



INTERNATIONAL CIVIL AVIATION ORGANIZATION

A35-WP/277

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**ASSEMBLY — 35TH SESSION**

**LEGAL COMMISSION**

**DRAFT TEXT FOR THE REPORT  
ON  
AGENDA ITEMS 34, 35 and 37**

The attached material on Agenda Items 34, 35 and 37 is submitted for consideration by the Legal Commission.

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**Agenda Item 34: Progress report on the modernization of the Rome Convention of 1952**

34:1 This item was considered on the basis of WP/18 presented by the Council, WP/135 presented by Turkey, WP/266 presented by Greece and WP/118 presented by the Latin American Association of Aeronautical and Space Law (ALADA).

34:2 WP/18 provided for the information of the Assembly a progress report since its 33rd Session on the work carried out on the modernization of the Rome Convention of 1952. It stated that a study on the subject by the Secretariat was considered by the Council which, on 5 June 2002, established a Secretariat Study Group to assist the Secretariat in the future work. The Secretariat, with the assistance of the Study Group, developed a Draft Convention on Damage Caused by Foreign Aircraft to Third Parties. This draft Convention was considered by the 32nd Session of the Legal Committee. Following its deliberations, the Committee concluded that further work was needed in some areas. On 31 May 2004, the Council decided to establish a Special Group on the Modernization of the Rome Convention to advance the work.

34:3 WP/135 stated that, during the 32nd Session of the Legal Committee, no consensus was reached on key areas of the draft Convention, in particular, on the scope of the air carriers' liability and the insurability of risks. WP/135 outlined Turkey's position on a number of issues dealt with in the draft Convention and proposed that due to the absence of consensus on certain critical issues, the Secretariat might deem it necessary to issue a questionnaire consisting of different Convention options, and inviting States to provide their views, particularly on the ratifiability of a new Convention within a certain set of parameters. The replies to the questionnaire would provide the Secretariat with a better database on the ratifiability of a new Convention and, if necessary, to develop new draft text.

34:4 Greece presented WP/226 which stated that, in Article 1 (h) of the draft Convention, reference should also be made to Article 101 of the *United Nations Convention on the Law of the Sea* (1982).

34:5 In WP/118, ALADA presented for the information of the Assembly its position on the on-going work regarding the modernization of the Rome Convention of 1952, especially as regards the liability regime found in the draft Convention and the issue of insurance.

34:6 Several delegations expressed support for the ongoing process of modernization of the Rome Convention of 1952 and confidence that the Special Group established by the Council would be able to resolve the outstanding issues. These delegations also stressed the need for urgency in completing the task.

34:7 One delegation was of the view that it was important to encourage insurance companies to review their position on war risk coverage taking into consideration the work being done by ICAO and the aviation community on issues of liability and security; such review by the companies would facilitate the task of modernization of the Rome Convention.

34:8 Another delegation expressed a desire for a broadening of the work to take into account parties other than airlines who were suffering from the difficult insurance situation.

34:9 One delegation stressed that it was essential to have a global instrument covering liability for both the safety-related risk as well as that arising from acts of unlawful interference, even if these would give rise to different problems and may require different solutions; it was essential to have a comprehensive regime when dealing with compensation to third parties caused by aircraft in flight. This delegation stated that the result of the work being carried out must be just, efficient and realistic: there must be sufficient compensation for victims, but the needs of airlines should also be taken into account so as not to impede international operations, and the system of compensation must not be divorced from market realities.

34:10 One delegation opposed the proposal in WP/266; it believed that the reference to Article 101 of the *United Nations Convention on the Law of the Sea* (1982) was not necessary and that such a reference may deter States not party to that Convention from ratifying the future ICAO instrument.

34:11 Another delegation stated that the new Convention should establish a balance between the interests of the airlines and those of third parties, and that domestic flights should be taken into consideration.

34:12 It was the view of one observer that while the revision of the Rome Convention had gained momentum because of the difficulties facing airlines, other aviation-related parties also had problems in obtaining insurance cover for third-party liability. The Rome revision was part of a long-term solution to these problems. It urged ICAO to advance the work with speed.

