



ASSEMBLY — 38TH SESSION

REPORT OF THE LEGAL COMMISSION ON THE GENERAL SECTION AND AGENDA ITEMS 45, 46, 47 AND 48

(Presented by the Chairperson of the Legal Commission)

The attached report on the General Section, Agenda Items 45, 46, 47 and 48 has been approved by the Legal Commission. Resolutions 46/1 and 47/1 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.

REPORT OF THE LEGAL COMMISSION TO THE ASSEMBLY

General

1. The Legal Commission held three meetings between 25 and 30 September 2013. Ms. M. Gordon (Jamaica) was elected by the Plenary as Chairperson of the Commission.
2. At its first meeting, the Commission elected Mr. S. Eid (Lebanon) and Ms. H. Hitula (Namibia) as its First and Second Vice-Chairpersons respectively.
3. The three meetings of the Commission were held in open session.
4. Representatives from 103 Member States and 7 observer delegations attended one or more meetings of the Commission.
5. The Secretary of the Commission was Mr. J. V. Augustin, Acting Director of the Legal Affairs and External Relations Bureau. Dr. J. Huang and Mr. A. Jakob, Senior Legal Officers, acted as his Deputies. The Assistant Secretaries were Messrs. C. Petras and A. Opolot, Legal Officers, and Ms. M. Weinstein, Legal Officer.

Agenda and Working Arrangements

6. Agenda items 45, 46, 47 and 48 referred to the Commission by the Plenary were considered, as follows:

Item 45: Annual Reports of the Council to the Assembly for 2010, 2011 and 2012

Item 46: Acts or offences of concern to the international aviation community and not covered by existing air law instruments

Item 47: Work Programme of the Organization in the legal field

Item 48: Other issues to be considered by the Legal Commission.

- 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 45: Annual Reports of the Council to the Assembly for 2010, 2011 and 2012

45.1 The Commission **noted** the chapters of the Annual Reports of the Council to the Assembly for the years 2010 (Doc 9952), 2011 (Doc 9975) and 2012 (Doc 10001) as well as the Supplement for the first half of the year 2013 (Doc 10001 Supplement) which had been referred to it by the Plenary.

Agenda Item 46: Acts or offences of concern to the international aviation community and not covered by existing air law instruments

46.1 The Commission considered this item on the basis of A38-WP/49, presented by the Council; A38-WP/109, presented by the United States and subsequently co-sponsored by the Air Crash Victims Families Group (ACVFG); and A38-WP/154 presented by the Dominican Republic. A38-WP/49 provided a progress report on the work relating to unruly passengers and on the implementation of the *Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation* (the Beijing Convention) and the *Protocol Supplementary to the Convention for the Suppression of Unlawful Seizure of Aircraft* (the Beijing Protocol). With respect to the work relating to unruly passengers, the Legal Committee had presented a draft text for the protocol to amend the *Convention on Offences and Certain Other Acts Committed on Board Aircraft* (the Tokyo Convention). The text was considered sufficiently mature and ready for transmittal to the Council as a final draft for presentation to States and, ultimately, to a Diplomatic Conference. Based on the results of the work of the Legal Committee, the Council decided to convene a Diplomatic Conference to amend the Tokyo Convention in Montréal from 26 March to 4 April 2014.

46.2 All delegations and observers who took the floor underlined the importance of modernizing the Tokyo Convention. As one of the most successful conventions adopted under the auspices of ICAO, the Tokyo Convention had stood the test of time, but changes had occurred during the last 50 years. In particular, the vast expansion of air transport and the corresponding increase of unruly incidents on board, had given rise to the need to update this instrument. These delegations commended the initiative of ICAO in this respect, with particular reference to the work of the Rapporteur, the Chairperson of the Sub-Committee, and the Chairman of the Legal Committee. It was pointed out that the Assembly should encourage as many States as possible to participate in the Diplomatic Conference. The higher the number of State participation, the wider the interest of the international community which would be represented. Potentially, this could also contribute to a better outcome at the Diplomatic Conference and subsequent acceptance of the instrument concluded at the Conference.

