International Civil Aviation Organization

LC/33-WP/3-3
1/4/08

WORKING PAPER

LEGAL COMMITTEE – 33RD SESSION

(Montréal, 21 April – 2 May 2008)

Agenda Item 3: Compensation for damage caused by aircraft to third parties arising from acts of unlawful interference or from general risks

DRAFT CONVENTION ON COMPENSATION FOR DAMAGE CAUSED BY AIRCRAFT TO THIRD PARTIES, IN CASE OF UNLAWFUL INTERFERENCE

REPORT OF THE RAPPORTEUR

(15 pages)

REPORT OF THE RAPPORTEUR ON THE DRAFT CONVENTION ON COMPENSATION FOR DAMAGE CAUSED BY AIRCRAFT TO THIRD PARTIES, IN CASE OF UNLAWFUL INTERFERENCE

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1. Setting the stage

1.1 Picture the following hypothetical situation taking place some years from now: Ruritania is hosting a World Cup football finals match. Terrorists hijack a commercial aircraft departing from a neighbouring country and fly it into the huge stadium as the event is just getting underway. The world watches in horror as 5,000 people, from 45 countries, are killed and another 10,000 are injured. There is considerable damage to property as well. In the ensuing weeks, the political and security ramifications of the crime are very serious indeed. On the economic front, however, there is no repeat of the baleful effects on civil aviation – and the broader global economy – from the terrorist attacks of 11 September 2001.

1.2 Although aviation activity might come to a brief halt as the security situation is sorted out, it resumes quickly. Moreover, the economic recovery is much quicker and does not take months and years to regain pre-attack levels. The insurance market does not fail. The air carrier, which is obviously among the principal victims of the crime, is not extinguished. The victims on the ground and their families can look forward to full, orderly, and just compensation for their losses. Why? An international organization created by an international convention for just such an eventuality steps in immediately, preparing to compensate victims of terror, wherever they may be found, beyond losses that can be covered by the carrier's insurance coverage. Few members of the public are even aware of the organization. Its director and staff, which operate in an efficient, cost-effective, standby mode in normal times, quickly gear up to identify the victims and qualify the claims, all of which will be handled uniformly in Ruritania's courts, in accord with a global legal regime enacted under the aegis of the International Civil Aviation Organization (ICAO).

1.3 The carrier makes advance payments in accord with Ruritanian law to victims to alleviate their distress and meet emergency needs. This money comes out of the carrier's insurance coverage, the cost of which has incidentally been stabilized and perhaps even held in check by the advent of this compensation organization. Damage claims beyond what can be paid from the remainder of the insurance money are compensated by an international fund. The convention has been in effect long enough to permit contributions by the world's air carriers to reach the point that it can cover from funds on hand losses up to nearly four billion Special Drawing Rights (SDRs) (an International Monetary Fund inflation-adjusted unit), equal to more than five billion U.S. dollars.

1.4 Moreover, the fund will provide compensation much more quickly than would have been possible under Ruritania's old adversarial claims system, in line with a time schedule that is considered normal in the aviation insurance industry. Even though the scars of such a crime can never be erased, the victims are nevertheless made economically whole.

2. Introduction and general considerations

2.1 The purpose of this report is to introduce the draft *Convention on Compensation for Damage Caused by Aircraft to Third Parties, in Case of Unlawful Interference* (the Unlawful Interference Compensation Convention) and provide the Committee with background on its task, which is to ready the draft for submission to a diplomatic conference. This introductory section will describe how the work has unfolded since the 32nd Session of the Legal Committee in 2004. It will emphasize the reasons the draft

split into two instruments and the implications for the nature of the present instrument. Next, it will provide a capsule summary of the Unlawful Interference Compensation Convention's system for compensation of victims. The report will then describe its relationship to the draft *Convention on Compensation for Damage Caused by Aircraft to Third Parties* (the General Risks Convention), which is also before the Committee, as well as its relationship to other, related civil aviation instruments. After a brief but important word about the terrorist perpetrators, the report will review the major features of the draft Unlawful Interference Compensation Convention and the most important issues to be addressed by the Committee. Finally, it will address some of the principal criticisms that have been levelled at the draft, both within and outside ICAO.

2.2 Transformation of the revision of the Rome Convention from a pure liability reform instrument into a compensation fund mechanism

2.2.1 The Secretariat paper (LC/33-WP/3-1) briefly describes developments since the Legal Committee added this item to its Work Programme at its 31st Session in 2000. The addition was motivated perhaps by an impulse to tidiness, to follow up the successful resolution of the hopelessly fragmented passenger liability regime in the *Convention for the Unification of Certain Rules for International Carriage by Air*, Montreal, 28 May 1999 (the 1999 Montreal Convention). That convention replaced the old Warsaw system, which included a treaty, several protocols, and inter-carrier agreements, with a self-contained instrument for the first time. It has since come into effect and is widely subscribed to.

2.2.2 The present work began with a study on the modernization of the *Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface*, Rome, 7 October 1952 (the 1952 Rome Convention). The Committee devoted its 32nd Session in 2004 to a draft revision of the Rome Convention, but decided that more work was needed before a diplomatic conference could be convened. More detail on the initial work and the issues before the 32nd Session of the Committee can be found in the Secretariat papers (LC/32-WP/3-1 and LC/32-WP/3-2), the initial rapporteur's report (LC/32-WP/3-3), and the report of the meeting (ICAO Doc 9832-LC/192). These documents are available on the ICAO-NET website.

