



International Civil Aviation Organization

**WORKING PAPER**

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**ASSEMBLY — 39TH SESSION**

**LEGAL COMMISSION**

**Agenda Item 45: Work Programme of the Organization in the legal field**

**WORK PROGRAMME OF THE ORGANIZATION IN THE LEGAL FIELD**

(Presented by the Council of ICAO)

**EXECUTIVE SUMMARY**

This working paper reports on the on-going work of the Secretariat in the legal field and legal matters before the Council. It also presents an overview of developments and relevant decisions taken since the last Assembly with respect to items on the Work Programme of the Legal Committee, including the prioritization of items.

**Action:** The Assembly is invited to consider the programme of future work of the Organization in the legal field and to decide the Work Programme of the Legal Committee as set out in paragraph 3.4, including the prioritization of items.

<i>Strategic Objectives:</i>	Supporting Implementation Strategies – Programme Support – Legal Services and External Relations
<i>Financial implications:</i>	As provided by the Regular Budget.
<i>References:</i>	C-WP/14386 Doc 7669, <i>Legal Committee, Constitution, Procedure for Approval of Draft Conventions, Rules of Procedure</i> Doc 10061, Report of the 36th Session of the Legal Committee

## 1. INTRODUCTION

1.1 Each regular session the Assembly is informed of the on-going work of the Secretariat in the legal field and provided with an account of the relevant decisions taken subsequent to the previous session of the Assembly in relation to the items on the Work Programme of the Legal Committee.

## 2. ONGOING ACTIVITIES IN THE LEGAL FIELD OF THE LEGAL AFFAIRS AND EXTERNAL RELATIONS BUREAU (LEB)

2.1 The continuing functions of the Secretariat in the legal field includes the provision of legal advice and assistance, generally and in support of ICAO's Strategic Objectives, to the President of the Council and the Secretary General, other ICAO Bureaux, Regional Offices and to ICAO Member States; research, legal advice and services, including preparation of documentation, for the Council and its subordinate bodies, the Assembly, the Legal Committee, Diplomatic Conferences and other meetings; discharge of depositary functions in relation to certain international agreements; registration of aeronautical agreements and arrangements; collection of national laws and regulations relating to civil aviation; preparation of various reports, e.g. material for the United Nations Juridical Yearbook; representation of the Secretary General in appeals coming before the Advisory Joint Appeals Board and the United Nations Appeals Tribunal; coordination of representation of the Secretary General in other litigation in which ICAO may be involved in foreign jurisdictions; cooperation on legal matters with the United Nations and other organizations; and other related functions of a legal nature.

2.2 LEB continued to provide secretariat services to the Working Group on Governance and Efficiency (WGGE) which was constituted during the 195th Session of the Council in March 2012 following the merger of the former working groups on governance and efficiency (the WGOG and the WGOE). The WGGE addressed various policy and governance issues of the organization in areas such as the policy formulation process, improving preparatory work for the Assembly, ICAO Publications, Directives for Panels, composition of standing committees of the Council, performance management and corporate risk and assurance.

2.3 LEB co-hosted or contributed to a number of Legal Seminars: 23 to 24 January 2014 in Singapore; 17 to 21 February 2014 in Windhoek, Namibia; and 26 to 27 May 2015, Seoul, Republic of Korea. A joint ICAO/IATA Legal Seminar on Unruly Passengers took place in Geneva, Switzerland on 1 April 2016.

## 3. WORK PROGRAMME OF THE LEGAL COMMITTEE

3.1 In accordance with Rule 8 of its Rules of Procedure, the Legal Committee establishes and maintains, subject to approval of the Council, a general programme of work which includes subjects proposed by the Committee itself; in addition, it is to include any subjects proposed by the Assembly or the Council.

3.2 The 38th Session of the Assembly established the following General Work Programme of the Legal Committee with the subjects listed in the order of priority:

- 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.

