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5/10/04

ASSEMBLY — 35TH SESSION

REPORT OF THE LEGAL COMMISSION FOR THE GENERAL SECTION OF ITS REPORT AND ON AGENDA ITEMS 7, 8, 33, 34, 35, 36, 37 AND 38

(Presented by the Chairman of the Legal Commission)

The attached report on the General Section of its Report and Agenda Items 7, 8, 33, 34, 35, 36, 37 and 38 have been approved by the Legal Commission. Resolutions 36/1 and 37/1 are recommended for adoption by the Plenary.

Note.— After removal of this covering sheet, this paper should be inserted in the appropriate place in the report folder.

(20 pages)

REPORT OF THE LEGAL COMMISSION TO THE ASSEMBLY

General

1. The Legal Commission held three meetings between 30 September and 4 October 2004. Mr. H. Kjellin (Sweden) was elected by the Plenary as Chairman of the Commission.
2. At its first meeting, the Commission elected Ms. S.H. Tan (Singapore) as its First Vice-Chairman and Mr. J. Salazar (Colombia) as its Second Vice-Chairman.
3. The three meetings of the Commission were held in open session. On the recommendation of the Executive Committee, the Assembly had agreed to the suspension of minutes for the meetings of the Legal Commission during A35.
4. Representatives from 78 Contracting States and 7 observer delegations attended one or more meetings of the Commission.
5. The Secretary of the Commission was Mr. D. Wibaux, Director of the Legal Bureau. Mr. S.A. Espínola, Principal Legal Officer, acted as his Deputy, and Mr. J.V. Augustin, Senior Legal Officer, as his assistant. Also assisting the Secretary were Messrs. B. Verhaegen, Legal Officer; J. Huang, Legal Officer and A. Jakob, Legal Officer.

Agenda and Working Arrangements

6. Agenda items 7, 8, 33, 34, 35, 36, 37 and 38 referred to the Commission by the Plenary were considered, as follows:
 - Item 7: Annual Reports of the Council to the Assembly for 2001, 2002 and 2003
 - Item 8: Programme Budget for 2005, 2006 and 2007
 - Item 33: International interests in mobile equipment (aircraft equipment)
 - Item 34: Progress report on the modernization of the Rome Convention of 1952
 - Item 35: Assistance in the field of aviation war risk insurance
 - Item 36: Report on the establishment of a legal framework with regard to CNS/ATM systems including GNSS
 - Item 37: Work Programme of the Organization in the legal field
 - Item 38: Assembly resolutions to be consolidated or to be declared no longer in force

6.1 The documents and working papers considered by the Commission are listed by agenda items in the Appendix to the Report.

6.2 The action by the Commission in respect of each item is reported on separately in the paragraphs which follow. The material is arranged according to the numerical sequence of the agenda items considered by the Commission.

Agenda Item 7: Annual Reports of the Council to the Assembly for 2001, 2002 and 2003

7:1 The Commission *noted* Chapter VI (Constitutional and Legal Questions) of the Annual Reports of the Council to the Assembly for the years 2001 (Doc 9786), 2002 (Doc 9814) and 2003 (Doc 9826) as well as the Supplement for the first half of the year 2004 (Doc 9826 – Supplement), which had been referred to it by the Plenary.

Agenda Item 8: Programme Budget for 2005, 2006 and 2007

8:1 The Commission *noted* the programme budget set out in Part IV of WP/20 AD/2, Corrigenda Nos.1 and 2 and Addendum No. 1.

Agenda Item 33: International interests in mobile equipment (aircraft equipment)

33:1 The Commission discussed this item on the basis of WP/16 containing a progress report on international interests in mobile equipment (aircraft equipment), presented by the Council, and WP/117, presented by the Latin American Association of Air and Space Law (ALADA).

33:2 The Delegation of Ireland expressed its satisfaction with the progress made in the contractual negotiations between Aviareto and ICAO and in the implementation of the International Registry, and stated that its government is very supportive of the establishment of the Registry in its territory. Ireland is preparing the necessary legislation with a view to ratifying the Cape Town Convention and Protocol in the near future.

