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International Civil Aviation Organization

Legal Committee 36th Session

Montréal, 30 November - 3 December 2015

Report

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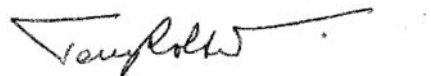
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REPORT OF THE 36TH SESSION OF THE LEGAL COMMITTEE

Letter of Transmittal

To: President of the Council
From: Chairman of the Legal Committee

I have the honour to submit, in accordance with Rule 46 of the *Rules of Procedure of the Legal Committee*, the Report of the 36th Session of the Legal Committee.



Terry Olson

Paris, 23 December 2015

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LEGAL COMMITTEE – 36TH SESSION

(Montréal, 30 November to 3 December 2015)

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1. Place and Duration

1.1 The 36th Session of the Legal Committee was held at Montréal from 30 November to 3 December 2015. The Chairman of the Legal Committee, Mr. Terry Olson (France), presided over the Session.

2. Opening Addresses

2.1 The meeting was declared open by **the Chairman of the Legal Committee. The First Vice-President of the Council**, Mr. Englebert Zoa Etundi, welcomed all delegates and observers on behalf of the Council, its President and the Secretary General. He recalled that from its inception, ICAO had relied on the Committee to provide it with legal advice for its activities and to enable it to meet its objectives under the *Convention on International Civil Aviation*. While several previous sessions of the Legal Committee mainly focused on the drafting of one or more international air law treaties, it was not the expectation of this Session to prepare any new protocol or convention. However, it did not by any means imply that the work of the current Session was less significant. It was a highly demanding task for the Committee to examine the contemporary legal issues, with a view to promoting safety and security of international civil aviation.

2.2 The First Vice-President recalled that with regard to acts or offences of concern to the international aviation community and that are not covered by existing air law instruments, as recently as last year, a new protocol had been adopted to amend the *Convention on Offences and Certain Other Acts Committed on Board Aircraft*. The Committee will be informed of the follow-up work in the Task Force on Legal Aspects of Unruly Passengers, to update the guidance material consequential to the new protocol.

2.3 He noted that conflicts of interest was for discussion by the Committee, and that the overall objective of work on this item was to consider the development of ICAO rules or guidance in order to assist member States on measures to be used to detect, avoid, mitigate and/or manage conflicts of interest within their national framework. For this purpose, a survey had been undertaken by the ICAO Secretariat, the report on which was for discussion by the Committee.

2.4 At its last Session the Committee took the view that legal issues may arise in the implementation of Article 83 *bis* by some member States. To deal with this situation an Article 83 *bis* Task Force was established in 2014, which had made excellent progress. It is assisting the Secretariat with the development of a Manual to update the guidance on Article 83 *bis* and has proposed recommendations to the Committee, including the establishment of a web-based registration system for Article 83 *bis* agreements.

2.5 Remotely piloted aircraft (RPAS), as a new component of the civil aviation system, may present myriad technical and operational issues arising from the removal of the pilot from the aircraft. A preliminary study concerning the liability issue of RPAS had been undertaken by the Secretariat, for consideration by the Committee.

2.6 The First Vice-President expressed his high expectations for the work of the Legal Committee on these and the other items of the agenda, including the legal framework relating to CNS/ATM systems, promotion of the ratification of international air law instruments, and determination of the status of an aircraft. He placed great confidence in the Legal Committee in the fulfillment of its tasks. Following this meeting, the Council will consider the results and decide on the future course of work.

2.7 The Chairman expressed his thanks to the First Vice-President for his clear and concise remarks. He then paid tribute to the memory of Ms. Hilma Hitula who passed away on 17 April 2015. He recalled that Ms. Hitula had been a legal practitioner and a leading female professional serving on several statutory boards of Namibian public companies. She was a senior lawyer in the Namibian Directorate of Civil Aviation, staunchly advocating the goals of civil aviation regulation in Namibia and was elected the 4th Vice-Chairperson of the Legal Committee at its 35th Session. Her warm personality and high-level professional skills were well known in ICAO and elsewhere. In memory of Ms. Hitula the Legal Committee observed a minute of silence.

3. **Agenda and Working Arrangements**

3.1 The Committee agreed with the provisional agenda shown in LC/36-WP/1-1. The agenda of the Session as adopted can be found at **Appendix A** to this Report.

