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ASSEMBLY — 41ST SESSION

LEGAL COMMISSION

**DRAFT TEXT FOR THE REPORT
ON
AGENDA ITEMS 40 AND 41**

The attached material on Agenda Items 40 and 41 is submitted for consideration by the Legal Commission.

Agenda Item 40: Annual Reports of the Council to the Assembly for 2019, 2020 and 2021

40.1 The Commission noted the chapters of the Annual Reports of the Council to the Assembly for the years 2019, 2020 and 2021 as well as the Supplement for the first half of the year 2022 which had been referred to it by the Plenary.

Agenda Item 41: Work Programme of the Organization in the Legal Field

41.1 The Commission considered this item on the basis of A41-WP/53 (presented by the Council), A41-WP/65 (presented by IATA/IFALPA), A41-WP/124 Revision No. 1 (presented by Republic of Korea), A41-WP/126 Revision No. 1 (presented by Republic of Korea), A41-WP/208 Revision No. 1 (presented by AFCAC on behalf of 54 African States: Algeria, Angola, Benin, Botswana, Burkina Faso, Burundi, Cameroon, Cabo Verde, Central African Republic, Chad, Comoros, Congo, Côte d'Ivoire, Democratic Republic of the Congo, Djibouti, Egypt, Equatorial Guinea, Eritrea, Eswatini, Ethiopia, Gabon, Gambia, Ghana, Guinea, Guinea-Bissau, Kenya, Lesotho, Liberia, Libya, Madagascar, Malawi, Mali, Mauritania, Mauritius, Morocco, Mozambique, Namibia, Niger, Nigeria, Rwanda, Sao Tome and Principe, Senegal, Seychelles, Sierra Leone, Somalia, South Africa, South Sudan, Sudan, Togo, Tunisia, Uganda, United Republic of Tanzania, Zambia and Zimbabwe), A41-WP/324 Revision No. 1 (presented by Dominican Republic with the support of Argentina, Costa Rica and Panama) and A41-WP/327 (presented by Dominican Republic and supported by Aruba, Belize, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Uruguay and Venezuela (Bolivarian Republic of) Member States of LACAC). The Commission noted Information Papers A40-WP/125 (presented by Republic of Korea) and A41-WP/260 Revision No. 1 (presented by Dominican Republic).

41.2 A41-WP/53, presented by the Council, informed the Assembly on the legal work of the organization and highlighted the ongoing activities of the Legal Affairs and External Relations Bureau (LEB), particularly its support to the Council and Standing Committees and the recent establishment of the ICAO Appeals Board. The Secretariat updated the Commission on one subject covered in Section 2 of the working paper; i.e. the legal support to the Fact-Finding Investigation Team, the FFIT, established to investigate the event involving Ryanair flight FR4978 in Belarus airspace on 23 May 2021. The Secretariat mentioned that on 18 July 2022, during its 226th Session, the Council considered an updated Report on the fact-finding investigation and concluded with grave concern that the safety of Ryanair Flight FR4978 was endangered when a false bomb threat was communicated to the flight crew, on the instructions of senior government officials of Belarus. Further, the Council determined that these actions represented a violation by the Republic of Belarus of the Chicago Convention. By decision of the Council, the conclusions and findings of the investigation had been communicated to all Member States by a State letter issued on 4 August 2022, and by publishing the final report on the ICAO public website. The Council also decided, in accordance with Article 54 k) of the Chicago Convention, to submit this matter to the 41st Session of the Assembly for consideration of Member States. The Secretariat advised that the relevant consideration would take place in the Executive Committee.

41.3 The Secretariat invited the Commission to consider the future work of the Organization in the legal field and to decide on the Work Programme of the Legal Committee as set out in paragraph 4.3 of A41-WP/53, including the prioritizations of items.

41.4 The delegations who intervened on this matter expressed support for the Work Programme as it currently stood. Two delegations nevertheless urged the Legal Committee to exert more efforts regarding the legal and institutional aspects of GNSS. The issue of cybersecurity and the need to promote adequate safeguards was highlighted by one delegation. The Chairperson noted the widespread support for WP/53 and the appreciation for LEB and the various groups and task forces established under its auspices.

