Compensable Damage in the Modernized Rome Convention

Presentation to GCAA/McGill Conference on Air Transport, Air & Space Law and Regulation

Jae Woon Lee
Korean Air Legal Affairs Dept.

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- Damage to property
- Punitive, exemplary or any non-compensatory damages
  (Not recoverable)

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Thank You!

Shukran gazilan!

Draft Modernized Rome Conventions

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1. The carrier is liable for damages sustained in case of death or bodily injury of a passenger upon condition only that the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

Compensable damage in the modernized Rome Convention: – in comparison with Article 17 in the Montreal Convention

by

Jae Woon Lee※

S Y N O P S I S

I. Overview

On 15 January 2009, US Airways flight 1549 made an emergency landing in the Hudson River adjacent to Manhattan, New York. It has been said that the fact that all 155 people aboard escaped safely is a miracle. Even though the National Transportation Safety Board is currently in the process of investigating the accident and the investigation is expected to take a considerable amount of time before a full analysis can be revealed, the captain of the flight, Chesley B. Sullenberger III, has been widely praised for his keen judgment and deft maneuvers in landing the crippled jetliner in the river.

※ LL.M(Institute of Air and Space Law, McGill University), Korean Air Legal Affairs Department

Other than the great admiration for Captain Sullenberger, the instinctive feeling among New Yorkers who experienced 9/11 while watching the Hudson miracle would have been fear. Despite the fact that air transportation is considered to be the safest transportation method[1], the fear that an airplane could crash onto my house, my building or the place where I stand, thereby possibly resulting in irreparable damage has existed since the birth of the airplane. This fear is especially strong for those who have lived near airports due to the fact that most aircraft crashes occur during take-off or landing.

In factuality, how to compensate for the damage -- physical damage and damage to property caused by an aircraft crash itself or falling parts of it -- was addressed from the early stage of air transportation. The First Conference in Private Air Law which met in Paris on 28 October 1926, expressed the opinion that a committee of experts should be organized to study the question on unification of the rules for liability of the operator of an aircraft for damage caused by aircraft to persons and property on the surface. And, after much effort by CITEJA, *the Convention for the Unification of Certain Rules to Damage Caused to Third Parties on the Surface*, generally referred to as the Rome Convention of 1933, was signed at the 3rd International Conference on Air Law in Rome on 29 May 1933.[2]

Following the Brussels Protocol of 1938, which was adopted at the 4th International Conference on Private Air Law held in Brussels, the Rome Convention of 1952 (*the Convention on Damage Caused by Foreign Aircraft to Third parties on the Surface*) was finally signed on 7 October 1952 as an outcome of a Diplomatic Conference in Rome from 9 September 1952 to 7 October 1952. Although it came into force in 1958, the Rome Convention of 1952 has been considered to be a lame convention especially for the lack of parties to the Convention[3] and the unrealistic amount for compensation.[4]

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[1] In 2008, the total number of fatalities from aviation accidents was 502. This resulted in a 56% improvement in the fatality rate from 0.23 fatalities per million passengers in 2007 to 0.13 per million passengers in 2008, see International Air Transportation Association (IATA), News Release, "More Accidents But Fewer Fatalities in 2008"(19 February 2009), online: http://www.iata.org/pressroom/pr/2009-02-19-01.htm

[2] Michael Milde, "Liability for damage caused by Aircraft on the Surface – Past and Current Efforts to Unity the Law" (2008), 57 Z.L.W. 534[Milde]

[3] As of March 7, 2009, 49 member States have ratified: there are not many states with strong international air transportation

[4] Professor Katsutoshi Fujita briefed reasons for delay in ratifying and joining the Convention:"(1) that limited amounts of damages stipulated in the Convention are too low, (2) that it is considered unnecessary to introduce international rules because domestic laws already provide for sufficient limited amounts of damages in terms of

More than 20 years after the Montreal Protocol of 1978 which aimed to modernize the amounts of limits of liability but failed to do so, the 31st session of the Legal Committee, held in Montreal between 28 August 2000 and 8 September 2000, accepted the proposal of Swedish Delegation: *"Consideration of the Modernization of the Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface"* in the Legal Committee's General Work Program. Although the Council approved the subject and the 33rd session of the Assembly confirmed it, the subject was not a priority.[5] However, just before the 33rd Session of the Assembly took place from 25 September 2001 to 5 October 2001, the most disastrous event in aviation history had occurred on 11 September 2001, and the subject became the one of the top priorities.