33:3 One delegation recalled that its State had already become a Party to the Convention and the Protocol and encouraged other States to do so. Five other delegations also encouraged States to ratify the Convention and the Protocol. One observer organization informed that it had produced a paper jointly with another observer organization to be presented to the Legal Commission on this item, but it had not yet been distributed. In such paper, States were encouraged to ratify the Convention and the Protocol.

33:4 Another observer organization considered that the Convention and the Protocol are likely to raise legal difficulties in Latin-American jurisdictions, although consideration of economic nature may prevail in making decisions regarding the ratification of the Cape Town instruments. The opt-in/opt-out provisions of the Convention and the Protocol would facilitate States to overcome such legal difficulties.

33:5 One delegation recalled the active participation of its State in the work leading to the adoption of the Cape Town instruments and on the on-going work of the Preparatory Commission for the International Registry. Its State had assisted in the organization of two seminars, the first on the then draft Convention and Protocol (in consultation with ICAO and UNIDROIT); and the second on the ratification of the Convention and the Protocol (organized by UNIDROIT in consultation with ICAO). The materials of such seminars may be provided for assistance to other States if they so wish. Two delegations expressed appreciation for such materials being made available to other States.

33:6 One delegation recalled that its State had launched in 1988 the concept of international interests in mobile equipment and had ever since supported the implementation of such concept by treaty law, considering the benefits that can derive therefrom for both developing and developed States. Its State had signed the Convention and the Protocol and is introducing legislation with a view to implementing the Cape Town instruments. The delegation noted the progress made by ICAO and the Preparatory Commission for the International Registry in their work towards the establishment of the Registry. The delegation further noted that two matters remained to bring matters into accord with the Convention and the Protocol. The Council will need to make its formal decision to become the Supervisory Authority and, in order to ensure confidence in the International Registry, it will have to be seen that it is in accord with the Convention and the Protocol and with Resolution No. 2 of the Cape Town Diplomatic Conference especially in relation to insurance, liability and the supervisory participation of States. There should be no dilution of the institutional role of the Supervisory Authority.

33:7 One delegation commended ICAO and UNIDROIT for their work in the context of the Cape Town instruments and informed that its State has been taking the necessary steps to ratify them. These instruments were also the result of cooperation between States and the industry, and would promote availability of credit at lower cost, thereby contributing also to better safety and security in international civil aviation. The delegation informed that its State is willing to assist other States with regard to ratification of the Convention and the Protocol if they so wish.

33:8 In summarizing the discussions, the Chairman emphasized the economic benefits of the Cape Town instruments, the strong support for the instruments, the encouragement given to States to ratify these instruments as soon as possible, and the confidence of the Commission that the rules and principles of the instruments will be fulfilled by the International Registry being operational by February 2005. He also noted the willingness of some States to provide information that will assist other States in their ratification process.

33:9 As a result of the discussions, the Commission *noted* the working papers referred to in paragraph 33:1.

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, expressing its concern especially as regards the liability regime found in the draft Convention and the issue of insurance, which it believed is incompatible with third-party interests.

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 the need for the text of the new convention to settle the problem of liability for risks related to acts of war in addition to those related to acts of unlawful interference.

34:9 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.

34:10 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 liability must not be divorced from international insurance market realities.

34:11 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.

34:12 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.

34:13 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.

34:14 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.

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 could 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 objective mentioned in WP/280, nevertheless had hesitations as to the methods proposed, 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 a number of delegations insisted that all options should be left open for consideration by the Special Group. 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.

**Agenda Item 36: Report on the establishment of a legal framework with regard to
CNS/ATM systems including GNSS**

36:1 Consideration of this item was based on WP/75 introduced by the Secretariat, WP/125 presented by the 41 Members of the European Civil Aviation Conference, WP/179 presented by the 21 Member States of the Latin American Civil Commission, WP/215 presented by the International Air Transport Association and WP/216 presented by the United States.

