



A40-WP/600
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ASSEMBLY — 40TH SESSION

LEGAL COMMISSION

**DRAFT TEXT FOR THE REPORT
ON
AGENDA ITEMS 39 & 40**

The attached material on Agenda Items 39 and 40 are submitted for consideration by the Legal Commission.

Agenda Item 39: Consolidated statement of continuing ICAO policies in the legal field

39:1 The Commission considered this item on the basis of A40-WP/9, presented by the Council; A40-WP/204, presented by Singapore and co-sponsored by Armenia, Australia, Bahamas, Belgium, Botswana, Bulgaria, Canada, China, Fiji, Finland, Gambia, Ghana, Indonesia, Japan, Kuwait, Lao People's Democratic Republic, Nigeria, North Macedonia, Oman, Papua New Guinea, Philippines, Poland, Qatar, Russian Federation, Saudi Arabia, South Africa, United Arab Emirates, United States and Viet Nam; A40-WP/236, presented by the People's Republic of China; and A40-WP/335, presented by the International Air Transport Association (IATA), the International Federation of Air Line Pilots' Associations (IFALPA) and the International Transport Workers' Federation (ITF). The Commission noted the information papers A40-WP/142, presented by India and A40-WP/534, presented by the International Transport Workers' Federation (ITF).

39:2 With respect to A40-WP/9, the Secretariat highlighted that the working paper had been prepared and the Assembly Resolution had been revised mainly to reflect the work completed by the Task Force on Legal Aspects of Unruly Passengers to update Circular 288, *Guidance Material on the Legal Aspects of Unruly/Disruptive Passengers* (Circular 288) following the adoption of the *Protocol to Amend the Convention on Offences and Certain Other Acts Committed on Board Aircraft* (Montréal Protocol of 2014). The recommendations of the Task Force were accepted by the 37th Session of the Legal Committee in September 2018, and by the Council in November 2018, most notably that the updated guidance material be published in the form of a manual, which was subsequently published as the *Manual on the Legal Aspects of Unruly and Disruptive Passengers* (ICAO Document 10117). The Secretariat pointed out that Circular 288 has not been discontinued, but remains available as guidance to those States which have not ratified the Montréal Protocol of 2014. The working paper also highlighted the status of ratification of the Protocols introducing Articles 3 *bis* and 83 *bis* of the Chicago Convention, and reports on the introduction of the ICAO International Air Law Course in 2017 initially available in English only, now translated into French and Spanish. The Secretariat noted the Commission's decision under Agenda Item 38 to reformulate the title of the work item on CNS/ATM Systems in the General Work Programme of the Legal Committee (paragraph 38:12 refers), and that Appendix F of the Assembly Resolution therefore needs to be updated to reflect the current title and priority.

39:3 There was widespread support for the working paper and for the changes to the Assembly Resolution, particularly Appendix E, with many delegations expressing appreciation to the Task Force for its efforts and hard work in producing Doc 10117. In response to one query, the Secretariat clarified that the word "civil" was deleted from the Appendix and Model Legislation to align with modern usage and terminologies in treaties and ICAO documents, and it remains the case that the Model Legislation is not intended to apply to State aircraft, in line with paragraph 4 of Article 1 of the *Convention on Offences and Certain Other Acts Committed on Board Aircraft* (Tokyo Convention). Another delegation questioned why the section on jurisdiction had been removed from the Model Legislation, to which the Secretariat pointed out that it was no longer necessary given that the Montréal Protocol of 2014 has now filled in the jurisdictional gaps of the Tokyo Convention. The Model Legislation in particular is intended to provide guidance on areas which are not specifically covered in the Protocol, such as the list of offences.

39:4 One delegation voiced its objection to the Montréal Protocol of 2014 averring that it fails to take meaningful steps to address the issue of unruly and disruptive passengers, that there are limitations imposed on the ability of in-flight security officers (IFSOs) to take reasonable preventive measures when there is a threat to the safety of an aircraft or to persons on board, and that the language makes

implementation of the State of landing jurisdiction over offenders difficult for many States. One observer highlighted that there are substantial benefits to be derived from a broad ratification of the Protocol, and that the concerns expressed may not apply to all States. Another delegation in supporting the working paper, noted especially Appendix D of the Assembly Resolution and the expansion of the teaching of air law for States in need. Another delegation suggested that the work covered in two working papers of the Economic Commission, namely A40-WP/182 and A40-WP/192, which contain legal elements, should have been considered by the Legal Commission in the framework of its mandate; the Secretariat explained that the issues raised in those papers may not have been intended for adoption of treaties under ICAO auspices. As a matter of procedure, any treaty adopted under ICAO auspices would have first been considered by the Legal Committee and then reported to the Legal Commission.

39:5 Several editorial suggestions to the Assembly Resolution were made by various delegations, which the Commission accepted.