The events of 9/11[6] resulted in considerable changes not only in aviation security issues, as the 33rd ICAO General Assembly passed several resolutions strongly condemning the use of aircraft as weapons of mass destruction[7], but also in aviation insurance issues. As of 23 September 2001, the major aviation insurers cried out for the "seven-day clause," and cancelled all war and terrorism clauses from their aviation insurance policies. Assembly Resolution A33-20 ("Coordinated approach to providing assistance in the field of aviation war risk insurance") noted that insurance coverage for airline operators in the area of war risk insurance was no longer fully available on the global insurance markets and urged Contracting States to work together to develop a more enduring and coordinated approach in the field of aviation war risk insurance. Furthermore, Assembly

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rights of third parties on the surface, (3) that the Convention does not provide for such matters as noise, sonic boom, and nuclear disasters, and (4) that there is an objection against the single jurisdiction.", see Katsutoshi Fujita, "Some Considerations for the Modernization of the Rome Convention, in case of Unlawful Interference" (2008) 23 Korean J. Air & Sp. L. 59.

[5] The Council approved the subject as priority Number 4. see more Milde, *supra* note 2 at 545

[6] "At the end of scale are hijackings which, prior to 9/11, had not given rise to major Third Party claims; all of which had been dealt with by operators, existing insurers and claims machinery without anyone suggesting that a New Convention might be needed. At the other hand of the scale is 9/11, which revealed what can happen when civil aircraft are transformed into weapons." See Harold Caplan, "Liability for Third Party Damage on the Ground" (2008) 33:1 Air & Space L 195

[7] ICAO ASSEMBLY RES. A33-1, A33-2, A33-3 AND A33-4, Declaration on Misuse of Civil Aircraft as Weapons of Destruction and Other Terrorist Acts Involving Civil Actions. It was also recommended that Annex 17 be applied to domestic air transportation, the first time that ICAO had strayed into the domestic area- See Paul Stephen Dempsey, *Public International Air Law* (Montreal: Institute and Center for Research in Air & Space Law, McGill University, 2008) at 262-263.

A33-20 directed the Council to urgently establish a Special Group.[8]

Special Working Group on Aviation War Risk Insurance (SGWI) was established by the A33-20, and its work and developments, followed by those of Secretariat Study Group (SSG), the 32nd Session of the Legal Committee and its Special Group, resulted in two draft texts: one dealing with unlawful interference, and the other with general risks. The subject: "Compensation for damage caused by aircraft to third parties arising from acts of unlawful interference or from general risks", which had been in the Work Program of the Legal Committee since 2000 and endlessly discussed for 8 years after 9/11, was finally passed to the 33rd Session of the Legal Committee.[9]

II. Legal Committee 33rd Session

The 33rd Session of the International Civil Aviation Organization Legal Committee was held in Montreal from 21 April 2008 to 2 May 2008. The Legal Committee, attended by 48 ICAO Member States and 8 Observers[10], produced two draft Conventions (Draft Convention on Compensation for Damage to Third Parties, resulting from Acts of Unlawful Interference Involving Aircraft, hereinafter *Unlawful Convention Draft*; and Draft Convention on Compensation for Damage Caused by Aircraft to Third Parties, hereinafter *General Risk Convention Draft*). There are a number of points that should be addressed and analyzed in both Conventions, but set forth below are just the key characteristics of the Conventions:

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[8] Coordinated approach in providing assistance in the field of aviation war risk insurance, A33-20, ICAO, 33d Sess.,(2001) 86. online(http://www.icao.int/icao/en/assembl/a33/resolutions_a33.pdf)

[9] There are refutations as to why 9/11 triggered the modernization of Rome Convention. see Milde, *supra* note 2 at 547-548 "it must be noted that this approach was fundamentally flawed from the very beginning– the terrorist acts were not aimed at the airlines but against the State or States and the airlines were just victims who should not be burdened by liability for events beyond their control. The limitation of aviation industry liability and the protection of the victims were incompatible aims and the essence of the challenge was to seek methods of compensating the victims adequately without imposing unsubstantiated liability on the airlines."; see Harold Caplan, "Modernization of the 1952 Rome Convention and Protocol" (2006) 31:1 Air & Space L 27 "The air transport industry itself ranks as a victim, together with the human victims, in the event of an attack such as 9/11. This was explicitly recognized in the form and content of the emergency retrospective legislation enacted by Congress 22 September 2001."