3.2 The working papers considered by the Committee are listed by agenda items in **Appendix B** to this Report.

3.3 The action taken by the Committee in respect of each item is reported on separately in the Report. The material is arranged according to the numerical sequence of the agenda items considered by the Committee.

4. **Meetings**

4.1 The Committee held six meetings, all of which were held in open sessions.

4.2 The Secretary of the Committee was Mr. J.V. Augustin, Director of the Legal Affairs and External Relations Bureau. Dr. J. Huang, Senior Legal Officer, Mr. B. Verhaegen, Senior External Relations and Legal Officer and Mr. A. Jakob, Senior Legal Officer were Deputy Secretaries. Messrs. A. Opolot and C. Petras as well as Ms. M. Weinstein, Legal Officers, and Ms. D. Brookes, Legal Associate, were Assistant Secretaries. Other officials of the Organization also provided services to the Committee.

5. **Representation of States and International Organizations**

5.1 Sixty-three Member States and eleven international organizations were represented by 142 representatives and observers at this Session of the Legal Committee. The names of the representatives and observers appear in **Appendix C** to this Report.

6. **Records of Proceedings**

6.1 The Committee decided that in application of Rule 45 of its Rules of Procedure, the minutes of the 36th Session need not be prepared.

Agenda Item 2: Consideration of the General Work Programme of the Legal Committee**Acts or offences of concern to the international aviation community and not covered by existing air law instruments**

2:1 This agenda item was discussed on the basis of LC/36-WP/2-1, presented by the Secretariat. The working paper recalled that when the Diplomatic Conference held under the auspices of ICAO adopted on 4 April 2014 the *Protocol to Amend the Convention on Offences and Certain Other Acts Committed on Board Aircraft* (Montréal Protocol of 2014), it also adopted a Resolution which urges the Council of ICAO to request the Secretary General to update ICAO Circular 288 (*Guidance Material on the Legal Aspects of Unruly/Disruptive Passengers*) to include a more detailed list of offences and other acts, as well as to make consequential changes to the Circular arising from the adoption of the Protocol. Pursuant to this resolution, a Task Force on Legal Aspects of Unruly Passengers was established, which held its first meeting in September 2015.

2:2 The Chairperson of the Task Force, Mrs. M. Polkowska (Poland), provided a progress report of the Task Force to the Legal Committee. Among other things, the Task Force decided to maintain the list of offences in the Circular as it is, as the list is sufficiently comprehensive to cover the unruly behaviour that takes place on a daily basis. The Task Force also established three drafting groups respectively led by Singapore, Kenya and Finland for different chapters in the new guidance material.

2:3 Many delegations praised the work of the Task Force. One delegation noted that the adoption of the Montréal Protocol of 2014 may present implications to the current ICAO Assembly Resolution relating to the unruly passengers and call for its amendment. The delegation emphasized that if the Assembly could not update its resolution in the session of 2016, it should be done in the following Assembly session. The Secretariat explained that whether a draft Assembly Resolution on this subject could be presented in 2016 would depend upon the completion of the work of the Task Force.

2:4 One delegation requested that the guidance material would take into account the fact that the Tokyo Convention of 1963 would remain in effect for those parties that have not ratified the Montréal Protocol of 2014. Another delegation suggested that the guidance material should not only cover the acts on board aircraft in flight but should also cover certain acts on the ground, giving an example where the passengers refused to leave the aircraft after landing. The Secretariat explained that the provisions of Montréal Protocol of 2014 apply when the external door of an aircraft is closed. When the door is open, the acts on board aircraft are subject to the national law of the State of the airport where the aircraft lands.

2:5 The Chairman summarized the discussion, and the Committee agreed, by stating that the Task Force should be congratulated for its work, and encouraged to complete its task.

Consideration of guidance on conflicts of interest

2:6 The Secretariat introduced LC/36-WP/2-2 which reported on the results of the online survey on conflicts of interest in civil aviation to which 43 States responded. It was established from the survey that most States that responded have in place a framework dealing with conflicts of interest (COI) which they consider to be effective. Furthermore, the paper concluded that it was useful for all States to have such a framework given the prevalence of COI situations in the civil aviation activities of States. It was recommended to develop and present an Assembly Resolution to promote awareness of potential conflicts of interest in civil aviation and the need for States to take measures to avoid or mitigate risks from COIs to aviation safety and security.