2.2.3 The initial efforts to revise the Rome Convention adhered closely to the 1999 Montreal Convention model. The effort adopted several Montreal-related principles, including a resolve that third-party victims, who are essentially chosen at random by the terrorist perpetrators, would be treated no less favourably than passengers, who have a contractual relationship with the carrier and have undertaken the risks of flying. Use of the 1999 Montreal Convention as a model seemed obvious in the beginning, but it became increasingly apparent that key aspects were not helpful, the most problematic being that—in the case of unlawful interference—the model put the liability presumptively on the carrier even though it is among the victims.

2.2.4 The work changed significantly after the terrorist attacks of 11 September 2001, as the enormity of the damages sank in. It became apparent that there was not just a quantitative difference between so-called bounded and unbounded events. The worst foreseeable event in the case of general risks—a collision of two wide-body aircraft over a densely populated urban area—would generate claims amounting to a large number, but nevertheless a number insurable by the current market, and even within coverage required by major aviation States. *E.g.,* Regulation (EC) No. 785/2004 of the European Parliament and of the Council (21 April 2004). A terrorist attack, on the other hand, could produce an "unbounded" event beyond the capacity of the insurance market or at least not insurable at an economic cost. Attempts to grapple with this phenomenon up to and including the 32nd Session of the Committee were unsuccessful.

2.2.5 After the 2004 Session of the Legal Committee, the Council appointed a Special Group on the Modernization of the Rome Convention of 1952 (SG-MR) to continue the work. With the indispensable assistance of the Legal Bureau, the Special Group divided the effort into two independent drafts, one addressing general risks and the other unlawful interference. The Council has put both before this meeting.

2.3 Capsule summary of the Unlawful Interference Compensation Convention: a three-layer approach to compensation

2.3.1 The Unlawful Interference Compensation Convention employs three layers to provide full compensation to victims, while protecting the other actors in the air transport sector and promoting a stable long-term financial environment for the industry. The *first layer* is provided by the aircraft operator's third-party war risks insurance, up to a fixed and reasonably insurable level. The *second layer* consists of funds of a Supplementary Compensation Mechanism (SCM), with a very high ceiling. In the remote circumstance that the capacity of the SCM is exceeded, the *third, non-binding, unspecified layer* is provided by the government or governments concerned in accordance with their laws and policies and perhaps other governments in a spirit of solidarity. The SCM is designed to meet events foreseeable in the light of the 9/11 attacks; the third layer remains for events that are not foreseeable and perhaps remote. It is not spelled out in the Convention, but may be alluded to in the preamble or through an exhortation in the final act.

2.3.2 The air transport industry is protected by excluding the liability of the participants in the industry and channelling to the operator claims up to a fixed amount that is within its insurable limits. The SCM operates a fund to cover claims above the first layer. It consists of contributions from passengers and cargo shippers collected by carriers. Industry studies indicate that the fund could be viable with contributions as low as one SDR per passenger and a comparably low amount for cargo, even if the Convention does not achieve broad global adherence. The exclusive remedy provision is discussed further below.

2.4 Comparison and contrast: the Unlawful Interference Compensation vs. General Risks drafts

2.4.1 My colleague and fellow rapporteur, Mr. A. Mutti of Argentina, has been tasked with a report on the draft General Risks Convention. His helpful report, LC/33-WP/3-4, devotes particular attention to the many provisions that are common between the two drafts. The two drafts now find themselves in very different circumstances, however, which is worth a comment. The General Risks Convention has little impetus behind it because the regime is much less "broken" (in the sense of the old adage, "if it isn't broken, don't fix it"). As already noted, the potential damages are within insurable bounds. Even though there is no broadly subscribed conventional framework, the legal regime for nearly all claims will almost always be that of the jurisdiction where the accident took place. The claims system will almost always provide for unlimited liability, whether the basis is fault or no-fault. Finally, representatives of the insurance industry relate that there is no case of legitimate claimants going uncompensated in cases of the kind covered by the General Risks Convention.

2.4.2 The Unlawful Interference Compensation Convention is an entirely different case. As already noted, damages from a recurrence, even on a substantially lesser scale than the 9/11 attacks, could still be well beyond insurable amounts. Involvement of governments, perhaps including retroactive legislation, would again be required to ensure that victims are compensated, as well as to prevent the demise of the carrier, which might not have large assets beyond its insurance. As a consequence, the unlawful interference instrument has moved away from a liability convention in the classical sense to become an *instrument for the allocation of the cost of risk management*. "Liability" in the sense of

blameworthiness does not really apply. The word appears in the operative clauses because it is needed to provide the measure of compensation, and insurers cover "liability", but the word is conspicuously absent from the title. Because there will always be a carrier, however, and because it is insured, it is selected from among the victims to be the channel for compensation of other victims. There is no connotation of fault. The compensation mechanism is a self-contained remedy, funded by contributions of passengers and cargo shippers, collected by carriers.