36:2 The Commission noted the divergent views expressed in the aforementioned working papers, which ranged from the proposal to consider an international convention, the proposal to adopt a contractual framework as a step toward the long-term objective of a global instrument of international law, to the proposal to suspend work towards a new “long-term legal framework” until the next regular session of the Assembly. Bearing in mind the importance of Item No. 1 of the General Work Programme of the Legal Committee, and with a view to achieving a consensus, the Chairman, after extensive consultation, proposed to the Commission the following draft resolution:

‘DRAFT RESOLUTION A35/XXX

**A PRACTICAL WAY FORWARD ON LEGAL AND INSTITUTIONAL ASPECTS OF
COMMUNICATIONS, NAVIGATION, SURVEILLANCE/AIR TRAFFIC MANAGEMENT
(CNS/ATM)**

Whereas the global implementation of Communications, Navigation, Surveillance/Air Traffic Management (CNS/ATM) which, *inter alia*, is intended to provide safety-critical services for aircraft navigation, has made substantial progress since its inception at the 10th Air Navigation Conference in 1991 and received enthusiastic endorsement at the 11th Air Navigation Conference in 2003;

Whereas the existing legal framework for CNS/ATM, namely the Chicago Convention, its Annexes, Assembly Resolutions (especially including the Charter of GNSS Rights and Obligations), associated ICAO guidance (especially including the Statement of ICAO Policy on CNS/ATM Systems Implementation and Operation), regional navigation plans, and exchanges of letters between ICAO and the States operating satellite navigation constellations has enabled the technical implementation achieved thus far;

Whereas ICAO has devoted substantial resources to the study of the legal and institutional aspects of CNS/ATM in the ICAO Assembly, the Council, the Legal Committee, and a Panel of Legal and Technical Experts and a Study Group, building a detailed record and developing an understanding of the issues, challenges, and concerns facing the global community; and

Whereas there is a need to consider regional initiatives to develop measures addressing any legal or institutional issues that could inhibit the implementation of CNS/ATM in the region, while ensuring that such mechanisms will be consistent with the Chicago Convention;

The Assembly:

1. *Reaffirms* the consensus that the implementation of CNS/ATM is fully consistent with the Chicago Convention, and that there is no need to amend the Chicago Convention for that reason;
2. *Invites* Contracting States to consider using regional organizations to develop mechanisms necessary to address any legal or institutional issues that could inhibit the implementation of CNS/ATM in the region, while ensuring that such mechanisms will be consistent with the Chicago Convention;
3. *Encourages* the facilitation of technical assistance in implementation of CNS/ATM by ICAO, regional organizations, and industry;
4. *Invites* Contracting States to consider development of additional sources of funding, both multilateral and third party, for assistance to States and regional groups in implementation of CNS/ATM;
5. *Directs* the Secretary General to monitor and, where appropriate, assist in the development of voluntary contractual frameworks, *inter alia*, on the basis of the structure and model proposed by the Members of the European Civil Aviation Conference;
6. *Invites* the Member States to transmit regional initiatives to the Council; and
7. *Directs* the Council to register such regional initiatives, to consider their value and to make them public as soon as possible (in accordance with Articles 54, 55 and 83 of the Chicago Convention)."

36:3 Most delegations welcomed the initiative of the Chairman and supported the substance of the draft resolution proposed by him.

36:4 Upon further discussions, the Chairman proposed to add the following as the first operative paragraph of the draft resolution: "*Recognizes* the importance of Item No. 1 of the General Work Programme of the Legal Committee 'Consideration, with regard to CNS/ATM systems including global navigation satellite systems (GNSS), of the establishment of a legal framework', and resolutions or decisions by the Assembly and the Council relating to it." It was stated that any regional initiatives should not replace the work of ICAO under Item No. 1 of the General Work Programme of the Legal Committee. This proposal was accepted by the Commission.

36:5 The Commission discussed whether the term "appropriate" should be added before the term "regional organizations" in paragraph 2. However, as there was no agreement, the term was not added. It was further decided to add "and public international law" at the end of paragraph 2 to indicate the possible application of space law instruments or other international legal instruments.

36:6 One delegation queried whether paragraph 4 of the draft resolution would give rise to an unintended interpretation that certain charges may be imposed on air carriers, which may in turn receive financial supports from Contracting States. This delegation suggested to include a clause that any charges should be levied in accordance with ICAO rules. It was explained by the Chairman that the applicability of ICAO rules had already been referred to in paragraph 2 of the draft. Upon further discussion, it was decided

to amend paragraph 4 to read as follows: “*Invites* Contracting States, other multilateral agencies and private financiers to consider development of additional sources of funding for assistance to States and regional groups in implementation of CNS/ATM”.