2:7 The United States, while introducing LC/36-WP/2-7, stated that its main purpose was to communicate interest in continuing the work on conflicts of interest. Scenarios such as civil aviation administrations (CAAs) with an oversight body upon which industry representatives sat or CAAs making public statements indicating their mission to support or improve the economic situation of national carriers were cited as posing possible risks to independent regulation. Provisions such as disclosure requirements and recusal from regulatory decisions were cited as examples of mitigating measures that could be put in place. In this regard the United States expressed enthusiastic support for the proposal to develop an Assembly Resolution on the subject of conflicts of interest.

2:8 The Committee's attention was drawn to additional ICAO provisions on COI in the form of a Standard contained in Annex 19 - *Safety Management*, in particular paragraph 3.2, which read together with paragraph 3.3 in Appendix 1, requires States to establish and implement a safety oversight system ensuring that personnel performing safety oversight functions are provided with guidance that addresses ethics, personal conduct and the avoidance of actual or perceived conflicts of interest in the performance of official duties. The Secretariat highlighted Universal Safety Oversight Audit (USOAP) results showing that since the relevant protocol question was introduced in 2012, 6 out of 15 States audited had established a mechanism to avoid perceived or potential conflict of interest of inspectorate staff.

2:9 Several delegations expressed appreciation to the Secretariat for the excellent work on the report including the considerable effort that went into the survey. One delegation expressed that the survey provided a valuable opportunity for the respondents to closely examine and take stock of the measures available in their State to deal with COI and commended it as a useful tool for States that had not already done so to reply.

2:10 All delegations who took the floor supported the proposal to develop and present an Assembly Resolution and many delegations expressed their willingness to contribute or sponsor such a Resolution. One delegation while expressing support for the proposal for an Assembly Resolution highlighted the need to take into account the level of development and resources available to States in prescribing measures for COI.

2:11 The need in some cases to draw a balance between the particular circumstances of States and the risks posed by COI as expressed in paragraph 4.4 of the Secretariat Working Paper was emphasized by one delegation. It was deemed important that in doing so a realistic and pragmatic approach is adopted that acknowledges the existence of COI situations that may not be automatically eradicated in some cases while taking appropriate steps to manage them so that they pose no risks to aviation safety and security. Another delegation recalled that the issue of conflicts of interest was included as one of the seven principles in the ICAO Policy on Interactions with Third Parties and drew the Committee's attention to add the organizational dimension to the work and guidance on conflict of interest, in light of the interaction between public and private entities, such as dealings between various governmental agencies responsible respectively for regulation and providing aviation services.

2:12 In summing up the Chairman noted that the survey had generated a reasonable response rate and that States in their deliberations at the Committee had indicated their continuing interest in work on the subject. It was noted further that there was a desire to address other forms of COI such as organizational conflicts of interest in arrangements between various public and private agencies involved in civil aviation. In addition consideration should be given to the specific circumstances of States in determining preventive or mitigating measures on COI available to them. The following next steps were identified in continuing work on the item: (a) Interested States will prepare and present to the Assembly a resolution that urges States to develop a legal framework and cooperate in order to share their best practices in dealing with COI and the Secretariat would provide assistance requested in this regard; and (b) States that have not already done so are encouraged to respond to the COI survey that remains open online

(<https://portal.icao.int/surveys/En/Lists/ATTACHMENTB/newform.aspx>) and to provide ICAO with additional information, including legislative and regulatory texts. At the same time the Secretariat will collate information from States concerning their best practices particularly on i) separation of responsibilities and authorities between regulatory entities and state-owned service providers; ii) the movement of individuals between jobs in the regulatory and regulated entities; and iii) performance of regulatory duties by seconded or designated staff of the regulated entities. The Secretariat would also collate the rules and guidance material available within ICAO on this subject.

Safety aspects of economic liberalization and Article 83 bis

2:13 The Committee then turned to LC/36-WP/2-3 presented by the Secretariat which was the object of an informal briefing the previous day (through Power Point slides which were posted on the website of the Legal Committee under “References”). The paper recalled that at its 35th Session the Legal Committee recommended that a task force be formed; this was endorsed by the Council. The Article 83 *bis* Task Force was consequently established in September 2014, the deliverables of which were: recommendations for revisions to ICAO Circular 295 and identification of options to be considered by ICAO as alternatives to the current registration system, possibly web-based.