39:6 Singapore presented WP/204, providing information relating to the inaugural Civil Aviation Legal Advisers' Forum (CALAF), which was organized by LEB and hosted by Singapore in May 2019. Many delegations thanked and congratulated LEB and Singapore for a successful Forum, and recognized the importance and usefulness of having an informal avenue for discussion of timely issues affecting international civil aviation. Delegations noted that the regular convening of the Forum would enable civil aviation legal advisers, through the sharing of information, to continuously update and enhance their competencies, capabilities and capacities to carry out their responsibilities effectively, and therefore urged States to consider hosting future editions of the Forum. In that context, Gambia invited participation to the international air law course and seminar it would be hosting in February 2020.

39:7 However, some delegations expressed their hope for financial and language support to be provided, in order to achieve even greater participation in the Forum. A few delegations also suggested formalizing the Forum by placing it within the hierarchy of ICAO's legal bodies. For instance, the Forum could be held between Legal Committee sessions as a form of preparation for the latter. Some delegations highlighted the importance of developing a competency framework for civil aviation legal advisers in order to ensure consistency and uniformity, while others emphasized the need for civil aviation administrations to have dedicated in-house legal advisers. There was broad support for the draft Appendix to the Assembly Resolution proposed in WP/204. The Commission accepted the suggestion by a delegation that the Appendix should include the contribution to the adherence of the rule of law as part of the mandate of civil aviation legal advisers.

39:8 China presented A40-WP/236, providing information on the credit administration system in civil aviation of China. Based on domestic laws, in order to enhance aviation safety and improve legal compliance, China has developed relevant credit mechanisms, including measures to sanction unlawful behaviour, that endangers aviation safety and order. These measures apply to domestic and foreign enterprises, personnel and passengers from home and abroad. Since these credit administrative measures have proved effective, China's objective is to share its experience with other civil aviation authorities, to receive support from ICAO and contribute to the promotion of credit administration.

39:9 Many delegations thanked China for sharing its experience and information. Some delegations sought clarification on the application of the credit measures. The Commission took note of the working paper and welcomed the information contained in it while noting that additional information will be needed from China in the course of future deliberations.

39:10 The International Air Transport Association (IATA) presented A40-WP/335, promoting ratification of the Montréal Protocol of 2014. Several delegations expressed support for the working paper and the Protocol, while commenting on the progress of their State's ratification of the Protocol. One delegation, however, noted their objection to the Montréal Protocol of 2014, citing the reasons they had previously detailed in their intervention of A40-WP/9.

39:11 The Commission then agreed to recommend to the Plenary the adoption of the following resolution:

Resolution 39/1: 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 40th 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 A39-11.

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 A39-11, 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 amending Articles 50 (a) and 56 adopted in 2016, and the final paragraphs (relating to the Arabic and Chinese texts);

Also noting that while a substantial number of States are party to the Protocols introducing Articles 3 *bis* and 83 *bis* of the Chicago Convention, there is still a need to further progress the ratification of those Protocols;

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 those 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 Convention and Aircraft Protocol of 2001, the two Montréal Conventions of 2 May 2009, the Beijing Convention and the Beijing Protocol of 2010, the Montréal Protocol of 2014 and the Protocols on the Authentic Quinquelingual Text (1995) and the Authentic Six-Language Text (1998) of the Chicago Convention, 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; and

Welcoming the introduction in 2017 of the ICAO international air law course with the objective to enable representatives of Civil Aviation Administrations, airports and air navigation service providers to support their organizations in the implementation of air law:

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 aircraft (unruly and 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 and disruptive passengers on board 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 and 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 and 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; and

Noting further the publication of ICAO Doc 10117 - *Manual on the Legal Aspects of Unruly and Disruptive Passengers*, which incorporates changes consequential to the adoption of the Montréal Protocol of 2014 and contains a list of offences and acts most likely to be committed on board aircraft by unruly and disruptive passengers;

Therefore:

Urges all Contracting States to enact as soon as possible national law and regulations to deal effectively with the problem of unruly and disruptive passengers, taking into account the guidance in the ICAO *Manual on the Legal Aspects of Unruly and Disruptive Passengers* (Doc 10117) and incorporating so far as practical the provisions in the Model Legislation set out below;

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

Encourages States which have not yet done so to consider introducing civil and administrative sanctions to deal with less serious acts or offences relating to unruly and disruptive behaviour on board aircraft in an expeditious and effective manner.

Model Legislation on Certain Offences Committed on Board Aircraft

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

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

- (1) physical assault or threat to commit such assault against a crew member;
- (2) verbal intimidation or threat 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;
- (3) refusal to follow a lawful instruction given by or on behalf of the aircraft commander for the purpose of:
 - (a) protecting the safety of the aircraft or of persons or property therein; or
 - (b) maintaining good order and discipline on board.

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

- (1) Any person who commits on board an 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 an 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 an Aircraft

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

- (1) smoking in a lavatory, or smoking elsewhere when such act is prohibited;
- (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.

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;

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; and

Whereas the 13th Air Navigation Conference in 2018 reviewed the status of existing and future technologies enabling the global air navigation system:

The Assembly:

1. *Recognizes* the importance of Item No. 8 of the General Work Programme of the Legal Committee “Study of international legal issues relating to global satellite systems and services supporting international air navigation services”, 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).

