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ASSEMBLY — 39TH SESSION
LEGAL COMMISSION

DRAFT TEXT FOR THE REPORT
ON
AGENDA ITEMS 46 & 47

The attached material on Agenda Items 46 and 47 are submitted for consideration by the Legal Commission.

Agenda Item 46: Consolidated statement of continuing ICAO policies to the legal field

46:1 The Commission considered this item on the basis of A39-WP/57 presented by the Council.

46:2 The Secretariat highlighted, in conjunction with paragraph 45:7 above, that the working paper had been prepared to address certain consequential changes to the Assembly Resolution following the adoption of the Montréal Protocol of 2014, and the ensuing work of the Task Force to update guidance material on legal aspects of unruly passengers that impacts Appendix E of the resolution. Additional changes were included in the Assembly Resolution in light of anticipated amendments to increase the size of the Council and the Air Navigation Commission that had been presented to this session of the Assembly for adoption.

46:3 The Commission accepted the proposal made by one delegation to reflect those amendments in the sixth preambular clause in Appendix C to the Assembly Resolution containing references to other amendments to the Chicago Convention that had not yet come into force, instead of in the seventh preambular clause.

46:4 The Commission then agreed to recommend to the Plenary the adoption of the following resolution:

Resolution 46/1: Consolidated Statement of Continuing ICAO Policies in the Legal Field

Whereas it is considered desirable to consolidate Assembly resolutions on the Organization's policies in the legal field in order to facilitate their implementation and practical application by making their texts more readily available, understandable and logically organized:

The Assembly:

1. *Resolves* that the Appendices attached to this resolution constitute the consolidated statement of continuing ICAO policies in the legal field, up to date as these policies exist at the close of the ~~37th~~ 39th Session of the Assembly;
2. *Resolves* to continue to adopt at each ordinary session a consolidated statement of continuing ICAO policies in the legal field; and
3. *Declares* that this resolution supersedes Resolution ~~A36-26~~ A37-22.

APPENDIX A

General Policy

Whereas international civil aviation can greatly help to create and preserve friendship and understanding among the nations and peoples of the world, yet its abuse can become a threat to the general security; and

Whereas it is desirable to avoid friction and to promote that cooperation between nations and peoples upon which the peace of the world depends:

The Assembly:

Reaffirms the important role of law in the avoidance and resolution of conflicts and disputes among the nations and peoples of the world and, in particular, in the achievement by the Organization of its aims and objectives.

APPENDIX B

Procedure for approval of draft conventions on international air law

The Assembly resolves:

That the following constitutes the procedure for the approval of draft conventions:

1. Any draft convention which the Legal Committee considers as ready for presentation to the States as a final draft shall be transmitted to the Council, together with a report thereon.
2. The Council may take such action as it deems fit, including the circulation of the draft to the Contracting States and to such other States and International Organizations as it may determine.
3. In circulating the draft convention, the Council may add comments and afford States and organizations an opportunity to submit comments to the Organization within a period of not less than four months.
4. Such draft convention shall be considered, with a view to its approval, by a conference which may be convened in conjunction with a session of the Assembly. The opening date of the conference shall be not less than six months after the date of transmission of the draft as provided in paragraphs 2 and 3 above. The Council may invite to such a conference any non-Contracting State whose participation it considers desirable, and shall decide whether such participation carries the right to vote. The Council may also invite international organizations to be represented at the conference by observers.

APPENDIX C

Ratification of ICAO international instruments

The Assembly:

Recalling its Resolution ~~A36-26~~ A37-22, Appendix C relating to the ratification of the Protocols of Amendment to the Chicago Convention and of the private air law and other instruments which have been developed and adopted under the auspices of the Organization;

Noting with concern the continuing slow progress of ratification of the aforementioned Protocols of Amendment, including in particular those introducing Articles 3 *bis* and 83 *bis* to the Chicago Convention, and the final paragraphs (relating to the Arabic and Chinese texts);

Recognizing the importance of these amendments to international civil aviation, in particular to the viability of the Chicago Convention, and the consequent urgent need to accelerate the entry into force of these amendments not yet in force;

Recognizing the need to accelerate the ratification and entry into force of air law instruments developed and adopted under the auspices of the Organization;

Conscious of the fact that only a universal participation in these Protocols of Amendment and other instruments would secure and enhance the benefits of unification of the international rules which they embody:

Urges all Contracting States which so far have not done so to ratify those Amendments to the Chicago Convention which are not yet in force [i.e. those amending the final paragraph to add Arabic and Chinese to the authentic texts of the Convention], and those amendments to Articles 50 (a) and 56 adopted in 2016, as soon as possible;

Urges all Contracting States which have not yet done so to ratify the Protocols introducing Articles 3 *bis* and 83 *bis* of the Chicago Convention;