2:14 The Secretary thanked Ireland as well as the United Kingdom and the civil aviation authorities of Bermuda for facilitating this work on Article 83 *bis* by generously hosting Task Force meetings, and further thanked the Task Force members as a whole for their hard work and swift achievements. The Task Force delivered recommendations to the Secretariat for the publication of a Manual to update Circular 295, the main features of which were presented in Section 4 of the paper, as well as five recommendations to the Legal Committee which were found in section 5. It was indicated that a consolidated draft text of the Manual should be ready around April 2016 for review by the Task Force Members and other peer review, with a view to submitting the Manual for approval of the Secretary General by the end of summer 2016, and publication possibly in fall 2016.

2:15 The Recommendations to the Committee were introduced by the Chair of the Task Force, Mr. J. Thachet of the Canadian delegation. As regards the proposed amendment to the applicable Council’s Rules to allow swift registration and publication of Article 83 *bis* agreements through an interactive web-based system, he indicated that it was believed that the Secretariat and the Council could consider whether there would be efficiencies to extend such on-line registration system to other aeronautical agreements and arrangements; this point was supported by some delegations. On the fifth recommendation calling for ratification of Article 83 *bis* by States not yet parties thereto, he was pleased to inform the Committee that Chad had very recently ratified the Protocol. In closing, Mr. Thachet thanked the ICAO Secretariat composed of staff from the Legal Affairs and External Relations Bureau (LEB), Air Navigation Bureau (ANB) and Air Transport Bureau (ATB), and indeed all the members of the Task Force, for its successful outcomes and the great team-spirit that prevailed during its proceedings.

2:16 In the ensuing discussions, there was general support and appreciation expressed for the work accomplished by the Task Force and its very productive outcome which surpassed expectations and further demonstrated efficient multidisciplinary collaboration including among various ICAO Bureaus. Several delegations opined that the new Manual would definitely assist States in overcoming the difficulties faced in implementing Article 83 *bis*, one of them drawing attention to the proposal for a template for an Article 83 *bis* agreement summary, as well to the importance of a Chapter on Training of inspectors. One delegation, supported by others, recommended that the Secretariat should organize dedicated workshops and seminars or briefings during appropriate meetings, on the guidance to be offered in the new Manual to come.

2:17 The delegations also generally expressed strong support for the five recommendations. The second recommendation on an interactive web-based registration and publication system for Article 83 *bis* agreements was overwhelmingly endorsed, considering the swift transfers of aircraft under leasing nowadays. One delegation mentioned the advantage of a cost-benefit analysis of any new web-based registration system. One delegation suggested that the Secretariat should consider resorting to the PKD technology already available and used through ICAO for authentication purposes. With reference to ICAO projects such as the Aircraft Registration and the Air Operator Certificate systems, one observer proposed that any web-based Article 83 *bis* registration system should certainly be linked to other systems through ICAO, allowing access to reliable registration and AOC data from all ICAO Member States. This observer's proposal was supported in principle by two delegations according to Rule 31 a) of the Rules of Procedure. These two delegations called for further investigation and information on this topic. The Secretariat provided an update on the said aircraft registration database, currently hampered by the fact that many States had still not authorized access to their data. In this connection, one delegation offered a suggestion, although not directly related to this item, that consideration should eventually be given by the Secretariat to amend Annex 7 to the Chicago Convention so as to provide States with international rules governing de-registration of aircraft.

2:18 Special support was expressed by several delegations for the third recommendation on a new Standard in Annex 6 requiring that a certified true copy in paper or electronic format of a Summary of the Article 83 *bis* Agreement be carried on board aircraft while the agreement is in force, the same way as for the air operator certificate.

2:19 On the fourth recommendation, one delegation required further clarification on the issue of general aviation. The Secretariat explained that since the notion of State of the Operator was intrinsically linked to the issuance of the Air Operator Certificate in case of commercial air transport, a review of Parts II and III of Annex 6 would be required to identify the best way to address transfer of oversight responsibility for general aviation operations, hence catering for transfers under Article 83 *bis*. On the same recommendation, one delegation, supported by another, proposed modifications to the last sentence so as to better reflect the fact that some of the current Annex 6 requirements could not practically apply to remotely piloted aircraft.