2.5 Influences of other conventions: Cape Town and the IOPC Funds

2.5.1 The documentation for the 32nd Session of the Legal Committee included an annotated version of the draft Convention that showed the origin of its provisions, which were largely taken from the 1952 Rome Convention and the 1999 Montreal Convention. (LC/32-WP/3-1, Appendix, available at ICAO-NET) Some provisions were drawn from other sources and some were wholly new. Since the 32nd Session, two additional precedents have become influential.

2.5.2 The *International Oil Pollution Compensation Funds* (the IOPC Funds) and their organic conventions provided the model for the SCM. The IOPC Funds operate efficiently and effectively to compensate for damage from tanker oil spills. They collect contributions and pay claims on a continuing basis, albeit on a much smaller scale than that which must be considered here. The cost is modest, and the Funds are viable even though the conventions have not been ratified by some key oil shipping States.

2.5.3 An additional instrument that features some parallels, even if they were not consciously adopted, is the *Convention on International Interests in Mobile Equipment* and its aircraft protocol, the *Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment*, both signed at Cape Town in 2001 (the Cape Town instruments). The Cape Town instruments apply to all transport category aircraft, which relates to the present instrument's opt-in feature for coverage of domestic operations, discussed below. In addition, the international registry created by the Cape Town instruments depends on a series of regulatory documents, beneath the level of the convention, similar to those discussed below in connection with the powers of the SCM's Conference of Parties (COP).

2.6 Meeting the needs of both victims and air carriers

2.6.1 From the outset, the Rome Convention modernization effort took on, as a fundamental task, ensuring that victims would continue to be fully compensated, without adding materially to the economic burdens of air carriers. It was acknowledged that an instrument that failed to achieve either of these difficult-to-accommodate ends could not be ratified. Indeed, the deficiencies of the text in this regard contributed to its failure to gain sufficient support at the 32nd Session of the Legal Committee. The present draft, however, accomplishes both goals. There are no limits on compensation for individual third-party victims, and the liability is strict, that is, without any need for demonstration of fault. All third-party claims will be accepted to the full extent of proven damages, regardless of the availability of insurance to cover them.

2.6.2 To ensure the continued existence of the carrier, the draft Convention places a global cap on aircraft operator liability, without limiting individual claims. The global limit is fundamentally necessary; it must be unbreakable except in the most extreme circumstances; and it must take into account the insurance coverage limits available in the market. The costs are designed to be modest; they are passed on to the users of commercial air transportation—which in many countries is a substantial portion of the population; and they should be at least partially offset by the stability and predictability that the system will lend to the insurance market.

2.7 **A brief note on the terrorist perpetrators**

2.7.1 The blameworthy parties are unreachable through this scheme, and they likely have no appreciable assets anyway. It would be palpably unfair to require the victims to go after the terrorists. The terrorists nevertheless continue to be subject to the unlawful interference instruments. The Committee's Work Programme also includes improvements to the antiterrorism conventions resulting from a review initiated after the 9/11 attacks. Protocols to amend the *Convention for the Suppression of Unlawful Acts Against Safety of Civil Aviation,* Montreal, 23 September 1971 (the 1971 Montreal Convention) and the *Convention for the Suppression of Unlawful Seizure of Aircraft* The Hague, December 16, 1970 (the Hague Convention) will likely be addressed by the 34th Session of the Legal Committee.

3. **Overview of the Unlawful Interference Compensation Convention's major functions and features**

3.1 There is no need to summarize here all the draft Convention's major provisions because it has been so ably done by the Secretariat. Both drafts are given a capsule summary in the Secretariat paper (LC/33-WP/3-1 Appendix A). This review will focus on the main points of agreement or contention.

3.2 **Scope**

3.2.1 The term "act of unlawful interference" is defined in Article 1 with reference to the 1970 Hague and 1971 Montreal unlawful interference conventions, including amendments or protocols in force among the State Parties concerned. This definition will pick up other acts, such as the transportation offenses, currently under consideration by ICAO, once the amending protocols are adopted by a diplomatic conference and go into effect. The Committee should consider any ramifications, such as the case where compensation might not be available to victims because a State Party to the Unlawful Interference Compensation Convention might not have ratified one of the specified conventions or an amendment thereto.

3.3 **Domestic application**

3.3.1 As the draft has developed, there has been much discussion of the question whether the compensation regime ought to be applied to domestic aviation. Those against domestic application say that conventions relating to civil aviation have traditionally applied only to international aviation, from the *Convention on International Civil Aviation,* Chicago, 7 December 1944 (the Chicago Convention) up to and including the 1999 Montreal Convention. Further, they say, questions of liability are closely related to the core functions of a sovereign State, such as protection of the health and welfare of its citizens. On the other hand, proponents of domestic application say that States are always free to apply international legal regimes in their domestic arena. They also note that domestic flights are equally vulnerable to unlawful interference and that their inclusion would substantially broaden the funding base of the SCM. Moreover, the insurance market treats civil aviation as a single global market and the Cape Town instruments apply to all transport category aircraft.