Urges all Contracting States which so far have not done so to ratify the other international air law instruments, in particular the Montréal Convention of 1999, the Cape Town ~~instruments~~ Convention and Cape Town Protocol of 2001, the two Montréal Conventions of 2 May 2009, the Beijing Convention and the Beijing Protocol of 2010, and the Montréal Protocol of 2014, as soon as possible;

Urges States which have ratified the instruments in question to provide to the Secretary General copies of the text and documents they have used in the process of ratification and implementation of such instruments and which may serve as an example assisting other States in the same process; and

Directs the Secretary General to take all practical measures within the Organization's means in cooperation with States to provide assistance, if requested, to States encountering difficulties in the process of ratification and implementation of the air law instruments, including the organization of and the participation in workshops or seminars to further the process of ratification of the international air law instruments.

APPENDIX D

The teaching of air law

The Assembly, considering the undoubted importance for the Organization and the States of the specialized teaching of air law and the desirability of fostering knowledge of this important subject:

Invites the Council to take all possible action to promote the teaching of air law in those States where it is not yet available;

Urges the States to adopt appropriate measures which would further the achievement of the above objective; and

Calls upon Contracting States and interested parties to contribute to the Assad Kotaite Graduate and Postdoctoral Fellowship Fund.

APPENDIX E

Adoption of national legislation on certain offences committed on board civil aircraft (unruly/disruptive passengers)

The Assembly:

Recognizing that, under the Preamble and Article 44 of the *Convention on International Civil Aviation*, one of the aims and objectives of the Organization is to foster the planning and development of international air transport so as to meet the needs of the peoples of the world for safe, regular, efficient and economical air transport;

Noting the increase of the number and gravity of reported incidents involving unruly or disruptive passengers on board civil aircraft;

Considering the implications of these incidents for the safety of the aircraft and the passengers and crew on board these aircraft;

Mindful of the fact that the existing international law as well as national law and regulations in many States are not fully adequate to deal effectively with this problem;

Recognizing the special environment of aircraft in flight and inherent risks connected therewith, as well as the need to adopt adequate measures of national law for the purpose of enabling States to prosecute criminal acts and offences constituting unruly or disruptive behaviour on board aircraft;

Encouraging the adoption of national legal rules enabling States to exercise jurisdiction in appropriate cases to prosecute criminal acts and offences constituting unruly or disruptive behaviour on board aircraft registered in other States;

Noting that States at the International Conference on Air Law held in Montréal adopted on 4 April 2014 a *Protocol to Amend the Convention on offences and Certain other acts Committed on Board Aircraft* and that the Conference decided not to include a list of offences and other acts within the Protocol but recommended that ICAO Circular 288 – *Guidance Material on the Legal Aspects of Unruly/Disruptive Passengers* published in 2002 be updated;

Therefore:

Urges all Contracting States to enact as soon as possible national law and regulations to deal effectively with the problem of unruly or disruptive passengers, incorporating so far as practical the provisions set out below; ~~and~~

Calls on all Contracting States to submit to their competent authorities for consideration of prosecution all persons whom they have a reasonable ground to consider as having committed any of the offences set out in the national laws and regulations so enacted, and for which they have jurisdiction in accordance with these laws and regulations. ~~and;~~

Requests the Council to encourage the Task Force on Legal Aspects of Unruly Passengers to continue its work, including the review of the contents of the Model Legislation on Certain Offences Committed on Board Civil Aircraft found in this Appendix and to report to the 37th Session of the Legal Committee; and

Decides to review this Appendix at its next ordinary session on the basis of the outcome of the work of the said Task Force.

Model Legislation on Certain Offences Committed on Board Civil Aircraft

Section 1: Assault and Other Acts of Interference against a Crew Member on Board a Civil Aircraft

Any person who commits on board a civil aircraft any of the following acts thereby commits an offence:

- 1) assault, intimidation or threat, whether physical or verbal, against a crew member if such act interferes with the performance of the duties of the crew member or lessens the ability of the crew member to perform those duties;
- 2) refusal to follow a lawful instruction given by the aircraft commander, or on behalf of the aircraft commander by a crew member, for the purpose of ensuring the safety of the aircraft or of any person or property on board or for the purpose of maintaining good order and discipline on board.

Section 2: Assault and Other Acts Endangering Safety or Jeopardizing Good Order and Discipline on Board a Civil Aircraft

- 1) Any person who commits on board a civil aircraft an act of physical violence against a person or of sexual assault or child molestation thereby commits an offence.
- 2) Any person who commits on board a civil aircraft any of the following acts thereby commits an offence if such act is likely to endanger the safety of the aircraft or of any person on board or if such act jeopardizes the good order and discipline on board the aircraft:

- a) assault, intimidation or threat, whether physical or verbal, against another person;
- b) intentionally causing damage to, or destruction of, property;
- c) consuming alcoholic beverages or drugs resulting in intoxication.