34:13 In summarizing the discussion on this Agenda Item, the Chairman stated that comments had been made on several specific points. There was strong support for the process of modernizing the Rome Convention, and several delegations had emphasized the need for urgency in this regard. Also, several delegations had expressed confidence that the Special Group established by the Council would arrive at a quick and satisfactory resolution of the outstanding issues.

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**Agenda Item 35: Assistance in the field of aviation war risk insurance**

35:1 This agenda item was considered on the basis of WP/17 presented by the Council, WP/126 presented by the International Union of Aviation Insurers (IUAI), WP/87 presented by the European Community (EC), WP/97 presented by the International Air Transport Association (IATA) and WP/280 presented by the United Kingdom.

35:2 WP/17 presented a status report on the action taken pursuant to Assembly Resolution A33-20, in particular the development of an international contingency mechanism to provide non-cancellable third-party aviation war risk coverage through a non-profit special purpose insurance entity, with multilateral government backing for the initial years (“Globaltime”). A condition for the setting up and operation of Globaltime is that Contracting States representing 51% of ICAO contribution rates declare their intention to participate and it was noted that this threshold had not been reached so far. Another condition is that there is further failure of the commercial insurance market, as determined by the ICAO Council. Pending fulfilment of these two conditions, Globaltime is held in contingency mode. Several delegations expressed their appreciation for the work done in respect of Globaltime and one delegation underlined its moderating effect on the markets. However, it was acknowledged that Globaltime offered a solution for the short- and medium term only, which had not attracted enough participation. In this regard, one delegation expressed concerns that Globaltime might encourage the commercial market players to withdraw such coverage which might not be interesting enough from a business viewpoint.

35:3 WP/126 described aviation insurance coverages and market changes after 11 September 2001 and explained the concepts of insurability and accumulation, focusing on the existing policy exclusions as well as the new total exclusions proposed by some aviation insurers. WP/87 outlined the European developments with respect to new rules that will apply as from 30 April 2005 regarding minimum insurance requirements to be observed by all operators flying into, within, out of or over the territory of a State of the European Union. WP/97 pointed out the purported new exclusions for all liability claims caused by the hostile use of a dirty bomb, electromagnetic pulse device, or biochemical materials and urged States to grant government guarantees therefor, as well as to get underway the drafting of a limitation of liability regime for war and terrorism losses.

35:4 WP/280 presented recommendations to the Assembly to address the problem of instability in the commercial war risk insurance market which threatens the continuing operations of airlines and other related services providers. In particular, it was recommended that the work of the Legal Committee relating to the modernization of the Rome Convention proceed with the utmost despatch and that consideration be given, if need be, to advance the work in this area via two instruments, one covering the new risks posed by war and terrorism and the other the “classic” third-party risks. This was supported by several delegations. A number of delegations mentioned that it was also necessary to recognize the worrying situation of all the other actors of the aviation industry, not only that of the airlines. One delegation further suggested that options should not be restricted to one or two instruments. Another delegation noted that, although the scope of a liability reform should deal with both “normal” risks and terrorism-related risks, the latter should be treated with urgency, perhaps even in priority.

35:5 Continuing on this subject, one delegation, while expressing its support in principle to the basic concept in WP/280, nevertheless had hesitations, mainly as regards a two instrument approach. In its opinion, this question should rather be considered by the Special Group on the Modernization of the Rome Convention of 1952, taking into account that an overall system covering not only traditional but also terrorist risks should be rapidly set up. This was supported by another delegation which had doubts that any splitting of this matter would accelerate the solution to the outstanding issues and expressed concerns on the treatment of the “new” risks for which total exclusions were announced by the underwriters. Furthermore, this delegation stated that passenger liability was already covered by the 1999 Montreal Convention. Several delegations then intervened in order to draw attention to the need for a global solution on this issue, which would involve developing and less developed States in addressing the related difficulties of their governments and aviation industry.