41.5 With respect to Item 1 of the Work Programme, “Review of the ICAO Rules for the Settlement of Differences”, A41-WP/124, Revision No. 1, presented by the Republic of Korea, outlined the provisions of the Chicago Convention on the settlement of disputes (Articles 84, 85 and 86), the limitations of the dispute settlement mechanism under the Chicago Convention, and the efforts of ICAO, particularly through the Working Group for the Review of the ICAO Rules for the Settlement of Differences (WG-RRSD), to revise the dispute settlement system. The paper proposed that the Assembly support the work of WG-RRSD and that ICAO prepare a workshop/seminar for all Contracting States to exchange views on the outcomes of the WG-RRSD, upon the completion of its work. The Secretariat highlighted that the WG-RRSD is continuing its work on the item, and that an informal briefing to the WG-RRSD will take place virtually on 17 October 2022, to be followed by the Seventh Meeting of the Group, which will be held in person in Montréal from 10 to 12 January 2023.

41.6 Several delegations expressed appreciation for the work on the item by the Chairperson of the WG-RRSD, the Rapporteur and the Secretariat. One delegation emphasized that the Council is a political organ entrusted with quasi-judicial authority. In this regard, it highlighted the importance of ensuring equity for disputing States and facilitating the settlement of disputes. One delegation stressed that while the Group has identified several areas where there is a high level of agreement on possible revisions to the Rules or where no revisions are needed, there are also a number of other areas that require further consideration by the Group. That delegation questioned the added value of the proposal to hold a workshop/seminar at this time. It mentioned that the next Session of the Legal Committee would provide ample opportunity to present the outcomes of the work of the Group. This view was supported by another delegation which outlined the complex nature of Article 84 and called upon the Group to continue its work. On the proposal to hold a seminar/workshop, the Secretariat mentioned that the suggestion could be revisited upon completion of the work by the Group.

41.7 The Chairperson of the WG-RRSD commended the Secretariat, the Chairperson of the Legal Committee as well as the Rapporteur for supporting the Group’s work and expressed appreciation to the Members of the WG-RRSD for the good spirit of collaboration among the Group. He also mentioned that since its establishment the Group had held six meetings, two in-person before the outbreak of the COVID-19 pandemic, and subsequently four held virtually. He indicated, without prejudging the outcomes of subsequent meetings, that the WG-RRSD should be in a position to complete its work with a maximum of two additional in-person meetings.

41.8 The Chairperson of the Legal Committee outlined the challenges of holding virtual meetings, including that they were shorter in duration and not conducive to informal consultations among Members, adding that despite these challenges, the Group had made significant progress in its work. She also highlighted the importance of this subject for the Council as well as for parties to future disputes.

41.9 The Commission noted the progress made by the WG-RRSD, that the work is continuing as outlined by the Secretariat, and that the suggestion by the Republic of Korea to hold a seminar/workshop on the outcomes of the work could be for reconsideration upon completion of that work.

41.10 With respect to the item *International legal aspects of unmanned (pilotless) aircraft operations and integration into civil aviation*, the Dominican Republic presented A41-WP/327, which requests the inclusion of the civil liability for RPAS operations in the Work Programme of the ICAO Legal Committee. According to the paper, the growth of RPAS operations requires a uniform framework for civil liability, specifically in cases of injury or damage caused by the RPAS operations. A41-WP/327 concludes that a new international instrument would be needed to address these matters.

41.11 The Secretariat expressed its appreciation for the working paper and, noting that the significant questions raised therein could be covered by the existing item on the Work Programme relative to unmanned (pilotless) aircraft, proposed that the working paper be referred to and addressed by the Secretariat Study Group on Legal Issues related to Pilotless Aircraft (SSG-LIPA).