Section 3: Other Offences Committed on Board a Civil Aircraft

Any person who commits on board a civil aircraft any of the following acts thereby commits an offence:

- 1) smoking in a lavatory, or smoking elsewhere in a manner likely to endanger the safety of the aircraft;
- 2) tampering with a smoke detector or any other safety-related device on board the aircraft;
- 3) operating a portable electronic device when such act is prohibited.

Section 4: Jurisdiction

1. The jurisdiction of (*Name of State*) shall extend to any offence under Sections 1, 2, or 3 of this Act if the act constituting the offence took place on board:

- 1) any civil aircraft registered in (*Name of State*); or
- 2) any civil aircraft leased with or without crew to an operator whose principal place of business is in (*Name of State*) or, if the operator does not have a principal place of business, whose permanent residence is in (*Name of State*); or
- 3) any civil aircraft on or over the territory of (*Name of State*); or
- 4) any other civil aircraft in flight outside (*Name of State*), if
 - a) the next landing of the aircraft is in (*Name of State*); and
 - b) the aircraft commander has delivered the suspected offender to the competent authorities of (*Name of State*), with the request that the authorities prosecute the suspected offender and with the affirmation that no similar request has been or will be made by the commander or the operator to any other State.

2. The term “in flight” as used in this section means the period from the moment when power is applied for the purpose of takeoff until the moment when the landing run ends.

APPENDIX F

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. 4 of the General Work Programme of the Legal Committee “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 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 47: Other issues to be considered by the Legal Commission

47:1 Following up on the merits to further promote the ratification of the Montréal Convention of 1999, in its presentation of A39-WP/120, IATA recalled the significant benefits for passengers, shippers and other stakeholders established by virtue of said instrument. The observer noted that despite the good progress that had been made in the number of ratifications since the previous Assembly there were still 72 Member States that had yet to ratify the instrument, including states in growing markets and regions. The observer stated that the absence of a single, universal liability regime for international carriage by air left an undesirable patchwork of differing legal regimes, and it was therefore necessary to renew the efforts to urge all Member States that have not done so, to ratify the Montréal Convention of 1999 at the earliest opportunity. Echoing the sentiment that had been expressed during the consideration of A39-WP/100 and the draft resolution contained therein (paragraph 45:8), all delegations which took the floor welcomed the proactive approach taken by IATA on this subject and reiterated the importance of a universal regime.

47:2 In addition to the discussion in paragraph 45:7 and the following, IATA presented A39-WP/139, which called upon all States to ratify the Montréal Protocol of 2014. A number of delegations supported the proposals of IATA. Some of their States had ratified the Protocol and others were in the process of doing so.

47:3 One delegation mentioned that while it was always willing to join the consensus under the auspices of ICAO, it was disappointed by the results of the Protocol. The treaty neither effectively modernized the Tokyo Convention, nor undertook any meaningful steps to deal with the issues of unruly passengers. It was backward regarding the status of in-flight security officers. Accordingly, its State would not ratify the Protocol. Supporting this delegation, another delegation mentioned that it agreed with the principles of the Protocol but was not satisfied with its specific terms.

47:4 Some delegations stated that the results of the Protocol reflect the compromise among a variety of issues. One delegation specified that while the Protocol was not as robust as it should be, it nevertheless represented good efforts to enhance the legal framework against unruly behaviour. While understanding the difficulties of some States to accept the Protocol, it still believed that there would be more advantages to bring the treaty into effect.

47:5 The delegation of France presented A39-WP/159 by outlining the obligations of Contracting States under Article 21 of the Chicago Convention for the sharing of information on ownership of aircraft registered in a State. The delegation recalled State Letter AN 11/47-10/67 regarding the implementation of a web-based system for the provision of pertinent data concerning aircraft registered in a State pursuant to Article 21. It was noted that Contracting States encountered varying degrees of difficulty in complying with their obligations under Article 21, with the result being that even information provided through the web-based system was incomplete and unreliable. Noting that the air transport landscape as it related to changes in aircraft ownership and registration had vastly changed since Article 21 was drafted, the delegation suggested that Contracting States could benefit from clarification and alignment of the definition of ownership and related concepts. In proposing that there be a clarification of, and not an amendment to, the Chicago Convention in this regard, the delegation averred that there was to be no constraint on the freedom of Contracting States to manage their respective domestic registration procedures. The delegation concluded by proposing that the Legal Commission recommend this topic for inclusion on the General Work Programme of the Legal Committee.