36:7 With respect to paragraph 5, the Commission decided to delete the word “voluntary” and add after “contractual frameworks” the term “to which parties may accede”. Upon request by some regional organizations, the term “and other regional civil aviation commissions, and on international law” was added to the end of the paragraph.

36:8 A significant number of delegations expressed their support to the proposal contained in WP/179. While accepting the draft resolution proposed by the Chairman, these delegations continued to emphasize the need to develop a binding international instrument under the auspices of ICAO as a long-term approach.

36:9 The Commission decided to recommend the resolution below for adoption by the Assembly:

**RESOLUTION FRAMED BY THE LEGAL COMMISSION
AND RECOMMENDED FOR ADOPTION BY THE ASSEMBLY**

Resolution 36/1

**A Practical Way Forward on Legal and Institutional Aspects of Communications,
Navigation, Surveillance/Air Traffic Management (CNS/ATM) Systems**

Whereas the global implementation of Communications, Navigation, Surveillance/Air Traffic Management (CNS/ATM) systems, which, *inter alia*, is intended to provide safety-critical services for aircraft navigation, has made substantial progress since its inception at the 10th Air Navigation Conference in 1991 and received enthusiastic endorsement at the 11th Air Navigation Conference in 2003;

Whereas the existing legal framework for CNS/ATM systems, namely the Chicago Convention, its Annexes, Assembly Resolutions (especially including the Charter of GNSS Rights and Obligations), associated ICAO guidance (especially including the Statement of ICAO Policy on CNS/ATM Systems Implementation and Operation), regional navigation plans, and exchanges of letters between ICAO and the States operating satellite navigation constellations has enabled the technical implementation achieved thus far;

Whereas ICAO has devoted substantial resources to the study of the legal and institutional aspects of CNS/ATM systems in the ICAO Assembly, the Council, the Legal Committee, and a Panel of Legal and Technical Experts and a Study Group, building a detailed record and developing an understanding of the issues, challenges, and concerns facing the global community; and

Whereas there is a need to also consider regional initiatives to develop measures addressing any legal or institutional issues that could inhibit the implementation of CNS/ATM in the region, while ensuring that such mechanisms will be consistent with the Chicago Convention;

The Assembly:

1. *Recognizes* the importance of Item No. 1 of the General Work Programme of the Legal Committee “Consideration, with regard to CNS/ATM systems including global navigation satellite systems (GNSS), of the establishment of a legal framework”, and resolutions or decisions by the Assembly and the Council relating to it;

2. *Reaffirms* that there is no need to amend the Chicago Convention for the implementation of CNS/ATM systems;

3. *Invites* Contracting States to also consider using regional organizations to develop mechanisms necessary to address any legal or institutional issues that could inhibit the implementation of CNS/ATM in the region, while ensuring that such mechanisms will be consistent with the Chicago Convention, and public international law;

4. *Encourages* the facilitation of technical assistance in implementation of CNS/ATM systems by ICAO, regional organizations and industry;

5. *Invites* Contracting States, other multilateral agencies and private financiers to consider development of additional sources of funding for assistance to States and regional groups in implementation of CNS/ATM;

6. *Directs* the Secretary General to monitor and, where appropriate, assist in the development of contractual frameworks to which parties may accede, *inter alia*, on the basis of the structure and model proposed by the Members of the European Civil Aviation Conference and the other regional civil aviation commissions, and on international law;

7. *Invites* the Contracting States to transmit regional initiatives to the Council; and

8. *Directs* the Council to register such regional initiatives, to consider their value and to make them public as soon as possible (in accordance with Articles 54, 55 and 83 of the Chicago Convention).

Agenda Item 37: Work Programme of the Organization in the legal field

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, WP/71 presented by IATA, WP/62 presented by the Council and WP/279 presented by Canada and the United Kingdom.

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.

37:9 The Commission next considered WP/62 and WP/279.

37:10 WP/62 recalled the discussions in different ICAO fora concerning the applicability of Article IV of the *Convention on the Marking of Plastic Explosives for the Purpose of Detection* in the event of an amendment to its Technical Annex. The main issue was whether the existing explosives which no longer meet the requirement of the amendment should be destroyed or otherwise disposed of in accordance with Article IV, when such an amendment enters into force. WP/62 proposed a draft assembly resolution which would urge Contracting States to apply Article IV in such a manner that all such explosives shall be subjected to Article IV, paragraphs (2) and (3) of the Convention.