41.12 Several delegations took the floor to affirm the importance of the matters addressed A41-WP/327 and expressed support for the subject being considered by the Legal Committee. One delegation, whose delegate serves as Rapporteur of the SSG-LIPA Subgroup on Liability and Security, recalled the earlier work done in this area under the auspices of the Legal Committee and reassured the Commission that the subject of legal responsibility and liability for remotely piloted aircraft system (RPAS) operations would most promptly and efficiently be taken up by the Subgroup. Several States thereafter took the floor to acknowledge the importance of the issues raised by A41-WP/327 and, expressing support for the work of the SSG-LIPA, proposed that further work on these matters be carried out by its Liability and Security Subgroup.

41.13 In summarizing the discussions, the Chairperson highlighted the States' recognition of the importance of the issues raised by A41-WP/327, and affirmed that there appeared to be broad support among the delegations that took the floor to refer the paper to the existing Secretary Study Group for further consideration.

41.14 The Chairperson of the Article 12 Task Force thanked participants of the Task Force which had started its work on Item 3 of the Work Programme, "Processes and Procedures for States to fulfil their obligations under Article 12 of the Chicago Convention", at a virtual meeting held on 23 November 2021. A second meeting of the Task Force to be convened in-person will be held on 5 and 6 October 2022, on the margins of the ongoing 41st Session of the Assembly.

41.15 With respect to Item 4 of the General Work Programme, "Acts or offences of concern to the international aviation community, including cyber threats, that may not be adequately covered by existing air law instruments", A41-WP/65, presented by the International Air Transport Association (IATA) and the International Federation of Airline Pilots Associations (IFALPA), highlighted the importance to implement mechanisms to deal with non-compliance by unruly and disruptive passengers which has been an issue of concern for many years but was more recently exacerbated by the application of COVID-19 pandemic measures. The paper proposed three action items: the implementation of public awareness to ensure travellers are informed of what constitutes prohibited conduct and the legal and other sanctions that could result in line with the SARPs of Annex 9 – *Facilitation*; ratification of the Montréal Protocol 2014 to remove any jurisdictional gaps; and the implementation of a civil and administrative penalties regime as outlined in ICAO Doc 10117.

41.16 The Secretariat referred the Commission to A41-WP/53, paragraph 4.1.4 and Appendix A, paragraph 4, with respect to the Secretariat's support of the work of the Council Aviation Recovery Task Force (CART) in reviewing Doc 10117 and its application to the implementation and enforcement of COVID-19 public health measures, and its response to inquiries relating to the Montréal Protocol 2014. It was pointed out that more than ten Member States have ratified the said Protocol since the onset of COVID-19.

41.17 The Commission was cognizant of the issues highlighted in A41-WP/65 and agreed that it was important to have mechanisms in place to deter unruly and disruptive behaviour effectively, although different views were expressed on the extent of such mechanisms. All of the delegations and one observer who took the floor supported the working paper, sharing the concern on the importance of addressing the problem of unruly and disruptive behaviour on board aircraft. Most of those delegations also supported the paper's three action items, with several States highlighting their implementation of administrative and penal sanctions against unruly and disruptive acts or offences, some citing zero-tolerance policies towards behaviour which threatens the good order and safety of the aircraft. One delegation, supported by others, was of the view that the aviation industry is best situated to implement public awareness campaigns with maximum impact. Another delegation stressed the need for risk management in order to reduce the prevalence of unruly and disruptive passenger incidents, which, in turn, would reduce the need to implement sanctions. Two delegations expressed their lack of support for the Protocol, with one citing its failure to effectively modernize the Tokyo Convention 1963, and concerns about the practicality and limitations of certain provisions on in-flight security officers (IFSOs) and the State of landing jurisdiction. Other delegations emphasized the importance of implementing State of landing jurisdiction, which States are able to do, whether or not they have ratified the Montréal Protocol 2014. There was a unanimous recognition by the Commission of the need for States to keep their approach to responsiveness and deterrence measures for dealing with unruly and disruptive passengers under constant review.