3.3 The Work Programme, including the prioritization of items, was last considered by the Council as its fifth meeting of its 203rd Session in November 2014. On this occasion, the Council decided to raise the priority of item 6) “Study of legal issues relating to remotely piloted aircraft” to become fourth in priority. As a consequence, existing item 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” and item 5) “Promotion of the ratification of international air law instruments” were reprioritized and reordered as items 5) and 6), respectively. The Council further agreed to the inclusion of an additional item 7) on the determination of the status of an aircraft, while taking note of the caveats arising from its historical background. In so doing, the Council requested LEB to review the 1993 Secretariat Study on “Civil/State Aircraft” (C-WP/9835) to identify those areas where it would be possible to engage the Legal Committee; and recommended that consideration be given to ways to address item 7) other than through the amendment of Article 3 b) of the Chicago Convention, which could prove to be difficult.

3.4 The Work Programme including the prioritization of items, was subsequently revised by the 36th Session of the Legal Committee (30 November to 3 December 2015), as follows:

- 1) Study of legal issues relating to remotely piloted aircraft;
- 2) Consideration of guidance on conflicts of interest;
- 3) Acts or offences of concern to the international aviation community and not covered by existing air law instruments;
- 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) Determination of the status of an aircraft – civil/State;

- 6) Promotion of the ratification of international air law instruments; and
- 7) Safety aspects of economic liberalization and Article 83 *bis*.

Information on the status of items on the Work Programme is found in the **Appendix A** hereto. Information on legal work in certain additional areas, namely, international interests in mobile equipment (aircraft equipment) and review of the application of ICAO treaties relating to conflict zones, is found in **Appendix B** hereto.

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## APPENDIX A

### A. STATUS OF ITEMS IN THE WORK PROGRAMME OF THE LEGAL COMMITTEE

#### 1. Study of legal issues relating to remotely piloted aircraft

1.1 On the basis of the action of the 38th Session of the Assembly in response to working paper A38-WP/262, which was presented by the Republic of Korea and reasoned that there was a need for further legal research and examination of Remotely Piloted Aircraft (RPA) liability matters in light of the increasing use of remotely piloted aircraft (RPA), and in furtherance of the decisions taken by the Council during its 200th (C-DEC 200/5) and 203rd (C-DEC 203/5) Sessions, respectively, the Legal and External Relations Bureau (LEB) undertook a study of the issue of liability as it relates to RPA. The study examined the existing international legal liability regime, to include the regime for liability to third parties to determine whether there were any issues that needed to be addressed with respect to RPA, and concluded the regime in its current state is legally adequate to accommodate RPA technology.

1.2 The study was presented to the 36th Session of the Legal Committee, which expressed its overall satisfaction with the work of the Secretariat. However, though the Committee concluded that the matter of the adequacy and efficacy of the international liability regime had been rightly addressed by the study, it found there are other aspects of RPAS operations of an international nature, such as operations over the high-seas, cross-border operations, and changes in possession/control of the RPA during international flight, which necessitated continued consideration of an international framework. There was thus broad support for maintaining this item on the Committee's work programme. There was also broad support on the Committee for a questionnaire to States, both as a means of gathering information on national legislation for comparative purposes, and as a means to identify the international issues that are in play (that is, what are the problems that national legislation cannot solve).

1.3 Consistent with the Committee's recommendations, LEB is undertaking the drafting of this questionnaire and anticipates that its preparation and distribution will take place in the spring of 2016.

#### 2. Consideration of guidance on conflicts of interest

2.1 The Legal Committee at its 36th Session considered the results of the online survey on conflicts of interest in civil aviation to which 43 States responded. It was established from the survey that most States that responded have in place a framework dealing with conflicts of interest (COI) which they consider to be effective. It was considered useful for all States to have such a framework given the prevalence of COI situations in the civil aviation activities of States. In view of the continuing interest in work on the subject, the following next steps have been identified for further work on the item: (a) Interested States will prepare and present to the Assembly a resolution that urges States to develop a legal framework and cooperate in order to share their best practices in dealing with COI and the Secretariat would provide assistance requested in this regard; and (b) States that have not already done so are encouraged to respond to the COI survey that remains open online and to provide ICAO with additional information, including legislative and regulatory texts. At the same time the Secretariat will collate information from States concerning their best practices particularly on: i) separation of responsibilities and authorities between regulatory and state-owned service providers; ii) the movement of individuals between jobs in the regulatory and regulated entities; and iii) performance of regulatory duties by seconded or designated staff of the regulated entities. Results from these activities will be reported to the Legal Committee at its next session.