APPENDIX G

Enhancing the capacity and effectiveness of States to implement air law treaties and update national laws and regulations

Recalling the important role of law (especially air law) for the achievement by ICAO of its aims and objectives and for ICAO, Member States and the aviation industry to respond effectively to new and emerging opportunities, challenges and threats to the development of international civil aviation;

Recognizing that Member States must ensure that appropriate legislation and regulations are formulated to implement, and are applied in accordance with, the Chicago Convention, relevant air law instruments and ICAO provisions;

Affirming the important role that civil aviation legal advisers and air law practitioners play in supporting their States and Organizations to implement air law treaties, to formulate and update national laws and regulations to give effect to national policies and regulatory requirements, and to contribute to adherence to the rule of law;

Considering that legal advisers must continuously update and enhance their competencies, capabilities and capacities to effectively carry out their responsibilities; and

Welcoming the first Civil Aviation Legal Advisers Forum initiative organized by ICAO and hosted in Singapore in May 2019, which enabled legal advisers, particularly those serving in Organizations that regulate civil aviation, to share and exchange views on current issues of interest to the international aviation community and on strengthening their support for their Organizations and States:

The Assembly:

1. *Encourages* Member States that have not already done so to establish positions of dedicated in-house legal advisers for their civil aviation administrations;
2. *Encourages* Member States to make use of ICAO seminars and workshops, the International Air Law Course and other similar events for the continuous training and development of their legal advisers and to consider hosting from time to time such events in their States and regions;
3. *Invites* Member States to support the Civil Aviation Legal Advisers Forum initiative and to consider hosting subsequent editions of the Forum as well as encourage and facilitate their legal advisers to participate in and to contribute to the Forum;
4. *Requests* the Secretary General to assist Member States in achieving and maintaining the appropriate competency of civil aviation legal advisers including through developing a competency framework for strengthening their role; and
5. *Urges* Member States to support ICAO's work in the legal field by encouraging the active participation of their legal advisers in the work of the Legal Committee, subcommittees and task forces, panels, working groups, and similar bodies established to examine air law issues and develop legal solutions.

Agenda Item 40: Other issues to be considered by the Legal Commission

40:1 The delegation of China presented A40-WP/235, outlining the following four reasons underlying the development of targeted and precise oversight by the Civil Aviation Administration of China (CAAC): (1) the rapid growth of the air transport industry in China, which had led to discrepancies in compliance management; (2) limited resources leading to limited oversight capabilities, as the number and quality of inspectors was not keeping pace with the growth of the industry; (3) advances in technology, which facilitated targeted and precise oversight; and (4) the need to lower the cost of regulation for both the CAAC and for industry. The delegation explained that it would welcome ICAO's support in the next phase of the promotion of targeted and precise oversight in China. One delegation took the floor to express its interest in the new approach to oversight being taken by the CAAC and indicated it would welcome hearing from other States on their approaches.

40:2 The Air Crash Victims' Families' Federation International (ACVF) presented A40-WP/434, noting that the past experiences of aircraft crash victims' families demonstrated the negative impact that delays in the payment of insurance benefits had on victims and their families and the need for improvements in the treatment of victims. The ACVF thus recalled ICAO Resolutions regarding the compensation of victims; urged all stakeholders to support the best practices of insurers in the treatment of victims; called upon the Council to make States' implementation of best practices a subject of the ICAO Universal Safety Oversight Audit Programme (USOAP); and called upon ICAO to organize a seminar in the coming year on States' best practices for the treatment of insurers/air operators in regards to compensation of victims.

40:3 Several delegations took the floor to express support for A40-WP/434 and, in particular, the organization of a seminar as proposed in the paper. One delegation expressed its appreciation for the paper and noted the importance of the subject matter, but observed that consistent with Council guidelines the focus of USOAP was aviation safety and therefore States' implementation of best practices in regards to compensation of victims was not an appropriate subject for USOAP. Another delegation echoed this concern and also suggested that the subject of States' best practices of insurers/air operators in regards to compensation of victims might be incorporated into other events.

40:4 The Director of LEB expressed his appreciation for the ACVF paper and affirmed the Secretariat's support for the goal of full victim compensation. He further relayed that after having seen first-hand the terrible plight of victims of the downing of Malaysia Airlines Flight 17 in Ukraine, he personally shared the sentiments expressed in the paper. He noted, however, that the compensation of victims was not exclusively a legal matter and will require a multidisciplinary approach. He also observed that LEB lacks the budget to organize a seminar devoted to this subject alone and called upon the States that expressed support for the paper to fund such an event. In the alternative, he proposed that the ACVF could bring the subject forward for consideration at the next Civil Aviation Legal Advisers Forum or at the ICAO Legal Seminar, which is to be convened in the Republic of Korea in 2021.

40:5 The Commission noted A40-WP/235, welcoming the information presented and encouraging China to share information on future developments. The Commission also noted A40-WP/434 and requested the Secretariat to study the possibility of future work on the issues raised in the paper and report to the Council in due course, while considering a multidisciplinary approach. The

Commission further requested the Secretariat to encourage the ACVF to present these issues for discussion at the next Civil Aviation Legal Advisers Forum or at the 2021 ICAO Legal Seminar in Korea.