41.18 With respect to Item 5 of the Work Programme of the Legal Committee, "Promotion of the ratification of international air law instruments", A41-WP/126, Revision No. 1, presented by the Republic of Korea highlights the coexistence of rules (treaties or amendments to treaties) that the Contracting States have ratified with those that are not ratified. Different approaches are suggested to accelerate the ratification of amendments with a focus on the Chicago Convention, and, if not all States have ratified international air law instruments, the possibility of ratified and non-ratified rules co-existing compatibly. The paper proposes that the Assembly prepare seminars, symposiums, meetings and other forms of action to facilitate Contracting States' knowledge of amendments, and to convene a meeting for all Contracting States to share their experiences so that they accelerate ratification of international air law instruments.

41.19 With regard to the first action item of WP/126, the Secretariat referred to A41-WP/53 with respect to the report on Item 5 of the Work Programme at paragraph 4.1.7 of the paper and paragraph 6 of the Appendix, which summarize actions to increase ratification of air law instruments including the Assembly's adoption of Resolutions promoting ratification, the issuance of State letters in which States are reminded to ratify certain ICAO treaties, LEB's participation and facilitation of events aimed at promoting ratification, and LEB's assistance to the Global Aviation Training Office (GAT) with the development and delivery of the ICAO International Air Law Course. The Secretariat also emphasized the second Treaty Event which took place earlier in this Assembly Session (27 and 28 September), which was held with a view to encouraging ratification. With regard to the second action item of WP/126, the Secretariat pointed out that LEB has recently conducted meetings with ICAO Regional Directors to assist with ratification matters, and will continue to facilitate such meetings as well as with governments and industry stakeholders to raise understanding and awareness of air law treaties. With respect to provisional application of treaties, the Secretariat clarified that the Council has expressed a clear preference for administrative action, as opposed to legal measures, to accelerate ratification and entry into force of ICAO treaties. This was most recently considered by the Council at the Ninth Meeting of its 206th Session in November 2015 concerning the possibility of examining alternatives to facilitate the entry into force as early as possible of the amendment to Article 50 (a) of the Chicago Convention (subsequently adopted by the Assembly at its 39th Session in 2016). At that meeting, the President of the Council had noted that the majority of

Representatives was clearly not in favour of fast-tracking its entry into force and considered that it was necessary to respect Article 94, according to which the number of ratifications required for the entry into force of any proposed amendment shall not be less than two-thirds of the total number of Contracting States.

41.20 One delegation recognized the importance of ratification of international air law instruments, and expressed appreciation for the work of LEB with respect to promoting such ratification.

41.21 South Africa introduced WP/208 on behalf of the African Civil Aviation Commission and 54 African States. The Working Paper highlighted that aspects of the Global Navigation Satellite System (GNSS) require additional legal frameworks/instruments to guide: a) the operational services; and b) the introduction of more satellites within the GNSS constellation. The paper further noted that due to the increased application of GNSS as a primary means of navigation support during all phases of flight, it was important to ensure the safety, availability, and continuity of GNSS. While observing that the item “Study of international legal issues relating to global satellite systems and services supporting international air navigation services” had existed on the General Work Programme of the Legal Committee for such a long period without any recent progress, the paper advocated for a reprioritization of the item and underlined the need to develop regulations to address the probability of private ownership of the satellite systems supporting international air navigation in terms of implications to Member States. While conceding that the implementation of the actions proposed in the Working Paper would have financial implications for the Organization, it was recommended that this should not deter the resumption of work within ICAO to develop a legal framework/instrument to address aspects of GNSS operations in support of the Global ATM System.