### 3. Acts or Offences of concern to the international aviation community and not covered by existing air law instruments

3.1 The Diplomatic Conference held under the auspices of ICAO from 26 March to 4 April 2014 adopted the *Protocol to Amend the Convention on Offences and Certain Other Acts Committed on Board Aircraft* (Montréal Protocol of 2014).

3.2 The Montréal Protocol of 2014 modernizes the *Convention on Offences and Certain Other Acts Committed on Board Aircraft* of 1963. The preamble of the Protocol expresses concern about the escalation of the severity and frequency of unruly behaviour on board aircraft and recognizes the desire of many States to assist each other in curbing unruly behaviour and restoring good order and discipline on board aircraft. The operative part of the Protocol recognizes, under certain conditions, the competence of the State of landing and the State of the operator to exercise jurisdiction over offences and acts on board aircraft. The establishment of such jurisdiction over offences is mandatory if the criteria set out in the Protocol are met. The Protocol extends legal recognition and certain protections to in-flight security officers. It contains provisions addressing such issues as coordination among States, due process and fair treatment, and right to seek recovery under national law.

3.3 The Diplomatic Conference also adopted a Resolution which urges the Council of ICAO to request the Secretary General to update ICAO Circular 288 (*Guidance Material on the Legal Aspects of Unruly/Disruptive Passengers*) to include a more detailed list of offences and other acts, as well as to make consequential changes to the Circular arising from the adoption of the Protocol. Pursuant to the Resolution, the Council, at the second meeting of its 202nd Session on 11 June 2014, instructed the Secretary General to update the Circular. The Secretary General subsequently established a Task Force on Legal Aspects of Unruly Passengers to assist in this exercise.

3.4 The Task Force, chaired by Mrs. M. Polkowska (Poland), met in Montréal from 15 to 17 September 2015 and noted that certain States have the system of imposing civil, administrative or other penalties as an alternative for punishing unruly behaviour which amount to criminal offences as well as for those which do not amount to criminal offences. Accordingly, it was decided to insert a short text to Chapter 2 of the amended Circular to refer to the possibility that a State may, if it deems necessary, establish such a system of penalties.

3.5 The Task Force has completed the initial identification of the possible consequential changes to the Circular arising from the adoption of the Montréal Protocol of 2014. The follow-up work was taken up by three drafting groups for different chapters of the Circular. They completed their initial drafts before the second meeting of the Task Force, which was held from 30 to 31 March 2016 in Geneva, Switzerland.

3.6 The Task Force further noted that following the consequential changes arising from the adoption of the Protocol, Assembly Resolution A37-22, Appendix E (*Adoption of national legislation on certain offences committed on board civil aircraft (unruly/disruptive passengers)*) may need to be amended. The 36th Session of the Legal Committee considered the progress report of the Task Force and encouraged it to complete its task. A separate working paper is being presented to the Assembly proposing the amendment to Resolution A37-22. The Task Force will hold its third meeting in 2017.

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**

4.1 This item is accorded priority No. 4 on the Work Programme of the Legal Committee. The Secretariat continues to observe and to monitor, as necessary, the relevant activities related to this item.

5. **Determination of the status of an aircraft – civil/State**

5.1 At the fifth Meeting of its 203rd Session in November 2014, the Council agreed to adding the “determination of the status of aircraft” to the Work Programme of the Legal Committee. During the 36th Session of the Legal Committee, Poland presented working paper LC/36-WP/2-6 – State/Civil Aircraft Definition and Its Impact on Aviation, on behalf of Poland, Bulgaria, The Czech Republic, Cyprus, Greece, Lithuania, Romania, Slovakia, Slovenia, and Hungary, which recalled the 1993 ICAO Secretariat Study on Civil/State Aircraft and called upon the Legal Committee to express its opinion on how to (a) achieve the definition of Civil/State aircraft; (b) “[establish] more precise criteria for qualification of civil, state or mixed character of aircraft and flights operated for unusual purposes”; and (c) “ensure the recognition of the relevant rules by the International Aviation community for determining the aircraft status for each flight or flight series (who is competent to take such decision, how such determination has to be identified and notified to the parties concerned if flight planning rules are not sufficient)”, all without amending the Convention.