[10] IATA, the Aviation Working Group(AWG), the International Union of Aerospace Insurers (IUAI), Airports Council International(ACI), London Market Brokers Committee(LMBC), EUROCONTROL, the European Commission, and the Latin American Air & Space Law Association(ALADA)

A. Scope

Article 2 of both Convention drafts provides the applicable scope of these Conventions. Unlawful Convention Draft and General Risk Convention Draft would affect an air operator whose aircraft causes damage in the territory of a signatory State, regardless of whether or not the operator's country of registration is a party to the Conventions. Moreover, as far as the Supplementary Compensation Mechanism is concerned, Unlawful Convention could be applicable to a State non-party in a situation where an air operator, which has its principle place of business or permanent residence in a State party, is liable for damage occurring in the State non- party.

This is a critical aspect of the two drafts because the modernized Rome Convention would quickly and widely influence international air transportation once effectuated. Ratification of a treaty, from a member state's perspective, is a tool for deciding the time of adoption for the treaty, which generally requires sufficient study and discussion on the content with the relevant authorities. In other words, although there is a treaty already in effect, a member state's citizens and companies are not governed by the treaty until a member state ratifies it. However, if the two drafts are adopted in the Diplomatic Conference without changes in the scope provision and finally come into effect, with ratification by a certain State where most international air carriers operate, such as United States or EU, most international airlines would be subject to the modernized Rome Convention irrespective of their own government's ratification.

B. Limit of Liability

Whilst the Unlawful Convention Draft basically provides a limited liability regime, an operator's liability in the General Risk Convention Draft will be unlimited unless the operator proves that the damage was not resulted from its servants or agents, or the damage was solely resulted from another person.[11] In principle, the liability of the

[11] Article 4 – Limit of the Operator's Liability.
(2) The limits in paragraph 1 of this Article shall only apply if the operator proves that the damage:
a) was not due to its negligence or other wrongful act or omission or that of its servants or agents; or
b) was solely due to the negligence or other wrongful act or omission of another person.

operator should not exceed 700,000,000 Special Drawing Rights (SDR) for each aircraft and event in the two drafts. There are ten categories of aircraft based on the aircraft's maximum mass (MTOW: Maximum Take-Off Weight); from 500 kilograms to 500,000 kilograms. As its maximum mass becomes larger, so does the amount of compensation[12]

Dr. Michael Milde points out that the fact that the extent of liability depends on the weight of the aircraft is a dubious basis since a very light aircraft could cause very extensive damage if it crashes on a sensitive target on the surface; similarly, a very heavy aircraft may cause insignificant damage if it crashes in an open field.[13] In addition, it should be noted that MTOW of most international jetliners is between 70,000 and 400,000 kilograms; therefore 300,000,000 SDR (from 50,000 to 200,000 kilograms) and 500,000,000 SDR(from 200,000 to 500,000kilograms) would be the cap, respectively, in most international air transportation[14], with the exception of the A380 which weighs more than 500,000 kilograms and which has a cap of 700,000,000 SDR in the draft Conventions.

C. SCM (Supplementary Compensation Mechanism)

The Supplementary Compensation Mechanism[15] is an organization established by the Unlawful Convention Draft. It is made up of Conference Parties, consisting of the State Parties, and a Secretariat, headed by a Director.[16] The Supplementary Compensation shall only be paid to the extent that the total amount of damages exceeds the limit of an operator's liability, and the maximum amount of compensation available from the Supplementary Compensation Mechanism shall be 3,000,000,000 SDR for each event.[17] It is important to note that the Supplementary Compensation Mechanism does not exist in the General Risk Convention Draft.