3.3.2 Article 2(2) of the draft permits each State Party to declare to the Depositary that it will apply the Convention to damage caused by its national aircraft. The Committee may even want to broaden this provision to permit State Parties to apply the regime to purely domestic operations. In either case, it is best to leave domestic application optional. Since the legal regime is no longer punitive or fault-based, it makes sense for States ratifying the Convention to weigh the economic pros and cons, upon sober reflection, in deciding whether to make an Article 2(2) declaration, should it apply to domestic operators or to domestic operations.

3.4 **Environmental damage**

3.4.1 Environmental damage is compensable under Article 3(3) to the extent that it is compensable under the law of the State Party where the damage occurs. The law with respect to environmental damage varies greatly from one State to the next, and it is appropriate that the rules for compensation be those that govern that State in which the damage occurred and in whose courts the claims will be processed.

3.5 **Mental injury**

3.5.1 Mental injury was not expressly mentioned in the 1999 Montreal Convention. It is highly controversial and treatment also varies widely from State to State. Article 3(5) of the present draft Convention, which address mental injury, was drafted in the light of the discussion of the issue in the 1999 Statement by the Diplomatic Conference (Doc 9775 – DC/2, Vol I, Minutes of the Seventeenth Meeting, Commission of the Whole, para. 34) as to why it was not treated expressly. This provision is intended to tighten the connection between mental injury and the event, where news of a terrorist attack will be widely disseminated and may even be broadcast live, as was featured in the opening hypothetical. The provision would exclude those who merely saw it on television, but cover someone traumatized by having survived direct involvement in the event. European experience shows that this approach is insurable, but the question remains whether this approach is suitable as an international standard and would stand the test of time.

3.6 **Unlawful interference and carrier liability limits based on weight classes**

3.6.1 The aggregate claims limits of Article 4 are specified in terms of gross weight classes, a structure that carries over from the 1952 Rome Convention. The current figures, ranging from 750,000 SDRs to 700 hundred million SDRs, are in square brackets to indicate that they are for discussion purposes only. It would probably be appropriate to leave specification of these amounts to the diplomatic conference. This liability cap may be broken only in exceptional circumstances. It is true that a very light aircraft could be used to inflict a relatively large amount of damage in an unusual situation, that is, if it could be used by terrorists to attack a small but very high value, vulnerable target. However, it is intuitive that larger aircraft are generally more likely to be capable of inflicting greater damage. Moreover, the graduated limits make economic sense. In line with their generally greater potential for damage, larger aircraft produce more revenue and can support the higher insurance limits that they are required to carry. In addition, the draft limits in Article 4 reflect the current economic and operating environment. They are based on insurance requirements to operate into or through European airspace. Regulation (EC) No. 785/2004 of the European Parliament and of the Council (21 April 2004). These figures are reasonable and attainable, and the use of SDRs prevents erosion of the coverage through inflation. Finally, the much higher limit of the SCM is not based on weight of the aircraft involved.

3.7 **Mid-air collisions**

3.7.1 This draft addresses a potentially significant gap left by the 1999 Montreal Convention – mid-air collisions. Article 5 specifies that, in events involving two or more aircraft, the operators are jointly and severally liable for damage suffered by third parties, which include the owner of the hull. The SCM could thus conceivably pay for the two aircraft in a collision. The carriers are already liable to their own passengers under the 1999 Montreal Convention, but if a passenger's carrier was at fault, his or her compensation would be limited to 100,000 SDRs under that Convention.

3.8 **Structure of the SCM and powers of the Conference of Parties**

3.8.1 As already noted, the SCM borrows its major features from the IOPC Funds, although some aspects of its governance derive from the Chicago Convention. Like the IOPC Funds, the SCM collects contributions and pays claims, covers damage regardless of fault, makes victims whole, pays for itself through contributions that are ultimately paid by the air transport users, and requires no government intervention. The IOPC Funds rules have been adjusted to fit aviation and to reflect two key differences from the maritime sector: oil spill claims occur fairly regularly and the contributions come largely from major oil companies.

3.8.2 On a day-to-day basis, the SCM will be managed by a Secretariat headed by a Director, appointed by the Conference of Parties. The COP is a powerful institution (its duties and powers are enumerated in Article 9), but remember that *it is made up of the State Parties*. In contrast with ICAO, it merges the functions of Council and Assembly, although it can appoint committees. Creating an organization separate from ICAO permits a match between the participating States and the decision-making. The COP can meet swiftly in case of an event, it can deal with the event in executive fashion, and it has no other distracting responsibilities. It is wholly devoted to compensation. The COP fixes the contributions to be made to the SCM.

3.8.3 The SG-MR established an SCM Task Force as an open-ended informal group, on the model of a similar group created to build the regulatory layer implementing the Cape Town instruments. The Task Force's terms of reference include producing drafts of (1) the COP's rules of procedure, (2) the SCM's regulations, (3) guidelines for compensation, (4) a decision on SCM contributions, (5) guidelines for investment, (6) a decision on the application of dropdown (Article 19(3)), (7) a resolution on application of breakability (Article 24), (8) a resolution on incidents in a non-State Party (Article 26), and (9) a resolution on credits from financial institutions. Drafts of these documents are under development and will of course be adjusted to reflect the outcome of this Committee meeting. Members of the Task Force are expected to produce for this Session an Information Paper that introduces these drafts and another aimed at providing a better understanding of the SCM's funding.

