the adherence of a majority or even a substantial number of the nations. 84

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84 As this article goes to press in December of 1962, there is evidence of an increased distaste in the United States for any international agreement which limits the liability of aircraft operators. This was brought out in the course of the Fifty-Sixth Annual Meeting of the American Society of International Law in the session held on April 27, 1962, dealing with international aviation policy. Proceedings of the American Society of International Law at its Fifty-Sixth Annual Meeting, 117-134 (1962). The particular questions considered dealt primarily with the limitations of liability under the Warsaw Convention, to which the United States is a signatory—i.e., $8,292—and to the proposed $16,584 under the Hague Protocol to the Warsaw Convention which is still before the Senate Foreign Affairs Committee. The objections to these limitations, as being very low compensation for a man's life or for permanently disabling injuries, are applicable.
equally to the dollar limitations under the Rome Convention of 1952, although it should be noted that the $33,000 maximum imposed by the Rome treaty was higher than either the Warsaw Convention or the Hague Protocol. For a discussion of the difficulties encountered by the United States delegation in attempting to raise the limits of liability at the Hague, see Calkins, *Hiking the Limits of Liability at the Hague*, id. 120 at 122-125.

Senator Homer Capehart’s Administrative Assistant, George Buschmann, informed the session that Senator Capehart had plans to call for a Senate probe to consider whether or not the United States should withdraw from the Warsaw Convention, particularly if the limitation of liability provisions could be separated from the procedural ones. However, the recent defeat of Senator Capehart may prevent such a probe from developing as fully as it might otherwise have done.

Seven months earlier on September 22, 1961, the Aviation Subcommittee of the Commerce Committee of the United States Senate, acting under S. Res. 167, 87th Cong., 1st Sess., had held preliminary hearings on International Air Transportation Problems. It is significant that this hearing, said to be the forerunner of an anticipated staff report, did not mention either the Warsaw or Rome Conventions or the broad question of the limitation of liability in international air transportation. The hearing however, did state that the President’s Special Task Force on National Aviation Goals had issued a “comprehensive report, dealing in large part, with the particular problems and issues in U. S. International Aviation Policy. . . .” *Hearings Before the Aviation Subcommittee of the Senate Committee on Commerce, 87th Cong., 1st Sess.*, at 19. However, the Monthly Index to Government Publications, 1961, contains no reference to such “comprehensive report.”