5.2 The Committee reached consensus in the four following areas: (1) safety and security requirements impacting civil aviation are preeminent; (2) there is no need to amend Article 3 a) and b) of the Chicago Convention; (3) the “Determination of the Status of an Aircraft – Civil/State” should remain on the Committee’s Work Programme; and (4) the 1993 Secretariat Study is excellent and should serve as the basis for of the Committee’s review and continued work on this issue. Consensus is yet to be developed with respect to the need for or desirability of an official ICAO interpretation of Article 3 b), and the need for or desirability of amendments to the Annexes of the Convention to address the matter.

5.3 The Committee further took note of the fact that the Council has directed LEB to review the 1993 Study and agreed that a questionnaire, inquiring about the practical problems States are facing due to the classification of “civil/State aircraft”, should be sent out before LEB’s review of the 1993 Study is undertaken to aid in narrowing the scope of the review, and that LEB should complete its review and analysis of the study before the Committee’s next session. The Committee thus concluded that LEB should make its best efforts to i) send the questionnaire in summer 2016; and ii) complete its review and analysis of the study before the Committee’s next session.

5.4 Consistent with the Committee’s recommendations, LEB is undertaking the drafting of this questionnaire in an effort to complete its preparation and distribution in the summer of 2016.

6. **Promotion of the Ratification of International Air Law Instruments**

6.1 This item, formerly titled “Review of the question of the ratification of international air law instruments”, was re-named at the 38th Session of the Assembly in order to emphasize the main aspect of this item.

6.2 A Diplomatic Conference in Montréal, convened under the auspices of ICAO, from 26 March to 4 April 2014, adopted the *Protocol to Amend the Convention on Offences and Certain Other*

*Acts Committed on Board Aircraft* (Montréal, 2014) (Montréal Protocol of 2014). The Secretary General of ICAO is its depositary. As of 31 May 2016, the Montréal Protocol of 2014 had been signed by 30 States, ratified by 1 and acceded to by 2. To assist States in becoming parties to this treaty, an administrative package has been developed and placed in the Treaty collection on the ICAO website (<http://www.icao.int/Secretariat/Legal/Pages/TreatyCollection.aspx>).

6.3 The Treaty Collection provides information such as current lists of parties to multilateral air law treaties; the status of individual States with regard to multilateral air law treaties; a composite table illustrating the status of treaties and status of States vis-à-vis treaties; administrative packages to assist States in becoming parties to treaties; Assembly resolutions related to ratification matters; and current information and recommendations on ratification matters. All depositary actions are promptly reflected in a chronological record on the above-mentioned website.

6.4 There is continued emphasis on ratification matters by the President of the Council and the Secretary General and other ICAO officials during their visits to States. LEB provides briefs for these missions, indicating the instruments remaining to be ratified and specifying their priority. LEB promotes ratification at legal seminars, during personal deposits by State officials, Assembly sessions and other ICAO meetings. In this context, it is worth noting that pursuant to Assembly Resolution A37-22, Appendix C, ICAO Member States which so far have not done so were urged to ratify in particular the Montréal Convention of 1999, the Cape Town instruments of 2001, the two Montréal Conventions of 2009 and the 2010 Beijing Convention and Beijing Protocol as soon as possible. The importance of broadening and strengthening the global aviation security regime by ratifying the two Beijing instruments and the importance of universal adoption of the Montréal Convention of 1999 were expressly recognized by the Assembly in Assembly Resolutions A38-19 and A38-20 respectively.