3.9 **Damage in a non-State Party**

3.9.1 One power of the COP deserves separate attention. Under Article 26, it can decide whether to provide financial support to a carrier of a State Party that has been the subject of unlawful interference that resulted in damage in a non-State Party, so as to keep it solvent. Although not obligated to do so, the non-party State whose victims would benefit from such assistance could be requested to and ought to observe the Convention's protection for the carrier. That is, the non-party State should limit the carrier's liability as if it were a State Party and direct claims above the liability limit only to the SCM and only up to the SCM limit. It must take a policy decision whether to do this. The COP would determine whether these conditions have been met. If the COP decides not to extend the financial support, the non-State Party victims might not be fully compensated when the insurance proceeds are exhausted and the carrier is insolvent. No help would then be available from the SCM; it would be up to the resources of the non-party State.

3.10 **Contributions: pre-funding vs. post-funding**

3.10.1 Some SG-MR participants have insisted that the SCM should be completely pre-funded, that is, that it be designed to achieve full funding of the SCM (amount yet to be specified) to enable the maximum payout, before an event occurs. Others have argued that collection of a substantial amount of the contributions can be delayed until after an incident, which is referred to as post-funding.

3.10.2 A fully paid up SCM has been characterized as a large sum of essentially idle money – collected by the aircraft operators from their customers—which is not justifiable in an industry that seems to be perpetually financially troubled. Pre-funding may also be thought to be politically difficult because of the perceived remoteness of the risk. Three billion SDRs (the amount proposed for discussion purposes) is not an unreasonably large sum of money, however, compared to common investment vehicles in world markets. Moreover, the risk of an incident is not so remote that the insurance market cannot see it. There was a time when some war-risks coverage was free of charge and not even itemized separately in the premium, but that time will never return. There are also perceptions that the risk of terrorism is borne principally by only a few lightning-rod States. Terrorists have nevertheless attacked aviation targets of dozens of States and continued security improvements force them to look for the weakest link, which could be anywhere.

3.10.3 Post-funding of the SCM raises other issues. It could be more difficult to induce States to contribute after an incident when its geopolitical dimensions might become apparent. Also, contributions in the form of a fee on passengers and cargo will decline to the extent that traffic volume is depressed in the aftermath of the attack, perhaps significantly, as was the case after 11 September.

3.10.4 The SG-MR has resolved on a permissive hybrid in Article 15(2). A State's carriers collect initial contributions in respect of passengers and cargo on international flights from the time of the Convention's entry into force for that State. They would also collect for passengers and cargo on domestic flights covered by a declaration to opt-in for domestic coverage. The COP fixes contributions to achieve a specified percentage of the maximum pay-out limit of the fund (currently set at three billion SDRs, for discussion purposes) within four years of its coming into effect. The initial collection would continue for a fixed period until the agreed level of pre-funding is reached. The collection in respect of a State party would then stop, and would only restart if something happens. Even after the Convention has come into force and reached its specified funding, States that newly ratify it would be subject to initial contributions, to prevent free riders. The contributions constitute a legal obligation, regardless of whether collected before or after an incident. In general, under Article 13, the SCM cannot collect more than three times the maximum amount of compensation the SCM would pay per event (nine billion SDRs is the amount set for discussion purposes), within two consecutive years. The Committee must flesh out Article 15(2) and decide between two bracketed percentage options.

3.10.5 Why is there a four-year funding cycle? Insurers say that it normally takes ten years to clear all claims from a particular incident, and the bulk of the funds needs to be available three to four years after an event. As a rule, claimants would be kept afloat by advance compensation payments. Compensation is thus not a question of survival. It depends on the identification of victims and the verification and qualification of claims in normal course. The courts do not, it must be remembered, have to establish fault, just the victim's right to the compensation.

3.11 **Contributions: general aviation**

3.11.1 The general aviation (GA) fleet includes transport category aircraft of every size. Some corporations operate dozens of aircraft. News reports indicate that at least one individual has ordered an Airbus A380 for personal transport. The draft Convention's compensation mechanism includes general aviation; it speaks only of "aircraft" and "operators". Victims of incidents involving GA aircraft will be compensated from their insurance in the first layer and by the SCM in the second. The draft Convention does not, however, provide for the collection of contributions to the SCM fund from GA operators. One State has said that this is an important defect. In ICAO Council discussion, it said that GA aircraft benefit from the protection of the scheme without paying for it. Moreover, the fund would reach its target level more quickly if a reasonable and fair means could be found for charging general aviation aircraft. It suggested using maximum takeoff weight. The SG-MR discussed general aviation, including the possible

need to devise a way to collect from corporate aircraft. It made no decision to exclude GA outright, but also considered it reasonable not to include it in the contribution scheme. The Committee should consider the GA issue, including its potential for involvement in acts of unlawful interference relative to air carriers, and resolve its status.

3.12 **Dropdown – the remedy for market failure**

3.12.1 The market-stabilizing effects of the SCM should make it easier for operators to obtain insurance at reasonable and predictable rates. If insurance becomes unavailable, or available only at costs that threaten carriers' economic viability, however, the Convention permits the SCM to cover operators' first-layer liability. The decision is within the discretion of the Conference of Parties. This feature, set out in Article 19 (3), is referred to as "dropdown". It comes into play when the market fails to provide coverage to the Article 4 limits or to provide coverage for all the risks. For example, there may be a nuclear risks limitation, or the market may be able to provide general terrorism risks coverage but not coverage of weapons of mass destruction (WMD) risks. The COP could decide to cover the first-tier risks, not directly, but channelled through the operator, as of a certain time, and to impose a fee for it. The Director can make temporary decisions and can call an extraordinary session of the COP.