41.22 At the invitation of the Chairperson of the Commission, the Secretariat provided a historical background on the work that had been carried out by the Organization in relation to the subject since it was first included in the Work Programme of the Legal Committee over 30 years ago. It was indicated that the institutional and legal aspects of future air navigation systems was considered by a panel of legal and technical experts (the LTEP) established in 1995, that met several times over the course of many years. Legal aspects of GNSS were also discussed extensively at the World-wide CNS/ATM Systems Implementation Conference of May 1998. The work of the Organization on this subject resulted in the adoption of Assembly Resolutions A32-19, Charter of the Rights and Obligations of States Relating to GNSS Services, Appendix F to A40-28, A Practical Way Forward on Legal and Institutional Aspects of CNS/ATM Systems, and A32-20, Development and elaboration of an appropriate long-term legal framework to govern the implementation of GNSS. The Secretariat noted that it had monitored other organizations and entities in view of identifying substantive work in the field, but had not identified any developments that would necessitate the consideration of legal instruments other than the current Assembly Resolutions. The Secretariat expressed an openness to receive concrete proposals from States on how to advance the work on the item.

41.23 In addition, the Secretariat indicated that States providing GNSS services had established arrangements with the Organization through the exchange of letters pertaining to the USA’s Global Positioning System (GPS) done in 1994 and reaffirmed in 2007, the Russian Federation’s GLONASS done in 1996 and China’s BeiDou done in 2022. These arrangements provide for the free use of the system, assurance of SARP compliance and at least six years of notice prior to any discontinuance of the service. The Secretariat concluded that, as with other long-range air navigation services, international air law instruments remain applicable to GNSS and thus the current GNSS use and operation do not exist outside of a broader legal framework.

41.24 Several delegations who took the floor expressed support for the issues presented in WP/208, as well as for the need to retain the item on the General Work Programme of the Legal Committee. A number of delegations supported the proposal to reprioritize the item on the Work Programme. In noting the need to address legal issues relating to GNSS, such as liability, some delegations acknowledged that a broader discussion encompassing legal, institutional, technical and policy aspects of the subject would be warranted. Some delegations highlighted the work previously done by the Organization, particularly in the LTEP and Secretariat Study Group on the legal aspects, which considered many issues including the need for a new international instrument on GNSS. While taking into account the resource constraints faced by the Secretariat, several delegations expressed support for a proposal by one delegation to revisit the extensive work previously carried out in the Organization and, to determine whether any new developments that have since occurred warrant the resumption of work on the item.

41.25 In summarizing the interventions, the Chairperson noted the understandable disappointment and frustration expressed by many delegations in connection with the fact that the work on this item had not progressed in the past years and the overwhelming support to keep this important item on the Work Programme of the Legal Committee. While noting that the priority of the item had been recently changed from 8 to 6, the Chairperson observed that a further change in priority would perhaps not bring about the desired outcomes. Instead, taking into account the Secretariat's willingness to consider concrete proposals from States and the widely supported suggestion to review the work previously done on the item a focus on the substance of the work to be carried out rather than the reprioritization of the item could help clarify what needs to be done going forward.

41.26 The Dominican Republic presented A41-WP/324, highlighting the progress made by the Dominican Republic in enacting its domestic legislation and the importance for Member States to establish provisions aimed at preventing or managing conflicts of interest (COI) as an essential means of impartially and effectively regulating civil aviation safety and security. The Secretariat noted that the matters discussed in this paper are covered under the item "Consideration of guidance on conflicts of interest" on the General Work Programme of the Legal Committee and that Assembly Resolution A39-8 asks States to take various actions to establish appropriate legal frameworks on COI.

41.27 There was widespread support for the working paper with some delegations noting that COI could have adverse impacts for aviation safety. Delegations unanimously supported the retention of the item in the Work Program of the Legal Committee as it requires continuous attention. One delegation expressed its appreciation to ICAO for the publication of the compilation of ICAO provisions on COI in 2019 and its efforts to ensure this compilation remaining up to date. Some delegations noted that different approaches and legal tools could be used in various jurisdictions for the mitigation of conflicts of interest considering local circumstances, with one delegation citing those developed by the United Nations. One observer, while expressing appreciation for the work done on this issue, offered its contribution to future work.

41.28 No delegations took the floor with respect to Item 8 of the General Work Programme, "Implementation of Article 21 of the Chicago Convention".

41.29 Concluding its deliberations, the Commission confirmed the Work Programme of the Legal Committee as set out in paragraph 4.3 of A41-WP/53.