6.5 LEB has participated in various activities of the United Nations Office of Drugs and Crime (UNODC), through its Terrorism Branch, aimed at providing assistance to requesting countries in their efforts to address the legal and criminal justice aspects of countering terrorism. In this regard, LEB was involved in facilitating national workshops on the promotion and implementation of the transport related counter-terrorism international legal instruments held in Abuja, Nigeria from 3 to 14 September 2014, in Lagos, Nigeria from 12 to 13 August 2015 and Dhaka, Bangladesh, 27 and 28 April 2015 and contributing to various UNODC publications on transport-related (aviation and maritime) terrorism offences and the international legal framework against Chemical, Biological, Radiological and Nuclear (CBRN) Terrorism. These activities have contributed to ICAO efforts in promoting the ratification of the 2010 Beijing Instruments and providing assistance to States in the process of domesticating and implementing the provisions of various civil aviation counter-terrorism air law instruments.

## 7. Safety aspects of economic liberalization and Article 83 *bis*

7.1 As of 31 May 2016, 169 States were parties to the Protocol of amendment to the Chicago Convention relating to Article 83 *bis*. A continuously updated list of parties to Article 83 *bis* may be found on the ICAO website as part of the LEB Treaty Collection. The Database of Aeronautical Agreements and Arrangements (DAGMAR), also available via the LEB page on the ICAO website, features essential information on registered agreements. The registration of Article 83 *bis* Agreements by the Secretariat is now up to date.

7.2 Article 83 *bis* of the Chicago Convention makes provision for the transfer of certain functions and duties normally incumbent on the State of Registry to the State of Operator, in the case of

lease, charter or interchange of an aircraft or similar arrangement. It also prescribes the limits of the responsibilities which are transferable in the agreement, i.e. those duties attached to Articles 12, 30, 31 and 32 a) of the Convention. The Council, at its 199th Session endorsed the recommendation of the 35th Session of the Legal Committee that a task force be formed to assist in revising Circular 295 *Guidance on the Implementation of Article 83 bis of the Convention on International Civil Aviation* (Cir 295 LE/2) and also to better educate Member States on the applicability of 83 *bis* agreements. The Article 83 *bis* Task Force (83 *bis* TF) was established in September 2014 with the following deliverables: (a) recommendations for revisions to ICAO Circular 295; and (b) identification of options to be considered by ICAO as alternatives to the current registration system, possibly web-based.

7.3 The 83 *bis* TF, chaired by Mr. J. Thachet (Canada), met three times, in Montréal in 2014 and in Dublin and Bermuda in 2015, with work carrying on remotely in the intervening periods. Experts from 12 member States participated in one or more of the meetings of the 83 *bis* TF. The 83 *bis* TF opined that Circular 295 should not be replaced by another circular but updated in the form of a Manual. The 83 *bis* TF assisted the Secretariat in developing such a draft Manual, for finalization after last review by the 83 *bis* TF. The salient features of the draft Manual were presented for the information to the 36th Session of the Legal Committee. The 83 *bis* TF made five recommendations to the Legal Committee, including with respect to the establishment of an interactive web-based registration and publication system for Article 83 *bis* agreements.

7.4 The Legal Committee supported and appreciated the work of the 83 *bis* TF, including its assistance to the Secretariat in the development of a draft Manual expected to be published by the end of 2016, and approved its recommendations, as amended, for the consideration of the Council. At the 7th meeting of its 207th Session, on 29 February 2016, the Council accepted the list of recommendations regarding Article 83 *bis*.

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## APPENDIX B

### B. OTHER TOPICS OF LEGAL INTEREST

#### 1. International interests in mobile equipment (aircraft equipment)

1.1 The Council, in its capacity as the Supervisory Authority of the International Registry, continues to monitor the operation of the Registry to ensure that it functions efficiently in accordance with Article 17 of the *Convention on International Interests in Mobile Equipment*, signed at Cape Town on 16 November 2001 (Cape Town Convention).