3.12.2 There are three issues that need to be addressed by the Committee. First, what is the appropriate standard for application of the dropdown? Some participants in the SG-MR thought the standard in the draft is too high and that the test should be whether insurance is available on commercially reasonable terms. That threshold was used by several States in providing guarantees for their carriers after the 9/11 attacks. Second, does dropdown provide financial support to potentially liable persons, replacing insurance, or does it take on the liability? This is important chiefly in times that the SCM is not well funded, but also relates to mandatory insurance requirements and contract defaults. Third, is the dropdown to take place on a mandatory or discretionary basis and, if mandatory, would it be triggered automatically when the applicable standard is met? If dropdown is seen as an automatic feature, national authorities might view it as an impermissible interference with the insurance market.

3.13 **Exclusive remedy – an integrated approach to the industry**

3.13.1 During the development of the draft the SG-MR and its predecessors wrestled repeatedly with the question of excluding non-operational participants in civil aviation. The question was settled only recently by including the exclusive remedy provision of Article 27. The draft treats the third-party compensation regime with an industry-wide, integrated approach. Limiting the liability of one component of the sector, without more, would merely increase the attractiveness of other actors to those pressing claims outside the regime created by the Convention. Key non-operational entities involved in civil aviation—such as aircraft owners and lessors, manufacturers, air navigation service providers, and airport operators—have the same exposure to financial ruin as aircraft operators. Moreover, leaving them out would undermine the protection that the Convention gives to aircraft operators because of the potential that these other actors have for recovery from the carriers through interlocking agreements, subrogation, and other recovery means. Interlocking indemnity agreements are a long-standing feature of the aviation industry. Even a carrier protected by the Convention could be pulled back into litigation through these interlocking agreements were it not for the exclusive remedy provision. The Convention channels all claims to the aircraft operator and the SCM with the provision to seek recourse only from entities that intentionally support the act of unlawful interference that causes the damage. The exclusive remedy provision also helps to prevent redundant recovery, thus reducing overall insurance losses from a catastrophic incident. The provision is a key feature regarded as necessary for the functioning of the system. It does not apply, needless to say, to a person who commits an intentional act of unlawful interference.

3.14 **The single jurisdiction**

3.14.1 The single jurisdiction of Article 30 is another key element. Where the Montreal Convention multiplied jurisdictions, this Convention pares them down to one, which was a basic provision of the 1952 Rome Convention and is a key feature of the IOPC Funds. Most victims or their survivors will likely be found within the jurisdiction where the incident occurred, but the SCM will provide outreach to victims wherever they are. Multiple courts and jurisdictions, however, would slow compensation, because of the difficulty of applying caps across jurisdictions.

3.15 **The hard cap on aircraft operator liability**

3.15.1 The maximum cap on an operator's liability is 700 million SDRs (bracketed in the current draft, as the number is for discussion purposes only). This limit may be broken in exceptional circumstances only. Carriers consider since the hard cap an essential *quid pro quo* for assuming strict liability in the first tier. When the total damages exceed the first two layers, that is, both the carrier's limit and the amounts payable by the SCM, claimants may seek additional compensation from the carrier, but only under the narrow conditions of Article 24. This is known as "breaking the cap". To do this, the claimant must essentially prove that the carrier (if it is a natural person) or its senior management intentionally committed the act of unlawful interference or contributed to it in particularly egregious fashion. A safe harbor is available to operators that are certified to have adopted so-called best practices, currently described as a standard set by industry. How to determine the appropriate basis for the best-practice certification is a significant issue. The Committee might resolve it at this Session, it might suggest options for the diplomatic conference, or it might suggest that it is an issue appropriately treated in the operating regulations to be adopted by the Conference of the Parties.

3.15.2 This hard cap is one of the draft's more controversial provisions, but it is explained by the policy underpinnings of the transformation of the instrument since 2004, and it will be a key element of a successful instrument. This feature is one of the significant departures from the rules of the 1999 Montreal Convention, which deprive the carrier of protection at the level of negligence. The SG-MR tried to capture a level of fault that is lower than intent but substantially higher than negligence. The effort is complicated by the contrast between common and civil law systems and by the fact that aircraft operators are not usually natural persons, which were the original subjects of the law of negligent behavior. The issue before the Committee is less the specific words and more the level of behavior that needs to be captured. There is further discussion below in the section on criticisms of the draft.

3.16 **Right of recourse**

3.16.1 The right of recourse in Article 25 is related to the hard cap. After the SCM has paid claims, it also has a right of recourse to the carrier if the carrier has engaged in behavior that warrants breaking the cap, as provided by Article 24. It also has a right of recourse against other persons who have committed the act of unlawful interference.