From air carriers' standpoint, the most critical provision in the Chapter III (The Supplementary Compensation Mechanism) is Article 12 (Contributions to the

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[12] Article 4 (1), a) to j)
[13] Milde, *supra* note 2 at 537-538
[14] MTOW of aircrafts that Korean Air operates is as follows(kilograms): B737(70,000-80,000), A300-600(150,000-170,000), A330(210,000-230,000), B777(280,000-300,000), B747(380,000-415,000)
[15] The name of the Mechanism has not yet been decided, ICAO Doc9907-LC/193 Attachment D
[16] Article 8
[17] Article 18

Supplementary Compensation Mechanism). It determines 1) that the contributions shall be the mandatory amounts collected in respect of each passenger and each [tonne][18] of cargo departing on an international commercial flight from an airport in a State Party and 2) that the operator shall collect these amounts and remit them to the Supplementary Compensation Mechanism. Along with the newly implemented liability regime, the collecting process would become an additional burden to airlines since they would be blamed for the increase in total price that passengers and shippers end up paying, for the same reason that airlines were blamed for the increase of ticket and air waybill price due to the surge of jet fuel price in 2008.

D. Additional Compensation (Breakability)

The Unlawful Convention Draft would allow for unlimited liability on the operator if the person claiming compensation proved that the operator's senior management contributed to the event by an act or omission done with intent or recklessly and with knowledge that damage would probably result and which a) falls within the operator's regulatory responsibilities and actual control and b) is the primary cause of the event other than the actual act of unlawful interference.[19] However, the operator could make an absolute defense to an unlimited liability claim if it proved that it had a system for compliance with applicable regulatory requirements on security which had been applied to the event in question[20]. Nonetheless, the definition of "compliance with applicable regulatory requirements" in Article 23 should be specified and tightened so operators can ensure how to avoid potentially additional compensation.

III. Compensable damage in the draft modernized Rome Conventions

One of the distinct features in the original Rome Convention of 1952 is that it defined death, damage to property and "personal injury" as compensable damage.[21] This feature stands in contrast to the fact that neither the Warsaw Convention of 1929 and its instruments nor the Montreal Convention of 1999 referred to "personal injury": they

[18] Thus far, there is no common understanding with regard to the appropriate method for setting the cargo contributions. Airline industry has reviewed the issue of whether or not tonne is a proper measure for the contribution in the 30th IATA Cargo Committee Meeting in September 2008.
[19] Article 23 (Additional Compensation) 2
[20] Article 23 (Additional Compensation) 3
[21] Article 11 and Article 14 (The Rome Convention of 1952)

only referred to "bodily injury." For the first and only time, "personal injury" was substituted for "bodily injury" in the Guatemala City Protocol of 1971; however, the Guatemala City Protocol was never in force.[22] It is generally accepted that personal injury is a wider term and would encompass "mental" trauma, post-traumatic shock syndrome, etc.[23]

Surprisingly, the draft modernized Rome Convention clearly includes mental injury as compensable damage:

Article 3 – Liability of the Operator
3. *Damages due to death, bodily injury and mental injury shall be compensable. Damages due to mental injury shall be compensable only if caused a recognizable psychiatric illness resulting either from bodily injury or from direct exposure to the likelihood of imminent death or bodily injury.*

If the draft modernized Rome Conventions were adopted without any revisions made to the wording of Article 3, Article 3 would be a very controversial provision for the following reasons: a balancing issue and an ambiguity issue.

The Montreal Convention of 1999 (Convention for the Unification of Certain Rules for International Carriage by Air) made no explicit reference to mental injury, even though the proposal that the Montreal Convention 1999 had to expressly provide for compensation in case of mental injury was exhaustively discussed in the Montreal Conference[24]. Thus, to put it bluntly, if the draft modernized Rome Conventions were adopted, airlines should compensate damages due to the mental injury of the third parties although they would not have to compensate damages due to the mental injury of their passengers in cabin.

The principle that third party victim protection ought to be at least as good as under the Montreal Convention of 1999 was established at the outset of the Special Group's meetings in 2005[25] and the same view has been expressed in the 33rd Session of the

[22] Only 7 member States ratified.
[23] Milde, *supra* note 2 at 538
[24] ICAO, International Conference on Air Law – Vol.1 Minutes, ICAO Doc.9775-DC/2(1999).
[25] ICAO, Legal Committee 33rd Session Working Paper, LC/33-WP/3-1(2008) 2.2

Legal Committee[26]. Nonetheless, from the perspective of airlines and passengers, it would be very difficult to accept that the compensation regime is more favorable to third party victims who do not have a contractual relationship with airlines than to passengers who obviously do have a contractual relationship as far as mental injury is concerned.