46.3 One delegation, supported by several others, referred to certain issues upon which consensus had yet to be built, particularly the status and functions of In-flight Security Officers. It was recalled that the Council requested the Air Navigation Bureau of the Secretariat to provide a view on this matter. This delegation urged that such a view should be communicated to States well in advance of the Diplomatic Conference, in order to facilitate States being well-informed and suitably prepared. In this connection, one delegation mentioned that its State was in the process of organizing a pre-conference seminar for African States with a view to disseminating the relevant information. Another delegation also mentioned a plan to host a seminar in the Asia-Pacific region.

46.4 One delegation elaborated the key issues which had been discussed by the Legal Committee. The importance for the establishment of the jurisdiction of the State of landing and the State of the operator was emphasized. The Tokyo Convention, while establishing the jurisdiction of the State of registration, does not contain any provision to address this issue. Other delegations echoed this statement by underlining the need to prosecute unruly behaviour wherever it takes place. With respect to the issue of In-flight Security Officers, their existence was a reality in today's life but not every Member State of ICAO has these officers. Accordingly, it was suggested that those States who have the practice of deploying In-flight Security Officers would provide as much information as possible to facilitate the

discussion of this topic in the Diplomatic Conference. It was hoped that the Diplomatic Conference could achieve consensus on this matter and produce an instrument which is widely acceptable.

46.5 The Commission unanimously recommend that the Plenary call upon Member States to participate in the Diplomatic Conference to amend the Tokyo Convention.

46.6 With respect to the implementation of the Beijing Convention and the Beijing Protocol, the Secretariat reported that as of 25 September 2013, the Beijing Convention had been signed by 29 States, ratified or acceded to by 8 States, and the Beijing Protocol had been signed by 31 States, ratified or acceded to by 7 States.

46.7 WP/109 reiterated that these two instruments broaden and strengthen the global civil aviation counter-terrorism framework and therefore encouraged all Member States to sign and ratify these instruments. It contained a proposal for the renewed adoption of a Resolution urging all States to ratify as soon as possible the Beijing Convention and the Beijing Protocol of 2010 and directing the Secretary General of ICAO to provide assistance, as appropriate, with the ratification process if so requested by a State. In its presentation, the delegation of the United States stated that the Beijing treaties, which will replace or amend time-tested unlawful interference conventions having more than 175 Parties, must be as widely accepted to be truly successful. The delegation expressed the need to strive to make the Beijing Convention and the Beijing Protocol of 2010 a universally applicable regime.

46.8 WP/154 further encouraged Member States to include in their respective criminal laws or legislation sanctions against the offences listed in the two instruments.

46.9 Several delegations mentioned that their respective States had not only participated in the Diplomatic Conference in Beijing, but also had taken prompt action to ratify the two instruments. More delegations informed the Commission that their respective States had started the ratification process and would sign and ratify the instruments in the near future. One delegation mentioned that the two instruments respectively require 22 ratifications to bring them into force, which was considered as a high threshold. Accordingly, more efforts were needed to reach this threshold. Another delegation, supported by others, emphasized the need for ICAO to organize workshops and seminars at its Headquarters and in the regions to promote these two instruments. It was suggested that the matter of ratification be mentioned in every ICAO conference.

46.10 The Chairperson summarized that the Legal Commission had the full support from the delegations to promote the Beijing Convention and the Beijing Protocol. The Commission then **agreed** to recommend to the Plenary the adoption of the following resolution:

Resolution 46/1: Promotion of the Beijing Convention and the Beijing Protocol of 2010

Recalling its Resolution A37-23 entitled: *Promotion of the Beijing Convention and the Beijing Protocol of 2010*;

Recalling further its Resolution A37-22, Appendix C, relating to the ratification of instruments which have been developed and adopted under the auspices of the Organization; and

Recognizing the importance of broadening and strengthening the global aviation security regime to meet new and emerging threats;

The Assembly:

1. *Urges* all States to support and encourage the universal adoption of the *Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation* (Beijing Convention of 2010) and the *Protocol Supplementary to the Convention for the Suppression of Unlawful Seizure of Aircraft* (Beijing Protocol of 2010);

2. *Urges* all States to sign and ratify the Beijing Convention and Beijing Protocol of 2010 as soon as possible;

3. *Directs* the Secretary General to provide assistance, as appropriate, with the ratification process if so requested by a State; and

4. *Declares* that this Resolution supersedes Resolution A37-23.