3.16.2 Some carriers also want a right of recourse to other persons who may be at fault, such as ground handlers or airport managers, in situations where the cap is not broken. This would amount to distribution of insurance responsibility for channelled claims within the first layer, which, in light of the cross-indemnities, is a question internal to the industry. An agreed standard among the major participants in the industry should be acceptable, provided that compensation of victims is not altered or delayed.

3.17 **State aircraft**

3.17.1 The draft excludes state aircraft in Article 36, mirroring the definition in the Chicago Convention.

3.18 **Entry into force**

3.18.1 One feature of the final clauses deserves special attention. The viability of the SCM to handle an incident that could come at any moment is particularly important. Provisions for entry into force should take into account the amount of contributions needed to make the system viable and should probably be linked to traffic volumes as they are related to contributions.

4. **Criticisms**

4.1 Objections to the draft Unlawful Interference Compensation Convention have been raised by a State, by air carriers, and by independent observers. Some objections seem to be based primarily on conflict with certain domestic legal systems, some are based on important principles of public policy, and some are based on the instrument's balance of economic interests among the participants in the system. This section of the report focuses mainly on the points raised by those who believe that the instrument cannot be ratified and that the project should be abandoned.

4.2 **Aircraft operators should not be held strictly liable to pay for a crime of which they are among the victims**

4.2.1 Certain air carriers object that they, unique among the victims, are not only selected to pay for the damage but are held to strict liability, where "fault" is imposed. It is said to be particularly unjust because the security measures are specified in large degree by ICAO and member State governments. This report has touched on this issue several times, especially in connection with the advent of the draft Unlawful Interference Compensation Convention and the evolution away from 1999 Montreal Convention principles. It bears repeating that the draft Convention does not assign blameworthiness: it is an *instrument of risk management*. This point may be obscured for the casual reader by the use of the word "liability" in the draft instead of, perhaps, "obligation to provide compensation". To the extent that air carriers feel strongly about this matter, it might be worthwhile for the Committee to address the issue with hortatory language in the preamble or the final act.

4.3 **Aviation is not the right sector in which to craft a response to terrorism**

4.3.1 Some critics say that aviation is not the right sector in which to craft a response to terrorism, because terrorist attacks against aviation are really attacks against the State – attacks against the government and the society at large. It is "a collective burden that the nation or other political jurisdiction ought to bear." They say that aviation terrorism is part of a larger, world-wide problem requiring a world-wide, non-industry specific solution. The malefactors just choose aviation because of its visibility and its vulnerability. The ICAO Council is aware of these criticisms, however, and has reaffirmed the exercise repeatedly. Moreover, no such more broadly-based approach appears to be underway. This solution proposed in the draft is within reach at the moment, and the perfect solution is not. The Convention would resolve a significant part of the problem, at least in the aviation industry, and could provide a model for further work elsewhere.

4.3.2 Critics further say that there are already guidelines on the treatment of victims of crimes, including acts of terrorism, that provide examples for further work. Examples are UN General Assembly

Resolution 40/34, 29 Nov 1985, Justice for Victims of Crime and Abuse of Power, and EU Council Directive 2004/80/EC, 29 April 2004 relating to compensation to crime victims. These instruments do not provide a means for making crime victims whole. Even if they did, it is not clear whether they could possibly meet the costs of an unbounded aviation event, or whether air disaster victims should wait in line behind those who have been assaulted or robbed. There is certainly no global instrument under development that would provide for compensation of provable damages to all victims of terrorist attacks. It is a tribute to ICAO's effectiveness that it has often been in the forefront of developments having an impact well beyond the aviation sector and even transportation, such as the Cape Town instruments, the marking of explosives, and machine-readable passports.

4.4 The government of the State alone should bear responsibility for security and compensation for terrorists acts

4.4.1 This criticism is related to the argument that aviation should not be the starting point for dealing with compensation for terrorism, but takes a different approach. Some carriers have argued that because terrorism is an attack on a State, the Government should bear all its costs. Indeed, carriers should not even have to pay for increased security, including costs of risk management. Every industry has security costs, however, regardless of the extent to which they may be imposed by government regulation. It is part of doing business. Moreover, carriers are already liable to their passengers and – more important – they have *unlimited* liability, whether strict or fault-based, to third parties in virtually every State around the world, regardless of whether unlawful interference is involved. One critic objecting on precisely these grounds nevertheless acknowledges that the carrier is going to be bankrupted and dissolved without extraordinary government intervention. The question is how to provide a uniform, cost-effective, and practical means for dealing with the unlimited liability (especially if it is strict) that is already there.

4.4.2 Another commentator has said that acts of terrorism are like natural disasters, such as hurricanes, tsunamis, earthquakes, and volcanoes, for which governments assume responsibility. It is unjustifiable, he said, to put the burden on aircraft operators when compensating victims is "a well recognized responsibility of sovereign States". This analogy does not work well. States certainly make best efforts to help victims of natural disasters within their means, through emergency assistance out of contingency funds or emergency appropriations or with assistance in kind. States also make loans, ease regulatory and tax burdens, and seek to mobilize charity to victims. They typically urge residents to insure themselves against such risks, however, and it is rare that they undertake to make every victim economically whole, much less establish an institutional mechanism for the uniform and universal handling of disaster claims. Moreover, and this is a key consideration, in the typical natural disaster there is no actor like an aircraft operator that is already presumptively liable under municipal law to pay compensation for the injury to its fellow victims, regardless of its ability to do so.