Equally importantly, the current wording of compensable mental injury in Article 3 can also be interpreted ambiguously. Compensable mental injury in Article 3 is divided into two types: "*a recognizable psychiatric illness resulting from bodily injury"* and "*a recognizable psychiatric illness resulting from direct exposure to the likelihood of imminent death or bodily injury"*.

There remains little doubt in the interpretation of the first type. "Bodily injury" is not a confusing term and a question of whether or not "recognizable psychiatric illness" exists can be proved in court by medical diagnosis. In fact, the said rule is a generally accepted standard when most common law courts, including those in the United States, interpret compensable mental injury in the Montreal Convention of 1999. In other words, the courts do not allow recovery for purely mental injuries unaccompanied by bodily injury; however, they generally accept that mental injury could be compensable if that injury results directly from the bodily injury[27].

However, the second type seems to be unclear so that it could cause numerous lawsuits aiming to define the compensable mental injury, if not changed. The lack of precision in the wording of the article was already discussed at the 33rd Legal Committee. Since some delegations in the 33rd Legal Committee expressed their concern of the possibility that a television viewer of the event could be compensated under Article 3 of the first draft prepared by the Council Special Group[28], and compensation for the mental injury of the viewer could be too broad if covered, it was agreed to refer the matter to the

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[26] ICAO, Legal Committee 33rd Session Report, Doc 9907-LC/193(2008) Agenda Item 3, 3:42

[27] Jae Woon Lee, *The concepts of "Accident" and "Bodily injury" in private international air law*,(LL.M McGill University Institute of Air and Space Law 2005) at 48-69 [unpublished]

[28] Article 3-Liability of the Operator

5. Damages due to death, bodily injury and damage to property shall be compensable. Damages due to mental injury shall be compensable if caused by a recognisable psychiatric illness resulting either from bodily injury or from a reasonable fear of exposure to death or bodily injury.

Drafting Committee to consider the language "… or from direct exposure…"; in order to explicitly exclude persons watching on television from the subject of compensation.[29]

The second point of ambiguity comes from the use of the word "likelihood" in Article 3. "Likelihood" means probability or something less than reasonably certain.[30] Consequently, it is vital to determine what is "the *likelihood of imminent death or bodily injury"*.

If the Hudson river miracle were taken as an example, with some hypotheses, namely 1) the draft modernized Rome Conventions were adopted and in effect when the emergency landing happened, 2) the United States had ratified the modernized Rome Convention, and 3) it was an international flight operated by a non-US air carrier, it would be feasible that people who saw the emergency landing in the river side could bring a suit against the foreign air carrier arguing that they suffered from recognizable psychiatric illness resulting from direct exposure to the likelihood of imminent death or bodily injury.

The above is not an unlikely scenario since pilots of aircraft in distress would try their best to make an emergency landing in a remote area, like in a field or on a mountain, in order to minimize damage on the surface. And, if there were a passerby who saw an emergency landing, despite there not having been any physically injured passenger after the emergency landing, the passerby would be able to easily bring a suit based on the argument: "the *likelihood of imminent death or bodily injury"*.

Certainly, the above situation is not consistent with the intention of the drafters and the Legal Committee. However, the current wording of compensable mental injury in Article 3 is ambiguous enough to give rise to a number of trials claiming compensation for, arguably, mental injury. It must be emphasized that we have witnessed numerous lawsuits worldwide involving Article 17 in the Warsaw Convention of 1929 worldwide due to its ambiguity which will be discussed in Chapter IV.

As for the other damage, damage to property shall be compensable[31]; environmental damage shall be compensable, insofar as such compensation is provided for under the

[29] ICAO, Legal Committee 33rd Session Report, Doc 9907-LC/193(2008) Agenda Item 3, 3:37-3:43
[30] *Black's Law Dictionary*, 5th ed.
[31] Article 3.4

law of the state in the territory of which the damage occurred.[32] However, damages caused by nuclear incidents fall outside the scope of this Convention[33] and punitive, exemplary or any other non-compensatory damages shall not be recoverable.[34]

IV. **Compensable damage in the Montreal Convention of 1999**

There is no doubt that the Montreal Diplomatic Conference 1999 was a success since it adopted a new Convention for the Unification of Certain Rules for International Carriage by Air. The key word of the Montreal Convention of 1999 is 'uniformity'. The Montreal Convention modernized the Warsaw Convention and its instruments and became a new single convention: as the number of states that ratified the Montreal Convention of 1999 has increased[35], the Montreal Convention of 1999 has come to rule on complexity caused by several patchworks from both inside[36] and outside[37] of ICAO.