47:6 All delegations which took the floor supported A39-WP/159, and were in favour of including this item on the General Work Programme of the Legal Committee. A number of delegations identified the difficulties highlighted in the working paper. For instance, one delegation mentioned that in its domestic law, the term “owner” refers to a person who is responsible for the operation and maintenance of an aircraft. Some delegations were of the view that more effective implementation of Article 21 obligations would promote transparency, improve traceability over the lifetime of aircraft and streamline procedures for transfer of ownership, all of which would benefit the industry.

47:7 A representative from the Air Navigation Bureau explained that the web-based system was already functioning although it posed a challenge for some States, and was being reviewed to facilitate usability. The Bureau welcomed feedback on improving the system.

47:8 One observer supported A39-WP/159 on the basis that it could alleviate the regulatory burden on airlines, and recommended coordination of efforts with the work undertaken by the Technical Commission relating to A39-WP/237 on the Facilitation of the Cross-Border Transferability Process. This recommendation was supported by one delegation who added that if the item were to be included in the General Work Programme of the Legal Committee, it would be important to appropriately reference all ongoing or completed work that may be relevant to a clarification of ownership and related concepts.

47:9 The Commission thereafter unanimously supported the addition of the subject “Implementation of Article 21 of the Chicago Convention” as a new Item 8 to the General Work Programme of the Legal Committee. Accordingly, the Commission established the General Work Programme 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;
- 7) Safety aspects of economic liberalization and Article 83 *bis*; and
- 8) Implementation of Article 21 of the Chicago Convention.

47:10 Relating to paragraph 45:3 above and concerning the item “Remotely Piloted Aircraft Systems Legal Definition”, Brazil presented WP/229, highlighting the problem faced by Brazil in applying ICAO Standards and Recommended Practices (SARPs) relative to remotely piloted aircraft systems (RPAS) due to the definition of “aircraft” in Brazil’s national legislation being at variance with the definition of “aircraft” in Annex 7 to the Chicago Convention, as illustrative of the types of problems States were facing with respect to legal regulation of RPAS, and thus calling for the issue of the

definition of RPAS to be included on the Work Programme of the Legal Committee, while taking into account the conclusions and developments of the RPAS Panel.

47:11 A number of delegations shared the concerns expressed by Brazil in WP/229, with one delegation offering the view that the concept of “pilotless aircraft” under Article 8 of the Chicago Convention was unclear. Another of these delegations noted particularly the possible need for work by the Legal Committee to address other topics related to RPAS operations, such as navigation rules, aircraft nationality and registered marks, and accident investigations, as was pointed out in paragraph 2.2 of the paper.

47:12 The Chairman of the Legal Committee then took the floor to remind delegates that the subject of “Study of legal issues relating to remotely piloted aircraft”, which comprises all legal definitional issues, was already on the General Work Programme of the Legal Committee, with the highest priority as item 1. He also reminded delegates of the survey on RPAS legal issues that was distributed to all Member States in August 2016 and encouraged States to respond and to raise definitional issues, like those presented by Brazil in A39-WP/229, or any other legal issues related to RPAS that they wished to put before the Legal Committee.

47:13 Several delegations that thereafter took the floor supported the concept of including the issue of the definition of RPAS on the General Work Programme of the Legal Committee, but highlighted the importance of the element proposed by Brazil in A39-WP/229; i.e., that the conclusions and developments of the RPAS Panel be taken into account. One delegation then noted that while the matter of definitions is naturally of particular interest to lawyers, the definition of aircraft contained in Annex 7 to the Chicago Convention predates the establishment of ICAO and underpins the more than 10,000 SARPs contained in all of the Annexes. This delegation emphasized that those same SARPs are the basis for the civil aviation legislation of many States, and that it was therefore important to be mindful of the potentially far-reaching impact that any changes to the longstanding definition of “aircraft” could have on the existing ICAO regulatory structure. Another delegation pointed out that Annexes 2, 4, and 7, were relevant and should be analyzed to determine whether the definition of RPAS as aircraft is already adequately addressed.

47:14 The remaining delegations that took the floor generally offered strong support and appreciation for the paper presented by Brazil, but a significant number of these underscored that the issue of the definition of RPAS was already included on the General Work Programme of the Legal Committee under item 1, or should be considered as being included in this item.

47:15 A39-WP/251 presented by Brazil drew the attention of the Assembly to the difficulties some States face in complying with Article 12 due to the lack of procedural rules and the negative impact it might represent for civil aviation safety. The Commission noted the paper and encouraged Member States to strengthen the enforcement of Article 12.

47:16 In conjunction with paragraph 45:7 above, the Commission also noted A39-WP/293 presented by Colombia on behalf of Guatemala and referred this paper to the Task Force on Legal Aspects of Unruly Passengers. It was noted by a delegation and an observer that the experience of some States in administrative sanctions against unruly behaviour could serve as useful reference, pending the entry into force of the Protocol.