Agenda Item 47: Work Programme of the Organization in the legal field

47.1 The Commission considered this item on the basis of A38-WP/62, presented by the Council; A38-WP/114, presented by the United States and subsequently co-sponsored by Canada, France, Germany, Singapore and South Africa; A38-WP/170, presented by the United Arab Emirates, the Air Crash Victims Families Group (ACVFG) and the International Air Transport Association (IATA); A38-WP/262 Revision No. 3 and A38-WP/340, both presented by the Republic of Korea; and A38-WP/358 and Corrigendum No. 1, presented by the Latin American Association of Air and Space Law (ALADA).

47.2 A38-WP/62 provided information to the Assembly regarding the on-going work of the Organization in the legal field and an overview of the developments and relevant decisions taken by the Council and the Legal Committee since the previous session of the Assembly in relation to the items on the Work Programme of the Legal Committee, including the prioritization of items.

47.3 The delegate of the Republic of Korea presented A38-WP/262, proposing that ICAO organize a study group similar to the Unmanned Aircraft System Study Group (UASSG), to examine and conduct legal research on liability issues related to Remotely Piloted Aircraft (RPA). ICAO was further asked to establish a data collection and sharing system for RPA accidents and incidents and associated liability.

47.4 Several delegations expressed their support for A38-WP/262, indicating that they shared the Republic of Korea's concern over the need for research into civil liability issues related to RPA.

47.5 However, one delegation dissented, noting that with respect to the issue of liability in particular, A38-WP/262 did not adequately establish the need for new law relative to RPA, especially in light of the fact that existing law – the 1952 Rome Convention where it is in force and remarkably uniform national law in all other States – already addresses the liability concerns raised in the paper.

47.6 The concerns raised by this delegation were shared by a number of other delegations who viewed that the creation of a study group might be premature. One of these delegations suggested that research could be done on whether the coverage of the third party liability aspects by the Rome Convention of 1952 and the Montreal Conventions of 2009 left any issues to be addressed, and thereafter Member States could be surveyed (if necessary) on their liability regimes under national laws. Another delegation seconded this approach, noting that although A38-WP/262 showed that there may be outstanding issues relating to RPA registration and insurance, further preliminary research was needed to establish the need for and possible program of a prospective study group.

47.7 The remainder of the delegations generally agreed with the proposal for additional research to be undertaken before the establishment of a study group. Additionally, it was understood that technical aspects of RPA accidents and incidents and the resulting data collection and sharing would be handled through existing systems under the management of the ICAO Air Navigation Bureau.

47.8 On these bases, the agreement of the Commission coalesced around the proposal of the Chairperson to refer the matter of legal issues related to RPA to the Legal Committee for further study, with due consideration for the limited resources of the Organization, particularly given that third-party

liability regimes already exist. The Commission further agreed that this topic should be added as a new item on the Work Programme of the Legal Committee.

47.9 The Chairman of the Legal Committee stated to the Legal Commission that in order to facilitate the work of the Commission, the Chairman and Vice-Chairs of the Legal Committee had held a meeting to discuss the future work of the Committee. Recognizing the budgetary and other resource constraints of the Organization, it was proposed to explore and mobilize other available resources to promote the work programme of the Organization in the legal field. He underlined the importance of harmonizing the legal work with the other work of the Organization, through the close coordination of the Legal Committee with other bodies of the Organization. He noted that there were many vital issues in the civil aviation community, such as those relating to safety, security, environment and the economics of air transport. The Legal Committee was not limited to the drafting of conventions, but should serve as an intellectual resource for the transformation of the collective political will of the Member States into reality.

47.10 A number of delegations supported the statement of the Chairman of the Legal Committee and emphasized the need to assist the Secretariat. For instance, Member States may consider initiating the study, investigation or survey of certain legal issues of common interest, organizing regional legal seminars, workshops or conferences, and/or providing personnel on secondment.

47.11 The Chairman of the Legal Committee thereafter proposed to remove from the work programme those items in relation to which the Committee had in fact already completed its work, namely item 1) "Compensation for damage caused by aircraft to third parties arising from acts of unlawful interference or from general risks", and item 6) "International interests in mobile equipment (aircraft equipment)". Taking up a proposal made by another delegation, the Chairman of the Legal Committee further suggested modifying item 7) to read "Promotion of the ratification of international air law instruments". In this context, the sentiment was expressed that the Legal Committee would provide active support to ICAO and its Legal Affairs and External Relations Bureau with regard to rendering assistance to States on matters of ratification of air law instruments. On account of the fact that the transmission of a questionnaire to States in relation to the item regarding guidance of conflicts of interest is expected to be actioned shortly, the Chairman of the Legal Committee further proposed to raise the priority of this item to number 2.