2:20 In summing up the debate, the Chairman stated that it was the overwhelming opinion of the Committee that this item on its general work program had been handled in a very professional and expedited manner, offering a real solution adhered to by the civil aviation community. He concluded that the Committee had approved the five recommendations, as amended as regards the first and the fourth ones (see the final text of the recommendations in **Appendix D**) and that the Secretariat was encouraged to familiarize States with the guidance in the new Manual once published, on the occasion of the forthcoming 39th Session of the Assembly or during other meetings as appropriate.

Study of legal issues relating to remotely piloted aircraft

2:21 The Secretariat presented LC/36-WP/2-4, to which was appended a study undertaken by the Secretariat to ascertain the adequacy and efficacy of the existing liability framework for remotely piloted aircraft system (RPAS) integration. The study noted that remotely piloted aircraft (RPA) are simply one type of unmanned aircraft, and all unmanned (pilotless) aircraft, whether remotely piloted, fully autonomous, or combinations thereof, are subject to the provisions of the Chicago Convention and its Annexes. The overall conclusion of the study was that although the propagation of RPAS will likely expose a new evidentiary landscape relating to how the international regime for liability would be applied to RPAS operations and operators, the regime in its current state is legally adequate to accommodate RPAS technology.

2:22 The Secretariat's presentation of the paper was then followed by another Secretariat presentation on the technical work of ICAO related to RPAS. Upon conclusion of a number of questions and answers on the technical work of ICAO as regards RPAS, a question was raised on insurance requirements. Since LC/36-WP/2-4 had concluded that the existing international treaties on liability were applicable to RPAS, the Secretary referred the Committee to the specific provisions of the treaties dealing with insurance requirements, to wit: Article 50 of the 1999 Montréal Convention; Article 15 of the 1952 Rome Convention; Article 9 of the 2009 Montréal General Risks Convention; and Article 7 of the 2009 Montréal Unlawful Interference Compensation Convention.

2:23 The Secretariat study was lauded as excellent by several members of the Committee, and generally characterized as thorough and comprehensive. However, one delegate in particular believed there were still issues relating to the liability regime that merited further deliberation, noting, for example, that the 2009 General Risks and Unlawful Interference Compensation Conventions defined an "aircraft in flight" based upon the opening and closing of the aircraft's external doors and that such a definition might not encompass all RPAS. Nevertheless, the vast majority of delegates expressed their unqualified support for the report's analysis and conclusions, while also expressing their appreciation for the presentations made by the Secretariat.

2:24 The Committee's overall satisfaction with the work of the Secretariat notwithstanding, a number of delegates noted that legal aspects of RPAS operations other than liability still might need to be addressed and so favored maintaining the "Study of Legal Issues Relating to Remotely Piloted Aircraft" as an item on the work programme of the Committee. One delegate further averred that though its State already had in place all-encompassing national regulations on RPAS, including extensive provisions addressing even very small craft commonly referred to as "drones", they were interested in the views of other States and favored a questionnaire to collect information on the national regulations of other States. The proposal for a questionnaire was supported by a significant number of other delegates, several of whom advocated it be used as a means to identify the specific international legal problems that RPAS integration was presenting for States. One delegation also stressed the importance of ensuring the Committee's future work on RPAS takes into account technical developments and industry needs through coordination with the RPAS Panel.

2:25 The Chairman, in summarizing the discussion of Agenda item 2.4, identified three main conclusions reached by the Committee. First, the Committee unanimously concluded that the item should remain on its work programme. Second, the Committee concluded that the matter of the adequacy and efficacy of the international liability regime had been rightly addressed by the Secretariat study, however, other aspects of RPAS operations of an international nature, such as operations over the high-seas, cross-border operations, and changes in possession/control of the RPA during international flight necessitated continued consideration of an international framework. Third, there was broad support on the Committee for a questionnaire to States, both as a means of gathering information on national legislation for comparative purposes, and as a means to identify the international issues that are in play (that is, what are the problems that national legislation cannot solve). The Chairman proposed that the questionnaire might be sent out during the next semester, and invited States to submit recommendations to the Secretariat on how to shape the content of the questionnaire.

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

2:26 The Committee noted LC/36-WP/2-5 presented by the Secretariat, which stated that there had been no major activities within ICAO relating to this item, and the Secretariat would continue to observe and to monitor, as necessary, the relevant activities.