



A36-WP/297  
LE/14  
21/9/07

**ASSEMBLY — 36TH SESSION**  
**LEGAL COMMISSION**

**DRAFT TEXT FOR THE REPORT**  
**ON**  
**AGENDA ITEMS 46 AND 47**

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

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**Agenda Item 46: Acts or offences of concern to the international aviation community and not covered by existing air law instruments**

46.1 This item was considered on the basis of A36-WP/12 presented by the Council, which provided a progress report on the work carried out to address the new and emerging threats to civil aviation. Through a survey conducted among the Member States and the work of the Secretariat, the Study Group and the Special Sub-Committee of the Legal Committee, it had been recognized that the existing aviation security conventions could be amended to cover certain new and emerging threats, such as the use of civil aircraft as a weapon, the use of civil aircraft to unlawfully spread biological, chemical and nuclear substances, and the attacks against civil aviation using such substances. It had also been considered necessary to incorporate certain common provisions in more recent UN conventions on counter-terrorism, such as the “military exclusion clause”, which expressly specifies that these conventions do not govern the activities of armed forces during an armed conflict, and the activities undertaken by military forces of a State in the exercise of their official duties. Two draft protocols were proposed by the Sub-Committee for these purposes. Some delegations had proposed at the meeting of the Sub-Committee in July this year to include provisions prohibiting the intentional and unlawful transport by air of particularly dangerous goods and fugitives. The Sub-Committee had decided to seek the guidance of the Council on this issue and on the need for an additional meeting.

46.2 While applauding the work so far accomplished, one delegation wished to reiterate its reservations in the Sub-Committee with regard to the military exclusion clause. This delegation could perhaps accept the exemption of armed forces activities during armed conflict, which would be in line with Article 89 of the Chicago Convention, but could not accept a total military exemption even during peacetime, since it viewed that such an exemption would constitute a violation of the principles set out in the preambles of The Hague and Montreal Conventions and also of the principles and provisions of the Chicago Convention, particularly Article 44. Moreover, it viewed that it would also constitute a violation of a number of UN and ICAO resolutions, particularly ICAO Resolution A35-9, which condemns all acts of unlawful interference against civil aviation wherever and by whomsoever and for whatever reason they are perpetrated. It was not yet convinced that the inclusion of such a military exclusion clause could be justified by the sole reason that the same clause already exists in other conventions. It was concerned that the result of this clause would be that armed officers guilty of unlawful seizure of civil aircraft or using an aircraft in the service of a third State as a weapon of mass destruction would be immune from criminal prosecution.

46.3 The same delegation referred to the difficulty which may be encountered in the integration of the rules of “international humanitarian law” with civil aviation regulations. As neither the consequences of such integration nor those of the military exclusion clause had been addressed by the Rapporteur to the Sub-Committee, it proposed that a study on the subject should be carried out by the Rapporteur or the ICAO Secretariat. It also suggested that the Legal Commission invite the Council to request the Sub-Committee or the Legal Committee to reconsider the military exclusion clause in the light of such a study.

46.4 Three delegations supported, but one delegation was opposed to the reservations and proposal expressed at paragraphs 46.2 and 46.3. Two delegations emphasized the need for States to apply consistently the conventions and Assembly resolutions concerning acts of unlawful interference against

civil aviation in order to prosecute and condemn severely the persons who execute, are involved with or support criminal acts against civil aviation, including acts against aircraft, airport facilities and passengers.

46.5 In response to an inquiry by a delegation, the Vice-Chairman of the Sub-Committee clarified that the Sub-Committee recommended inclusion of the military exclusion clause on the clear understanding that military activities were governed by other international rules regarding State actions. The Sub-Committee had noted that other views on this issue would be reflected in its report, with the expectation that such views would be debated in future fora. The Vice-Chairman also clarified that, regarding the mere transport of certain prohibited material, it was considered by a number of delegations that this issue exceeded the Sub-Committee's mandate and it would therefore be necessary to seek further guidance from the Council. Another delegation, in supporting the Vice-Chairman's statement and the contents of A36-WP/12, encouraged the future work on amending the conventions without undue delay.

46.6 In summarizing the discussion, the Chairperson concluded that the Commission commended the work of the Secretariat, the Study Group and the Sub-Committee, and supported that the work should proceed to the next stage. It also noted the serious concerns expressed by certain delegations, in particular with regard to the military exclusion clause, which should be noted in this Report and referred to the Council for consideration when it convenes to consider the report of the Sub-Committee and determines whether to convene a further meeting of the Sub-Committee.

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**Agenda Item 47: Work Programme of the Organization in the legal field**

47.1 The Commission considered this item on the basis of A36-WP/8 presented by the Council, A36-WP/134, presented by India, A36-WP/140, presented by the Members of the European Civil Aviation Conference, A36-WP/230, presented by Colombia, A36-WP/234, presented by Saudi Arabia, and A36-WP/256, presented by Republic of Korea.