47.12 In relation to the item on the work programme dealing with a legal framework with regard to CNS/ATM systems, one observer representing a Commission composed of 54 States objected to the removal of this item from the Work Programme of the Legal Committee or the reduction of its priority therein, and requested that the Secretary General develop guidance material for the implementation of CNS/ATM systems. In relation to this item, one delegation expressed the view that it could be removed from the work programme, or reduced in priority, in light of the material already developed by ICAO and the fact that no work had been done in the Legal Committee or the Legal Commission over a period of nine years.

47.13 The Commission thereafter unanimously supported the re-alignment of the work programme along the proposal advanced by the Chairman of the Legal Committee. Accordingly, the Commission established the Work Programme of the Legal Committee as follows:

- 1) Acts or offences of concern to the international aviation community and not covered by existing air law instruments;
- 2) Consideration of Guidance on Conflicts of Interest;
- 3) Safety aspects of economic liberalization and Article 83 *bis*;
- 4) Consideration, with regard to CNS/ATM systems including global navigation satellite systems (GNSS), and the regional multinational organisms, of the establishment of a legal framework;
- 5) Promotion of the ratification of international air law instruments; and
- 6) Study of legal issues relating to remotely piloted aircraft.

47.14 A38-WP/114 contained a proposal for the renewed adoption of a Resolution urging all States to ratify as soon as possible the Montreal Convention of 1999 and directing the Secretary General of ICAO to provide assistance, as appropriate, with the ratification process if so requested by a State. In its presentation, the delegation of the United States stated that there continued to be a confusing patchwork of legal regimes in place on account of the lack of universal adoption of the instrument. Recalling the benefits contained in the Convention for the travelling public and efficiencies and cost savings for airlines, the delegation expressed the need to strive to make the Montreal Convention of 1999 a universally applicable regime.

47.15 In its presentation, on behalf of the co-sponsors of A38-WP/170, the delegate of the United Arab Emirates recalled Assembly Resolution A37-24 but remarked that a large number of States have not yet ratified the Montreal Convention of 1999. He stated that in order to enjoy the benefits derived from the Convention it was necessary to eliminate the patchwork of existing parallel legal regimes. He urged all Member States that have not done so, to become parties to the Montreal Convention of 1999 as soon as possible.

47.16 A38-WP/358 and Corrigendum No. 1 also urged States that have not done so to support and encourage the universal adoption of the Montreal Convention of 1999. ALADA reiterated its offer of cooperation in the task of dissemination of the benefits of ratifying or acceding to the Montreal Convention of 1999, especially in the Latin American region.

47.17 The Commission discussed the working papers presented and the recommendations therein, and the contents of the working papers were supported. The Commission consequently **agreed** to recommend to the Plenary the adoption of the following Resolution:

Resolution 47/1: Promotion of the Montreal Convention of 1999

Recalling its Resolution A37-24 entitled *Promotion of the Montreal Convention of 1999*;

Recalling further its Resolution A37-22, Appendix C, relating to the ratification of instruments which have been developed and adopted under the auspices of the Organization;

Recognizing the importance of achieving a universal regime to govern airline liability to passengers and shippers on international flights; and

Recognizing the desirability of an equitable, fair and convenient system that allows full compensation for losses;

The Assembly:

1. *Urges* all States to support and encourage the universal adoption of the *Convention for the Unification of Certain Rules for International Carriage by Air*, done at Montreal on 28 May 1999 (Montreal Convention of 1999);
2. *Urges* all States that have not done so to become Parties to the Montreal Convention of 1999 as soon as possible; and
3. *Directs* the Secretary General to provide assistance, as appropriate, with the ratification process if so requested by a State.
4. *Declares* that this Resolution supersedes Resolution A37-24.

47.18 A38-WP/340, containing an offer by the Republic of Korea to host a Regional Legal Seminar in 2015 to address legal matters of interest in the Asia-Pacific Region, was **noted** by the Commission with appreciation.

Agenda Item 48: Other issues to be considered by the Legal Commission

48.1 There were no other issues for consideration by the Legal Commission.