37:11 WP/279 proposed amendments to the draft resolution appended to WP/62. The main proposal in the working paper was to limit the application of the resolution to only one particular amendment relating to the increase of the concentration level of the detection agent DMNB.

37:12 In view of the time constraint, the Chairman proposed and the Commission agreed to establish an informal working group and to invite any interested delegations to join such group, which would be chaired by the Delegation of the United Kingdom.

37:13 The Delegation of the United Kingdom reported to the Commission that Delegations of Canada, France, Japan, the United Kingdom and the United States had participated in the discussion of the informal working group. As a compromise, the group suggested that the draft resolution would mainly be applicable to the proposed amendment relating to DMNB, but would also be applicable to any future amendment to the Technical Annex, unless any Contracting State notifies all other Contracting States and the Council that it does not agree to such application.

37:14 The Commission *endorsed* the suggestion of the informal working group and *agreed to recommend* the following resolution for adoption by the Assembly:

**RESOLUTION FRAMED BY THE LEGAL COMMISSION
AND RECOMMENDED FOR ADOPTION BY THE ASSEMBLY**

Resolution 37/1

Application of Article IV of the *Convention on the Marking of Plastic Explosives for the Purpose of Detection*

Recognizing the importance of the *Convention on the Marking of Plastic Explosives for the Purpose of Detection* in the prevention of unlawful acts against civil aviation;

Conscious of the current proposal made by the International Explosives Technical Commission to amend the Technical Annex to the Convention for the purpose of increasing the required minimum concentration of the detection agent 2,3-Dimethyl-2,3-Dinitrobutane (DMNB) from 0.1 to 1.0 per cent by mass;

Bearing in mind the desirability of maintaining a uniform regime for the detection system of the explosives, particularly after the amendment to the Technical Annex; and

Noting the recommendation of the Legal Committee as approved by the Council that Article IV of the Convention should be applied *mutatis mutandis* to the explosives which are not marked in accordance with the amended Technical Annex;

The Assembly:

Urges the ICAO Contracting States which are Parties to the Convention to apply Article IV of the Convention in their mutual relations in the following manner:

1. The explosives which, at the time of manufacture, met the requirements in Part 2 of the Technical Annex but which no longer meet the requirements of Part 2 because of the above-mentioned

amendment to the Technical Annex, namely to increase the minimum concentration of the detection agent DMNB from 0.1 to 1.0 per cent by mass, shall be subjected to the provisions of Article IV, paragraphs (2) and (3), from the entry into force of that amendment.

2. Accordingly, when such an amendment to Part 2 of the Technical Annex enters into force, each State Party not having expressly objected to the amendment shall take the necessary measures to ensure that:

- a) all stocks of those explosives in its territory referred to in the preceding paragraph are destroyed or consumed for purposes not inconsistent with the objectives of this Convention, marked or rendered permanently ineffective within a period of three years from the entry into force of the amendment, if these explosives are not held by its authorities performing military or police functions; and
- b) all stocks of those explosives referred to in sub-paragraph (a) held by its authorities performing military or police functions and that are not incorporated as an integral part of duly authorized military devices are destroyed or consumed for purposes not inconsistent with the objectives of this Convention, marked or rendered permanently ineffective within a period of fifteen years from the entry into force of the amendment.

3. The foregoing paragraph shall apply to any State Party that withdraws its objection to the amendment as from the date it expresses its consent to be bound.

4. The above paragraphs shall apply *mutatis mutandis* to any future amendment to the Technical Annex unless any Contracting State notifies all other Contracting States and the Council that it does not agree to such application. Such notification shall take place within the 90-day period referred to in paragraph 3 of Article VII of the Convention.

Agenda Item 38: Assembly resolutions to be consolidated or to be declared no longer in force

38:1 The Commission considered this item on the basis of WP/33, Appendix D, which recommended that none of the resolutions in Part V (Legal Matters) be declared no longer in force.

38:2 The Secretary explained that this Agenda Item was standard. Apart from WP/33, there were no other working papers on this item because, after careful review, it was found that there were no resolutions in the legal field to be consolidated or declared no longer in force.

38:3 The Commission *noted* this information.

— END —