47.2 A36-WP/8 outlined the work programme of the Legal Bureau, legal matters in the Council, the Work Programme of the Legal Committee and a plan of legal meetings for the period 2008-2010. The working paper listed the subjects on the Work Programme of the Legal Committee in their order of priority and provided information on the work status of individual items on the Work Programme.

47.3 A36-WP/134, presented by India, provided information in relation to various space-based augmentation systems and advised the Commission of the development of the GAGAN Satellite system in India which is expected to become operational in 2010. Based on Resolution A35-3, which directed the Secretary General to monitor and, where appropriate, assist in the development of contractual frameworks, the paper called for the development of guidelines for a regional legal framework.

47.4 A36-WP/230, presented by Colombia, proposed to include the element of regional multinational organisms in the future consideration of the legal framework for CNS/ATM systems, including GNSS, and to modify the wording of Item No. 3 on the Work Programme in this respect.

47.5 A36-WP/234, presented by Saudi Arabia, invited States who have not yet ratified the Cape Town Convention and the Protocol to do so for the benefit of both debtors and creditors.

47.6 A36-WP/256, presented by the Republic of Korea, contained a proposal by Korea to host an additional regional legal seminar in 2009, with the joint sponsorship of the Legal Bureau of ICAO. The proposed regional seminar would be aimed at States to which the ICAO Asia and Pacific Office is accredited.

47.7 In relation to Item No. 1 on the Work Programme (Compensation for damage caused by aircraft to third parties arising from acts of unlawful interference or from general risks), one delegation recalled the earlier deliberations which had taken place under Agenda Item 45 of the Commission, where two delegations had expressed the sentiment that the draft convention on general risks appeared to have attracted less interest than the draft convention dealing with unlawful interference. The delegation queried whether it was necessary to consider this point in the context of the work programme, as the Commission had envisaged to refer the outcome of the entire work of the Special Group, i.e. both draft conventions, for further consideration to the Legal Committee. On this point, one delegation considered that there could be room for further reflection in case it was assessed that a priority between the two draft conventions was needed. In this context, another delegation remarked that due to the expected heavy workload for the Legal Committee and the desire for a successful outcome of its deliberations, it would be upon the Council of ICAO to make a political decision as to which texts ought to be considered by the Legal Committee. In the ensuing discussion, a number of delegations expressed the view that both draft conventions ought to be referred to the Legal Committee on equal terms, and that both drafts should

receive the same attention by the Legal Committee without conferring any priority of one text over the other. In summarizing the discussion on this point, the Chairperson noted that the majority of delegations supported the submission of both draft texts to the Legal Committee and stated that there appeared to be no complete consensus regarding the issue of priority. She suggested that the Council could carefully consider the allocation of items to be considered by the Legal Committee, in the light of the availability of time and resources.

47.8 In discussing Item No. 3 of the General Work Programme of the Legal Committee, several delegations supported the inclusion of the regional multinational organisms as suggested in A36-WP/230. These delegations considered it of utmost importance to devise clear rules and guiding principles regarding the involvement of regional bodies in the implementation of CNS/ATM systems. One delegation also underlined the need for a clear global framework. The Delegation of the United States reiterated that its government had renewed its offer to make the Global Positioning System (GPS) available for the use by civil aviation. The delegation further stated that its government had adopted a policy of not resorting to selective availability for different users, and that the new generation of the hardware did not even contain the feature of selective availability. Another delegation recalled paragraphs 4 and 5 of Resolution A35-3 and emphasized the importance of providing technical and financial assistance to developing countries.

47.9 The Commission **agreed** to modify Item No. 3 of the General Work Programme of the Legal Committee to include the regional multinational organisms in the consideration of a legal framework. The Commission noted its understanding that once a model of a regional legal framework is developed by the Members of the European Civil Aviation Conference, such model could be distributed through ICAO to its Member States, and interested States may use the information as guidance material to develop their own regional legal framework as appropriate.

47.10 In relation to Item No. 4, the Commission noted A36-WP/234.

47.11 Consequently, the Work Programme of the Legal Committee was established as follows:

- 1) Compensation for damage caused by aircraft to third parties arising from acts of unlawful interference or from general risks;
- 2) Acts or offences of concern to the international aviation community and not covered by existing air law instruments;
- 3) Consideration, with regard to CNS/ATM systems including global navigation satellite systems (GNSS) and the regional multinational organisms, of the establishment of a legal framework;
- 4) International interests in mobile equipment (aircraft equipment);
- 5) Review of the question of the ratification of international air law instruments; and

- 6) *United Nations Convention on the Law of the Sea* – Implications, if any, for the application of the Chicago Convention, its Annexes and other international air law instruments.

47.12           The Commission also noted with appreciation the regional legal seminar proposed in  
A36-WP/256.