35:6 In summing up on this item, the Chairman noted that the recommendations in WP/280 had received the support of several delegations but that a certain number of delegations had also conveyed doubts. He concluded from the discussion that the Legal Commission wished to reiterate that ICAO should rapidly proceed with the work on the modernization of the Rome Convention to tackle this matter, leaving the details as to the best approach to be taken for consideration by the Special Group in charge of this item.

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**Agenda Item 37: Work Programme of the Organization in the legal field – Part I**

37:1 The Commission considered this item on the basis of WP/84 presented by the Council, WP/173 presented by the Republic of Korea, WP/238 presented by Colombia and WP/71 presented by IATA.

37:2 WP/84 outlined the work programme of the Legal Bureau, legal matters in the Council, the Work Programme of the Legal Committee and a plan of legal meetings for the period 2005-2007. The working paper listed the subjects on the Work Programme of the Legal Committee in their order of priority and provided information on the work status of individual items on the Work Programme.

37:3 WP/173, presented by the Republic of Korea, contained a proposal by Korea to host a regional legal seminar in 2006, with the joint sponsorship of the Legal Bureau of ICAO. The proposed regional seminar would be aimed at States to which the ICAO Asia and Pacific Office is accredited. This proposal was noted by the Commission.

37:4 Colombia presented WP/238 which submitted for further consideration the desirability of conducting further study on the subject of “attachment”, “arrest” and other “precautionary measures” in the context of enforcement of judgements stemming from liability for aeronautical activity. This delegation was mindful of the budgetary constraints faced by the Organization and mentioned that, apart from a separate study, this issue could be accommodated within the work on the modernization of the Rome Convention. The Commission noted this proposal.

37:5 WP/71 was presented by IATA. It noted the significant progress which already had been achieved by ICAO through the development of model legislation and guidance material on the subject of unruly passengers. Notwithstanding, in light of the continuously increasing number of incidents, it expressed the view that further coordinated work on the global level through ICAO was necessary, which should also include a review of potential necessary amendments to existing Conventions and Protocols to be conducted by the ICAO Secretariat Study Group on Unruly Passengers. This proposal was noted by the Commission.

37:6 Two delegations expressed a desire for the linking of the issue of war risk insurance with the item dealing with the modernization of the Rome Convention. Referring to the topic of unruly passengers, one of these delegations stated that the future work on this subject should also take into account the gaps which have been identified in WP/88 (ICAO Aviation Security Plan of Action – Project 12: Legal). One delegation suggested to raise the priority of the modernization of the Rome Convention to No.1 of the Work Programme.

37:7 In summarizing the discussion on this Agenda Item, the Chairman stated that the Commission had taken note of the various proposals contained in the working papers. In light of the previous discussions on Agenda Item 36 and the adopted draft resolution related thereto, he recommended to retain the subject dealing with the consideration of the establishment of a legal framework for GNSS with the highest priority on the Work Programme, but to raise the priority of the modernization of the Rome Convention from No. 3 to No. 2. As the prior deliberations on the modernization of the Rome Convention contained ample references to the issue of war risk insurance, it was not considered necessary to formally amend the wording of this item on the Work Programme. It was understood that the planning of legal meetings for the period 2005 to 2007 would be appropriately reviewed as necessary throughout this period so as to commensurate with the progress of work on the various items of the Work Programme and their priority.

37:8 Consequently, the Work Programme of the Legal Committee was established as follows:

- 1) Consideration, with regard to CNS/ATM systems including global navigation satellite systems (GNSS), of the establishment of a legal framework;
- 2) Consideration of the modernization of the *Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface*, signed at Rome on 7 October 1952;
- 3) Acts or offences of concern to the international aviation community and not covered by existing air law instruments;
- 4) International interests in mobile equipment (aircraft equipment);
- 5) Review of the question of the ratification of international air law instruments; and
- 6) *United Nations Convention on the Law of the Sea* – Implications, if any, for the application of the Chicago Convention, its Annexes and other international air law instruments.