However, it is regrettable that the Montreal Convention missed opportunity[38] to clarify Article 17 in the Warsaw Convention 1929[39], the core provision to all liability for passenger injury and death. Article 17 has been the most litigated Article of the Warsaw Convention mainly because the Warsaw Convention did not provide clear definitions of "accident" and "bodily injury" in it. In fact, the United States federal courts have addressed the Warsaw Convention in more than 1,000 cases[40], of which more than 100 cases have referred to the question of what constitutes an aviation "accident" under

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[32] Article 3.5
"There is no attempt in the draft at a definition of the "environmental damage" and it is thus left to the *lex fori* of the state where the damage occurred" see Milde, *supra* note 2 at 550.
[33] Article 3.6
[34] Article 3.7
[35] As of March 13, 2009, 87 member states ratified.
[36] The Hague Protocol(1955), The Guadalajara Convention(1961), The Guatemala City Protocol(1971), The Montreal Protocols(1975)
[37] The Montreal Agreement(1966), The Japanese Initiative(1992), The IATA Inter carrier Agreements(1995-1996), European Union Regulation 2027/97
[38] Paul Steven Dempsey & Michael Milde, *International Air Carrier Liability: The Montreal Convention of 1999* (Montreal: McGill University Institute of Air and Space Law, 2005) at 120. [Dempsey & Milde]
[39] Article 17
The carrier is liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.
[40] Dempsey & Milde, *supra* note 38 at 151.

Article 17 of the Warsaw Convention.[41] With respect to "bodily injury" in Article 17, while the concept of mental injury has matured significantly in various fields compared to 1929 when Warsaw Convention was established, there was practically no change concerning compensable damage in Article 17. As a consequence, states that culturally have strong protection mechanisms for mental injury in their domestic law have tried to stretch the meaning of "bodily injury" in Article 17 by interpreting it as flexibly as they could.[42]

The Montreal Diplomatic Conference 1999 witnessed strong and lengthy debates regarding the amendment of Article 17. At the third meeting of the Commission of Whole on 12 May 1999, the proposal, presented by Norway and Sweden, that the words "or mental injury" be introduced in the first sentence of Article 16, paragraph 1[43] in the draft convention was fully discussed. While a majority of delegates who made their comments in the meetings supported the proposal, IUAI (International Union of Aviation Insurers) and IATA (International Air Transport Association) showed their serious concern of escalated claims and expensive protracted litigations if mental injury were included in the Convention.[44]

At the 8th meeting of the Commission of the Whole on 17 May 1999, the president announced the creation and composition of the "Friends of the Chairman" Group – an informal advisory body not foreseen by the Rules of Procedure. "Mental injury" was one of the key topics in the Group discussion and the Group agreed that compensable mental injury should be inserted into the Convention. [45] As a result, the definition of compensable injuries became specific in the "Draft Consensus Package" drawn up by the "Friends of the Chairman" Group.[46]

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[41] *Ibid.* at 136.
[42] See Jae Woon Lee, *supra* note 27 Chapter V
[43] The text would then read as follows:
"The carrier is liable for damage sustained in the case of death or bodily injury or mental injury of a passenger upon condition only that the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking. However, the carrier is not liable to the extent that the death or injury resulted from the state of health of the passenger." See ICAO, Doc 9775-DC/2(1999) at 67
[44] ICAO, International Conference on Air Law-Vol.1 Minutes, ICAO Doc 9775-DC/2(1999) at 67-74
[45] *Ibid.* at 110-122
[46] ICAO, Draft Consensus Package DCW-FCG No.1 Revision 2 24/5/99
Article 16 – Death and Injury of Passenger

However, on the day the Chairman presented the "Consensus Package"[47], he suddenly changed the article involving mental injury by saying that the jurisprudence on the issue of mental injury is still developing.[48] After all, the Montreal Convention did not succeed in changing Article 17:

Article 17 in the Montreal Convention – Death and Injury of Passenger
1. The carrier is liable for damages sustained in case of death or bodily injury of a passenger upon condition only that the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

In connection with the compensable damage in the modernized Rome Convention, there are two distinct aspects in the Montreal Convention 1999 that need to be emphasized.