1.2 As the third term of appointment of the Commission of Experts of the Supervisory Authority of the International Registry (CESAIR) members came to an end in July 2015, the Council, pursuant to Article XVII (4) of the *Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Aircraft Equipment*, signed at Cape Town on 16 November 2001 (Cape Town Protocol), and further to nominations/re-nominations received from the Contracting and Signatory States to the Cape Town Convention and Protocol, appointed/re-appointed members to the Commission for the fourth term. CESAIR is currently composed of 13 experts nominated by Brazil, Canada, China, France, Ireland, Jordan, Malaysia, Nigeria, Singapore, South Africa, United Arab Emirates, United Kingdom and the United States. CESAIR held its seventh meeting in Montréal in December 2015, during which the Commission considered amendments proposed by the Registrar and the Secretariat to, respectively, the *Regulations and Procedures for the International Registry* (Doc 9864) and to the Rules of Procedure for CESAIR (Doc 9893). Recommendations were made by CESAIR to, and subsequently approved by, the Council at the 7th meeting of its 207th Session, on 29 February 2016.

1.3 Pursuant to Article 17 (2) (b) of the Cape Town Convention and Article XVII (5) of the Cape Town Protocol, the Council, at the third meeting of its 202nd Session in June 2014, decided to re-appoint the Registrar of the International Registry (Aviareto Ltd.) for a third five-year term commencing 1 March 2016.

1.4 Pursuant to Article 62 (2) (c) of the Cape Town Convention and Article XXXVII (2) (c) of the Cape Town Protocol, the Council, in its capacity as Supervisory Authority, regularly receives information from the Depositary on ratifications, declarations, denunciations and designations of entry points. As of 31 May 2016, there were 65 Contracting States to the Cape Town Convention and Protocol.

#### 2. Review of the Application of ICAO Treaties Relating to Conflict Zones

2.1 In light of the downing of Malaysia Airlines Flight 17 (MH17), the Senior-Level Task Force on Risk to Civil Aviation arising from Conflict Zones (TFRCZ) was established by ICAO and met three times in 2014. The Report presented by the Chairman of the Task Force included a work programme. The Council, during the first meeting of its 203rd Session on 27 October 2014 approved, in principle, the proposed work programme. One of the tasks identified in this work programme is to review the application of the provisions relating to conflict zones in the *Convention on International Civil Aviation* (Chicago Convention) and other ICAO treaties, with a view to strengthening the awareness and observance of the obligations under these provisions, and to update relevant guidance material for these provisions, if necessary. For this purpose, the Secretary General decided to establish a Special Group to review the application of ICAO treaties relating to conflict zones. The Group, chaired by Ms. K. Staples (United Kingdom), held its meeting in Montréal from 13 to 14 July 2015.

2.2 The Group considered the nature of the responsibilities of States and aircraft operators under the Chicago Convention and the need to enhance the assessment by States and aircraft operators of the risks arising from conflict zones. Among other things, it came to the conclusion that at this stage, it has not identified any need to amend the Convention or other treaties, while not excluding that such revisions might be necessary in future.

2.3 The Council, at the 5th meeting during its 206th Session on 10 November 2015, endorsed the conclusions of the Group and agreed that they be brought to the attention of the Legal Committee at its 36th Session for information purposes. The Netherlands presented to that session of the Committee an information paper, which referred to the Final Report on the investigation of MH17, released by the Dutch Safety Board on 13 October 2015. The Report called for stricter definition of States' responsibilities related to the safety of their airspace and referred to the need to amend the Chicago Convention and its annexes. The Netherlands stated that as the Final Report was released after the conclusions of the Special Group mentioned above, the Legal Committee is requested to take into consideration in its deliberations whether reconsideration of the conclusions of the Group is necessary.

2.4 The issue before the Committee was not whether the Chicago Convention should be amended, but whether the General Work Programme of the Legal Committee should be changed, taking into account the recommendations in the Final Report released by the Dutch Safety Board. The Committee did not sense that the majority would favour the inclusion of this item in its work programme. The Committee noted that a number of work items, such as amendments of Standards and Recommended Practices, were still going on in ICAO. Pending the results of this work, the Committee could advise the Council about its availability and willingness to assist. If the Council, based on new information provided, including the Final Report of the Dutch Safety Board, decides that the assistance of the Legal Committee is needed, then the work may be carried out following the regular procedure of ICAO.

— END —