4.5 Government measures taken after an incident are satisfactory and do not need supplementing

4.5.1 In the absence of practical precedent and any adequate legal regime, domestic or international, the U.S. Government had to craft the best remedy it could after the 9/11 terrorist attacks, through retroactive legislation. The 9/11 attacks involved domestic carriers, and the Government summoned the political and fiscal wherewithal to cap their liability and pay compensation to victims. Other governments provided support, whether short-term or long-term, to their carriers due to the disruption of the insurance markets. A host government would have much less incentive, however, to cap liability for a foreign carrier. Substantial government economic intervention is even less likely if the incident occurs in a developing country. The draft Convention is aimed at a truly international scenario: a foreign aircraft used as a terrorist weapon that causes damage well beyond any conceivable insurance coverage of the carrier. The SCM mechanism would achieve the same results as the U.S. Government

measures, but on a multilateral, industry-funded basis, with the modest unit cost passed on to the customers. The SCM is also non-discriminatory and would eliminate any competitive effects that might be attributed to government measures.

4.6 **The hard cap on liability helps potentially culpable carriers at the expense of victims**

4.6.1 Some critics of the Convention believe that the inclusion of the hard cap on carrier liability is alone sufficient to warrant abandoning the effort to modernize the Rome Convention. They say that victims could go uncompensated if the carrier has misbehaved, yet still benefits from the liability cap. The most heartfelt of these criticisms, however, seem to be based on concerns about particular domestic legal systems. Moreover, they do not reflect the shift in focus away from the blameworthiness of carriers, who are among the victims, and toward full compensation of claims and the sharing of costs. The concern is really more about the punishment of perceived malefactors than the compensation of victims, because the victims will be fully compensated (up to the very high limit of the SCM) in any case, regardless of Article 24. The issue of breaking the cap only arises at the SCM level. The question is how contributions to the compensation get distributed, not *whether* the victim is compensated.

4.7 **Aviation does not need "another tax"**

4.7.1 Some critics have said that there are already too many regulatory and other government-imposed economic burdens on aviation and that ICAO should not be devising new ones. Risk management, however, is a necessary part of doing business. In the case of unlawful interference, the industry thought it had the costs covered, but the 9/11 attacks demonstrated that they were not. This draft provides a remedy. The fees involved, to be set by the COP, manifestly do not constitute a tax. Rather, they pay for concrete protection against a very real, however remote, risk. The question for States in deciding whether to ratify the Convention is ultimately an economic calculation, that is, whether the costs are reasonable for the benefits obtained.

4.8 **Passengers should not pay for protection of third parties**

4.8.1 Passengers will indeed pay for a compensation system that benefits others. Cargo shippers will also pay for the system, however, in a proportion not yet determined. Third-party damage is a foreseeable feature of the industry and it must bear the costs of risk management. The system nevertheless spreads the risk as far as is reasonably practical. The SG-MR considered requiring contributions from other participants in the sector – those who benefit from the exclusive remedy feature – but could not devise an uncomplicated and fair means to do so. The base of airline users is broad, however, especially in developed countries. Passengers are potential third-party victims when they are not flying. The whole society benefits from aviation and benefits when damages from foreseeable events are covered. The advent of the SCM means that, even if there are deaths and injuries from terrorist attacks beyond what the aircraft operator can recompense, the system will not collapse. The industry will remain insurable, and there will be less damage to the economy as a whole. The costs should be modest, and States can decide whether the SCM is cost-effective.

5. **Conclusion**

5.1 **A thought about broader benefits**

5.1.1 The new system will not prevent injury, death, and property damage if an attack should occur, but it will severely limit the larger economic costs of a terrorist attack and make it less catastrophic for the industry and for the society as a whole. The system's advent may well make insurance against such events more broadly available and at more stable premium rates for all carriers, regardless of a

particular carrier's perceived vulnerability to terrorism. There would be a uniform guarantee of compensation, regardless of where the incident took place and the identity of the victims. This predictability of compensation will help to reassure markets at times when they are likely to be under stress. It would also eliminate the need for government support and retroactive intervention after an event. The instrument would create a level playing field in the courts for victims and carriers. The overall enhancement to stability could even reduce the sector's attractiveness, however slightly, to terrorists.

5.2 **The task of the Committee**

5.2.1 There are some difficult issues to resolve and many details to fill in. The basic policy elements of the package, however, should not be in doubt. The current version represents a quantum improvement over the draft before the Committee when it last met in 2004. The instrument should be viable, if sober judgment can prevail on details as well as on policy issues. The most critical dilemma at the Committee's last Session, the apparently insuperable incompatibility of the interests of victims and those of carriers, is ameliorated by the SCM. It promises to make victims economically whole and preserve carriers from insolvency while not materially increasing carriers' costs. Moreover, calculations of observers indicate that the Convention should be viable even if, like the IOPC Funds, it does not gain universal adherence.

5.2.2 The draft Convention represents a balanced package, but the interests of all sides must be taken into account if a diplomatic conference is to produce a ratifiable instrument. The Committee has a lot of work to do in a short time. The Chairman and the Secretariat will need all the cooperation and good will they can get.

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