First of all, the Montreal Convention of 1999 ended up silent on mental injury while stipulating that death and bodily injury are compensable damage. Since it is hard to say that the compensation regime to passenger and that to third party victims are completely separate liabilities-both are what air carriers would be held accountable by an event resulting in damage- it will be crucial to seek a balance or priority between the scope of passengers' recovery and that of the third party.

Secondly, what the Montreal Conference, including "Friends of the Chairman" Group, has compromised was that there were circumstances where mental injury which was associated with or directly resulting from bodily injury would indeed be recoverable. It is *de facto* a standard rule to consider compensable damage in most developed countries when interpreting bodily injury in Article 17. Therefore, it would be seriously

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2. In this Article the term 'injury', means bodily injury, or mental injury associated with bodily injury, or other mental injury which so seriously and adversely affects the health of the passenger that his or her ability to sustain the day-to-day activities of an ordinary person is significantly impaired.

[47] ICAO, Consensus Package, 1999, DCW Doc.No.50.

[48] "All had recognized that under the concept of bodily injury there were circumstances in which mental injury which was associated with bodily injury would indeed be recoverable and damages paid therefore. The Group had equally recognized that the jurisprudence in this area was still developing." See ICAO, *International Conference on Air Law -Vol.1 Minutes*, ICAO Doc.9775-DC/2 (1999) at 201

unbalanced if the modernized Rome Convention admits solely mental injury, which is not associated with bodily injury, as compensable damage.

As for the other damage, the Montreal Convention of 1999 made it clear that punitive, exemplary of any other non-compensatory damages shall not be recoverable.[49]

V. Conclusion

Between 20 April 2009 and 2 May 2009, a Diplomatic Conference in Montreal will attempt to reach a post-Rome Convention to modernize the international convention relating to damage caused to third parties on the surface. By its own nature, the result of the Diplomatic Conference is unpredictable. The delegates could adopt the two draft Conventions without major changes; they could adopt them after substantial changes in the draft Conventions; or they could not adopt the draft Conventions. Even if they may well fail to modernize the post-Rome Convention, however, compensation for damage to third parties on the surface and related issues will continue to be examined in years to come.

A treaty[50] is decided by a way of compromise among actors in international law, namely states and international organizations, and becomes an agreement among the actors. Hence, maintaining a balance is fundamentally important when implementing a treaty. If a treaty is revolutionary, despite its perfectly good intention, many countries (mainly developing countries) will not be able to follow. On the contrary, if a treaty is retrogressive, it will be ignored by many countries (mainly developed countries).[51]

The other important requirement of a treaty is clarity. International customary law and the Vienna Convention of 1969 provide the rules with regard to interpreting treaties: treaties should be interpreted on a textual basis to the maximum possible degree and with the teleological approach as a supplement. Since each state has different jurisprudence and interprets a treaty by its domestic court, wording in a treaty must not leave ambiguity in order to eliminate avoidable inconsistencies and to minimize unavoidable ones.

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[49] The Montreal Convention Article 29 (Basis of Claims)
[50] A treaty may also be called as: (international) agreement, protocol, covenant, convention.
[51] See Jae Woon Lee, *supra* note 27 at 45

The upcoming Diplomatic Conference in Montreal should not neglect the two values: balance and clarity. Prior to expressly admitting mental injury in compensation regime for damages to third parties, ICAO member states need to solve the issue of whether or not mental injury for passengers should be compensable damage, an issue which the Montreal Convention of 1999 regrettably kept silent about. It would be much more logical to establish a specific rule of compensation for passengers' mental injury first than to discuss the rule of compensation for third party's mental injury at this stage. If the Diplomatic Conference reaches a conclusion that compensation for third party's mental injury should be included in the modernized Rome Convention, it must exclude the compensation arising solely out of mental injury which is not associated with bodily injury, and eliminate ambiguity in interpreting compensable mental injury.

The provision to an air carrier's liability for third party, Article 3 in the current draft, should not be another Article 17 in the Warsaw Convention of 1929 and the Montreal Convention of 1999, a notoriously litigated Article in private international air law. Therefore, the Diplomatic Conference should try to make its best effort to specify the details of the conditions for compensable damage.